Filed: 20180601
EB-2017-0364
Book of Authorities of the
Métis Nation of Ontario

ONTARIO ENERGY BOARD

IN THE MATTER OF the *Ontario Energy Board Act*, *1998*

AND IN THE MATTER OF an Application by Hydro One Networks Inc. pursuant to s. 92 of the *OEB Act* for an Order or Orders granting leave to construct new transmission facilities ("Lake Superior Link") in northwester Ontario;

AND IN THE MATTER OF an Application by Hydro One Networks Inc. pursuant to s. 97 of the *OEB Act* for an Order granting approval of the forms of the agreement offered or to be offered to affected landowners.

BOOK OF AUTHORITIES OF THE MÉTIS NATION OF ONTARIO

June 1, 2018

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INDEX

Book of Authorities
of the Métis Nation of Ontario

TABLE OF CONTENTS

Book of Authorities
of the Métis Nation of Ontario

TABLE OF CONTENTS

Tab 1

Ministry of Energy

Office of the Minister

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Ontario

MAR 2 9 2011

MC-2011-1537

Ms Cynthia Chaplin
Chair
Ontario Energy Board
PO Box 2319
2300 Yonge Street
Toronto ON M4P 1E4

Dear Ms Chaplin:

Ontario's Long-Term Energy Plan, published November 23, 2010, identified five priority transmission projects based on the advice of the Ontario Power Authority (OPA). Among the five priority projects is the East-West Tie, identified by the OPA primarily to meet the need of maintaining long-term system reliability in Northwest Ontario.

Consistent with the intents identified in the Long-Term Energy Plan, I am writing to express the Government's interest that the Ontario Energy Board ("the Board") undertakes a designation process to select the most qualified and cost-effective transmission company to develop the East-West Tie.

The Board's Policy Framework for Transmission Project Development Plans is well suited to apply to the East-West Tie project. Such an approach would allow transmitters to move ahead on development work in a timely manner, encourage new entrants to transmission in Ontario and bring additional resources for project development. It will also support competition in transmission in Ontario to drive economic efficiency for the benefit of ratepayers.

A designation process for the East-West Tie also promotes the Board's electricity objectives of protecting the interests of consumers with respect to prices and of promoting cost-effectiveness in the transmission of electricity. In respect of those particular ends, and given the location and value of the East-West Tie in ensuring reliability and maintaining efficiency and flexibility of the system, I would expect that the weighting of decision criteria in the Board's designation process takes into account the significance of aboriginal participation to the delivery of the transmission project, as well as a proponent's ability to carry out the procedural aspects of Crown consultation.

.../cont'd

As the Board has noted in its framework, the starting point for transmission project development planning should be an informed, effective plan from the province's transmission planner, the OPA. As such, it would be prudent for the Board to request further analysis for the East-West Tie from the OPA to support initiation of a designation process.

Sincerely,

Brad Duguid
Minister

Tab 2

Ministry of Energy

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Ontario

August 25, 2011

Mr. Colin Andersen
Chief Executive Officer
Ontario Power Authority
1600-120 Adelaide Street West
Toronto, ON M5H 1T1

Dear Mr. Andersen:

Re: Amending Previous September 24, 2009 Direction Regarding Aboriginal Energy Partnerships Program to Include Capacity Funding for Participation on Transmission Projects

I write pursuant to my authority as the Minister of Energy in order to exercise the statutory powers of ministerial direction which I have in respect of the Ontario Power Authority (the "OPA") under subsection 25.32 (4.5) of the *Electricity Act, 1998* and to provide the OPA with further direction regarding the Aboriginal Energy Partnerships Program (the "AEPP") as first established by the minister's direction of September 24, 2009.

In its Long-Term Energy Plan ("LTEP"), Ontario recognized the importance of a modern and reliable transmission system in achieving the province's key electricity sector objectives. The LTEP identified five priority transmission projects to integrate renewables, meet provincial demand growth and ensure reliable service. The OPA has also been directed to prepare a plan for remote community connections and will plan and study additional transmission projects as demand and changes to supply require.

Accordingly, I hereby direct the OPA to adjust the AEPP to provide funding support to Aboriginal communities that are exploring equity positions in future, planned, major transmission lines in Ontario where OPA has identified a need for transmission capacity. Funding preference for this initiative should be given to Aboriginal communities where these lines cross a community's traditional territory.

The initiative shall be open to Aboriginal communities as defined by the Feed-in Tariff Program rules. Aboriginal communities applying to the program developed

by the OPA under this initiative must be: a) partnered with or exploring a partnership with a licensed transmitter in Ontario or b) a licensed transmitter in Ontario or seeking to become one. Further, the OPA shall establish a reasonable timeframe for reimbursement of eligible costs incurred between November 23, 2010 and the date the program developed by the OPA under this initiative is launched.

In carrying out this initiative the OPA will make available up to $500,000 in total funding for each transmission line. Funding for this initiative shall come from within existing funding levels established to deliver the AEPP. In addition, the OPA shall develop appropriate program criteria to carry out this initiative.

This direction is effective and binding as of the date hereof.

Sincerely,

Brad Duguid
Minister

Tab 3

Ontario's Long-Term Energy Plan

Building Our Clean Energy Future

Ontario

table of
contents

5 aboriginal communities

Accomplishments

The Ontario government is committed to encouraging opportunities for Aboriginal participation in the energy sector and has launched several initiatives to support participation by First Nation and Métis communities in energy projects, including:

- The Aboriginal Energy Partnerships Program
- The FIT Program: 17 aboriginal-led or partnered projects have secured contract offers
- The $250-million Aboriginal Loan Guarantee Program

Ontario also has a significant partnership at the $2.6 billion Lower Mattagami hydroelectric project, which will see Moose Cree First Nation have up to a 25 per cent equity position with OPG.

Future Needs

First Nation and Métis communities have diverse energy needs and interests. Ontario will work to ensure there is a wide range of options for Aboriginal participation in Ontario's energy future.

Conservation

Conservation priorities and the applicability of programs will vary between First Nation and Métis communities. Community education and youth engagement are also critical for conservation success. Ontario will launch programs to support participation in conservation initiatives, including Aboriginal Community Energy Plans and targeted conservation programs.

Renewable Energy

Future opportunities for First Nation and Métis communities include:

- Partnerships with private developers on confirmed FIT projects under development,
- Development of smaller renewable microFIT projects, like small wind or solar, to build community capacity in energy and generate income.

Existing Green Energy and Green Economy Act, 2009 support programs will be adjusted to ensure that aboriginal communities can take advantage of these opportunities. Aboriginal participation levels will also be reviewed during the regular FIT program review to determine whether adjustments are needed to the rules and incentives.

Transmission

Where new transmission lines are proposed, Ontario is committed to meeting its duty to consult First Nation and Métis communities in respect of their aboriginal and treaty rights and accommodate where those rights have the potential to be adversely impacted. Ontario also recognizes that Aboriginal communities have an interest in economic benefits from future transmission projects crossing through their traditional territories and that the nature of this interest may vary between communities.

There are a number of ways in which First Nation and Métis communities could participate in transmission projects. Where a new transmission line crosses the traditional territories of aboriginal communities, Ontario will expect opportunities be explored to:

- Provide job training and skills upgrading to encourage employment on the transmission project development and construction.
- Further Aboriginal employment on the project.
- Enable Aboriginal participation in the procurement of supplies and contractor services.

Ontario will encourage transmission companies to enter into partnerships with aboriginal communities, where commercially feasible and where those communities have expressed interest. The government will also work with the OPA to adjust the Aboriginal Energy Partnerships Program — currently focussed on renewable energy projects — to provide capacity funding for aboriginal communities that are discussing partnerships on future transmission projects.

The Plan

Ontario recognizes that successful participation by First Nation and Métis communities will be important to advance many key energy projects identified under a Long-Term Energy Plan. The path forward needs to be informed by regular dialogue with First Nation and Métis leadership through distinct processes. Working with First Nation and Métis leadership, Ontario will look for opportunities to promote on-going discussion of these issues.

Ontario's remote First Nation communities currently rely on diesel generation for their electricity supply — but diesel fuel is expensive, difficult to transport, and poses environmental and health risks. According to analysis done so far, transmission connection would be less expensive over the long term than continued diesel use for many remote communities.

New transmission supply to Pickle Lake is a crucial first step to enable the connection of remote communities in northwestern Ontario. A new transmission line to Pickle Lake — one of this plan's five priority projects — will help to service the new mining load and help to enable future connections north of Pickle Lake. Subject to cost contributions from benefiting parties, Ontario will focus on supplying Pickle Lake from the Ignace/Dryden area immediately. A line to serve the Nipigon area specifically will continue to be considered as the need for it evolves.

As part of this project, the government will also ask the OPA to develop a plan for remote community connections beyond Pickle Lake, including consideration of the relevant cost contributions from benefiting parties, including the federal government. This plan may also consider the possibility of onsite generation such as small wind and water to reduce communities' diesel use.

6 energy in Ontario's economy — capital investments

Energy has a significant impact on Ontario's economy. Ontario businesses rely on electricity to produce goods and services and it is essential to our quality of life.

- Ontario's electricity sector is a $15 billion annual industry.
- Energy accounts for eight per cent of Canada's GDP.
- Some 95,000 Ontarians are currently directly and indirectly employed in the energy sector.
- More than $10 billion has been invested in Ontario in new clean energy projects that are online or under construction.
- Ontario has attracted more than $16 billion in private sector investments in the energy sector in the past year.

Ontario's progress in modernizing and upgrading electricity has not only benefited electricity users, it has strengthened the economy by attracting investment and creating jobs. Large infrastructure projects typically have high GDP and employment impacts, and this is also true of the ongoing and planned investments in Ontario's electricity sector.

Hydroelectric investment

Waterpower has been helping to fuel Ontario's economic growth for more than 100 years and is the backbone of renewable supply.

Ontario hydroelectric producers spend $250 million annually in operating and maintenance costs and in the past decade alone have made additional capital investments of $400 million to bring new waterpower online. Today, Ontario's hydroelectric producers directly employ more than 1,600 people and support an additional 2,000 jobs.

Hydroelectric has an even greater impact in Ontario's north, where it accounts for more than 80 per cent of the electricity generated. Twenty-four of 65 generating stations run by OPG are located in Ontario's north, representing close to 2,000 MW.

Many older hydroelectric facilities date to Ontario's early industrial mining and forestry activities and some of these sites are being rebuilt at higher capacity. Recent substantial investments are playing an important economic role in the north. The Lower Mattagami River Hydroelectric Project, Ontario's largest hydroelectric project in 40 years, will bring a $2.6-billion investment into northeastern Ontario and create up to 800 construction jobs.

Tab 4

Achieving Balance

Ontario's Long-Term Energy Plan

Ontario

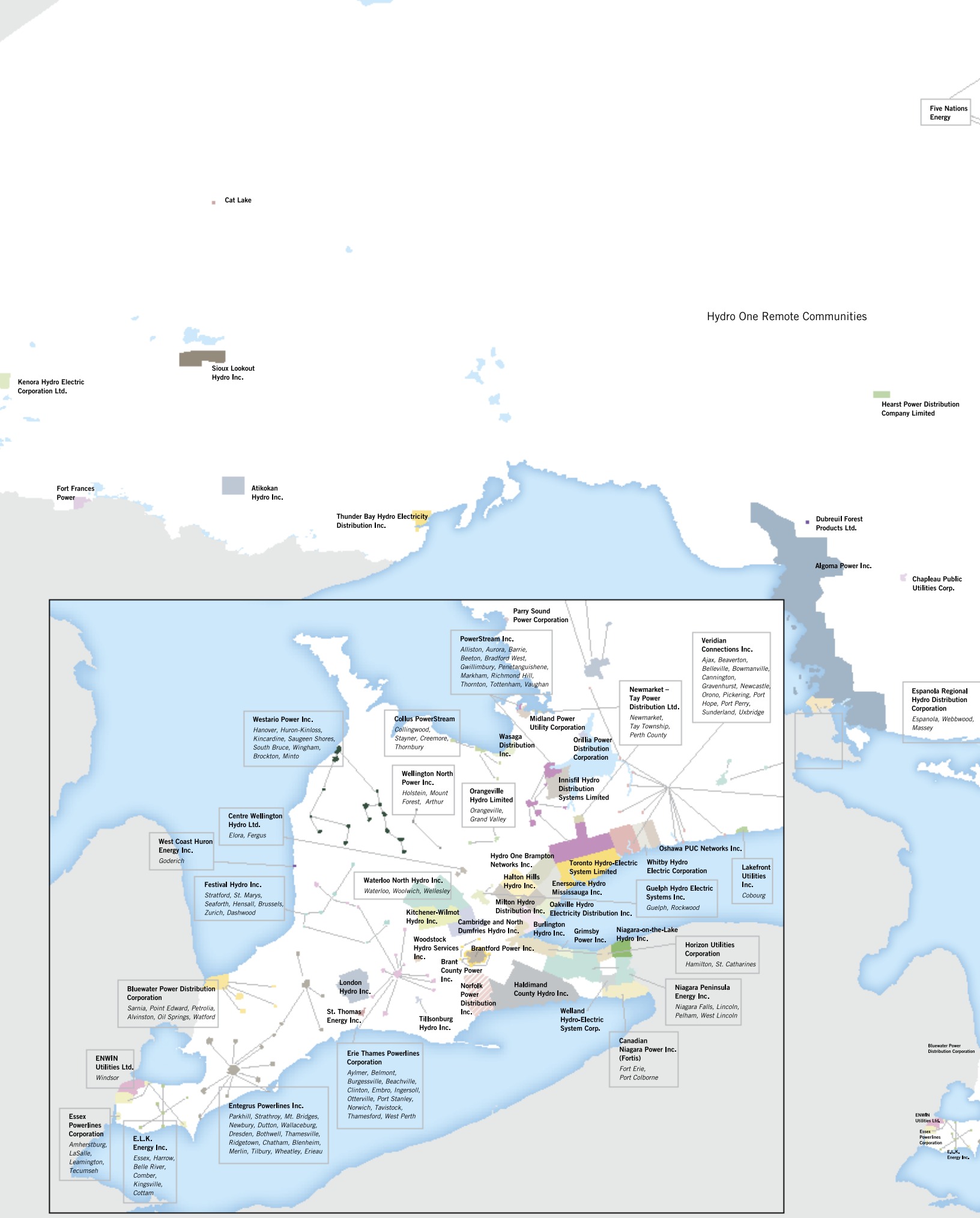

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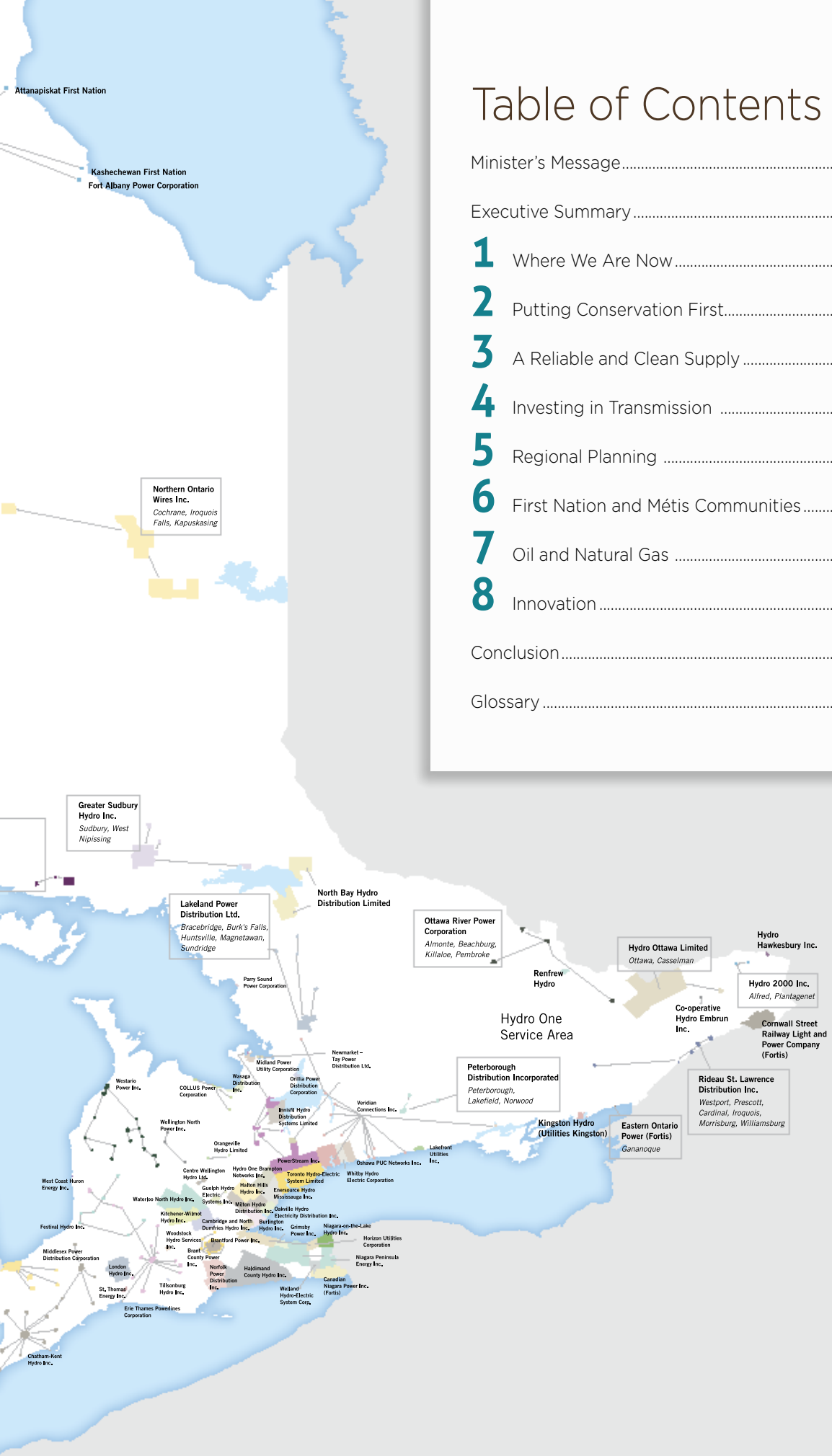
Table of Contents



Source: Independent Electricity System Operator
November 2013

6

First Nation and Métis Communities

The Ontario government has recognized that Aboriginal participation in the energy sector is one of the keys to the economic development of First Nation and Métis communities. Ontario also understands that these communities need opportunities to engage and participate in ways that align with their unique community needs and interests.

Ontario takes its duty to consult First Nation and Métis communities very seriously. The government is committed to ensuring that First Nation and Métis communities are consulted on any energy activity that could potentially affect their Aboriginal or treaty rights.

New Post Creek

OPG and its partner, Coral Rapids Power LP, a wholly owned company of Taykwa Tagamou Nation, are moving forward with the 25-MW New Post Creek hydroelectric development. As an equity owner in the project, the Taykwa Tagamou Nation will benefit from long-term revenues over 50 years to support community development. Construction of this clean, renewable hydro power project is expected to begin in 2014. At peak construction, the development is expected to create up to 100 construction jobs. The project will also provide Taykwa Tagamou Nation members with experience and skills for future opportunities.

Ontario has brought in a range of policies and programs over the past four years to increase the involvement of Aboriginal communities in the sector:

- The Aboriginal Energy Partnerships Program helps communities plan and participate in the development of electricity infrastructure such as clean energy generation projects.
- Aboriginal participation is an important component of the Feed-in Tariff program, with price adders and contract set-asides for Aboriginal led or partnered renewable energy projects.
- The Aboriginal Loan Guarantee Program (ALGP) helps communities secure financing for their equity participation in clean energy and transmission projects. It started with $250 million, which was expanded to $400 million.

Ontario will continue to support and encourage participation by both First Nation and Métis communities in new generation and transmission projects and in conservation initiatives.

- Ontario recently launched the Aboriginal Community Energy Plans (ACEP) program, to support the energy planning activities of First Nation and Métis communities, including the identification of needs, interests and opportunities for conservation and small-scale renewable generation projects.
- The government expects to see Aboriginal involvement become the standard for the future development of major, planned transmission lines in Ontario. First Nation and Métis communities are interested in a wide range of opportunities — from procurement to skills training to commercial partnerships. When new, major transmission line needs are identified, the province expects that companies looking to develop the proposed lines will, in addition to fulfilling consultation

Grand Renewable Energy Park

The Six Nations community has negotiated a 10% equity interest in Samsung's Grand Renewable Energy Park, a 149 MW wind project and a 100 MW solar project partially located on Ministry of Infrastructure controlled lands in the Haldimand Tract area. Details of the agreement between Samsung and Six Nations include a 10% equity interest in the Grand Renewable Energy Park, estimated to represent up to $65 million in net profit for the community; and a Capacity Funding Agreement which includes post-secondary scholarship funding and provisions making construction and maintenance jobs at the Grand Renewable Energy Park available to Six Nations members. These benefits to the community will last the 20-year term of the project. In addition, Ontario has committed to the transfer of funds from the province to Six Nations equivalent to the lease payments made by Samsung to the province for the lease of the Ministry of Infrastructure controlled lands.

obligations, work to involve potentially affected First Nation and Métis communities, where commercially feasible and where there is an interest.

- Ontario will also launch the Aboriginal Transmission Fund (ATF) in early 2014 to help First Nation and Métis communities undertake the due diligence required before becoming involved in new major planned transmission line projects. The fund will help Aboriginal communities examine whether economic participation in a proposed transmission line is the right choice for them, and whether a potential partnership is meaningful and will bring lasting benefits to their community members.
- Ontario will continue to encourage Aboriginal participation, including through the FIT program and the future large renewable energy procurement program.

Building local capacity and providing skills training will be critical to driving participation levels and long-term success. The province recently extended education and capacity building funding delivered by the OPA to Aboriginal communities and organizations. This funding will be available to support education and capacity-building activities that better equip First Nation and Métis communities to participate in and develop renewable energy projects and initiatives.

Ontario will work with Hydro One to expand its training and skills development initiatives for Aboriginal peoples seeking to work in the transmission/distribution sector, including working with its existing college consortium to focus on Aboriginal opportunities as it relates to trades and technicians.

Conservation can and will play an important role for Aboriginal communities that identify high electricity costs as a significant challenge. Earlier this year, the OPA launched the Aboriginal Conservation Program, which delivers direct, customized conservation information and programs to First Nation communities on reserve and outreach to urban Aboriginal and Métis peoples.

First Nation and Métis community representatives across the province have expressed a desire for conservation measures that reach a greater number of communities, as well as a desire to work with their local electricity service provider on reducing their bills.

Ontario will give LDCs an enhanced role in the delivery of Aboriginal conservation programs, particularly for on-reserve First Nation customers. Where appropriate, the province will work with federal partners to implement provincial conservation initiatives effectively.

While the government works to ensure First Nation and Métis communities have access to procurement and conservation programs that will support their economic development, it also recognizes the unique problems faced by 25 remote First Nation communities in the province's northwest. They are not connected to the grid, and get their electricity

Lower Mattagami

Moose Cree First Nation successfully obtained a loan guarantee under the ALGP to support its purchase of up to 25% equity ownership in the $2.6-billion Lower Mattagami hydroelectric project. The community is partnering with OPG to build the project, which will add up to 440 MW of clean, renewable energy to Ontario's electricity supply mix when it comes online in 2015. The partnership will also help Moose Cree First Nation develop commercial capacity and infrastructure to take advantage of future development opportunities. Construction on the project is currently under way, with about 1,600 workers employed, including more than 250 First Nation and Métis individuals.

from on-site generators burning diesel fuel. These are increasingly expensive sources of electricity that pollute the environment. For most communities, diesel fuel has to be brought in on ice roads in the winter, even though the shipping season is getting shorter because of warmer winters. When roads are not available, reliance on even more expensive airfreight is often the only option to bring in diesel fuel.

Remote First Nation Communities

The OPA developed a draft plan for connecting many of the remote First Nation communities. The OPA's study shows that there is a strong economic case for connecting up to 21 of the remote First Nation communities with new transmission and distribution lines. The OPA's analysis indicates that over the next 40 years, grid connection could be 30% to 40% less expensive than the continued use of diesel fuel. Such savings would amount to about $700 million in avoided costs for the parties who currently subsidize and fund the diesel systems — the federal government and the province.

Figure 27: Remote First Nation Communities

Connecting the remote communities is a priority for Ontario. Ontario will continue to work with the federal government to connect remote First Nation communities to the electricity grid or find alternatives where it is not economically feasible to do so.

Since the release of the draft Remote Community Connection Plan, the OPA has engaged most of the participating communities and received feedback. The OPA is planning to engage the remaining communities so that the plan can be updated and finalized by the end of 2013. As mentioned in Chapter 4 — Investing in Transmission, a key first step to connecting some of the remote communities will be the new line to Pickle Lake.

Success in connecting the remote communities will depend on contributions from all of the parties that benefit from the new transmission lines and other infrastructure, particularly the federal government, whose commitment and co-operation will be required to make this priority project a reality. The federal government, which is responsible for supporting First Nation community infrastructure, would also share in the savings, as the costs associated with using diesel fuel would be reduced.

The federal government would receive additional benefits beyond the diesel related savings. Once the remote communities are connected, there would be a reduction in the environmental impact and environmental

liabilities associated with diesel spills, lower greenhouse gas emissions, improved social and living conditions for remote community residents, and increased opportunities for economic development within First Nation communities.

Because of these benefits, and its current responsibility for costs in remote communities, federal participation is a critical element in moving forward to connect remote communities. The project will not be possible without it.

Another important step in the connection of remote communities will be the development of transmission and distribution plans by proponents interested in the connection of remote communities, and securing all required approvals.

While transmission appears to be the most economic solution for up to 21 of the 25 remote First Nation communities, there may be more cost-effective alternatives for the remaining First Nation communities. Ontario will continue to explore other opportunities to reduce diesel use in the north for these communities.

Preliminary studies by the OPA indicate that, within these First Nation communities, renewable generation can be integrated into the existing diesel-based electricity systems in a cost-effective manner. Alternative options are being considered that could significantly reduce the use of diesel fuel and result in a cost saving of approximately 20%.

The province will work with the federal government, energy partners and communities to support innovative solutions for supplying electricity in these remote First Nation communities, including consideration for on-site renewables, micro-grids and conservation. Ontario has already started focusing on conservation opportunities through its Aboriginal Conservation Program, which has a dedicated category for remote communities.

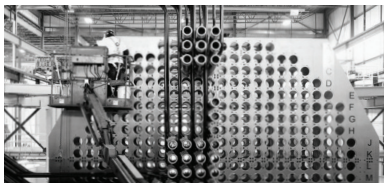
The OPA will continue to work with these remote communities to identify and develop on-site options for reducing their dependence on diesel fuel. The implementation plans (expected by the end of 2014) will consider community economic development interests, such as the use of renewable or other generation opportunities that may be identified, as well as the opportunities for federal and provincial funding.

The government remains committed to an on-going and regular dialogue with First Nation and Métis communities. Ontario will work with Aboriginal leadership to identify effective mechanisms to discuss energy issues, such as the cost of electricity for First Nations on reserve, as well as share information in a timely way. Dialogue is the only way to ensure that support programs, conservation initiatives, procurement processes and electricity infrastructure projects reflect the needs, interests and capacity of Aboriginal communities, and maximize opportunities for participation.

In Summary

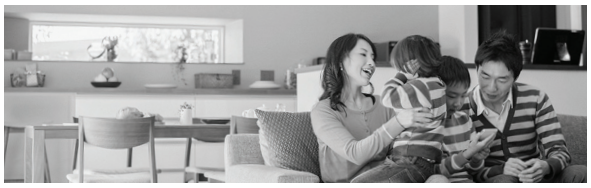
- The government understands the importance of First Nation and Métis participation in the development of energy and conservation projects. The government will continue to review participation programs to ensure they provide opportunities for First Nation and Métis communities.
- Ontario will launch an Aboriginal Transmission Fund in early 2014 to facilitate First Nation and Métis participation in transmission projects.
- The province expects that companies looking to develop new transmission lines will, in addition to fulfilling consultation obligations, involve potentially affected First Nation and Métis communities, where commercially feasible and where there is an interest.
- The government will continue to encourage Aboriginal participation, including through the FIT program and future large renewable energy procurements, in a way that reflects the unique circumstances of the First Nation and Métis communities.

Tab 5



ONTARIO'S LONG-TERM ENERGY PLAN 2017

Delivering Fairness and Choice



Ontario

CONTENTS

CHAPTER 3.
INNOVATING TO MEET THE FUTURE

CHAPTER 4.
IMPROVING VALUE AND PERFORMANCE FOR CONSUMERS

CHAPTER 5.
STRENGTHENING OUR COMMITMENT TO ENERGY CONSERVATION AND EFFICIENCY

CHAPTER 6.
RESPONDING TO THE CHALLENGE OF CLIMATE CHANGE

CHAPTER 7.
SUPPORTING FIRST NATION AND MÉTIS CAPACITY AND LEADERSHIP

8

CHAPTER 8.
SUPPORTING REGIONAL SOLUTIONS AND INFRASTRUCTURE

SUPPORTING FIRST NATION AND MÉTIS CAPACITY AND LEADERSHIP

7

SUPPORTING FIRST NATION AND MÉTIS CAPACITY AND LEADERSHIP

First Nations and Métis are leaders in Ontario's energy sector, bringing their unique perspectives, knowledge and leadership to energy planning, projects and policies.

They have created an unprecedented level of First Nation and Métis involvement in the energy sector:

- First Nations and Métis are now leading or partnering on over 600 wind, solar, and hydroelectric generation projects across Ontario, accounting for over 2,200 megawatts (MW) of clean energy capacity.
- First Nations lead, or are partners with, transmission companies on several major transmission lines.
- Nearly 100 First Nations are participating in the Independent Electricity System Operator's (IESO) Aboriginal Community Energy Plan program. These community-led energy plans assess a community's current energy needs and priorities and explore options for conservation and renewable energy.

The Province takes its duty to consult First Nation and Métis seriously and is committed to ensuring they are consulted on any energy activity that could potentially affect their Aboriginal and Treaty rights.

WHAT WE HEARD FROM YOU

- Need to connect remote communities
- Unreliable electricity service hurts quality of life and hinders community development
- Eliminate the on-reserve electricity delivery charge to improve electricity affordability
- Need for funding to assist with implementing Community Energy Plans
- Conservation programming should better meet community needs
- General preference for renewable energy over nuclear power
- Desire for First Nation and Métis ownership of and partnerships on projects
- Need for federal funding for connection of remote communities

Many First Nations and Métis across Ontario face energy-related challenges: the need for reliable and affordable power, energy-inefficient housing and inadequate infrastructure, to name just a few. The causes and solutions to these challenges are rooted in complex historical, jurisdictional, geographic and regulatory contexts, but progress is being made. The Province is committed to working together with First Nations and Métis to identify issues and propose actions that advance reconciliation and healing.

The Chiefs of Ontario and the Province signed the First Nations-Ontario Political Accord on August 25, 2015, creating a formal bilateral relationship framed by the recognition of the treaty relationship.

THE FIRST NATIONS-ONTARIO POLITICAL ACCORD

- Affirms First Nations' inherent right to self-government
- Commits the parties to work together on issues of mutual interest, such as resource benefits sharing and jurisdictional matters
- Sets a path for reconciliation

The Ontario-Métis Nation Framework Agreement, signed in 2008 and renewed in 2014, guides the Province's relationship with the Métis Nation.

ONTARIO-MÉTIS NATION OF ONTARIO (MNO) FRAMEWORK AGREEMENT

- Facilitates the recognition and advancement of Métis people in Ontario
- Fosters collaboration between the province and the MNO on issues of mutual interest to support the goals and objectives of the new agreement
- Increases awareness of Métis history, identity and culture

The Province will continue the direction established in the 2013 LTEP and support First Nation and Métis leadership and capacity in Ontario's evolving energy sector. Reflecting the Province's strong energy supply position, *Delivering Fairness and Choice* responds to the concerns heard through the LTEP engagement process and the ongoing dialogue between the government, its agencies and First Nation and Métis partners.

Building on the conversations during the LTEP engagement process, the Province commits to a more regular and ongoing dialogue with First Nations and Métis. This will include energy awareness and education initiatives, the involvement of youth in the energy conversation, and a more regular communication to ensure First Nations and Métis are informed about the Province's energy commitments and have opportunities to provide insight and feedback.

Addressing Electricity Affordability

A major priority for Indigenous and non-Indigenous electricity consumers is to improve the affordability of their electricity. The government is working to address the issue with programs such as:

- The Ontario Electricity Support Program (includes enhanced credits for First Nations, Métis and Inuit electricity consumers) (more details in Chapter 1);
- Ontario's Fair Hydro Plan (more details in Chapter 1);
- The Low-Income Energy Assistance Program (more details in Chapter 1); and
- The Conservation First Framework (more details in Chapter 4).

First Nation Delivery Credit

The Province recognizes that First Nation electricity consumers living on-reserve face unique challenges with respect to electricity affordability. Customers living on-reserve often pay higher distribution costs than customers in more populated areas because distribution rates are partially based on population density. The problem of higher distribution rates is often exacerbated by energy-inefficient homes on reserves that lead to higher levels of energy consumption.

To address these unique energy affordability challenges, First Nation leaders recommended the elimination of delivery charges for electricity transmission and distribution when they met with the Minister of Energy and other energy sector leaders at the First Nations-Ontario Energy Table in April 2016.

The minister directed the Ontario Energy Board (OEB) to work with First Nations to research options that would address energy affordability on reserves, and to report back on its findings. Acting on the OEB's findings and feedback from First Nations, the Province collaborated with the Chiefs of Ontario to develop the First Nations Delivery Credit. The First Nations Delivery Credit was implemented on July 1, 2017 and provides a credit equal to 100 per cent of the electricity delivery charge on the bills of on-reserve First Nation residential customers of licenced distributors. This collaborative effort between the Province and First Nations is another example of the Political Accord being brought to life.

Connecting Off-Grid First Nation Communities

Twenty-five remote First Nation communities in the province's northwest rely on diesel fuel to power their communities. The Province recognizes the distinct challenges they face and, because of the high cost of diesel fuel, there is a good economic case to connect as many as 21 of those communities to Ontario's electricity grid.

The Province has made it a priority to connect these remote First Nations. Communities cannot improve their housing, their water treatment systems or other community infrastructure if they do not have a reliable and adequate supply of electricity.

Connection to Ontario's low-carbon electricity grid will not only improve the quality of life of these communities and enable their economic development, but it will also reduce local pollution, greenhouse gas (GHG) emissions, and the environmental risks associated with transporting and storing diesel fuel.

FIGURE 20.

Reducing Diesel Generation in Remote First Nation Communities

- Remote communities proposed for connection through the Wataynikaneyap power project
- Remote communities that could be connected through future proposals
- Remote communities uneconomical to connect where other diesel reduction initiatives will be pursued
- Other First Nations
- First Nation settlements
- Roads

Transmission Line

- 230 kV
- 115 kV

For these reasons, the government has taken several steps to begin the connection of remote First Nation communities. These include:

- Selecting Wataynikaneyap Power as the transmitter for connecting most of the remote First Nations;
- Creating a mechanism for funding a portion of project costs; and
- Advocating for a fair cost-sharing arrangement with the federal government that ensures the project is fully funded and can proceed to construction.

ONTARIO POWER GENERATION AND GULL BAY FIRST NATION

Left to right: Gillian MacLeod, Anthony "AJ" Esquega, Wayne King and Ryan Morin

Ontario Power Generation (OPG) and Gull Bay First Nation (GBFN) are in the early stages of building an advanced renewable microgrid on the GBFN reserve on the western shore of Lake Nipigon. GBFN has an on-reserve population of 300 people and is one of the four remote First Nation communities that the IESO has determined to be economically unfeasible to connect to the provincial grid at this time.

The Gull Bay Diesel Offset Microgrid project will create a community microgrid by integrating new solar photovoltaic generation, battery energy storage, and a microgrid control system with the existing on-site diesel generators that currently supply the community's entire energy needs. The development, construction and operation of the project will create additional opportunities for capacity building and employment.

The Province also supports the connection of the five remote Matawa communities that are not currently part of the Wataynikaneyap Power project. Further steps will be taken to advance their connection when proposals are brought forward.

Grid connection is not currently feasible for four of the 25 remote First Nations in Ontario. Each of these communities has begun the planning and development work to add sustainable technologies that will reduce their reliance on diesel. Projects that reduce diesel reliance could include renewable microgrids, battery storage, and other innovative technologies that meet identified community needs.

The government will continue to partner with these communities and other collaborators, and is looking to the federal government to support these projects. The Government of Canada has agreed to financially support the early connection of Pikangikum First Nation and Wataynikaneyap Power plans to begin construction in 2017 to connect this First Nation.

Conservation

Over 40 First Nations participated in the Aboriginal Conservation Program between 2013 and 2015. The program funded energy efficiency upgrades such as new insulation, appliances and lighting for approximately 3,000 First Nations households.

Through the 2015–2020 Conservation First Framework, First Nation and Métis customers also have access to other energy efficiency and conservation programs, such as the Save on Energy programs offered by local distribution companies.

CONSERVATION ON THE COAST

Local Distribution Companies (LDCs) owned by Attawapiskat, Kashechewan and Fort Albany First Nations are collaborating to provide conservation programs to their customers, using the name Conservation on the Coast (COTC).

COTC began in 2013 by conducting annual energy audits in the three communities.

By October 2017, 30 homes per community will have LED bulbs, power bars, low flow aerators and showerheads, hot water pipe wrap, and improved insulation. This has reduced electricity usage by 20 to 25 per cent per home. In addition to the energy savings, residents say their homes are more comfortable to live in, they are burning less wood, and moisture and mold problems have diminished.

WIKWEMIKONG FIRST NATION

In June 2017, the Wikwemikong First Nation launched its Ignite Energy and Infrastructure Project. This is a long-term community driven strategy to address the high energy costs faced by the community and upgrade its aging infrastructure. Phase One is a major retrofit and upgrade to LED lighting for three schools, a nursery school, the community's health centres, arenas, and the band administration office.

It is estimated this will save the community more than $157,000 per year in energy costs, a 58 per cent savings in the energy used for lighting. The $1.1 million project will be financed with a contribution of $127,900 from the IESO's Save on Energy Program and private debt financing.

Wikwemikong First Nation is also looking to expand its portfolio of renewable energy projects with the Wikwemikong Solar Micro-grid construction project. The 300kW micro-grid is expected to begin construction in 2018/19 and will include a solar generation plant, improvements to the energy efficiency through insulation and replacements of high energy heating and cooling systems of five community buildings and the development of a microgrid software program. This project will receive funding through the Small Communities Fund, co-funded by the Ontario and the federal governments.

While conservation programs are working well in some First Nation and Métis households, participants in *Delivering Fairness and Choice* engagement sessions said the programs need to be more flexible and more widely available.

In conjunction with the mid-term review of the Conservation First Framework and engagement with the Indigenous communities, the IESO will give the Province options for improving conservation programs and their availability for First Nations and Métis, including the 10 communities served by unlicensed LDCs in North-Western Ontario known as the Independent Power Authorities: Eabametoong, Keewaywin, Muskrat Dam, Nibinamik , North Spirit Lake, Pikangikum, Poplar Hill, Wawakapewin, Wunnumin and Weenusk.

The Climate Change Action Plan allocates $85-$96 million from cap and trade auction proceeds for collaboration with Indigenous communities. This includes establishing a fund for community level GHG reduction projects and for community energy and climate action planning in First Nation communities, particularly to reduce emissions from buildings and infrastructure, and for the development of carbon sequestration projects.

Implementing Community Energy Plans

Community energy plans are an important way to understand local energy needs better. They help communities identify opportunities for energy efficiency and clean energy and develop a plan to meet their community's energy goals. Close to 100 First Nations are now developing community energy plans, using funding from the Aboriginal Community Energy Plan (ACEP) program. The Province is committed to continuing this funding.

But energy plans are just a first step and the Province recognizes that further support is needed to turn these plans into tangible actions and results. That is why the ACEP program will be expanded to help communities implement their community energy plans and support the Climate Change Action Plan.

The IESO will engage with First Nation and Métis communities and organizations to identify the strengths and weaknesses of the current ACEP program, explore the use of conservation projects or other community-directed energy initiatives, and then recommend changes that allow community energy plans to flourish. Funding will come from the $10 million the IESO has dedicated annually for this and other support programs.

Supporting Local Opportunities

Building Sector Knowledge and Capacity

The IESO's Education and Capacity Building (ECB) program supports the education, training and skill building of First Nations and Métis. The ECB program will continue to support initiatives that help build local business skills, energy literacy, and youth engagement.

Exploring Energy Projects and Partnerships

The IESO's Energy Partnerships Program (EPP) supports First Nation and Métis communities and organizations that want to lead or be partners on renewable energy and transmission projects.

Three streams of funding from the EPP help support:

- Financial, legal and technical due diligence so First Nations and Métis can partner on major priority transmission lines and renewable energy projects;
- The development of renewable energy projects, including costs for regulatory approvals; and
- Initiatives that reduce the reliance on diesel fuel for the four First Nations that can't be feasibly connected to the transmission grid.

The government will engage further and explore how to change these programs so they better reflect the needs of First Nations and Métis within the current energy system. This may include an examination of how programs can help integrate small-scale renewable energy projects into the local energy system, or the use of net metering and other innovative solutions that address local or regional energy needs and interests.

Access to Financing

The development of energy projects requires significant financial and human capital. Barriers can prevent First Nation and Métis communities and organizations from accessing this capital so they can actively participate in the energy sector. Barriers to more widespread First Nation and Métis participation include:

- Lack of capital at reasonable terms;
- High financing costs; and
- A shortage of capacity around financing and building partnerships.

The Aboriginal Loan Guarantee Program has helped First Nations and Métis obtain lower-cost financing to participate in large-scale energy projects. However, Ontario recognizes that barriers to financing remain, particularly for smaller-scale projects. As a result, the government will engage with First Nations and Métis to identify gaps in financing, possible changes to existing programs, and alternative financing models.

WHAT IS THE ABORIGINAL LOAN GUARANTEE PROGRAM?

Launched in 2009, the $650 million Aboriginal Loan Guarantee program (ALGP) provides a provincial guarantee to support a First Nation or Métis corporation borrowing to purchase up to 75 per cent of the corporation's equity in a qualifying energy project application, to a maximum of $50 million. To date, the ALGP has supported First Nation or Métis equity interests in nine projects, including the 438MW Lower Mattagami hydro-electric project, the Bruce to Milton transmission reinforcement project, the 28MW Peter Sutherland hydro-electric project, and the 4MW Mother Earth Renewable Energy wind project.

The government can build on its strong record and apply innovative financing models to promote First Nation and Métis participation in energy projects. These financing models and social finance tools have been successfully used in the United States, Australia, and elsewhere in Canada to facilitate greater Indigenous economic participation.

The Province also appreciates the unique social benefits that can accrue to First Nations and Métis with their participation in energy projects. Measuring and assessing these non-financial benefits could help the government take a broader and more inclusive view of outcomes when deciding on energy policies and projects.

RAINY RIVER FIRST NATIONS SOLAR PROJECT

Rainy River First Nations signed a memorandum of understanding with Ontario Solar PV Fields to purchase three solar projects located in their community. The cost of the projects was around $154 million, of which $19 million was guaranteed by the ALGP.

Rainy River First Nations partnered with Clark, Conner and Lunn for the project. The projects are expected to generate around 37 million kilowatt-hours of electricity a year, enough to meet the needs of approximately 3,000 households.

Building on these and other successes across the province, Ontario will take the following actions to increase First Nation and Métis access to financing:

- Engage with leaders, organisations and financing experts to identify financing gaps and barriers to the participation of First Nations and Métis in energy projects;
- Investigate innovative financing models to better support First Nation and Métis participation in energy projects; and
- Develop methods to better capture the social, environmental, and local benefits of First Nation and Métis participation in energy projects.

Expanding Access to Natural Gas

Natural gas remains a clean, reliable energy option, and it will continue to play a critical role in Ontario's energy mix. Access to natural gas is an important issue, especially for First Nations.

To assist with natural gas expansion, the government launched a new $100 million Natural Gas Grant Program in April 2017. Through the program, municipalities and First Nation communities are able to work with natural gas utilities to bring forward proposals to expand access to natural gas. The guidelines for the Natural Gas Grant Program state that special consideration will be given to projects located in Northern Ontario or located within First Nation reserves. Successful applicants under this program can then apply to the OEB for leave-to-construct approval for their expansion projects.

Over the coming years, the Province looks forward to seeing natural gas expansion projects deliver greater consumer choice and economic growth to municipalities and First Nations in Ontario.

Summary

- The government will review current programs in order to improve the availability of conservation programs for First Nations and Métis, including communities served by Independent Power Authorities.
- The Province, working with the federal government, will continue to prioritize the connection of remote First Nation communities to the grid and support the four First Nation communities for which transmission connection is not economically feasible.
- The Aboriginal Community Energy Plan program will be expanded to help communities implement their energy plans and support Ontario's Climate Change Action Plan.
- The government will engage with First Nations and Métis to explore options for supporting energy education and capacity building, the integration of small-scale renewable energy projects, net metering and other innovative solutions that address local or regional energy needs and interests.
- Innovative financing models and support tools will be investigated to address barriers to the financing of projects led or partnered by First Nations or Métis.
- The government will report back to First Nations and Métis between Long-Term Energy Plans to provide updates on the province's progress and seek ongoing feedback.
- The government's Natural Gas Grant Program will support the expansion of natural gas access to First Nation communities.

Tab 6

Français

Ontario Energy Board Act, 1998

S.O. 1998, CHAPTER 15
Schedule B

Consolidation Period: From April 1, 2018 to the e-Laws currency date.

Last amendment: 2017, c. 34, Sched. 46, s. 33.

Legislative History: 1999, c. 6, s. 48; 2000, c. 26, Sched. D, s. 2; 2001, c. 9, Sched. F, s. 2; 2002, c. 1, Sched. B (But see Table of Public Statute Provisions Repealed Under Section 10.1 of the *Legislation Act, 2006* - December 31, 2012); 2002, c. 17, Sched. F, Table; 2002, c. 23, s. 4; 2003, c. 3, s. 2-90; 2003, c. 8; 2004, c. 8, s. 46, Table; 2004, c. 17, s. 32; 2004, c. 23, Sched. B (But see Table of Public Statute Provisions Repealed Under Section 10.1 of the *Legislation Act, 2006* - December 31, 2014); 2005, c. 5, s. 51; 2006, c. 3, Sched. C; 2006, c. 21, Sched. F, s. 136 (1); 2006, c. 32, Sched. C, s. 42; 2006, c. 33, Sched. X; 2006, c. 35, Sched. C, s. 98; 2007, c. 8, s. 222; 2009, c. 12, Sched. D; 2009, c. 33, Sched. 2, s. 51; 2009, c. 33, Sched. 6, s. 77; 2009, c. 33, Sched. 18, s. 21; 2010, c. 8, s. 38; 2010, c. 26, Sched. 13, s. 17; 2011, c. 1, Sched. 4; 2011, c. 9, Sched. 27, s. 34; See: Table of Public Statute Provisions Repealed Under Section 10.1 of the *Legislation Act, 2006* - December 31, 2011; 2014, c. 7, Sched. 23; 2015, c. 20, Sched. 31; 2015, c. 29, s. 7-20; CTS 16 MR 10 - 3; 2016, c. 10, Sched. 2, s. 11-16; 2016, c. 19, s. 17; 2016, c. 23, s. 61; 2017, c. 1; 2017, c. 2, Sched. 10, s. 2; 2017, c. 16, Sched. 1, s. 44; 2017, c. 16, Sched. 2; 2017, c. 20, Sched. 8, s. 109; 2017, c. 25, Sched. 9, s. 106; 2017, c. 34, Sched. 18, s. 3; 2017, c. 34, Sched. 31; 2017, c. 34, Sched. 46, s. 33.

CONTENTS

PART I
GENERAL

Board objectives, electricity

1 (1) The Board, in carrying out its responsibilities under this or any other Act in relation to electricity, shall be guided by the following objectives:

1. To protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service.

1.1 To promote the education of consumers.

2. To promote economic efficiency and cost effectiveness in the generation, transmission, distribution, sale and demand management of electricity and to facilitate the maintenance of a financially viable electricity industry.

3. To promote electricity conservation and demand management in a manner consistent with the policies of the Government of Ontario, including having regard to the consumer's economic circumstances.

4. To facilitate the implementation of a smart grid in Ontario.

5. To promote the use and generation of electricity from renewable energy sources in a manner consistent with the policies of the Government of Ontario, including the timely expansion or reinforcement of transmission systems and distribution systems to accommodate the connection of renewable energy generation facilities. 2004, c. 23, Sched. B, s. 1; 2009, c. 12, Sched. D, s. 1; 2015, c. 29, s. 7.

(2) REPEALED: 2016, c. 10, Sched. 2, s. 11.

Section Amendments with date in force (d/m/y)

2002, c. 23, s. 4 (1) - 09/12/2002

2003, c. 3, s. 2- 01/08/2003

2004, c. 23, Sched. B, s. 1 - 01/01/2005

2009, c. 12, Sched. D, s. 1 - 09/09/2009

2015, c. 29, s. 7 - 04/03/2016

2016, c. 10, Sched. 2, s. 11 - 01/07/2016

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 accordance with the policies of the Government of Ontario, including having regard to the consumer's economic circumstances.

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. 1998, c. 15, Sched. B, s. 2; 2002, c. 23, s. 4 (2); 2003, c. 3, s. 3; 2004, c. 23, Sched. B, s. 2; 2009, c. 12, Sched. D, s. 2.

Section Amendments with date in force (d/m/y)

2002, c. 23, s. 4 (2) - 09/12/2002

2003, c. 3, s. 3 - 01/08/2003

2004, c. 23, Sched. B, s. 2 - 01/01/2005

2009, c. 12, Sched. D, s. 2 - 09/09/2009

Board objectives, implementation plans

2.1 The Board, in exercising its powers and performing its duties under this or any other Act, shall be guided by the objective of facilitating the implementation of any directives issued under subsection 25.30 (2) of the *Electricity Act, 1998* in accordance with the implementation plans submitted by the Board and approved under clause 25.31 (5) (a) of that Act, including any amendments submitted by the Board and approved under that clause. 2016, c. 10, Sched. 2, s. 12.

Section Amendments with date in force (d/m/y)

2016, c. 10, Sched. 2, s. 12 - 01/07/2016

Definitions

3 In this Act,

"affiliate", with respect to a corporation, has the same meaning as in the *Business Corporations Act*; ("membre du même groupe")

"associate", where used to indicate a relationship with any person, means,

(a) any body corporate of which the person owns, directly or indirectly, voting securities carrying more than 50 per cent of the voting rights attached to all voting securities of the body corporate for the time being outstanding,

(b) any partner of that person,

(c) any trust or estate in which the person has a substantial beneficial interest or as to which the person serves as trustee or in a similar capacity,

(d) any relative of the person, including the person's spouse as defined in the *Business Corporations Act*, where the relative has the same home as the person, or

(e) any relative of the spouse, as defined in the *Business Corporations Act*, of the person, where the relative has the same home as the person; ("personne qui a un lien")

"Board" means the Ontario Energy Board; ("Commission")

"construct" means construct, reconstruct, relocate, enlarge or extend; ("construire")

"distribute", with respect to electricity, means to convey electricity at voltages of 50 kilovolts or less; ("distribuer")

"distribution system" means a system for distributing electricity, and includes any structures, equipment or other things used for that purpose; ("réseau de distribution")

"distributor" means a person who owns or operates a distribution system; ("distributeur")

"enforceable provision" means,

(a) a provision of this Act or the regulations,

(b) a provision of Part II of the *Energy Consumer Protection Act, 2010* or of the regulations made under it,

(c) a provision of Part III of the *Energy Consumer Protection Act, 2010* or of the regulations made under it,

(c.1) a provision of the *Ontario Clean Energy Benefit Act, 2010* or the regulations made under it,

(c.2) a provision of the *Ontario Rebate for Electricity Consumers Act, 2016* or the regulations made under it,

(c.3) a provision of Part III.1 of the *Green Energy Act, 2009* or of the regulations made under it,

(d) subsection 5 (4), (5), (6) or (7) or section 25.33, 25.36, 25.37, 26, 27, 28, 28.1, 29, 30.1, 31, 53.11, 53.13, 53.15, 53.16 or 53.18 of the *Electricity Act, 1998*, or any other provision of that Act that is prescribed by the regulations,

(e) regulations made under clause 114 (1.3) (f) or (h) of the *Electricity Act, 1998*,

(f) a condition of a licence issued under Part IV, V or V.1,

(g) a provision of the rules made by the Board under section 44 or a code issued under section 70.1, 70.2 or 70.3,

(h) a provision of an order of the Board,

(i) a provision of an assurance of voluntary compliance that is given to the Board under section 112.7 or that was entered into under section 88.8 before that section was repealed, or

(j) a provision of any other Act or the regulations made under an Act, as may be prescribed by regulation; ("disposition exécutoire")

"fuel oil" means any liquid hydrocarbon within the meaning from time to time of the Canadian General Standards Board specification CAN/CGSB-3.2-M89 entitled FUEL OIL HEATING, CAN/CGSB-3.3-M89 entitled KEROSENE, CAN/CGSB-3.6-M90 entitled AUTOMOTIVE DIESEL FUEL or, when used for heating, cooking or lighting, within the meaning from time to time of CAN/CGSB-3.27-M89 entitled NAPHTHA FUEL; ("mazout")

"gas" means natural gas, substitute natural gas, synthetic gas, manufactured gas, propane-air gas or any mixture of any of them; ("gaz")

"gas distributor" means a person who delivers gas to a consumer and "distribute" and "distribution" have corresponding meanings; ("distributeur de gaz", "distribuer", "distribution")

"gas transmitter" means a person who carries gas by hydrocarbon transmission line, and "transmit" and "transmission" have corresponding meanings; ("transporteur de gaz", "transporter", "transport")

"IESO" means the Independent Electricity System Operator established under the *Electricity Act, 1998*; ("SIERE")

"land" includes any interest in land; ("bien-fonds")

"manufactured gas" means any artificially produced fuel gas, except acetylene and any other gas used principally in welding or cutting metals; ("gaz manufacturé")

"Minister" means the Minister of Energy or such other member of the Executive Council as may be assigned the administration of this Act under the *Executive Council Act*; ("ministre")

"oil" means crude oil, and includes any hydrocarbon that can be recovered in liquid form from a pool through a well; ("pétrole")

"pipe line" means a pipe that carries a hydrocarbon and includes every part of the pipe and adjunct thereto; ("pipeline")

"pool" means an underground accumulation of oil or natural gas or both, separated or appearing to be separated from any other such underground accumulation; ("gisement")

"producer" means a person who has the right to remove gas or oil from a well, and "produce" and "production" have corresponding meanings except when referring to documents or records; ("producteur", "produire", "production")

"propane" means a hydrocarbon consisting of 95 per cent or more of propane, propylene, butane or butylene, or any blend thereof; ("propane")

"rate" means a rate, charge or other consideration and includes a penalty for late payment; ("tarif")

"regulations" means the regulations made under this Act; ("règlements")

"renewable energy generation facility" has the same meaning as in the *Electricity Act, 1998*; ("installation de production d'énergie renouvelable")

"renewable energy source" has the same meaning as in the *Electricity Act, 1998*; ("source d'énergie renouvelable")

"smart grid" has the same meaning as in the *Electricity Act, 1998*; ("réseau intelligent")

"Smart Metering Entity" means the corporation incorporated, the limited partnership or the partnership formed or the entity designated pursuant to section 53.7 of the *Electricity Act, 1998*; ("Entité responsable des compteurs intelligents")

"smart metering initiative" means those policies of the Government of Ontario related to its decision to ensure Ontario electricity consumers are provided, over time, with smart meters; ("initiative des compteurs intelligents")

"station" means a compressor station, a metering station, an odorizing station or a regulating station; ("station")

"storage company" means a person engaged in the business of storing gas; ("compagnie de stockage")

"suite meter" has the same meaning as in Part III of the *Energy Consumer Protection Act, 2010*; ("compteur individuel")

"transmission system" means a system for transmitting electricity, and includes any structures, equipment or other things used for that purpose; ("réseau de transport")

"transmit", with respect to electricity, means to convey electricity at voltages of more than 50 kilovolts; ("transporter")

"transmitter" means a person who owns or operates a transmission system; ("transporteur")

"unit smart metering" has the same meaning as in Part III of the *Energy Consumer Protection Act, 2010*; ("activités liées aux compteurs intelligents d'unité")

"unit smart meter provider" has the same meaning as in Part III of the *Energy Consumer Protection Act, 2010*; ("fournisseur de compteurs intelligents d'unité")

"unit sub-metering" has the same meaning as in Part III of the *Energy Consumer Protection Act, 2010*; ("activités liées aux compteurs divisionnaires d'unité")

"unit sub-meter provider" has the same meaning as in Part III of the *Energy Consumer Protection Act, 2010*; ("fournisseur de compteurs divisionnaires d'unité")

"utility line" means a pipe line, a telephone, telegraph, electric power or water line, or any other line that supplies a service or commodity to the public; ("ligne de service public")

"voting security" has the same meaning as in the *Business Corporations Act*; ("valeur mobilière avec droit de vote")

"well" means a hole drilled into a geological formation of Cambrian or more recent age, except a hole where no gas or oil is encountered that is drilled for the production of fresh water or salt. ("puits") 1998, c. 15, Sched. B, s. 3; 1999, c. 6, s. 48; 2002, c. 1, Sched. B, s. 1; 2002, c. 23, s. 4 (3); 2003, c. 3, s. 4; 2005, c. 5, s. 51; 2006, c. 3, Sched. C, s. 1; 2009, c. 12, Sched. D, s. 3; 2010, c. 8, s. 38 (1); 2010, c. 26, Sched. 13, s. 17 (1); 2011, c. 9, Sched. 27, s. 34 (1); 2014, c. 7, Sched. 23, s. 1; 2016, c. 19, s. 17 (1); 2016, c. 23, s. 61; 2017, c. 2, Sched. 10, s. 2 (1); 2017, c. 34, Sched. 18, s. 3.

Section Amendments with date in force (d/m/y)

1999, c. 6, s. 48 - 01/03/2000

2002, c. 1, Sched. B, s. 1 - 27/06/2002; 2002, c. 23, s. 4 (3) - 09/12/2002

2003, c. 3, s. 4 - 01/08/2003

2005, c. 5, s. 51 - 09/03/2005

2006, c. 3, Sched. C, s. 1 - 03/05/2006

2009, c. 12, Sched. D, s. 3 - 09/09/2009

2010, c. 8, s. 38 (1) - 01/01/2011; 2010, c. 26, Sched. 13, s. 17 (1) - 01/01/2011

2011, c. 9, Sched. 27, s. 34 (1) - 06/06/2011

2014, c. 7, Sched. 23, s. 1 - 01/01/2015

2016, c. 19, s. 17 (1) - 01/01/2017; 2016, c. 23, s. 61 - 05/12/2016

2017, c. 2, Sched. 10, s. 2 (1) - 22/03/2017; 2017, c. 34, Sched. 18, s. 3 - 14/12/2017

PART II
THE BOARD

Ontario Energy Board

Board continued

4 (1) The Ontario Energy Board is continued as a corporation without share capital under the name Ontario Energy Board in English and Commission de l'énergie de l'Ontario in French. 2003, c. 3, s. 5 (2).

Powers

(2) The Board has the capacity and the rights, powers and privileges of a natural person for the purpose of exercising and performing its powers and duties under this or any other Act, except as otherwise provided in this Act. 2003, c. 3, s. 5 (4).

Duties

(3) The Board shall perform the duties assigned to it under this or any other Act. 2003, c. 3, s. 5 (4).

Crown agency

(4) The Board is an agent of Her Majesty in right of Ontario, and its powers may be exercised only as an agent of Her Majesty. 2003, c. 3, s. 5 (4).

(5) REPEALED: 2003, c. 3, s. 5 (3).

Section Amendments with date in force (d/m/y)

2003, c. 3, s. 5 - 01/08/2003

Composition

4.1 (1) The Board shall be composed of at least five members. 2003, c. 3, s. 6.

Appointment

(2) The members shall be appointed by the Lieutenant Governor in Council. 2003, c. 3, s. 6.

Term of initial appointment

(3) The first term of office of a person who is appointed to the Board shall not exceed two years. 2003, c. 3, s. 6.

Transition

(4) Subsection (3) does not apply to a person who is a member of the Board when subsection (3) comes into force. 2003, c. 3, s. 6.

Reappointments

(5) A member of the Board may be reappointed for one or more terms of office, each of which does not exceed five years. 2003, c. 3, s. 6.

Chair and vice-chairs

(6) The Lieutenant Governor in Council shall, by order, designate a member of the Board as chair and shall designate two members as vice-chairs. 2003, c. 3, s. 6.

Same

(7) The chair and each vice-chair holds office for the term specified by the Lieutenant Governor in Council which shall not exceed his or her term as a member of the Board. 2003, c. 3, s. 6.

Same

(8) Despite subsections (3) and (5), when a member of the Board is designated as chair, the designation may provide that his or her term of office as a member continues for a period that does not exceed five years from the date of the designation as chair, and subsection (5) applies to any subsequent reappointment as a member. 2003, c. 3, s. 6.

Duties of chair

(9) The chair is the chief executive officer of the Board and, unless otherwise authorized by the Minister, shall devote his or her full time to the work of the Board. 2003, c. 3, s. 6.

Chair may delegate

(10) The chair may in writing delegate any of his or her powers or duties to a vice-chair. 2003, c. 3, s. 6.

Conditions and restrictions

(11) A delegation under subsection (10) is subject to such conditions and restrictions as the chair may specify in writing. 2003, c. 3, s. 6.

Acting chair

(12) If no one is available to exercise or perform a power or duty of the chair, any vice-chair may exercise the power or duty. 2003, c. 3, s. 6.

Section Amendments with date in force (d/m/y)

2003, c. 3, s. 6 - 01/08/2003

Management committee

4.2 (1) The Board shall have a management committee composed of the chair and the vice-chairs. 2003, c. 3, s. 7.

Duties

(2) The management committee shall manage the activities of the Board, including the Board's budgeting and the allocation of the Board's resources, and shall perform such other duties as are assigned to the management committee under this Act. 2003, c. 3, s. 7.

Rules of practice and procedure

(3) The Board's authority to make rules governing practice and procedure under section 25.1 of the *Statutory Powers Procedure Act* shall be exercised by the management committee on behalf of the Board. 2003, c. 3, s. 7.

Quorum

(4) Subject to the by-laws made under section 4.10, two members of the management committee constitute a quorum. 2003, c. 3, s. 7.

Presiding officer

(5) The chair shall preside over management committee meetings. 2003, c. 3, s. 7.

Delegation

(6) The management committee shall not delegate any of its powers or duties under the following provisions:

1. Sections 4.8 to 4.10.
2. Subsection 6 (1).
3. Section 26.

3.1 Section 26.1.

4. Any other provision prescribed by the regulations. 2003, c. 3, s. 7; 2009, c. 12, Sched. D, s. 4.

Same

(7) Subject to subsection (6), the management committee may delegate its powers and duties, but only to a member of the management committee. 2003, c. 3, s. 7.

Conditions and restrictions

(8) A delegation under subsection (7) is subject to such conditions and restrictions as the management committee may specify in writing. 2003, c. 3, s. 7.

Section Amendments with date in force (d/m/y)

2003, c. 3, s. 7 - 01/08/2003

2009, c. 12, Sched. D, s. 4 - 01/03/2010

Panels

4.3 (1) The chair may assign one or more members of the Board to a panel to hear or determine any matter and, for that purpose, the panel has all the jurisdiction and powers of the Board. 2003, c. 3, s. 8.

Same

(2) A member of the Board shall not exercise or perform any power or duty of the Board except as a member of a panel to which he or she has been assigned. 2003, c. 3, s. 8.

Same

(3) Subsection (2) does not apply to the powers of the Board under sections 44 and 70.1. 2003, c. 3, s. 8.

Section Amendments with date in force (d/m/y)

2003, c. 3, s. 8 - 01/08/2003

Market Surveillance Panel

4.3.1 (1) The Market Surveillance Panel established by the board of directors of the Independent Electricity Market Operator under subsection 13 (1) of the *Electricity Act, 1998* as it read on January 1, 2004 is continued as the Market Surveillance Panel of the Board. 2004, c. 23, Sched. B, s. 3.

Appointment

(2) The Board's management committee shall appoint the members of the Market Surveillance Panel. 2004, c. 23, Sched. B, s. 3.

Membership

(3) No person shall be appointed as a member of the Market Surveillance Panel if he or she has any material interest in a market participant or is a director, officer, employee or agent of,

(a) a generator, distributor, transmitter or retailer;

(b) a person who sells electricity or ancillary services through the IESO-administered markets or directly to another person who is not a consumer;

(c) a market participant;

(d) an industry association that represents a person referred to in clause (a), (b) or (c);

(e) REPEALED: 2014, c. 7, Sched. 23, s. 2 (1).

(f) the IESO; or

(g) an affiliate of a person listed in clause (a), (b), (c) or (f). 2004, c. 23, Sched. B, s. 3; 2014, c. 7, Sched. 23, s. 2.

Same

(4) Subsection (3) applies only with respect to persons who first become members of the Market Surveillance Panel on or after the day subsection (3) comes into force. 2004, c. 23, Sched. B, s. 3.

Staff and assistance

(5) Subject to the by-laws made under section 4.10, the Market Surveillance Panel may use the services of employees of the Board and the IESO, with the consent of their employers, and of persons who have technical or professional expertise that the panel considers necessary. 2004, c. 23, Sched. B, s. 3.

Testimony

(6) A person who is a member of the Market Surveillance Panel or an employee of the IESO or the Board and who is acting on behalf of the Panel shall not be required in any civil proceeding to give testimony with respect to information obtained in the course of his or her duties. 2004, c. 23, Sched. B, s. 3.

Law enforcement information

(7) A record that contains information provided to or obtained by the Market Surveillance Panel and that is designated by the Panel as relating to activity in the IESO-administered markets or to the conduct of a market participant shall be deemed, for the purpose of section 14 of the *Freedom of Information and Protection of Privacy Act*, to be a record the disclosure of which could reasonably be expected to interfere with a law enforcement matter. 2004, c. 23, Sched. B, s. 3.

Confidential information relating to market participant

(8) A record that contains information provided to or obtained by the Market Surveillance Panel relating to a market participant and that is designated by the Panel as confidential or highly confidential shall be deemed, for the purpose of section 17 of the *Freedom of Information and Protection of Privacy Act*, to be a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, the disclosure of which could reasonably be expected to prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization. 2004, c. 23, Sched. B, s. 3.

Regulations

(9) The Lieutenant Governor in Council may make regulations,

(a) prescribing a day on which the Market Surveillance Panel is dissolved and the Board commences to exercise the powers and perform the duties of the Panel under this or any other Act;

(b) governing the application, after the dissolution of the Panel, of any provision of this or any other Act that relates to the Market Surveillance Panel or its powers or duties. 2004, c. 23, Sched. B, s. 3.

Section Amendments with date in force (d/m/y)

2004, c. 23, Sched. B, s. 3 - 01/01/2005

2014, c. 7, Sched. 23, s. 2 - 01/01/2015

Stakeholder input

4.4 The Board shall establish one or more processes by which consumers, distributors, generators, transmitters and other persons who have an interest in the electricity industry may provide advice and recommendations for consideration by the Board. 2004, c. 23, Sched. B, s. 4.

Section Amendments with date in force (d/m/y)

2003, c. 3, s. 9 - 01/08/2003

2004, c. 23, Sched. B, s. 4 - 01/01/2005

Consumer advocacy

4.4.1 (1) The Board shall establish one or more processes by which the interests of consumers may be represented in proceedings before the Board, through advocacy and through any other modes of representation provided for by the Board. 2015, c. 29, s. 8.

Regulations

(2) The Lieutenant Governor in Council may make regulations governing the process or processes under subsection (1). 2015, c. 29, s. 8.

Section Amendments with date in force (d/m/y)

2015, c. 29, s. 8 - 04/03/2016

Fiscal year

4.5 The fiscal year of the Board begins on April 1. 2003, c. 3, s. 10.

Section Amendments with date in force (d/m/y)

2003, c. 3, s. 10 - 01/08/2003

Memorandum of understanding

4.6 (1) Every three years beginning with the Board's 2003-2004 fiscal year, the chair of the Board, on behalf of the Board and its management committee, and the Minister shall enter into a memorandum of understanding setting out,

(a) the respective roles and responsibilities of the Minister, the chair and the management committee;

(b) the accountability relationships between the chair, the management committee and the Minister;

(c) limitations on the Board's powers to borrow and invest;

(d) the responsibility of the chair and the management committee to provide the Minister with business plans, operational budgets and plans for proposed significant changes in the operations or activities of the Board;

(e) details of an obligation that requires the management committee to provide the Minister with statements of the Board's priorities and to publish those statements;

(f) details of an obligation that requires the management committee,

(i) to provide the Minister with regulatory calendars that set out anticipated dates for,

(A) dealing with proceedings that are expected to be heard or determined by the Board, and

(B) exercising the power to make rules under section 44 or issue codes under section 70.1, and

(ii) to publish the regulatory calendars described in subclause (i);

(g) details of an obligation that requires the management committee to establish performance standards for the Board;

(h) details of an obligation that requires the management committee to establish and maintain a pay for performance plan for full-time members of the Board that links payment of bonuses to the achievement of performance standards;

(i) details of an obligation respecting consumer protection support that requires the management committee, on behalf of the Board, to make and maintain rules governing practice and procedure under section 25.1 of the *Statutory Powers Procedure Act* that govern interim and final awards of costs to organizations representing consumers;

(j) details of an obligation that requires the management committee to consult with the advisory committee established under section 4.4 with respect to the obligations referred to in clauses (e) to (i); and

(k) any other matter that the parties consider necessary or appropriate. 2003, c. 3, s. 11.

Same

(2) The Board shall comply with the memorandum of understanding in exercising its powers and performing its duties under this Act, but the failure to do so does not affect the validity of any action taken by the Board or give rise to any rights or remedies by any person, other than rights or remedies provided by the memorandum of understanding. 2003, c. 3, s. 11.

Publication

(3) The management committee shall publish the memorandum of understanding on the Board's website on the Internet as soon as practicable after the memorandum is entered into. 2003, c. 3, s. 11.

Section Amendments with date in force (d/m/y)

2003, c. 3, s. 11 - 01/08/2003

Minister's request for information

4.7 (1) The Board's management committee shall promptly give the Minister such information about the Board's activities, operations and financial affairs as the Minister requests. 2003, c. 3, s. 11.

Examination

(2) The Minister may designate a person to examine any financial or accounting procedures, activities or practices of the Board and report the results of the examination to the Minister. 2003, c. 3, s. 11.

Duty to assist, etc.

(3) The members and employees of the Board shall give the person designated by the Minister all the assistance and co-operation necessary to enable him or her to complete the examination. 2003, c. 3, s. 11.

Section Amendments with date in force (d/m/y)

2003, c. 3, s. 11 - 01/08/2003

Financial statements

4.8 (1) The Board's management committee shall cause annual financial statements to be prepared for the Board in accordance with generally accepted accounting principles. 2003, c. 3, s. 11.

Same

(2) The financial statements must present the financial position, results of operations and changes in the financial position of the Board for its most recent fiscal year. 2003, c. 3, s. 11.

Auditors

(3) The management committee shall appoint one or more auditors licensed under the *Public Accounting Act, 2004* to audit the financial statements of the Board for each fiscal year. 2003, c. 3, s. 11; 2004, c. 8, s. 46.

Auditor General

(4) The Auditor General may also audit the financial statements of the Board. 2003, c. 3, s. 11; 2004, c. 17, s. 32.

Section Amendments with date in force (d/m/y)

2003, c. 3, s. 11 - 01/08/2003; 2004, c. 8, s. 46 - 01/11/2005; 2004, c. 17, s. 32 - 30/11/2004

Annual report

4.9 (1) The Board shall prepare an annual report, provide it to the Minister no later than 120 days after the end of the Board's fiscal year and make it available to the public. 2017, c. 34, Sched. 46, s. 33.

Same

(2) The Board shall comply with such directives as may be issued by the Management Board of Cabinet with respect to,

(a) the form and content of the annual report; and

(b) when and how to make it available to the public. 2017, c. 34, Sched. 46, s. 33.

Same

(3) The Board shall include such additional content in the annual report as the Minister may require. 2017, c. 34, Sched. 46, s. 33.

Section Amendments with date in force (d/m/y)

2003, c. 3, s. 11 - 01/08/2003

2017, c. 34, Sched. 46, s. 33 - 01/01/2018

Tabling of annual report

4.9.1 The Minister shall table the Board's annual report in the Assembly no later than 30 days after determining that the annual report meets the requirements of section 4.9 and shall comply with such directives as may be issued by the Management Board of Cabinet with respect to when and how to make that determination. 2017, c. 34, Sched. 46, s. 33.

Section Amendments with date in force (d/m/y)

2017, c. 34, Sched. 46, s. 33 - 01/01/2018

By-laws

4.10 (1) The Board's management committee may make by-laws,

(a) governing the administration, management and conduct of the affairs of the Board;

(b) prescribing emergency circumstances in which the quorum of the management committee is one member;

(c) governing the appointment of an auditor;

(d) setting out the powers, functions and duties of the chair, the vice-chairs and the officers employed by the Board;

(e) governing the remuneration and benefits of the chair, the vice-chairs and the other members of the Board;

(f) governing the composition and functions of the Market Surveillance Panel and the appointment, removal and remuneration of members of the Market Surveillance Panel. 2003, c. 3, s. 11; 2004, c. 23, Sched. B, s. 5.

Notice to Minister

(2) The management committee shall deliver to the Minister a copy of every by-law passed by it. 2003, c. 3, s. 11.

Minister's review of remuneration and benefits by-laws

(3) Within 60 days after delivery of a by-law made under clause (1) (e), the Minister may approve, reject or return it to the management committee for further consideration. 2003, c. 3, s. 11.

Effect of approval

(4) A by-law made under clause (1) (e) that is approved by the Minister becomes effective on the date of the approval or on such later date as the by-law may provide. 2003, c. 3, s. 11.

Effect of rejection

(5) A by-law made under clause (1) (e) that is rejected by the Minister does not become effective. 2003, c. 3, s. 11.

Effect of return for further consideration

(6) A by-law made under clause (1) (e) that is returned to the management committee for further consideration does not become effective until the committee returns it to the Minister and the Minister approves it. 2003, c. 3, s. 11.

Expiry of review period

(7) If, within the 60-day period referred to in subsection (3), the Minister does not approve, reject or return the by-law for further consideration, the by-law becomes effective on the 75th day after it is delivered to the Minister or on such later date as the by-law may provide. 2003, c. 3, s. 11.

Publication

(8) The management committee shall publish every by-law made under subsection (1) on the Board's website on the Internet as soon as practicable after the by-law becomes effective. 2003, c. 3, s. 11.

***Legislation Act, 2006*, Part III**

(9) Part III (Regulations) of the *Legislation Act, 2006* does not apply to by-laws made by the management committee under subsection (1). 2003, c. 3, s. 11; 2006, c. 21, Sched. F, s. 136 (1).

Section Amendments with date in force (d/m/y)

2003, c. 3, s. 11 - 01/08/2003

2004, c. 23, Sched. B, s. 5 - 01/01/2005

2006, c. 21, Sched. F, s. 136 (1) - 25/07/2007

Restrictions on Board powers

4.11 The Board shall not, without the approval of the Lieutenant Governor in Council,

(a) create a subsidiary;

(b) purchase or sell real property;

(c) borrow money, pledge, mortgage or hypothecate any of its property, or create or grant a security interest in any of its property;

(d) enter into a contract of a class prescribed by the regulations; or

(e) exercise other rights, powers or privileges under subsection 4 (2) that are prescribed by the regulations. 2003, c. 3, s. 12.

Section Amendments with date in force (d/m/y)

2003, c. 3, s. 12 - 01/08/2003

Purchases and loans by Province

4.12 (1) The Minister of Finance, on behalf of Ontario, may purchase securities of or make loans to the Board in such amounts, at such times and on such terms and conditions as the Lieutenant Governor in Council considers expedient. 2003, c. 3, s. 12.

Same

(2) The Minister of Finance may pay from the Consolidated Revenue Fund the money necessary for a purchase or loan made under subsection (1). 2003, c. 3, s. 12.

Section Amendments with date in force (d/m/y)

2003, c. 3, s. 12 - 01/08/2003

Authority re income

4.13 (1) Despite Part I of the *Financial Administration Act* and subject to subsection 26.1 (5), revenue from the exercise of a power conferred or the discharge of a duty imposed on the Board or the Board's management committee under this or any other Act, and the investments held by the Board, do not form part of the Consolidated Revenue Fund and, subject to this section, shall be applied to carrying out the powers conferred and duties imposed on the Board under this or any other Act. 2003, c. 3, s. 12; 2009, c. 12, Sched. D, s. 5.

Same

(2) The revenue referred to in subsection (1) includes the following:

1. Fees payable under section 12.1.
2. Assessments payable under section 26.
3. Costs payable to the Board under section 30.
4. Administrative penalties payable under section 112.5. 2003, c. 3, s. 12.

Section Amendments with date in force (d/m/y)

2003, c. 3, s. 12 - 01/08/2003

2009, c. 12, Sched. D, s. 5 - 01/03/2010

Collection of personal information

4.14 The Board may collect personal information within the meaning of section 38 of the *Freedom of Information and Protection of Privacy Act* for the purpose of carrying out its duties and exercising its powers under this or any other Act. 2003, c. 3, s. 12.

Section Amendments with date in force (d/m/y)

2003, c. 3, s. 12 - 01/08/2003

Non-application of certain Acts

4.15 The *Corporations Act* and the *Corporations Information Act* do not apply with respect to the Board. 2003, c. 3, s. 12.

Note: On the day subsection 4 (1) of the *Not-for-Profit Corporations Act, 2010* comes into force, section 4.15 of the Act is amended by striking out "The *Corporations Act*" at the beginning and substituting "The *Not-for-Profit Corporations Act, 2010*". (See: 2017, c. 20, Sched. 8, s. 109)

Section Amendments with date in force (d/m/y)

2003, c. 3, s. 12 - 01/08/2003

2017, c. 20, Sched. 8, s. 109 - not in force

Members and employees

4.16 (1) REPEALED: 2006, c. 35, Sched. C, s. 98.

Status of members

(2) The members of the Board are not its employees, and the chair and vice-chairs shall not hold any other office in the Board or be employed by it in any other capacity. 2003, c. 3, s. 12.

Conflict of interest, indemnification

(3) Sections 132 (conflict of interest) and 136 (indemnification) of the *Business Corporations Act* apply with necessary modifications with respect to the Board as if the Minister were its sole shareholder. 2003, c. 3, s. 12.

Agreement for services

(4) The Board and a ministry of the Crown may enter into agreements for the provision by employees of the Crown of any service required by the Board to carry out its duties and powers, and the Board shall pay the agreed amount for services provided to it. 2003, c. 3, s. 12.

Section Amendments with date in force (d/m/y)

2003, c. 3, s. 12 - 01/08/2003

2006, c. 35, Sched. C, s. 98 - 20/08/2007

Chief operating officer and secretary

5 The Board's management committee shall appoint a chief operating officer of the Board and a secretary of the Board from among the Board's employees. 2003, c. 3, s. 13.

Section Amendments with date in force (d/m/y)

2003, c. 3, s. 13 - 01/08/2003

Delegation of Board's powers and duties

6 (1) The Board's management committee may in writing delegate any power or duty of the Board to an employee of the Board. 2003, c. 3, s. 13.

Exceptions

(2) Subsection (1) does not apply to the following powers and duties:

1. Any power or duty of the Board's management committee.
2. The power to make rules under section 44.
3. The power to issue codes under section 70.1.
4. The power to make rules under section 25.1 of the *Statutory Powers Procedure Act*.
5. Hearing and determining an appeal under section 7 or a review under section 8.
6. The power to make an order against a person under section 112.3, 112.4 or 112.5, if the person gives notice requiring the Board to hold a hearing under section 112.2.
7. A power or duty prescribed by the regulations. 2003, c. 3, s. 13.

Conditions and restrictions

(3) A delegation under this section is subject to such conditions and restrictions as the management committee may specify in writing. 2003, c. 3, s. 13.

No hearing

(4) An employee of the Board may exercise powers and duties that are delegated under this section without holding a hearing. 2003, c. 3, s. 13.

Statutory Powers Procedure Act

(5) If an employee of the Board holds a hearing pursuant to this section, the *Statutory Powers Procedure Act* applies to the same extent as if members of the Board were holding the hearing. 2003, c. 3, s. 13.

Review by employee

(6) An employee of the Board who makes an order pursuant to this section may, within a reasonable time after the order is made and if he or she considers it advisable, review all or part of the order, and may confirm, vary or cancel the order. 2003, c. 3, s. 13.

Transfer to Board

(7) At any time before an employee of the Board makes an order in respect of a matter pursuant to this section, the management committee may direct that the matter be transferred to the Board for determination. 2003, c. 3, s. 13.

Effect of employees' orders, etc.

(8) Anything done by an employee of the Board pursuant to this section shall be deemed, for the purpose of this or any other Act, to have been done by the Board. 2003, c. 3, s. 13.

Application of s. 33

(9) Despite subsection (8), section 33 and subsection 38 (4) do not apply to an order made by an employee of the Board pursuant to this section. 2003, c. 3, s. 13; 2009, c. 33, Sched. 2, s. 51 (1).

Section Amendments with date in force (d/m/y)

2003, c. 3, s. 13 - 01/08/2003

2009, c. 33, Sched. 2, s. 51 (1) - 15/12/2009

Appeal from delegated function

7 (1) A person directly affected by an order made by an employee of the Board pursuant to section 6 may, within 15 days after receiving notice of the order, appeal the order to the Board. 2003, c. 3, s. 13.

Exception

(2) Subsection (1) does not apply to,

(a) a person who did not make submissions to the employee after being given notice of the opportunity to do so; or

(b) a person who did not give notice requiring the Board to hold a hearing under section 112.2, in the case of an order made by the employee under section 112.3, 112.4 or 112.5. 2003, c. 3, s. 13.

Parties

(3) The parties to the appeal are:

1. The appellant.
2. The applicant, if the order is made in a proceeding commenced by an application.
3. The employee who made the order.
4. Any other person added as a party by the Board. 2003, c. 3, s. 13.

Powers of Board

(4) The Board may confirm, vary or cancel the order. 2003, c. 3, s. 13.

Stay

(5) An appeal under this section does not stay the order of the employee, unless the Board orders otherwise. 2003, c. 3, s. 13.

Section Amendments with date in force (d/m/y)

2003, c. 3, s. 13 - 01/08/2003

Review of delegated function

8 (1) The Board's management committee may, on its own motion, within 15 days after the making of an order by an employee of the Board pursuant to section 6, direct the Board to review the order. 2003, c. 3, s. 13.

Parties

(2) The parties to the review are:

1. Every person directly affected by the order, including, if the order is made in a proceeding commenced by an application, the applicant.
2. The employee who made the order.
3. Any other person added as a party by the Board. 2003, c. 3, s. 13.

Exception

(3) Despite paragraph 1 of subsection (2), a person is not a party to the review if the person did not make submissions to the employee after being given notice of the opportunity to do so. 2003, c. 3, s. 13.

Application of subss. 7 (4) and (5)

(4) Subsections 7 (4) and (5) apply, with necessary modifications, to a review under this section. 2003, c. 3, s. 13.

Section Amendments with date in force (d/m/y)

2003, c. 3, s. 13 - 01/08/2003

Power to administer oaths

9 The secretary of the Board and an inspector appointed under section 106 has, in carrying out his or her duties under this Act, the same powers as a commissioner for taking affidavits in Ontario. 2003, c. 3, s. 14.

Section Amendments with date in force (d/m/y)

2003, c. 3, s. 14 - 01/08/2003

Not required to testify

10 Members of the Board and employees of the Board are not required to give testimony in any civil proceeding with regard to information obtained in the discharge of their official duties. 1998, c. 15, Sched. B, s. 10.

Liability

11 (1) No action or other civil proceeding shall be commenced against any of the following persons for any act done in good faith in the exercise or performance or the intended exercise or performance of a power or duty under any Act or regulation or for any neglect or default in the exercise or performance in good faith of such a power or duty:

1. A member of the Board.
2. An officer, employee or agent of the Board.
3. A member of the Market Surveillance Panel.
4. An officer, employee or agent of the IESO acting on behalf of the Market Surveillance Panel. 2004, c. 23, Sched. B, s. 6.

Same

(2) A member of the Board is not liable for an act, an omission, an obligation or a liability of the Board or its employees. 2003, c. 3, s. 15.

Crown liability

(3) Despite subsections 5 (2) and (4) of the *Proceedings Against the Crown Act*, subsections (1) and (2) do not relieve the Crown of any liability to which it would otherwise be subject in respect of a tort committed by any person referred to in subsection (1) or (2). 2003, c. 3, s. 15.

Section Amendments with date in force (d/m/y)

2003, c. 3, s. 15 - 01/08/2003

2004, c. 23, Sched. B, s. 6 - 01/01/2005

Fees and access to licences

12 (1)-(3) REPEALED: 2003, c. 3, s. 16.

Inspection

(4) The Board shall make all licences available for public inspection during normal business hours. 1998, c. 15, Sched. B, s. 12 (4).

Section Amendments with date in force (d/m/y)

2003, c. 3, s. 16 - 01/08/2003

Fees

12.1 (1) The Board's management committee may set and charge fees for copies of Board orders, decisions, reasons, reports, recordings or other documents or things, including documents certified by a member of the Board or the secretary of the Board. 2003, c. 3, s. 17.

Application and other fees

(2) The management committee may set and charge licence fees, application fees and other fees relating to an application or appeal to the Board. 2003, c. 3, s. 17.

Classes

(3) The management committee may establish different fees for different classes of persons and for different types of proceedings and types of licences. 2003, c. 3, s. 17.

Mandatory fees re gas marketers and retailers of electricity

(4) The management committee shall, as of the time or times prescribed by regulation, set and charge fees for the licensing of gas marketers under section 48 and retailers of electricity under section 57. 2010, c. 8, s. 38 (2).

Section Amendments with date in force (d/m/y)

2003, c. 3, s. 17 - 01/08/2003

2010, c. 8, s. 38 (2) - 01/01/2011

Forms

13 The Board's management committee may,

(a) establish forms and require their use in connection with any matter relating to the Board; or

(b) approve forms or the content of the forms and require that any application, appeal or information submitted to the Board be in the approved form. 2003, c. 3, s. 18.

Section Amendments with date in force (d/m/y)

2003, c. 3, s. 18 - 01/08/2003

Assistance

14 The Board may appoint persons having technical or special knowledge to assist the Board. 1998, c. 15, Sched. B, s. 14.

Orders and licences

15 (1) All orders made and licences issued by the Board shall be signed by the chair, a vice-chair or the secretary. 2003, c. 3, s. 19.

Same

(2) Despite subsection (1), an order made or licence issued by the Board pursuant to section 6 may be signed by the employee who made the order or issued the licence. 2003, c. 3, s. 19.

Judicial notice

(3) An order or licence that purports to be signed by a person referred to in subsection (1) or (2) shall be judicially noticed without further proof. 2003, c. 3, s. 19.

***Legislation Act, 2006*, Part III**

(4) Part III (Regulations) of the *Legislation Act, 2006* does not apply to the orders made or licences issued by the Board. 2003, c. 3, s. 19; 2006, c. 21, Sched. F, s. 136 (1).

Section Amendments with date in force (d/m/y)

2003, c. 3, s. 19 - 01/08/2003

2006, c. 21, Sched. F, s. 136 (1) - 25/07/2007

16 REPEALED: 2003, c. 3, s. 19.

Section Amendments with date in force (d/m/y)

2003, c. 3, s. 19 - 01/08/2003

17 REPEALED: 2003, c. 3, s. 19.

Section Amendments with date in force (d/m/y)

2000, c. 26, Sched. D, s. 2 (1) - 06/12/2000

2002, c. 1, Sched. B, s. 2 (1, 2) - 01/07/2002

2003, c. 3, s. 19 - 01/08/2003

Transfer of authority or licence

18 (1) No authority given by the Board under this or any other Act shall be transferred or assigned without leave of the Board. 1998, c. 15, Sched. B, s. 18 (1).

Same

(2) A licence issued under this Act is not transferable or assignable without leave of the Board. 1998, c. 15, Sched. B, s. 18 (2).

Board's powers, general

Power to determine law and fact

19 (1) The Board has in all matters within its jurisdiction authority to hear and determine all questions of law and of fact. 1998, c. 15, Sched. B, s. 19 (1).

Order

(2) The Board shall make any determination in a proceeding by order. 1998, c. 15, Sched. B, s. 19 (2); 2001, c. 9, Sched. F, s. 2 (1).

Reference

(3) If a proceeding before the Board is commenced by a reference to the Board by the Minister of Natural Resources, the Board shall proceed in accordance with the reference. 1998, c. 15, Sched. B, s. 19 (3).

Additional powers and duties

(4) The Board of its own motion may, and if so directed by the Minister under section 28 or otherwise shall, determine any matter that under this Act or the regulations it may upon an application determine and in so doing the Board has and may exercise the same powers as upon an application. 1998, c. 15, Sched. B, s. 19 (4).

Exception

(5) Unless specifically provided otherwise, subsection (4) does not apply to any application under the *Electricity Act, 1998* or any other Act. 1998, c. 15, Sched. B, s. 19 (5).

Jurisdiction exclusive

(6) The Board has exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it by this or any other Act. 1998, c. 15, Sched. B, s. 19 (6).

Section Amendments with date in force (d/m/y)

2001, c. 9, Sched. F, s. 2 (1) - 08/08/2001

Powers, procedures applicable to all matters

20 Subject to any provision to the contrary in this or any other Act, the powers and procedures of the Board set out in this Part apply to all matters before the Board under this or any other Act. 1998, c. 15, Sched. B, s. 20.

Tab 7

Ontario Energy Board

Commission de l'énergie de l'Ontario

EB-2011-0140

IN THE MATTER OF sections 70 and 78 of the *Ontario Energy Board Act 1998*, S.O.1998, c.15, (Schedule B);

AND IN THE MATTER OF a Board-initiated proceeding to designate an electricity transmitter to undertake development work for a new electricity transmission line between Northeast and Northwest Ontario: the East-West Tie Line.

BEFORE: Cynthia Chaplin
Presiding Member and Vice-Chair

Cathy Spoel
Member

PHASE 1 DECISION AND ORDER

July 12, 2012

INTRODUCTION

On February 2, 2012, the Ontario Energy Board issued notice that it was initiating a proceeding to designate an electricity transmitter to undertake development work for a new electricity transmission line between Northeast and Northwest Ontario: the East-West Tie line. The Board assigned File No. EB-2011-0140 to the designation proceeding. Seven transmitters registered their interest in the designation process.

The Board developed the Framework for Transmission Project Development (EB-2010-0059) (the “Policy”) as a way to encourage the timely development of electric transmission construction in Ontario. A number of transmission projects were expected to be identified by the Ontario Power Authority (“OPA”) through an Economic Connection Test or an Integrated Power System Plan to accommodate the connection of renewable generation. The designation process outlined in the Policy has, nevertheless, been adopted by the Board in this proceeding for a single bulk transmission line that was identified in the Minister’s Long Term Energy Plan to address reliability issues. The East-West Tie line will run between Thunder Bay and Wawa, and connect to the bulk transmission system in Northern Ontario at transformer stations owned by Hydro One Networks Inc. ("HONI”).

This designation proceeding represents an evolving process as the Board applies the Policy for the first time. The Board has adopted a two phase process for the designation proceeding. In Phase 1, which is the subject of this decision and order, the Board establishes specifics for the proceeding including decision criteria, filing requirements, obligations and consequences arising on designation, the hearing process for Phase 2 and the schedule for the filing of applications for designation.

In Phase 2, the registered transmitters will have an opportunity to file their applications for designation, and the Board intends to select one of them as the designated transmitter through a hearing process. The Board notes that this proceeding is voluntary on the part of the registered transmitters and intends that this Phase 1 decision and order will assist them in deciding whether to make an application for designation in Phase 2. The Board will not, at this stage, compel any transmitter to file a plan for the line.

It is important to remind participants of the limited scope of this process, which is the selection of a designated transmitter to do development work for the East-West Tie line. The final determination of the need for the line will be considered in a subsequent leave to construct proceeding. In general, environmental matters are not within the mandate of the Board and the necessary environmental assessment will be conducted in another forum.

THE PROCEEDING

On February 2, 2012, the Board issued a Notice of Proceeding for this designation proceeding. On March 9, 2012, the Board issued Procedural Order No. 1, granting intervenor status to the seven transmitters registered in this proceeding, namely: AltaLink Ontario, L.P. ("AltaLink"); Canadian Niagara Power Inc. ("CNPI"); EWT L.P.; Iccon Transmission Inc. ("Iccon"); RES Canada Transmission L.P. ("RES"); TransCanada Power Transmission (Ontario) L.P ("TPT"); and Upper Canada Transmission, Inc. ("UCT").

The Board's Decision on Intervention and Cost Award Eligibility, dated March 30, 2012, and the Board's Procedural Order No.2, dated April 16, 2012, granted intervenor status to 24 parties (or, in some instances, groups of parties) and cost award eligibility for the proceeding to nine of those parties. The matter of costs is discussed in further detail at the end of this decision.

Procedural Order No. 2 included the Board-approved issues list for Phase 1. On June 14, 2012, the Board issued its Phase 1 Partial Decision and Order to deal specifically with issue 19 of the issues list. This decision ordered HONI and Great Lakes Power Transmission LP ("GLPT") to file with the Board, and provide to other parties, certain documents in their possession which may be relevant to the development of the East-West Tie line. This decision addresses the other issues identified for Phase 1 of the proceeding.

BOARD FINDINGS ON THE ISSUES

The Board's primary objective in this proceeding is to select the most qualified transmission company to develop, and to bring a leave to construct application for, the East-West Tie line. The Board recognizes that the key to achieving this objective is the establishment of an efficient and transparent competitive process that avoids bestowing any unfair advantage upon a particular applicant or group of applicants. The Board's view is that competition is best served by creating an open, fair and cost-efficient proceeding that encourages multiple qualified proponents to participate. The Board has considered each of the issues in this light.

Decision Criteria: Issues 1 – 4

Issue 1. What additions, deletions or changes, if any, should be made to the general decision criteria listed by the Board in its policy Framework for Transmission Project Development Plans (EB-2010-0059)?

For the reasons given under issues 1 to 4, the Board's criteria for this designation process are:

- Organization
- First Nation and Métis participation
- Technical capability
- Financial capacity
- Proposed Design for the East-West Tie line
- Schedule
- Costs
- Landowner, municipal and community consultation
- First Nation and Métis consultation
- Other factors

Original criteria

There was general support among the parties for the retention of the original criteria from the Policy. The Board agrees that these original criteria remain valid for the East-West Tie line project, and will retain the following criteria in their original form: organization, technical capability, financial capacity, schedule, costs, and other factors. The criterion "landowner and other consultations" will be subdivided, as described below.

Several parties suggested that the Board provide guidance as to the way in which it would asses the criteria "cost" and "other factors". Regarding cost, the Board acknowledges, as several parties observed, that one of the purposes of the development work itself will be the estimation of construction and operation and maintenance costs, and that therefore applicants for designation will likely not be in a position to provide an accurate estimate of construction and operating and maintenance costs at the time of their application. Nevertheless, the Board finds that it must consider

all costs in assessing the merits of the various applications. Providing benefit to ratepayers through economic efficiency is a core objective in the Board's Policy, and the reasonableness of the total costs of the project will be a critical component in achieving that objective. The Board will therefore require that parties include in their applications an estimate of all costs, including those related to: preparation of an application for designation; development; construction; and operation and maintenance of the line.

However, in recognition of the uncertainty inherent in estimating costs of construction and operation and maintenance of the line, the Board will accept these estimates expressed as a range. All the transmitters who have registered their interest in the East-West Tie line project have, or have access to, experience in the construction of major infrastructure projects, and the Board expects that they will be able to create a reasonable estimated range for these costs, and provide justification for the cost estimates and width of the range. The Board will also require applicants to provide evidence of their plan to manage the costs of construction and operation and maintenance, and of their track record in estimating construction costs and keeping to those estimates.

Applicants should also describe any proposals they have regarding the recovery of the various categories of costs from ratepayers. For example, the Board notes TPT's submission that no applicant, including the designated transmitter, should be able to recover the costs of participating in the designation process. While this is not the Board's ruling (see issue 14 below), the Board invites any applicant to distinguish itself by proposals that reduce costs or risks for ratepayers for any category of cost.

The Board will retain the criterion "other factors", but will not specify at this time what factors or evidence will be considered under this criterion. This criterion offers applicants the opportunity to bring forward any distinguishing feature of their application that is not addressed in the other criteria. The Board acknowledges that this criterion is open-ended. However, all potential applicants are in the same position and have the same opportunity to provide evidence under this criterion. Experienced transmitters, such as those who have registered their interest in this proceeding, may bring forward useful information that the Board cannot anticipate at this stage in the proceeding.

Additional criteria, other than First Nation and Métis issues

The submissions of parties contained several proposals for additional criteria. The Board will not add a specific additional criterion relating to facilitating competition and new entrants. The facilitation of competition and the encouragement of new entrants to transmission in the province was part of the context for the Board's Policy, and are being recognized by the initiation of this designation process. Any applicant who wishes to bring evidence of any advantage to Ontario ratepayers of the designation of a new entrant for this project is invited to do so as part of the "other factors" criterion.

The Board finds that there is no need to create additional criteria related to the provision of socio-economic benefits, the ability to mitigate environmental impacts, regulatory expertise, or location-specific experience. Each of these issues will be considered to some degree under the criteria "technical capability" and "organization". The Board notes that mitigation of environmental and socio-economic impacts is considered as part of the Environmental Assessment process. The Board will not require evidence of an applicant's ability to mitigate these impacts, but will require evidence of the applicant's ability to successfully complete regulatory processes similar to Ontario's Environmental Assessment process.

With respect to regulatory expertise, the Board will require evidence under the criterion "technical capability" of an applicant's ability to successfully complete the regulatory processes necessary for the construction and operation of the line.

The Board will not necessarily favour experience in Ontario over experience in other jurisdictions. It is important that the designated transmitter be fully capable of constructing and operating an electricity transmission line that meets the needs identified by the OPA and the Independent Electricity System Operator ("IESO") in the location proposed in the transmitter's plan. However, the experience necessary to achieve this capability may have been gained in other jurisdictions. The Board invites applicants to bring evidence of their experience and to demonstrate its relevance to the East-West Tie line project.

The Board finds that three additional criteria are appropriate to address the specific circumstances of this designation process. The Board will add the new criterion "Proposed Design for the East-West Tie Line". In creating this additional criterion, the Board has particularly considered the submissions of Board staff, the IESO, RES, the

Power Workers Union ("PWU") and EWT LP. The evidence to be filed to satisfy this criterion is largely that listed in section 5 of Board staff's proposed filing requirements presently titled "Plan Overview". The criterion is intended to be assessed as pass/fail in respect of whether the applicant's plan for the line meets the targeted transfer capability while satisfying all applicable reliability standards. However, the other evidence to be filed under this criterion by each applicant will be compared against the plans of the other applicants to assess the relative strengths of the proposed designs. An applicant may demonstrate under this criterion the ways in which its technical design for the line provides advantages to the transmission system, local communities or transmission ratepayers, or demonstrates advantageous innovation, or in some way exceeds the minimum requirements while remaining cost effective.

The Board will divide the original criterion "landowner and other consultations" into two criteria: "landowner, municipal and community consultation" and "First Nation and Métis consultation". The delineation of "landowner, municipal and community consultation" from the more general original criterion is intended to make explicit the need for consultation with municipalities and communities located along the transmission line corridor.

Issue 2. Should the Board add the criterion of First Nations and Métis participation? If yes, how will that criterion be assessed?

Issue 3. Should the Board add the criterion of the ability to carry out the procedural aspects of First Nations and Métis consultation? If yes, how will that criterion be assessed?

Issue 4. What is the effect of the Minister's letter to the Board dated March 29, 2011 on the above two questions?

The Board finds that the Minister's letter is not a directive within the meaning of the *Ontario Energy Board Act, 1998.* However, the letter is an expression of the government's interest in promoting First Nations and Métis participation in energy projects, and is consistent with government policy as articulated in the Long Term Energy Plan.

The Board will create the criterion "First Nation and Métis participation" and, as indicated in the previous section, divide the original criterion "Landowner and other consultations" into two criteria: "landowner, municipal and community consultation" and

"First Nation and Métis consultation". The Board recognizes that First Nation and Métis consultation is unique in being a constitutional obligation on the Crown, certain aspects of which may be delegated to the designated transmitter. Applicants will be required to demonstrate their ability to conduct successful consultations with First Nation and Métis communities, as may be delegated by the Crown, by providing a plan for such consultations, and evidence of their experience in conducting such consultations.

The Board will not look more favourably upon First Nation and Métis participation that is already in place at the time of application than upon a high quality plan for such participation, supported by experience in negotiating such arrangements. "Participation" can mean many things, and the Board will not restrict its consideration to any particular type of participation. Applicants are invited to demonstrate the advantages of whatever type and level of First Nation and Métis participation they have in place, or are proposing to secure.

The Board notes the proposal of the Ojibways of Pic River First Nation ("PRFN") that the First Nation and Métis participation criterion be categorized, weighted, and scored by the impacted relevant communities. The Board will not adopt this methodology for assessing the criterion, which could amount to an improper delegation of its decision making power. The Board will evaluate this criterion through the public hearing process, and the various intervenors representing First Nation and Métis interests, along with the other parties, can seek input from their constituencies and bring that information forward for the Board's consideration in the hearing.

Use of the Decision Criteria: Issues 5 and 6

Issue 5: ***Should the Board assign relative importance to the decision criteria through rankings, groupings or weightings? If yes, what should those rankings, groupings or weightings be?***

Issue 6: ***Should the Board articulate an assessment methodology to apply to the decision criteria? If yes, what should this methodology be?***

The Board will not, at this time, articulate an assessment methodology to be applied to the decision criteria, nor will it ascribe any relative importance to the decision criteria through a weighting system. The Board appreciates the points made in the submissions from some parties that assigning weights or rankings to the criteria would

assist applicants in focusing their applications towards factors that the Board considers important. However, the Board is unwilling to remove the discretion and flexibility it may need in evaluating the applications for designation. The Board will exercise its judgment for each criterion, with the assistance of the evidence presented and the submissions received from all parties.

The Board notes that in providing decision criteria and filing requirements, it has provided some guidance to potential applicants, and that all applicants face the same challenge in designing their proposals around these criteria and filing requirements. All the decision criteria are important, and the Board is unwilling to restrict its ability to give full consideration to each criterion before it is informed by the content of the applications for designation.

Filing Requirements: Issues 7 and 8

Issue 7. What additions, deletions or changes should be made to the Filing Requirements (G-2010-0059)?

As part of its Policy, the Board issued its "Filing Requirements: Transmission Project Development Plans" (G2010-0059) dated August 26, 2010. Board staff proposed revisions to the original filing requirements to take into account the specific circumstances of the East-West Tie line. These revised filing requirements were attached as Appendix A to Board staff's April 24, 2012 submission. Most parties agreed with the reorganization of the filing requirements proposed by Board staff, but had specific suggestions for additions, deletions or changes.

The approved filing requirements for the East-West Tie line designation process are attached as Appendix A to this decision. The filing requirements have been modified from Board staff's proposed filing requirements to reflect the Board's findings in this Phase 1 decision. Certain issues raised by parties, and not otherwise addressed in this decision, are discussed below.

Background Information

AltaLink submitted that an additional requirement should be added to require each applicant to file a statement from a senior officer that the applicant is not in a position of an actual or perceived conflict of interest. The Board finds that this requirement is

unnecessary at this time. The Board, in issues 20 – 22 in this decision, addresses issues arising from the participation of entities related to incumbents. The Board can address this issue further through Phase 2 in the event additional concerns are identified.

Technical Capability

AltaLink and Iccon submitted that references to experience in Ontario and experience involving similar terrain, climate and other environmental conditions should be excluded from the filing requirements. EWT LP submitted that experience in Ontario and in similar terrain, climate and other environmental conditions is important when assessing a transmitter's technical experience.

As mentioned under issue 1 in this decision, the Board finds that it is appropriate for applicants to document their experience, wherever gained, and to demonstrate the relevance of that experience to the East-West Tie line project.

The Board will not, as urged by TPT, change the wording in the filing requirements to refer only to “linear infrastructure”, but recognizes that such experience may be relevant to the construction and operation of the East-West Tie line.

The Board will require evidence of consistency with good utility practice in the areas of safety, environmental compliance, and regulatory compliance.

Financial Capacity

School Energy Coalition (“SEC”) recommended the addition of a requirement for information on the current credit rating of the applicant and its parent company. The Board has adopted this proposal.

Plan Overview (now Proposed Design)

Some parties submitted that the requirements listed in Section 5.1 of Board staff’s proposed filing requirements are too detailed for the designation applications since providing this information would require development work which should not be part of the designation process. EWT LP suggested that these requirements should be determined by the designated transmitter once designated and that only a description of

the development activities planned to determine these requirements should be included in the designation application.

The Board is of the view that the filing requirements should require the applicant transmitters to provide sufficient detail to allow the Board to carry out a meaningful, thorough and accurate assessment of the applicant transmitters and their proposed plans. However, the Board also recognizes the time, effort and cost associated with preparation of detailed designation applications. If an applicant is unable to provide certain information, then it can provide a description of the methodology it will use to develop the information. The Board has made the list under this section (now 6.1) optional rather than mandatory, and provided the option of describing the method and criteria for the determination of these parameters.

Board staff noted that section 2.1.5 of the Board's Minimum Technical Requirements requires that "all proposed design assumptions" be provided by the applicant. Board staff recommended that the need to provide "all proposed design assumptions" be excluded from the designation application because this information will not be available to the applicants before development work for the line is well underway.

The Board agrees with Board staff that it would be premature to expect the applicants to be able to provide this information prior to having done at least some development work, and will not include a requirement for "all" design assumptions in the filing requirements. As a general rule, the Board agrees with UCT and PWU that if the filing requirements require detail which is impossible or impractical to obtain, the applicant should respond to the best of its ability and identify the factors that prevent a full response or require deviation from the filing requirements. The Board also acknowledges, as submitted by RES, that plans will evolve during the development phase.

The Board will adopt the proposal of the OPA (supported by SEC) for a requirement to outline how a proposed plan leads to a lower cost solution than other alternatives while meeting the project requirements. The Board is not, at this stage, asking applicants to compare their plans to those of other applicants, but to other options for the East-West Tie line that could reasonably be considered to satisfy the need for the line.

Schedule

EWT LP suggested that section 6.3 of Board staff's proposed filing requirements related to information regarding the construction phase of the project should be eliminated since this would require environmental assessment work and consultation which will not have been done at the time of filing the applications. Some parties suggested that specific milestone dates should be removed.

The Board is of the view that the requirements in section 6.3 will be helpful to the Board in assessing the merits of the applicants' proposed plans and that they should remain in the filing requirements. The Board is not seeking a commitment, but information to assist it in understanding the applicant's overall strategy for completion of the project. The Board recognizes that the construction schedule will change as a result of the more detailed development work to be carried out by the designated transmitter.

Costs

Board staff's revisions to the original filing requirements propose a number of additions including, among other things, amounts already spent for preparation of an application, major risks that could cause the applicant to exceed its development budget, strategy to mitigate risks, threshold of materiality for prudence review of cost overruns and evidence of the applicant's past success in completing similar transmission line projects.

The Board finds that it is reasonable to simplify the development cost breakdown by grouping some categories of cost. The Board is of the view that, while development cost estimates will be considered, the magnitude of development costs will be small in comparison to the total costs of the East-West Tie project. Consequently, an applicant's demonstrated ability to manage complex projects and control all costs is more important for the selection of a designated transmitter than the estimate of development costs.

Also, the Board concludes that the applicants are not required to propose a threshold of materiality for prudence review if cost overruns occur for the costs of development. Instead, the Board will ask parties to address this matter in their submissions in Phase 2.

Consultation

The Board determined under issue 1 that there will be a separate criterion for First Nation and Métis consultation, and the filing requirements have been modified accordingly. The Board has adopted most of the wording for this section proposed by the Métis Nation of Ontario ("MNO").

Several parties submitted that the information regarding routing in staff's proposed section 8.3 should not be required as this information will be unreliable until environmental assessment work has been done. The Board will permit applicants to file routing information at the level of detail they believe is appropriate, and will be assisted by such description as the applicant can provide regarding the route or routes it is considering.

Issue 8: May applicants submit, in addition or in the alternative to plans for the entire East-West Tie Line, plans for separate segments of the East-West Tie Line?

The Board will not permit applicants to submit plans for separate segments of the East-West Tie line. The Board recognizes that the proposed line could possibly be considered two segments, one from Wawa to Marathon and one from Marathon to Thunder Bay. However, the need identified by the OPA and the IESO cannot be satisfied by one of these two segments alone, and the project is best considered as a single unit. The Board agrees with those parties that submitted that attempting to consider separate applications for the two line segments would add cost and complexity to the designation process, require extensive co-ordination between the two selected transmitters, and could create additional risk for ratepayers and confusion for communities that are to be consulted. However, the Board would consider a joint venture or joint application from two or more parties who together propose to complete the entire East-West Tie line. Such a joint application would have to include a clear acceptance of risks and obligations by each party for the completion of the entire project.

Obligations and Milestones: Issues 9 – 12

Issue 9: ***What reporting obligations should be imposed on the designated transmitter (subject matter and timing)? When should these obligations be determined? When should they be imposed?***

Issue 10: ***What performance obligations should be imposed on the designated transmitter? When should these obligations be determined? When should they be imposed?***

Issue 11: ***What are the performance milestones that the designated transmitter should be required to meet: for both the development period and for the construction period? When should these milestones be determined? When should they be imposed?***

Issue 12: ***What should the consequences be of failure to meet these obligations and milestones? When should these consequences be determined? When should they be imposed?***

The Board will not impose a "performance obligation" in the sense of a performance bond or other financial instrument on the designated transmitter. Those parties who chose to address this issue in their submissions largely agreed with Board staff that a financial performance obligation was not necessary. The Board accepts the submission of EWT LP that the regulatory risk of cost disallowance is a deterrent to a voluntary failure to perform. The Board also agrees with SEC that the Board has the authority to impose conditions through amendments to the designated transmitter's licence if non-financial obligations are necessary.

The Board agrees with Board staff and other parties that it will be necessary to impose performance milestones and reporting obligations on the designated transmitter. The objectives of the milestones and reporting are:

- to ensure that the designated transmitter is moving forward with the work on the East-West Tie line in a timely manner;
- to facilitate early identification of circumstances which may undermine this ability to move forward; and

- to maintain transparency, as the costs of development work are intended to be recovered from ratepayers.

The Board will require, through its filing requirements, applicants for designation to propose performance milestones and reporting obligations that accomplish these objectives. The Board is reluctant to pre-determine the milestones and reporting that the successful applicant must accept, and expects that the experience in major project management that the applicants will bring to the designation process will be of assistance to the Board in setting appropriate conditions.

The proposed milestones and reporting obligations should apply to both the development phase and construction phase of the project, although the Board accepts that the milestones and reporting for the construction phase will be reconsidered and finalized during the Board's consideration of the leave to construct application. The Board will consider construction milestones and reporting only as indicative, and does not intend to impose those obligations at the time of designation.

Potential applicants for designation and other parties should note that the Board is not limited to imposing on a designated transmitter only those performance milestones and reporting obligations that the transmitter proposed in its application. All parties may choose to make submissions concerning the appropriate milestones that should be imposed on any transmitter that may be selected for designation. The Board will not impose novel conditions without providing designation applicants the opportunity to address the appropriateness of such conditions. The Board will establish the reporting requirements and performance milestones through an amendment to the designated transmitter's licence.

The Board finds that is it premature to determine in this Phase 1 decision the consequences for failure to meet the required performance milestones and performance obligations. Applicants for designation must include in their applications their proposals regarding the consequences of failure to meet their proposed performance milestones and reporting obligations.

The Board's policy indicates that the loss of designation and the inability to recover development costs are two potential consequences of failure. The Board is of the view that the severity of the consequences should be proportional to the severity of the

breach, and take into account the designated transmitter's mitigation efforts. In determining how to address any failure the Board will consider:

- the nature and severity of the failure
- the specific circumstances related to the failure
- the consequences of the failure
- the designated transmitter's proposal to address the failure

The Board notes SEC's submission that if a designated transmitter does not bring forth a leave to construct application, it must relinquish ownership of all information and intellectual property that it created or acquired during the development phase. AltaLink and others argued in response that to require delivery of all such information and intellectual property would be punitive, confiscatory and contrary to the public interest. The Board will not determine this issue at this time. However, if failure of the project occurs, and development costs are to be recovered from ratepayers, the Board may wish to consider whether information gathered and even design work completed at ratepayer expense must be made available to a substitute transmitter.

Runner up

Board staff, in its submission, asked parties to comment on the issue of whether one or more "runners-up" for designation should be selected by the Board. Some of the registered transmitters were not in favour of the Board selecting a runner-up, in part because keeping capital and human resources on hold awaiting potential failure of the designated transmitter would not be practical. However, several parties mentioned the potential efficiency to be gained, as if the original designee failed, no new designation process would be required to continue work on the project.

The Board will invite applicants for designation to indicate whether they are willing to be named as a runner-up. If the designated transmitter fails to fulfill its obligations and the line is still needed, the Board could offer the development opportunity to the runner-up. The runner-up would not be under an obligation to take on the project, but would have right of first refusal to undertake the work. Applicants that indicate their willingness to be named runner-up should also provide in their application any conditions that they believe are necessary to enable them to take on this role. The Board will not consider

willingness to take on the runner-up role in its selection of the primary designated transmitter. This is a choice for applicants, not a requirement.

Consequences of Designation: Issues 13 – 16

Issue 13: On what basis and when does the Board determine the prudence of budgeted development costs?

The Board agrees with the general tenor of parties' submissions that the time to review the budgeted development costs put forward in applications for designation is during Phase 2 of this designation proceeding. The level of development costs, which are expected to be recovered from ratepayers, will be a factor in the Board's selection of a designated transmitter. In this light, the Board does not foresee a circumstance, as suggested by SEC, in which it would adjust the amount of development costs proposed by a transmitter at the time the Board designates that transmitter.

The level of development costs is only one aspect of the proposal put forward by a transmitter. The Board does not intend to adjust this part of the proposal any more than it would adjust the proposed organization, design, financing or any other aspect. Unlike an application for rates or approval of a facility, this proceeding concerns itself with choosing from among several competing proposals. The Board will compare these proposals to each other and will determine which proposal is best overall. It would be inappropriate and unfair to the applicants to expect any of them to adjust their applications once they have been filed.

This does not mean that the development costs proposed in applications for designation cannot be questioned. The Board will receive and consider interrogatories and submissions regarding the level of these budgeted costs during Phase 2 and will take that evidence into account in assessing the applications. The selection of a transmitter for designation will indicate that the Board has found the development costs to be reasonable as part of an overall development plan. This selection will also establish that the development costs are approved for recovery. The Board will not select a transmitter for designation if it cannot find that the development costs are reasonable. However, applicants should be aware that costs in excess of budgeted costs that are put forward for recovery from ratepayers will be subject to a prudence review, which would include consideration of the reasons for the overage.

Issue 14: Should the designated transmitter be permitted to recover its prudently incurred costs associated with preparing its application for designation? If yes, what accounting mechanism(s) are required to allow for such recovery?

The Board finds that the designated transmitter will be permitted to recover from ratepayers its prudently incurred costs associated with preparing its application for designation, with one restriction. Cost recovery will be restricted to costs incurred on or after the date that the Board gave notice of the proceeding, February 2, 2012. This date represents the beginning of the proceeding and therefore is a date after which the designated transmitter could reasonably expect to recover its costs.

Applicant transmitters should identify the costs already incurred to prepare an application, as well as an estimate of the costs required to complete the designation proceeding, as part of their budgeted development costs. The Board will establish a deferral account for the designated transmitter in which the budgeted development costs, including amounts incurred after February 2, 1012 for the preparation of the application for designation, will be recorded for future recovery. As noted earlier in this decision, an applicant transmitter can choose not to seek recovery of all its costs, as a way to reduce the costs of its proposal to ratepayers.

Issue 15: To what extent will the designated transmitter be held to the content of its application for designation?

The Board will be choosing a designated transmitter based on the plans that applicants for designation file. Therefore, the Board will generally expect the designated transmitter to conform to its filed application, as it formed the basis for designation. However, the Board understands that there is a need for some flexibility, as the plan for the line will evolve as development work takes place.

The Board has discussed in the previous section of this decision the need for performance milestones and reporting obligations, and the expectation that these will be adhered to. Any development costs in excess of budgeted costs may not be recovered from ratepayers, and will be subject to a prudence review if recovery is sought. The leave to construct proceeding will provide an opportunity for the Board to assess the reasonableness of any deviations from other aspects of the designated transmitter's

plan, and the Board may choose to deny the leave to construct application or impose special conditions on its approval if warranted.

Particular concern was expressed by some parties regarding commitment to construction costs, First Nation and Métis participation, and First Nation and Métis consultation. The Board recognizes that these three areas in particular may be subject to modification to accommodate new information, and changing needs and circumstances. Nevertheless, in the leave to construct proceeding, the Board will compare the actual performance of the designated transmitter in these areas to the evidence filed in its designation application to assess the reasonableness of any deviations from the application.

Issue 16: What costs will a designated transmitter be entitled to recover in the event that the project does not move forward to a successful application for leave to construct?

On the issue of cost recovery after a failure to obtain an order for leave to construct the line, the Board agrees with Board staff and other parties that the reason for failure will be an important consideration in determining what costs, if any, are to be recovered from ratepayers. Generally, if the project does not move forward due to factors outside the designated transmitter's control, the designated transmitter should be able to recover the budgeted development costs spent and reasonable wind-up costs. If failure occurs due to factors within the designated transmitter's control, neither recovery nor automatic denial is certain. The Board will review the circumstances of the failure to determine a fair level of cost recovery. The Board acknowledges that it may not be possible to attribute failure to a single cause, and the sources of failure may be both internal and external to the designated transmitter. It is not possible to decide on the level of cost recovery in the abstract at this time, as the specific circumstances of the failure will need to be considered.

Process: Issues 17 – 23

Issue 17: The Board has stated its intention to proceed by way of a written hearing and has received objections to a written hearing. What should the process be for the phase of the hearing in which a designated transmitter is selected (phase 2)?

The Board will continue to proceed for the present by way of written hearing, and adopt the procedural steps proposed by Board staff (and largely supported by the registered transmitters). The Board is master of its own process, within the limits set by the *Ontario Energy Board Act, 1998* and the *Statutory Powers Procedure Act*. In the interests of fairness to all applicants and of keeping the costs of the designation proceeding within reasonable limits, the Board will exercise considerable control over the process. The Board's primary aim in Phase 2 is to obtain a good record upon which to make a decision on designation. The Board will ensure, as it does in all its hearings, that the process is open, transparent and fair.

The Board notes the concern of parties over the suggestion by Board staff that interrogatories be funneled through the Board, and that "culling and editing" may occur before the Board sends the interrogatories to the applicants. The Board will require all parties to send their interrogatories to the Board, and the Board panel (not Board staff) reserves the right to combine and edit interrogatories for matters such as relevance, duplication and excessive demands upon the applicants. The primary purpose of the interrogatory process is to create a good record for the Board to assist it in making a determination in this designation proceeding. The fact that this proceeding involves multiple competitive applicants and has elements similar to a procurement process that are absent from most Board proceedings calls for specific procedural approaches that respect fairness and efficiency.

Some parties suggested that an oral hearing is necessary to ensure full participation from non-applicant intervenors, particularly First Nation and Métis intervenors, and intervenors from northern communities. The Board will evaluate the need for an oral component to this proceeding, including the scope and location of any oral component, as the hearing proceeds.

The Board will not adopt the proposal of the PWU to remove intervenor status from the registered transmitters. The Board expects to receive useful information and submissions from all intervenors.

Issue 18: Should the Board clarify the roles of the Board's expert advisor, the IESO, the OPA, Hydro One Networks Inc. and Great Lakes Power Transmission LP in the designation process? If yes, what should those roles be?

The Board agrees with the description of the roles of the IESO and the OPA provided in their respective submissions. The Board panel will not receive information from either of these participants privately, and requires that any advice they have to offer be provided on the record of the hearing. The Board expects that the OPA and the IESO will remain neutral as between applicants. Consistent with the reply submissions from the OPA and the IESO, the Board does not anticipate that the participation of these entities in this proceeding will be affected by Bill 75, which contemplates their merger.

The Board panel will communicate with Board staff both on and off the record. The panel will be vigilant to ensure that Board staff continues to remain neutral as between other parties in the proceeding, and provides any new information or any opinion on the record so that other parties may respond to it. The Board will not receive any advice off the record from the Board's expert advisor, and expects any information from this expert to be placed on the record by Board staff.

HONI and GLPT must remain neutral as between applicants. The Board expects that the primary role of these transmitters will be to respond to reasonable requests for information. The Board would also appreciate receiving comment from these transmitters on any technical matters, or matters affecting existing infrastructure, as they see fit, through submissions in Phase 2 of the proceeding.

Issue 19: What information should Hydro One Networks Inc. and Great Lakes Power Transmission be required to disclose?

The Board ruled on this issue in the Phase 1 Partial Decision and Order, dated June 14, 2012.

Issue 20. Are any special conditions required regarding the participation in the designation process of any or all registered transmitters?

Issue 21. Are the protocols put in place by Hydro One Networks Inc. and Great Lakes Power Transmission LP, and described in response to the Board's letter of December 22, 2011, adequate, and if not, should the Board require modification of the protocols?

Issue 22. Given that EWT LP shares a common parent with Great Lakes Power Transmission LP and Hydro One Networks Inc., should the relationship between EWT LP and each of Great Lakes Power

Transmission LP and Hydro One Networks Inc. be governed by the Board's regulatory requirements (in particular the Affiliate Relationships Code) that pertain to the relationship between licensed transmission utilities and their energy service provider affiliates?

Board staff did not suggest any particular measures to address the concerns raised by issues 20 through 22, but asked that parties requesting such measures "explain the harm they are seeking to prevent, how the proposed condition or measure mitigates that harm without causing other harm, and whether the proposed condition or measure should apply to all similar participants in the interest of fairness."

EWT LP submitted that all designation applicants should be prohibited from working together or coordinating the preparation of plans or strategies and, moreover, that any party found to be coordinating or communicating with other designation applicants with respect to their designation plans or designation strategy be disqualified. In their reply submissions, a number of the other parties disagreed and, instead, suggested that a prohibition of co-operative submissions or co-development agreements was not only unwarranted but potentially counter-productive.

As discussed in the Board's findings on issue 8, the Board will not prohibit co-operation or co-ordination between the prospective applicants, whether among themselves or with other parties. As there may be potential for certain parties to demonstrate that their co-operation and co-ordination of efforts will be to the advantage of ratepayers, the Board will not impose conditions to preclude this. However, the nature and extent of any co-operation or co-ordination must be disclosed in the application(s).

A number of the parties submitted that there should be special conditions placed specifically on EWT LP, generally in furtherance of the Board's objective for a fair process. In particular, these applicants point to a perceived informational advantage of EWT LP given its relationship with HONI and GLPT, and submit that such advantage should be negated by preventing the sharing of employees between them, or by precluding EWT LP from participating altogether. Several of the parties submitted that EWT LP's relationship with HONI and GLPT should be governed by the Board's Affiliate Relationships Code for Electricity Distributors and Transmitters ("ARC"). As well, a number of these parties suggested that the protocols put in place by HONI and GLPT are insufficient to address data management and data access for shared employees, and they proposed various remedies, including modifications to the protocols.

EWT LP argued that the current protocols are adequate, and that they have effectively served to ensure that no information from HONI and GLPT was or will be provided to EWT LP that was or will not also be provided to all proponents. EWT LP also submitted that it is neither an affiliate of HONI nor GLPT; that the activities of EWT LP are not analogous to the activities of energy service providers; that EWT LP is comprised of three arm's length partners each of whom is unable to control EWT LP; and that, ultimately, the circumstances for which the ARC was developed do not apply to their circumstances.

The Board acknowledges the arguments of EWT LP that neither transmission development nor participation in the designation process is an activity controlled by the ARC and that no affiliate relationship exists between EWT LP and either of GLPT or HONI. The Board also appreciates the point made by PWU that, as the licenses currently stand, the ARC would not apply to many of the proponents.

In the Board's view, while the ARC does not apply to the relationship between EWT LP and each of HONI and GLPT, the types of harm that the ARC seeks to prevent in the context of affiliate relationships can also exist in other contexts. The Board notes that almost all of the parties to this proceeding have referred to HONI and GLPT as the "incumbents". While it is true that each of them (as well as CNPI) are transmission utilities operating in the Province of Ontario, the position of HONI is unique. HONI has information critical to the proposed East-West Tie line, as it owns the assets to which the East-West Tie line will connect and, under the Reference Option, the East-West Tie line will be located beside HONI's existing line and right of way. While GLPT, and to a lesser extent CNPI, may have some knowledge of similar terrain and the local transmission system, neither has the advantage of owning and operating an existing line in this specific area, or of determining the conditions and costing related to connection of the new line to the existing transmission system.

The Board believes that HONI and GLPT have been and will continue to be diligent in following the existing protocols. However, the Board is not satisfied that the protocols provide adequate protection against the inadvertent sharing or disclosure of information between HONI and EWT LP, if they continue to share employees in Phase 2 of this proceeding. While the Board is confident in the commitment of staff at HONI to not intentionally share information with one applicant that is not also shared with all other applicants, the legitimacy and integrity of this process requires that, going forward, there

be no opportunity during Phase 2 of this process for the disclosure or sharing (whether intentional or inadvertent) of any relevant information by HONI to EWT LP.

In order to avoid any real or perceived informational advantage, the Board will require that EWT LP make arrangements to ensure that no individual will be performing work concurrently for HONI and EWT LP during Phase 2 of this proceeding. This condition will be effective as of fifteen days from the date of issuance of this decision until the close of the record in Phase 2 of this proceeding.

Employees engaged by EWT LP must be placed in the position where they cannot inadvertently acquire advantageous information from employees currently employed by HONI, and, therefore, the work location of EWT LP must also be physically separated from the HONI offices until the record is closed in Phase 2 of this proceeding. This means, at a minimum, that HONI and EWT LP must not share a computer system or other data management system, and must occupy separate premises.

EWT LP's continued participation as an intervenor and as a registered transmitter is dependent on compliance with these conditions, as well as its role in adhering to the protocols established by HONI and GLPT.

Except for this ruling requiring a separation of employees and premises between EWT LP and HONI, the Board will not impose regulatory conditions governing the relationship between EWT LP and each of HONI and GLPT. However, the Board reminds both HONI and GLPT that careful separation of costs attributable to EWT LP's creation and participation in the designation process must be maintained.

Issue 23: What should be the required date for filing an application for designation?

The Board has considered the various timelines, and reasons for those timelines, proposed in the submissions on this issue. The Board finds that it will require applications for designation to be filed no later than January 4, 2013. This filing date should allow sufficient time for the preparation of applications, and is consistent with the period of six months which many transmitters proposed. The Board is of the view that this relatively generous timeline is appropriate because this is the first designation proceeding for transmission in Ontario, and all parties may need time to resolve matters related to the provision of information and the preparation of plans.

THE BOARD ORDERS THAT:

1. The Board adopts the filing requirements attached as Appendix A to this decision for the purpose of applications for designation to undertake development work for the East-West Tie line.

2. EWT LP must make arrangements so as to ensure that no individual will be performing work concurrently for HONI and EWT LP during Phase 2 of this designation proceeding, and the work location of EWT LP must also be physically separated from the HONI offices as described in this decision. This condition will be effective as of fifteen days from the date of issuance of this decision until the close of the record in Phase 2 of this proceeding. EWT LP must provide confirmation to the Board that this condition has been implemented, within 21 days of the date of this decision.

3. A licensed transmitter seeking designation to undertake development work for the East-West Tie line must file its application for designation no later than January 4, 2013.

Cost Claims for Phase 1 of the Proceeding

On March 30, 2012, the Board issued its Decision on Intervention and Cost Award Eligibility. Procedural Order No. 2 issued on April 16, 2012 also, to some extent, dealt with the issues of interventions and cost award eligibility. As a result of these orders, certain parties have been ruled eligible to apply for cost awards in both phases of this designation proceeding and certain other parties have been ruled eligible to apply for limited cost awards relating to their attendance at an all party conference in Phase 1 of this designation proceeding.

In total, nine parties have been determined to be eligible to apply for cost awards in both phases of this designation proceeding. These parties will be referred to as the "eligible parties". They are:

- the coalition representing the City of Thunder Bay, Northwestern Ontario Associated Chambers of Commerce and Northwestern Ontario Municipal Association;

- the coalition representing the Municipality of Wawa and the Algoma Coalition;
- Consumers Council of Canada;
- MNO;
- National Chief's Office on Behalf of the Assembly of First Nations;
- Nishnawbe-Aski Nation;
- Northwatch;
- PRFN; and
- SEC.

Each of the following parties has been granted eligibility for an award of costs up to a maximum of 12 hours if it attended the all party conference in Phase 1 of this proceeding on March 23, 2012:

- Association of Major Power Consumers in Ontario (“AMPCO”);
- Building Owners and Managers Association Toronto (“BOMA”);
- Canadian Manufacturers and Exporters (“CME”); and
- Energy Probe Research Foundation (“Energy Probe”).

The cost awards to the eligible parties, the cost awards to AMPCO, BOMA, CME and Energy Probe, and the Board’s own costs will be recovered from licensed transmitters whose revenue requirements are recovered through the Ontario Uniform Transmission Rate (and the costs will be apportioned between the transmitters based on their respective transmission revenues). These transmitters are:

- CNPI;
- Five Nations Energy Inc. (“FNEI”);
- GLPT; and
- HONI.

A schedule for claiming cost awards for Phase 1 is provided in the Board’s order below. A decision and order on cost awards will be issued after these steps have been completed.

Furthermore, parties claiming cost awards are reminded that they must submit their cost claims in accordance with the Board's *Practice Direction on Cost Awards* and ensure that their claims are consistent with the Board's required forms and the Cost Awards Tariff.

THE BOARD FURTHER ORDERS THAT:

1. Eligible parties shall submit their cost claims for Phase 1 of the Designation Proceeding by **July 26, 2012**. A copy of the cost claim must be filed with the Board and one copy is to be served on each of CNPI, FNEI, GLPT and HONI.

2. AMPCO, BOMA, CME and Energy Probe shall submit their cost claims up to a maximum of 12 hours if they attended the all party conference in Phase 1 of the Designation Proceeding on March 23, 2012 by **July 26, 2012**. A copy of the cost claim must be filed with the Board and one copy is to be served on each of CNPI, FNEI, GLPT and HONI.

3. CNPI, FNEI, GLPT and HONI will have until **August 2, 2012** to object to any aspect of the costs claimed. A copy of the objection must be filed with the Board and one copy must be served on the party against whose claim the objection is being made.

4. The party whose cost claim was objected to will have until **August 9, 2012** to make a reply submission as to why its cost claim should be allowed. A copy of the submission must be filed with the Board and one copy must be served on the party who objected to the claim.

All filings with the Board must quote the file number EB-2011-0140, and be made through the Board's web portal at www.errr.ontarioenergyboard.ca, and consist of two paper copies and one electronic copy in searchable / unrestricted PDF format. Filings must be received by the Board by 4:45 p.m. on the stated date. Parties should use the

document naming conventions and document submission standards outlined in the RESS Document Guideline found at www.ontarioenergyboard.ca. If the web portal is not available, parties may e-mail their documents to the attention of the Board Secretary at BoardSec@ontarioenergyboard.ca.

DATED at Toronto, July 12, 2012
ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary

APPENDIX A

To Phase 1 Decision and Order

East-West Tie Designation Process

Filing Requirements for Designation Applications

Board File No: EB-2011-0140

FILING REQUIREMENTS

EAST-WEST TIE DESIGNATION APPLICATIONS

An application for designation will contain three main sections. Together, these sections of the application address the Board's decision criteria for the East-West Tie line designation process:

(A) Evidence addressing the capability of the applicant to carry out the East-West Tie line project;

(B) The applicant's Plan for the East-West Tie line; and

(C) Other factors.

(A) CAPABILITY OF THE APPLICANT

1. Background Information

The applicant must provide the following information:

1.1 the applicant's name;

1.2 the applicant's OEB transmission licence number;

1.3 any change in information provided as part of the transmitter's licence application;

1.4 confirmation that the applicant has not previously had a licence or permit revoked and is not currently under investigation by any regulatory body;

1.5 confirmation that the applicant is committed to the completion of the development work for the East-West Tie line, and to the filing of a leave to construct application for the line, to the best of its ability;

1.6 a statement from a senior officer that the application for designation is complete and accurate to the best of his/her information and belief;

1.7 an indication of whether the applicant is willing to be named as a runner up designated transmitter and a statement of any conditions necessary to this role.

1.8 a description of any co-ordination or co-operation with other parties that has contributed to this application.

2. Organization

The applicant shall identify how, from an organizational perspective, it intends to undertake the East-West Tie line project. The applicant must file:

2.1 an overview of the organizational plan for undertaking the project, including:

- any partnerships or contracting for significant work;
- identification and description of the role of any third parties that are proposed to have a major role in the development, construction, operation or maintenance of the line; and
- a chart to illustrate the organizational structure described.

2.2 identification of the specific management team for the project, with resumés for key management personnel.

2.3 an overview of the applicant's experience with:

- the management of similar projects; and
- regulatory processes and approvals related to similar projects.

2.4 an explanation of the relevance of the applicant's experience to the East-West Tie line project.

3. First Nation and Métis Participation

The applicant must address its approach to First Nation and Métis participation in the East-West Tie line project. To that end, the applicant must file evidence of one of the following:

3.1 If arrangements for First Nation and Métis participation have been made, a description of:

- the First Nation and Métis communities that will be participating in the project;
- the nature of the participation (e.g. type of arrangement, timing of participation);
- benefits to First Nation and Métis communities arising from the participation; and
- whether participation opportunities are available for other First Nation and Métis communities in proximity to the line.

3.2 If arrangements for First Nation and Métis participation have not been made but are planned, a description of:

- the plan for First Nation and Métis participation in the project, including the method and schedule for seeking participation;
- the nature of the planned participation; and
- the planned benefits to First Nation and Métis communities arising from the participation;

3.3 If no First Nation or Métis participation in the project is planned, detailed reasons for this choice.

4. Technical Capability

The applicant must demonstrate that it has the technical capability to engineer, plan, construct, operate and maintain the line, based on experience with projects of equivalent nature, magnitude and complexity. To that end, the following must be filed:

4.1 a discussion of the type of resources, including relevant capability (in-house personnel, contractors, other transmitters, etc.) that would be dedicated to each activity associated with developing, constructing, operating and maintaining the line, including:

- design;
- engineering;
- material and equipment procurement;
- licensing and permitting;
- completion of environmental assessment and other regulatory approvals;
- consultations, both with First Nation and Métis, and other communities;
- construction;
- operation and maintenance; and
- project management.

4.2 resumés for key technical team personnel;

4.3 A description of sample projects, and other evidence of experience in Ontario and/or other jurisdictions in developing, constructing and operating transmission lines or other infrastructure and why these projects and experience are relevant to the East-West Tie line project. The evidence should include a description of experience with:

- the acquisition of land use rights from private landowners and the Crown;
- the acquisition of necessary permits from government agencies;
- obtaining environmental approvals similar to the environmental approvals that will be necessary for the East-West Tie line;
- community consultation; and
- completion of the procedural aspects of Crown consultation with First Nation and Métis communities.

4.4 Evidence that the applicant's business practices are consistent with good utility practices for the following:

- design;
- engineering;
- material and equipment procurement;
- right-of-way and other land use acquisitions;

- licensing and permitting;
- consultations, both with First Nation and Métis, and other communities
- construction;
- operation and maintenance;
- project management;
- safety;
- environmental compliance; and
- regulatory compliance

4.5 A description of:

- the challenges involved in achieving the required capacity and reliability of the East-West Tie line, including challenges related to terrain and weather; and
- the plan for addressing these challenges though the design and construction of the line (e.g. number and spacing of towers, planned resistance to failure).

5. Financial Capacity

The applicant must demonstrate that it has the financial capability necessary to develop, construct, operate and maintain the line. To that end, the applicant shall provide the following:

5.1 evidence that it has capital resources that are sufficient to develop, finance, construct, operate and maintain the line;

5.2 evidence of the current credit rating of the applicant, its parent or associated companies;

5.3 evidence that the financing, construction, operation, and maintenance of the line will not have a significant adverse effect on the applicant's creditworthiness or financial condition;

5.4 the applicant's financing plan, including:

- the estimated proportions of debt and equity; and
- the estimated cost of debt and equity, including:
  - the use of variable and fixed cost financing;
  - short-term and long-term maturities; and
  - a discussion of how the project might impact the applicant's cost of debt.

5.5 if the financing plan contemplates the need to raise additional debt or equity, evidence of the applicant's ability to access the debt and equity markets;

5.6 evidence of the applicant's ability to finance the project in the case of cost overruns, delay in completion of the project and other factors that may impact the financing plan;

5.7 evidence of the applicant's experience in financing similar projects;

5.8 the identification of any alternative mechanisms (e.g., rate treatment of construction work in progress) that the applicant is requesting or likely to request.[1]

(B) PLAN FOR THE EAST-WEST TIE LINE

6. Proposed Design

The applicant must provide an overview of its proposed design for the East-West Tie line including:

6.1 a summary description of how the Plan meets the specified requirements for the East-West Tie Line to the extent known at the time of the designation application. This could include the items listed below as well as any other relevant information the applicant may wish to provide. For items that are unknown, the applicant should describe the method and criteria for determination.

- length of the proposed transmission line;
- number of circuits;
- voltage class;
- load carrying capacity;
  - summer continuous rating (MVA)[2]; and
  - summer emergency rating (MVA)[3] ;
- resulting total transfer capability for the East-West Tie line (MW);
- anticipated lifetime of the line;
- structures and conductors
  - number and average spacing of towers;
  - tower structure types (lattice, monopole, etc.) and composition (wood, steel, concrete, hybrid, etc.);
  - conductor size and type; and
  - protection against cascading failure and conductor galloping;
- design assumptions; and
- other relevant transmission facility characteristics.

6.2 confirmation that the line will interconnect with the existing transformer stations at Wawa and Lakehead, and an indication of whether the line will be switched at the Marathon transformer station.

6.3 a signed affidavit from an officer of the licensed transmitter to confirm:

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[1]See Report of the Board on The Regulatory Treatment of Infrastructure Investment in connection with the Rate-regulated Activities of Distributors and Transmitters in Ontario.

[2] Based on an operating voltage of 240 kV, ambient temperature of 30ºC and conductor temperature of 93ºC

[3] Based on an operating voltage of 240 kV, ambient temperature of 30ºC and conductor temperature of 127 ºC

- that the line will be designed to meet or exceed the existing NERC, NPCC and IESO reliability standards; and
- that the line will be designed to meet or exceed the Board's Minimum Technical Requirements; or documentation of where the applicant seeks to differ from the Minimum Technical Requirements and evidence as to the equivalence or superiority of the proposed alternative option.

6.4 an indication as to whether the Plan will be based on the Reference Option for the East-West Tie line. Where the Plan is not based on the Reference Option, the applicant must file:

- a description of the main differences between the applicant's Plan and the Reference Option;
- a description of the interconnection of the line with the relevant transformer stations; and
- a Feasibility Study performed by the IESO, or performed to IESO requirements.

6.5 a brief description which highlights the strengths of the Plan, which may include:

- any technological innovation proposed for the line;
- reduction of ratepayer risk for the costs of development, construction, operation and maintenance;
- how the plan satisfies the identified need for the line at a lower cost than other options;
- local benefits (e.g. employment, partnerships); and
- enhanced reliability for the transmission grid.

6.6 an indication as to whether the applicant's present intention is to own and operate the line once the line is in service.

7. Schedule

The applicant must file, as part of its Plan:

7.1 a project execution chart showing major milestones for both line development and line construction phases of the project.

7.2 for the development phase of the project:

- a detailed line development schedule identifying significant milestones that are part of the development phase of the project, and estimated dates for completing these milestones;
- proposed reporting requirements for the development phase;
- proposed consequences for failure to meet the required performance milestones and reporting requirements for the development phase;
- a chart of the major risks to achievement of the line development schedule, indicating the likelihood of the item (e.g. not likely, somewhat likely, very likely) and the severity of its effects on the schedule (e.g. minor, moderate, major); and
- a description of the applicant's strategy to mitigate or address the identified risks.

7.3 for the construction phase of the project:

- a preliminary line construction schedule identifying significant milestones that are part of the construction phase of the project, and estimated dates for completing these milestones;
- proposed reporting requirements for the construction phase;
- proposed consequences for failure to meet the required performance milestones and reporting requirements for the construction phase;
- proposed in-service date for the line (can be 2017 or another date);
- a chart of the major risks to achievement of the construction schedule, indicating the likelihood of the item (e.g. not likely, somewhat likely, very

likely) and the severity of its effects on the schedule (e.g. minor, moderate, major); and

- a description of the applicant's strategy to mitigate or address the identified risks.

7.4 evidence of the applicant's past experience in completing similar transmission line or other infrastructure projects within planned time frames. Such evidence could include a comparison of the construction schedule filed with a regulator when seeking approval to proceed with a transmission line project and the actual completion dates of the milestones identified in the schedule.

7.5 any innovative practices that the applicant is proposing to use to ensure compliance with, or accelerate, the line development and line construction schedules.

8. Costs

As part of its Plan, the applicant must file a summary of the total costs associated with the Plan, divided into development costs, construction costs and operation and maintenance costs. In addition, the applicant must file:

8.1 the amount already spent for preparation of an application for designation, and an estimate of remaining costs to achieve designation.

8.2 the estimated total development costs of the line, broken down by the following categories of cost:

- permitting, licensing, environmental assessment and other regulatory approvals
- engineering and design
- procurement of material and equipment;
- costs of the acquisition of land use rights, First Nation and Métis participation, and consultations with landowners, municipalities, the public and First Nation and Métis communities;

- contingencies; and
- other significant expenditures.

8.3 the basis for and assumptions underlying the development cost estimates, and a description of how the applicant plans to manage the cost of development;

8.4 a schedule of development expenditures.

8.5 a chart of the major risks that could lead the applicant to exceed the line development budget, indicating the likelihood of the item (e.g. not likely, somewhat likely, very likely) and the severity of its effects on the budget (e.g. minor, moderate, major), and a description of the applicant's strategy to mitigate or address the identified risks.

8.6 a statement as to the allocation between the applicant and transmission ratepayers of risks relating to costs of development. For example:

- if the costs of development are less than budgeted, does the applicant propose to recover only spent costs, or all budgeted costs (spent and unspent) or spent costs plus a portion of unspent cost (savings sharing)? and
- if the costs of development exceed budgeted costs, does the applicant plan to seek recovery of the excess costs?

8.7 an estimated budget for the construction of the line. This budget and its elements may be expressed as a range. If a range is used, the applicant must provide an explanation for the width of the range;

8.8 if the Plan is not based on the Reference Option, evidence as to the difference in cost (positive or negative) of work required at the transformer stations to which the line connects, and at any other location identified by the IESO.

8.9 a list of the major risks that could lead the applicant to exceed the line construction budget, and the applicant's strategies to mitigate or address those risks.

8.10 evidence of the applicant's past experience in completing similar transmission line projects within planned construction budgets. Such evidence could include a comparison of the budget filed with a regulator when seeking approval to proceed with a transmission line project and the actual costs of the project.

8.11 a statement as to the allocation between the applicant and transmission ratepayers of the risks relating to construction costs;

8.12 the estimated average annual cost of operating and maintaining the line. This cost may be expressed as a range. If a range is used, the applicant must provide an explanation for the width of the range.

9. Landowner, Municipal and Community Consultation

The applicant must demonstrate the ability to conduct successful consultations with landowners, municipalities and local communities. In addition, the designated transmitter will be required to satisfy environmental and other requirements that are outside the jurisdiction of the Board.

As part of its Plan, the applicant must file:

9.1 an overview of:

- the rights-of-way and other land use rights, presented by category, that would need to be acquired for the purposes of the development, construction, operation and maintenance of the line;
- the applicant's plan for obtaining those rights; and
- a description of any significant issues anticipated in land acquisition or permitting and a plan to mitigate them.

9.2 a landowner, municipal and community consultation plan for the line, including:

- identification of the categories of parties to be consulted;

- the applicant's plan for consultation for each party or category of party, including method and tentative schedule in relation to the overall project schedule; and
- A description of any significant issues anticipated in consultation and a plan to mitigate them.

9.3 If the applicant has identified a proposed route for the line, the applicant must file a general description of the planned route for the line and may include:

- approximate right-of-way width;
- approximate portion of the route that is:
  - adjacent to the existing corridor (%); or
  - along a new corridor (%):
- a brief description of the environmental challenges posed by the proposed route; and
- an estimate of ownership by category of lands along the proposed route:
  - Crown (federal or provincial) (%);
  - Private (%);
  - First Nation or Métis (%); and
  - Other (%).

9.4 If a proposed route for the line has not been identified, the applicant must file:

- a list of alternative routes;
- an explanation of the method and decision criteria for route analysis and selection; and
- the planned schedule for route selection.

10. First Nation and Métis Consultation

The applicant must demonstrate the ability to conduct successful consultations with First Nation and Métis communities, as may be delegated by the Crown.

As part of its Plan, the applicant must file:

10.1 a proposed First Nation and Métis consultation plan, including:

- a list of First Nation and Métis communities that may have interests affected by the project;
- an approach for engaging with affected First Nations and Métis communities, along with rationale or other justification for such an approach;
- a description of any significant First Nation or Métis issues anticipated in consultation and a plan to address them;
- an overview of expected outcomes from the proposed consultation plan.

10.2 evidence of experience in undertaking procedural aspects of First Nations and Métis consultation in the development, construction or operation of transmission lines or other large construction projects. If applicable, previous engagement or existing relationships with the First Nation and Métis communities to be engaged.

(C) OTHER FACTORS

The applicant should provide any other information that it considers relevant to its application for designation, for example, any distinguishing features of the application.

Tab 8

Ontario Energy Board

Commission de l'énergie de l'Ontario

EB-2011-0140

IN THE MATTER OF sections 70 and 78 of the *Ontario Energy Board Act, 1998*, S.O.1998, c.15, (Schedule B);

AND IN THE MATTER OF a Board-initiated proceeding to designate an electricity transmitter to undertake development work for a new electricity transmission line between Northeast and Northwest Ontario: the East-West Tie Line.

BEFORE: Cynthia Chaplin
Presiding Member and Vice-Chair

Emad Elsayed
Member

Cathy Spoel
Member

EAST-WEST TIE LINE DESIGNATION

PHASE 2 DECISION AND ORDER

August 7, 2013

DESIGNATION DECISION

The Board has decided that the designated transmitter for the development phase of the proposed East-West Tie line is Upper Canada Transmission Inc. This selection is based on the submitted applications as well as the subsequent interrogatory answers and submissions.

BACKGROUND

This decision is the result of a process initiated by the Ontario Energy Board to designate a transmission company to undertake development work for the proposed East-West Tie line. The Ontario Government published its Long Term Energy Plan in November of 2010. The Plan identified five priority transmission projects, one of which was the East-West Tie, an electricity transmission line running between Thunder Bay and Wawa, Ontario. On March 29, 2011, the Minister of Energy wrote to the Board to express the government's interest in the Board undertaking a designation process to select the most qualified and cost-effective transmitter to develop the East-West Tie line.

Origin of Designation

The origin of the designation process is the Board's policy for transmission development. That policy was developed through a consultation process and culminated in the Board's report entitled *Board Policy: Framework for Transmission Development Plans.*[1] The report describes the issues considered through the consultation and the Board's conclusion that economic efficiency in transmission service is best pursued by introducing competition, and that providing greater certainty for cost recovery of development work would encourage participation in the competitive process. In describing the goals of the policy, the Board said:

> The Board believes that this policy will:
>
> - allow transmitters to move ahead on development work in a timely manner;

[1] EB-2010-0059 issued August 26, 2009.

- encourage new entrants to transmission in Ontario bringing additional resources for project development; and
- support competition in transmission in Ontario to drive economic efficiency for the benefit of ratepayers.

A transmission utility seeking to build a major transmission line applies to the Board under section 92 of the *Ontario Energy Board Act, 1998* ("the OEB Act") for leave to construct the line. Before bringing an application for leave to construct, the transmitter incurs costs to complete "development" work, which includes negotiating access and land rights, acquiring permits, conducting environmental assessment activities, consulting with affected communities, preparing line design and engineering studies, conducting economic feasibility studies, and obtaining a system impact assessment. The development phase ends with the filing of an application for leave to construct the line.

Board Authority to Implement Designation

The Board does not have the jurisdiction or authority to procure transmission services, or the authority to enter into contracts with transmitters to build or operate transmission infrastructure. The Board premised its original policy on its authority under section 70(2.1) of the OEB Act to require the filing of plans for the expansion of the transmission system to accommodate the connection of renewable energy generation facilities. The East-West Tie line is not primarily needed for the connection of renewable energy generation facilities. However, the Board has broad licensing and rate making jurisdiction under sections 70, 74 and 78 of the OEB Act to prescribe conditions under which a transmitter engages in owning or operating a transmission system, to amend transmission licences, and to set transmission rates. Subsection 78(3.0.5) specifically provides the Board with authority to provide incentives to a transmitter for siting, design and construction of an expansion to the transmitter's transmission system. In this decision, the Board will make an order under the authority of these sections to give effect to its decision on designation.

Implications of Designation

Designation does not carry with it an exclusive right to build the line or an exclusive right to apply for leave to construct the line. A transmitter may apply for leave to construct the East-West Tie line, designated or not. In designating a transmitter, the Board is providing an economic incentive: the designated transmitter will recover its development costs up to the budgeted amount (in the absence of fault on the part of the transmitter), even if the line is eventually found to be unnecessary. The designation may be rescinded and costs denied if the designated transmitter fails to meet the performance milestones for development or the reporting requirements imposed by the Board in this decision.

Initiation of Designation for the East-West Tie Line Project

After receiving the Minister's letter, the Board sought and received from the Ontario Power Authority (the "OPA") a preliminary assessment of the need for the East-West Tie line, which provided planning justification to support the implementation of a designation process. The OPA indicated that the primary driver for the East-West Tie line is the need to ensure long-term system reliability in northwestern Ontario. The Board also received a feasibility study of options for meeting the transfer capability requirements for the line from the Independent Electricity System Operator (the "IESO").

A double circuit 230 kV electricity transmission line already exists between Thunder Bay transmission station ("TS") and Wawa TS. The East-West Tie line project involves the construction of a new transmission line which, in conjunction with the existing line, will increase capacity and reliability of electrical transmission between northeast and northwest Ontario. The length of the new line will be approximately 400 kilometres.

The specifications for the East-West Tie line project were defined as follows:

- A new line that, in conjunction with the existing line, will provide total eastbound and westbound capabilities in the East-West corridor in the order of 650 MW, while respecting all NERC (North American Electric Reliability Corporation), NPCC (Northeast Power Coordinating Council), and IESO reliability standards.
- Lifetime of at least 50 years.

- Target in-service date: 2017 (applicants were invited to propose alternate in-service dates).
- The East-West Tie line is to be built in 2 segments:
  - Wawa TS to Marathon TS; and
  - Marathon TS to Lakehead TS.
- The demarcation points of each segment are the first transmission line structures outside the fence of the Wawa TS, Marathon TS and Lakehead TS, but within 250 metres of that fence.
- The East-West Tie line segments will dead-end on the demarcation point structures with a mid-span opener for non-compensated lines.
- If the proposal involves series compensated AC line or DC lines, the East-West Tie line will include the protection system, associated communications, and line isolation breaker(s).

For the purposes of designation, the Board assumed that the new East-West Tie line between the demarcation points would be owned and operated by the designated transmitter once constructed, although this was not an absolute requirement.

The Board invited transmitters to register their interest in filing a plan for development of the line.

Process Adopted by the Board for Designation

On February 2, 2012, the Board published notice in English, French, Cree and Ojibway that it was initiating a proceeding to designate an electricity transmitter to undertake the development work for the East-West Tie line, and invited intervention and public comment. The notice was published in the Globe and Mail, Ottawa Le Droit and seven newspapers in communities local to the existing line. The notice was also served on municipalities and First Nation and Métis communities in the area of the line. The Board received thirty-one requests for intervenor status, including the seven transmitters who had initially registered an interest in the project. The list of intervenors is attached as Appendix A to this decision. All materials on the record of the proceeding are available on the Board's website.

The Board used a two phase process to reach its designation decision. In Phase 1 of the East-West Tie designation process, the Board established criteria and filing requirements specific to the East-West Tie line project, considering the Minister's letter, the reports from the OPA and the IESO, and the submissions of all parties. The Board issued its Phase 1 decision on July 12, 2012. The Phase 1 decision is attached as Appendix B to this decision. The Phase 1 decision required transmitters seeking designation to file applications by January 4, 2013. The following six transmitters applied for designation:

- AltaLink Ontario LP ("AltaLink"): a wholly owned subsidiary of AltaLink Investments LP, which is wholly owned by SNC Lavalin Group Inc.
- Canadian Niagara Power Inc. ("CNPI"): owned by FortisOntario Inc., which is owned by Fortis Inc.
- EWT LP: a partnership of Hydro One Inc., Great Lakes Power Transmission EWT LP, and Bamkushwada LP.
- "Iccon/TPT": a joint application by Iccon Transmission Inc. (a wholly owned subsidiary of Isolux Infrastructure Netherlands B.V.), and TransCanada Power Transmission (Ontario) LP (a wholly owned subsidiary of TransCanada Corporation)
- RES Canada Transmission LP ("RES"): a partnership of Renewable Energy Systems Canada Inc., MEHC Transmission Canada Limited Partnership, and RES Canada Transmission GP Inc.
- Upper Canada Transmission Inc. ("UCT"): a partnership of NextEra Energy Canada (a wholly owned subsidiary of NextEra Energy Resources LLC), Enbridge Inc. and Borealis Infrastructure Management.

The Board adopted a written hearing process and tailored its process to suit the nature of the proceeding. The Board found in its Phase 1 decision that as the proceeding involved multiple competitive applicants and had some similarity to a procurement process, it called for specific procedures that respected fairness and efficiency in that context.

For example, while the Board invited parties to propose written interrogatories for the applicants to answer, the Board itself issued the interrogatories, having combined, edited and eliminated some interrogatories proposed by parties. The Board was of the

view that the applicants should be compared on the basis of the applications as filed, and attempted to avoid providing opportunities for applicants to fill any gaps in their applications. Parties were also invited to file written argument, with applicants filing an argument in chief, other parties filing responding arguments and applicants filing reply argument.

The Board convened an oral session in Thunder Bay to allow representatives of intervenors from communities local to the existing East-West Tie line to make oral presentations. The presentations were not sworn testimony, but oral commentary on matters concerning local interests. The oral session occurred on May 2 and 3, 2013, subsequent to the filing of argument in chief and prior to the receipt of arguments from non-applicant intervenors.

EVALUATION OF APPLICATIONS

The record of this proceeding demonstrates that all applicants spent a significant level of effort and resources to prepare these applications and to respond to interrogatories. Given that this is the first such competitive process for a transmission project in Ontario, it is encouraging that there are qualified entities which are willing to commit resources to compete in this market.

There was a significant amount of information for the Board to assess in order to arrive at a final decision. The overriding principle in establishing and executing the evaluation methodology is that it be fair and equitable and result in an outcome that serves the public interest. The evaluation was largely based on the applications as originally submitted. Information provided in response to interrogatories was used for clarification purposes, and not to enhance the original application. For example, the original applications included cost estimates for development, construction, and operation and maintenance phases of the project. In order to properly compare these estimates, the Board asked the applicants to break down these estimates into specific common components. The expectation was that the original bottom line cost estimates would not change, and if they did, then a full explanation would be provided to ensure that the answer did not represent an attempt to improve the proposal.

The intervenor and applicant submissions assisted the Board in deciding how to apply the criteria and evaluate the applications. However, any new facts provided through submissions were given little weight.

Evaluation Methodology

The evaluation was based on the decision criteria established in the Phase 1 Decision and Order. The headings of these criteria are provided below, and the information that was required of the applicants under each heading can be found in the Filing Requirements (Appendix A of the Phase 1 Decision and Order).

In its Phase 1 Decision and Order, the Board did not articulate an assessment methodology to be applied to the decision criteria, nor did it ascribe any relative importance to the decision criteria through a weighting system. The Board stated that it was unwilling to remove the discretion and flexibility it might need in evaluating the applications, and that it would exercise its judgment for each criterion, with the assistance of the evidence presented and the submissions received from all parties.

The Board has found no compelling reason to assign different weights to the decision criteria, and has therefore weighted them all equally at ten points each.

The criteria are:

- Organization
- First Nations and Métis participation
- Technical capability
- Financial capacity
- Proposed design
- Schedule; development and construction phases
- Cost; development, construction, operation and maintenance phases
- Landowner, municipal, and community consultation
- First Nations and Métis consultation

"Other Factors" was a criterion listed in the Phase 1 decision. Under that criterion, however, all applicants reiterated what they believe are strong features of their

proposals. Since these features have already been evaluated as part of the other criteria, the Other Factors criterion was not included in the evaluation.

For each of the criteria, the applications were reviewed and the proponents were ranked from 6 to 1, with 6 being the best. A score was assigned to each of the rankings with scores of 6, 5, 4, 3, 2, and 1 corresponding to the respective rankings. Given the qualitative nature of the ranking, if two or more applications were judged to rank equally in a certain criterion, they were given the same ranking with a corresponding average score (e.g. if two applicants were ranked at 5, they were each given a score of 4.5). The applicant's score for each criterion was then multiplied by ten. The process was repeated for each decision criterion and the scores added to determine the total score for each application. The application with the highest overall score was determined to be the most qualified applicant for designation.

EVALUATION RESULTS

Background Information

Background information was requested from the applicants in the Filing Requirements. All applicants provided the requested information and the Board has no substantive concerns with the information provided.

The Board also invited applicants to indicate whether they would be willing to be "runner up". The runner up would have the right of first refusal to undertake the project development work if the designated transmitter fails to fulfill its obligations. AltaLink confirmed that it would be willing to be runner up without qualification. CNPI, Iccon/TPT, and RES also confirmed but with some conditions attached, while UCT and EWT LP stated that they would not be willing to be runner up. As indicated in the Phase 1 Decision and Order, an applicant's willingness to be runner up had no influence on the assessment of the application.

In the following sections, the results of applying the methodology described above are summarized for each of the decision criteria, and the resulting ranking of the six applications for the particular criterion is provided.

Organization

The applicants were required to provide, among other things, a project organizational plan, a chart illustrating the organizational structure, identification of the project management team with resumés for key management personnel, and an overview of the applicant's experience with similar projects.

Subsequently, by interrogatories in Procedural Order No. 6, issued March 4, 2013, the applicants were asked to provide the following information regarding organization:

- Proposed organizational charts for the various project phases (development, construction, operation and maintenance) showing the various functions, including those listed in section 4.1 of the Filing Requirements, as well as the reporting structure.
- The names of members of the proposed management team (including the project manager / lead) and technical team who would be leading each function.
- Confirmation as to whether the project manager / lead will be dedicated to this project, and a description of this person's experience in managing similar projects.
- The specific proposed project / operation and maintenance role for each member of the "key technical team personnel" provided in response to section 4.2 of the Filing Requirements. (This item is evaluated under Technical Capability.)

In evaluating the applications in the area of Organization, the Board ranked applicants by considering the following factors:

- Clarity of the organizational structure for the various project phases and inclusion of all key project functions.
- Clarity as to who is accountable for the overall management of the project.
- Clarity as to the governance structure and lines of accountability, including the role of any third parties.
- Quality of the overall organization and the strength of the supporting structure.
- The relevance and extent of the experience of the proposed project manager and the management team in terms of size, type and complexity of projects.

- Experience in managing similar large projects.

The more of these characteristics which a proponent demonstrated through its application, the higher the Board ranked the proponent. Below, the Board sets out the proponents in ranked order for Organization and provides a brief discussion of the main characteristics of each application.

UCT (6)

UCT provided a project organizational structure with clearly defined accountabilities for all major areas of work, which would be used for all three phases of the project to ensure a seamless transition. The overall project management accountability and associated oversight structure were well defined. The structure consists of a Management Team with a Project Director having an overall accountability for the project, supported by an Operations Committee and an Aboriginal Advisory Board, all reporting to the Board of Directors. The proposed Project Director has significant experience with the transmission business and associated projects. UCT confirmed that the Project Director will be dedicated to the project. Names and resumés were provided for each of the positions in the chart which showed a strong combination of technical and managerial experience. UCT indicated that it would mostly use in-house resources seconded to it from partner organizations, supplemented by third-party contractors as required. UCT also proposed that, once in the operations phase, it will have an operation and maintenance contract with NextEra and that the Project Director will be replaced by a President of NextBridge Infrastructure to reflect the change in the nature of the role. UCT provided a description of its significant experience with relevant projects involving many aspects that are similar to this project, both in and outside Ontario.

AltaLink (5)

AltaLink provided two charts including all the key functions; one for the project (development and construction) and one for operations and maintenance with a description of the roles and accountabilities of proposed key management positions. Although the overall project management accountability was well defined, the oversight structure above the project lead was not clear. The proposed project lead has

significant project experience with transmission and other infrastructure projects in Canada and abroad. Names as well as a brief description of experience were provided for those leading the functions shown in the project chart, which showed strong technical and managerial experience. AltaLink confirmed that the project lead will be dedicated to this project and will be responsible for project delivery from development to in-service. AltaLink provided a detailed overview of its extensive experience with specific similar projects, mostly in Alberta. AltaLink also indicated that project planning and development as well as engineering, procurement and construction management services will be provided by SNC Lavalin, Altalink's owner.

EWT LP (4)

EWT LP provided two charts; one for the development phase and one for the construction phase of the project, including the key functions. In both charts, the project management function is split between two individuals; a Project Manager reporting to a Project Director who has three Special Advisors representing the three partners (Hydro One Inc., Great Lakes Power Transmission EWT LP ("GLPT-EWT"), and Bamkushwada LP ("BLP")). The distinction between these two roles in terms of the overall project management accountability is not clear. The charts showed the Project Director reporting to EWT LP, but the nature of this reporting (i.e. oversight) was also not clear. Names and resumés were provided only for those leading the functions shown in the project development chart. No names or detailed functions were provided for the construction phase. While the proposed Project Director and Project Manager appear to have extensive operational experience in transmission and other related areas, it is not apparent that they have significant experience in managing major projects first hand. EWT LP confirmed that the Project Manager will be dedicated to the project for the development phase only, while the Project Director will continue to the construction phase. EWT LP proposed that GLPT-EWT will be responsible for managing the development and construction phases of the project on EWT LP's behalf supported by a number of contractors. EWT LP did not provide an operations and maintenance organizational chart and contemplated that the ongoing operation of the facilities will be outsourced to Hydro One Networks Inc. ("HONI"). EWT LP provided an overview of its experience with similar projects which shows extensive experience in the development and construction of large transmission projects in Ontario.

RES (3)

One project organization chart was provided for the project development phase with a project management team representing the key project functions and led by a Project Manager. No charts were provided for the construction or the operation and maintenance phases. The oversight structure above the Project Manager was not clear. Although the proposed project management team appears to have significant relevant experience, RES was non-committal in terms of assigning the key personnel to the project and stated that it will "use its reasonable efforts" to ensure they remain involved. However, in its answer to interrogatory #2, RES confirmed that the Project Manager will be dedicated to the project. Names and resumés were provided for those leading the functions shown in the project chart which showed significant relevant experience. RES also indicated that it will use a "qualified owner's engineer" to augment its design review effort. RES provided an overview of its extensive relevant experience with similar projects. RES did not provide information for the operation and maintenance phase stating that a plan will be prepared during the project development phase.

CNPI (2)

The organizational chart provided initially by CNPI was not a functional chart, but rather a chart of participating organizations. Three charts were provided in answer to interrogatory #1 for the various phases which included key functions. The lead for all three phases (development, construction, operation and maintenance) is provided by an Executive Lead, managing the project on Fortis Inc.'s ("Fortis") behalf, and supported by a number of Fortis personnel as well as Aboriginal advisors. The structure and associated accountabilities below the Executive Lead for the development and construction phases of the project are not clear (i.e. the distinctive role of a Project Manager reporting to an Executive Sponsor, reporting to the Executive Lead). CNPI confirmed that the Executive Lead will be dedicated to the development and completion of the project. A list of proposed management team members was provided with names and resumés but without their specific project function. A long list of "key technical team personnel" was provided which included internal as well as third-party consultants; however, it was not clear to what degree they will all be involved in this project. CNPI

also provided an overview of its relevant experience with several transmission projects, mostly involving Fortis.

Iccon/TPT (1)

Iccon/TPT initially proposed that a management committee will govern the general partnership, with the day-to-day management of the partnership provided by a management team reporting to the management committee. The organizational chart provided initially by Iccon/TPT was not a functional chart, but a chart of participating organizations. In its answer to interrogatory #1, Iccon/TPT provided one chart for the development and construction phases of the project showing a General Manager reporting to the management committee with three functions reporting to the General Manager (a Project Director, Legal/Environment/Regulatory, and Controller/Finance). No further detail was provided beyond that level, which hampered the Board in its assessment of the proposed organization's effectiveness. Iccon/TPT did not provide an organizational chart for the operation and maintenance phase of the project. Iccon/TPT proposed that the preliminary engineering, detailed engineering, procurement and construction (EPC) management will be contracted to Isolux Ingenieria, which is an EPC company owned by Isolux Corsan. Iccon/TPT confirmed that the proposed General Manager, who has significant relevant experience, will be dedicated to the project. A "preliminary" list of personnel to be considered for the management team was provided but with no commitment of which personnel would actually be on the team. Iccon/TPT also provided an overview of its relevant extensive experience with similar projects in Canada and globally.

First Nation and Métis Participation

Applicants were required to describe their approach to First Nations and Métis participation in the project. They were asked to indicate whether or not arrangements have already been made and, in either case, to provide further details.

There is a distinction between this criterion (First Nations and Métis Participation) and the criterion addressed later in this decision (First Nations and Métis Consultation). The former arises from Ontario socio-economic policy and the latter is related to a constitutional obligation. Ontario's Long Term Energy Plan states:

> Where new transmission lines are proposed, Ontario is committed to meeting its duty to consult First Nations and Métis communities in respect of their aboriginal and treaty rights and accommodate where those rights have the potential to be adversely impacted. Ontario also recognizes that Aboriginal communities have an interest in economic benefits from future transmission projects crossing through their traditional territories and that the nature of this interest may vary between communities.
>
> There are a number of ways in which First Nation and Métis communities could participate in transmission projects. Where a new transmission line crosses the traditional territories of aboriginal communities, Ontario will expect opportunities be explored to:
>
> - Provide job training and skills upgrading to encourage employment on the transmission project development and construction.
> - Further Aboriginal employment on the project.
> - Enable Aboriginal participation in the procurement of supplies and contractor services.
>
> Ontario will encourage transmission companies to enter into partnerships with aboriginal communities, where commercially feasible and where those communities have expressed interest.

In evaluating the applications in this area, the Board kept in mind the distinction between participation and consultation, and considered the following factors:

- Whether the existing arrangement or plan provides for equity participation by First Nations and Métis communities.
- The extent to which the existing arrangement or plan provides for other economic participation such as training, employment, procurement opportunities, etc. for all impacted communities.
- The degree of commitment to the plan.

The more that an application demonstrably provided opportunities for participation and was committed to that participation, the higher the Board ranked the proponent. Below,

the Board identifies the proponents in ranked order for this criterion and provides a brief discussion of the main characteristics of each application.

It should be noted that one of the key considerations in the ranking process was articulated in the Board's Phase 1 Decision and Order which stated:

> The Board will not look more favourably upon First Nation and Métis participation that is already in place at the time of the application than upon a high quality plan for such participation, supported by experience in negotiating such agreements.

AltaLink (6)

AltaLink indicated that it had contacted the18 First Nations and Métis communities identified by the Ministry of Energy as being potentially affected by the project (May 31, 2011 letter), and engaged Ishkonigam (Phil Fontaine) in preparing its participation plan. AltaLink proposed to offer up to 49% equity ownership of the project to affected First Nations and Métis communities, to be held by a single entity in a limited partnership. AltaLink indicated that if requested, it would assist participating First Nations and Métis communities in arranging financing for their equity through independent financial institutions; and if necessary, AltaLink would provide loans. In addition to equity partnership, AltaLink proposed economic participation such as employment, contracting, and training and development. Priority for those forms of economic participation would be given to affected communities. AltaLink believes that no directly or indirectly affected First Nation or Métis community should be excluded; however, its plan provides for different levels of participation depending on the nature of the impact resulting from the project.

EWT LP (5)

One of EWT LP's partners is BLP which consists of six First Nations, all located within 40 km of the existing East-West line. In addition to having one-third equity in the partnership, BLP's participating First Nations will have priority for economic participation in areas such as employment, training, etc. However, according to EWT LP, other First Nations and Métis communities are not precluded from competing to provide goods and services that the participating First Nations may not be able to provide. While EWT LP's

plan is good for the six First Nation partners comprising BLP, there are more limited opportunities for other affected First Nations and Métis communities to participate in the various aspects of this project, and no opportunity for equity participation.

CNPI (5)

CNPI has formed a joint venture with Lake Huron Anishinabek Transmission Company Inc. (LHATC). LHATC is made up of 21 First Nations, two of which are on the project's list of affected First Nations. CNPI proposed that LHATC, along with other interested First Nations, will have the right to acquire in aggregate up to 49% equity interest in the project. It was not clear to what extent, if any, CNPI expected the Métis communities to be equity participants. However, CNPI stated that it is prepared to work towards negotiations resulting in meaningful participation by the Métis communities in this project. If needed, CNPI indicated that loans from Fortis could be provided to facilitate participation. CNPI is also prepared to offer First Nations and Métis communities opportunities for employment, apprentice training, preferential consideration for Aboriginal businesses, and a Skill Builder Program. CNPI's economic participation offer goes well beyond the identified affected communities but does not specify what criteria would be used to determine who participates. This has the potential of causing confusion and delay.

UCT (3)

As described in the Organization section of its application, UCT has created an Aboriginal Advisory Board to provide independent oversight in the areas of aboriginal participation and consultation. UCT indicated that it intends to offer negotiated participation in the project to the affected First Nations and Métis communities, including BLP; a partner of EWT LP. It has developed an initial set of approaches (e.g. preferred equity/limited partnership, common equity/limited partnership, lump sum payment, First Nations and Métis Adder) which it intends to explore with affected communities and other stakeholders and to finalize prior to submitting its leave to construct application. Some aspects of the proposals such as lump sum payments and an "adder" are not really in the nature of participation and may cause unanticipated costs for ratepayers. UCT's plan includes economic participation components such as employment, education and training, procurement and contracting, strategic community investment,

and access to other supporting programs. UCT provided a participation plan and schedule for each stage of the project (prior to designation, development, construction, and operation), and indicated that priority for these opportunities will be given to affected communities.

RES (3)

RES indicated that it invited the 18 First Nations and Métis communities identified by the Ministry of Energy in the project area to become involved in the development of its participation plan, and that some communities responded. RES provided a First Nations and Métis participation plan, which was supported by former Ontario Grand Chief John Beaucage, and indicated that it is prepared to offer as much as $50 million investment opportunity to affected First Nations and Métis communities, provided that that investment does not exceed 20% equity in the project. As an alternative, RES offered to negotiate Impact Benefits Agreements with those communities, although this type of arrangement may cause unanticipated costs for ratepayers. RES also proposed economic participation by the affected communities in areas such as employment, training, procurement of supplies and services, etc.

Iccon/TPT (1)

Iccon/TPT had initial communication with a number of affected First Nations and Métis communities (9 listed) in the spring of 2011. It provided an Aboriginal Engagement Plan which contained details in areas such as engagement process, capacity funding, Aboriginal working group, Traditional Ecological Knowledge, education and training, employment, contracting, and other areas. Iccon/TPT has not proposed equity participation at this time but indicated that, if selected, it would engage with affected communities as well as those who express an interest. Iccon/TPT described TransCanada's project experience and its role in leading the execution of its Aboriginal Engagement Plan. Iccon/TPT's participation plan is less well-defined than the other applicants' plans and does not distinguish sufficiently between participation and consultation.

Technical Capability

To demonstrate their technical capability to plan, engineer, construct, operate and maintain the East-West Tie line, the applicants were required to provide details regarding their technical resources in various disciplines, resumés of key technical team personnel, a description of experience with relevant projects and activities, and other related information. It should be noted that there is some overlap in the contents of this section and Organization in the applications.

In evaluating the applications in the area of Technical Capability, the Board ranked applicants by considering the following factors:

- Strength of the applicant's internal technical capability. A strong and diverse internal technical capability is considered by the Board to be a desirable feature where the resources are specifically identified, committed, and readily available.
- Strength of the proposed technical team in relevant areas and the clarity of their project roles, including the role of any third-parties. Where the utilization of third-parties is proposed, it is advantageous to identify who they are and what their specific role is.
- Level of experience in similar projects and activities in terms of technical complexity, geography, regulatory process, etc.
- Evidence of solid internal business practices.
- Thoroughness of assessing the technical challenges associated with achieving the required capacity and reliability of the line and the proposed measures to address these challenges.

The more of these characteristics which a proponent demonstrated through its application, the higher the Board ranked the proponent. Below, the Board sets out the proponents in ranked order for Technical Capability and provides a brief discussion of the main characteristics of each application.

UCT (6)

UCT provided details of its strong internal technical capability in the various project functions. For the most part, UCT is proposing to utilize internal resources in all phases

of the project, supported by third-party consultants as needed. UCT identified its proposed key technical team members, provided their detailed resumés and described their specific project roles. The proposed technical team demonstrates strong and diverse technical skills with significant relevant project experience. UCT also indicated that its partner NextEra will take the lead role in the operation and maintenance phase of the project. UCT provided information regarding its partners' experience with relevant projects and activities. It also provided many examples where its partners have been recognized by third parties for significant achievements in key business areas. It also described an internal approach to project management consistent with best practices, including work breakdown structure, risk management, and overall project controls. UCT identified what it perceives as potential technical challenges in this project and described its plan for addressing them.

AltaLink (5)

As described under Organization, AltaLink indicated that project planning and development as well as engineering, procurement and construction management services will be provided by SNC Lavalin. Third party contractors are expected to be used in project construction. In addition, local contractors will be used for operation and maintenance under AltaLink's General Manager's direction. AltaLink provided details of its technical capability in the various project functions, mostly from SNC Lavalin, including names, role, and brief descriptions of experience for each of the proposed key technical team personnel. Although the resumés of the team members were not sufficiently detailed to assess the individuals' specific project experience, the proposed team demonstrates good collective relevant experience. Altalink also provided information regarding its (SNC Lavalin's) extensive experience with projects of similar complexity (e.g. in Alberta). It also provided examples of business practices (standards and management systems) in various project areas that it considers to be consistent with good utility practices. It provided a comprehensive list of what it perceives as potential technical challenges in this project and described its plan for addressing them.

EWT LP (4)

EWT LP indicated that it plans to utilize third-party consultants and contractors for significant portions of the work in this project under EWT LP's management and

oversight (e.g. engineering, environmental assessment work, land rights acquisition, public engagement, procurement, and construction). It identified many of the consultants and contractors that it plans to utilize and described their areas of expertise. EWT LP also proposes to contract HONI to provide operating services, and may also outsource ongoing maintenance. A list of external technical team members was provided, but their specific project roles were not identified. Also, the internal list was primarily for its proposed management team (see Organization section) as opposed to the key technical team personnel. Information regarding its team's experience with relevant projects and activities was also provided. EWT LP also provided some examples of its partners' business practices in various areas that it considers to be consistent with good utility practices. EWT LP also identified some potential technical challenges and plans to address them.

Iccon/TPT (3)

As described under Organization, Iccon/TPT proposed to contract the engineering, procurement, and construction management (EPC) functions of the project to Isolux Ingenieria, with some contribution from local sub-consultants, under the direction of its General Manager. It also plans to outsource operation and maintenance to one or two companies. Iccon/TPT provided a "preliminary" list of its technical team members, without identifying their specific project roles. A description of its extensive experience with large transmission projects was provided, but did not explain how this experience was relevant to this project in terms of the specific technical challenges. Iccon/TPT provided examples of business practices in various areas that it considers to be consistent with good utility practices. It also provided a short description of what it perceives as potential technical challenges in this project and described its plan for addressing them.

CNPI (2)

CNPI intends to use a mix of internal and external resources in this project. Among the functions to be contracted out partially or fully are engineering/design, construction, operation and maintenance, project management, environmental and regulatory approvals, and community and stakeholder relations. CNPI identified a list of key technical internal (Fortis) and external team personnel and described their areas of

expertise, but it was not clear what the specific project role would be for some of them. There also appeared to be some overlap in these roles between internal staff and external consultants. Also, some of the proposed technical team members seem to have limited direct experience with similar projects. CNPI described some of the relevant project experience of Fortis and its other partners, and provided detailed examples of Fortis's business practices in various areas that it considers to be consistent with good utility practices. CNPI also identified, in general terms, what it perceives as potential technical challenges in this project and described its plan for addressing them.

RES (1)

RES intends to use a mix of internal and external resources in this project. Although RES indicated that the vast majority of the work will be done by external resources (approximately 80% of the development budget) with the internal team essentially limited to an oversight role, it was non-committal in terms of who it plans to use. It identified some of the potential external resources that it may utilize in the various project components and described their areas of expertise, but indicated that the actual determination of the specific external service providers will happen at the "appropriate time". RES is proposing that critical roles such as the owner's engineer and EPC contractor will be contracted using a competitive process. RES's significant experience with similar projects was described in detail.

Financial Capacity

Information was required from the applicants to demonstrate that the applicants have the financial capability necessary to develop, construct, operate and maintain the line. The information included capital resources, credit ratings, financing plan, and experience in financing similar projects.

The Board concludes that all the applicants provided information to substantiate that they have solid financial backing and, therefore, financial capacity was not a distinguishing factor among the applicants. All applicants were given the same ranking.

Proposed Design

The applicants were required to provide an overview of some of the characteristics of their proposed design to the extent known at the time of their applications. The Board, in the information it provided to potential applicants, identified a "Reference Option", which was based on the preferred option identified by the OPA and the reference case analyzed by the IESO. The applicants were required to indicate whether their plan for the line was based on the Reference Option, and if not, to describe the differences and to provide a feasibility study for their plan performed by the IESO, or performed to IESO standards. The applicants were also required to highlight the strengths of their plan in terms of innovation, reduction of ratepayer risk, lower cost, local benefits, and enhanced grid reliability.

In this evaluation, the Board will not make determinations on specific technical design issues. Making technical determinations at this point is premature since part of the project development process is to further investigate design options for the purpose of preparing a definitive proposal in the form of a leave to construct application. However, the Board notes the submissions of the IESO and the OPA regarding design, and will consider the adequacy of the design in meeting the need identified by the OPA at the time of the leave to construct proceeding.

Each applicant confirmed that its proposed design meets or exceeds existing reliability standards and the minimum technical requirements for the project, so these factors are not addressed in the following sections. In evaluating the applications in the area of Proposed Design, the Board ranked applicants by considering the following factors:

- Have any innovative alternatives or special design features been proposed, and how significant are their potential benefits?
- Have the proposed design and any alternatives been supported on a preliminary basis and is there an appropriate plan to assess the proposed design and alternatives during development?

The better the approach to these factors which a proponent demonstrated through its application, the higher the Board ranked the proponent. Below, the Board sets out the

proponents in ranked order for Proposed Design and provides a brief discussion of the main characteristics of each application.

RES (6)

RES presented two design options: a Reference Design and a Preferred Design. The Preferred Design involves the use of single-circuit transmission line with a combination of single-circuit tubular steel H-Frame structures and single-circuit steel-lattice structures. RES provided a comprehensive comparison of the two designs and indicated that, compared to the Reference Design, the Preferred Design would have superior electrical attributes, lower construction cost (about $80 million), and shorter construction schedule . RES also suggested that a staged installation of transfer capacity with the Recommended Design could result in a significant cost reduction to the ratepayers (approximately $62.5 million). Two feasibility studies, prepared by the IESO for the Reference Design and Preferred Design, were provided.

UCT (6)

UCT evaluated a number of different technology, routing, and structural options. Its Recommended Plan is based on the Reference Option with one major exception which is the use of Guyed-Y towers instead of self-supported steel-lattice towers. UCT stated that the Guyed-Y towers have better lightning performance, a smaller footprint, and a potential cost saving of about $33 million relative to the conventional self-supported steel-lattice towers. The IESO confirmed that the recommended structural change will not impact the existing Reference Plan feasibility study and that a new feasibility study is not required at this time. UCT indicated that Guyed-Y towers are used in several locations in British Columbia, Manitoba, and Quebec. Although these installations are for single-circuit designs, UCT indicated that the double-circuit application has been well researched and will be subject to further testing during the development phase. UCT also provided a consultant's assessment of, among other things, the proposed use of Guyed-Y structures for its Recommended Plan.

EWT LP (4)

EWT LP's proposed design is based on the Reference Option with one exception (40m right-of-way instead of 50m). It also presented three alternative designs; a modified double-circuit reference based design, a single-circuit design, and a single-circuit design with guyed cross-rope suspension type structures. EWT LP has not assessed these alternatives, but indicated that it plans, early in the development phase, to test the key assumptions underlying the Reference-based design and undertake the studies necessary to determine whether a different design can be adopted at a lower cost. EWT LP estimated that these alternative designs have the potential of reducing the project's capital cost by $47 million to $116 million.

AltaLink (3)

Altalink's plan proposed to use the Reference Option, but with some features aimed at reducing the project cost and environmental footprint. One of the main features to be considered is the use of a mix of H-Frame wood pole structures (2 single-circuit structures) in place of double-circuit steel-lattice towers along various parts of the right-of-way. This feature was presented to the IESO and it agreed that no new feasibility study is required. Other features suggested by AltaLink included the use of screw pile foundations for steel-lattice towers (used throughout Alberta according to AltaLink), off-site assembly yards, helicopter erection techniques, sequencing of construction work, and alternatives for cost recovery. AltaLink's plan was not specific, however, in terms of how some of these concepts (e.g. H-Frames) will be assessed.

Iccon/TPT (2)

Iccon/TPT's plan is based on the Reference Option. Iccon/TPT identified a number of possible innovative measures to be explored during the development phase including the design and testing of a new tower family specifically engineered for this project, the use of different materials, reducing the number of "dead ends", and designing lattice towers that span above the tree tops. Iccon/TPT presented limited supporting information or analysis for these proposals.

CNPI (1)

CNPI's plan is based on the Reference Option. CNPI has not identified any proposed design innovations or cost reduction measures.

Schedule

The applicants were required to provide an overall project execution chart showing major milestones for both the development and construction phases of the project. They were also asked to provide detailed schedules for both phases with estimated completion dates, as well as the proposed consequences for failure to meet key milestone dates. In addition, they were required to provide a description of major risks associated with meeting these schedules, and their plan to mitigate these risks. Evidence of past schedule performance in similar projects, as well as any proposed innovative practices to meet or accelerate the project development and construction were also requested. For proper comparison of dates and durations, the duration of the development phase of the project is defined as the period from the designation decision to the leave to construct application. It should be noted that the applicants were not ranked higher or lower based on their proposed project durations. The proposed construction phase schedules are only indicative at this stage and do not constitute a commitment on the part of the applicants. As for the development phase schedules, there is no specific benchmark as to what an appropriate duration may be. However, the Board notes that for the more aggressive schedules, the applicants would still be required to complete all the necessary work for purposes of completing the Environmental Assessment and leave to construct processes (including consultation) in an appropriate manner and would be at risk for any additional costs which result from schedule delays.

In evaluating the applications for the criterion of Schedule, the Board considered the following factors:

- Level of detail and clarity of the project execution chart and schedules.
- Demonstrated ability to identify the major risks impacting these schedules and a description of how these risks will be mitigated.
- The planned approach to achieving the proposed completion dates.

- Level of commitment to the proposed schedules, proposed reporting requirements, and proposed consequences for failure to meet key milestones.
- Past schedule performance for similar projects. It should be noted that the applicants were asked in interrogatory #32 to provide more specific information about past schedule performance for large transmission projects (greater than 100 km in length) over the past 10 years. This information is factored into the following evaluation. The Board's assessment of past schedule performance was qualitative in nature considering the fact that there were variations among the applicants in terms of when the project schedules were established and the reasons for the variances.

The Board's ranking was based on how well the proponents demonstrated the above characteristics. Below, the Board sets out the proponents in ranked order for Schedule and provides a brief discussion of the main characteristics of each application.

UCT (6)

UCT provided a clear, detailed schedule for both phases of the project with key milestones. Its proposed completion date for the development phase is October 2014, assuming designation by May 2013 (i.e. duration of approximately 18 months). The proposed in-service date is December 2017. UCT explained that its proposed overall schedule (development and construction) can be accomplished using parallel work streams and other measures. A comprehensive list of what UCT considers to be major schedule risks and mitigating measures was provided. UCT proposed a monthly progress reporting process. Although UCT did not propose specific consequences for failure to meet major milestones, it did suggest a process for notifying the Board of potential milestone delays and mitigating measures before they occur. UCT provided a description of past performance in a number of projects which showed very good schedule performance as most of the cited projects were completed on or ahead of schedule.

EWT LP (5)

EWT LP provided a high level schedule for the overall project and a more detailed schedule for the development phase with key milestones. Its proposed completion date

for the development phase is March 2016, assuming designation by August 2013 (i.e. duration of approximately 32 months). The proposed in-service date is November 2018. A comprehensive list of what EWT LP considers to be major schedule risks and mitigating measures was provided. EWT LP proposed a bi-annual progress reporting process which is likely insufficient. It also proposed possible ultimate consequences for failure to meet major milestones in the development phase which would only be warranted for the "most egregious failures". EWT LP provided a description of past performance in a number of projects which showed average schedule performance.

Iccon/TPT (4)

Iccon/TPT provided a high level schedule for both the development and construction phases as well as a more detailed schedule for the development phase. Its proposed completion date for the development phase is February 2015, assuming designation by July 2013 (i.e. duration of approximately 18 months). Iccon/TPT indicated that its relatively short development schedule is achievable subject to meeting certain milestones for items which are beyond its control such as regulatory approvals. The proposed in-service date is October 2018. A detailed list (risk register) of what Iccon/TPT considers to be major schedule risks and mitigating measures was provided for the overall project. Iccon/TPT did not provide any detail about progress reporting or potential consequences for missing major schedule milestones. Iccon/TPT provided a description of past performance in a number of projects showing schedule performance by quarter. Iccon/TPT in its answer to interrogatory #32 provided additional information for major transmission projects which showed average schedule performance.

AltaLink (3)

AltaLink provided a high level schedule for both the development and construction phases as well as a more detailed schedule for the development phase. Its proposed completion date for the development phase is June 2014, assuming designation by April 2013 (i.e. duration of approximately 14 months). The proposed in-service date is November 2018. AltaLink's proposed development schedule seems to be on the optimistic side which, according to AltaLink, is achievable given what it described as a significant amount of "pre-development work" completed before submitting its application. A short list of what AltaLink considers to be major schedule risks and

mitigating measures was provided for the overall project. AltaLink proposed a bi-monthly progress reporting process but did not provide details about potential consequences for missing major schedule milestones. AltaLink provided a description of past schedule performance in a number of projects which did not show good performance. In the original application, AltaLink stated that, for projects completed in 2010, it came within one month of the estimated preliminary in-service date 20% of the time. For the four projects listed in response to interrogatory #32, two are in the construction stage and are on schedule and the other two are significantly (11 to 26 months) behind schedule.

CNPI (2)

CNPI provided a high level schedule for the construction phase of the project as well a more detailed table for the development phase with key milestones. Its proposed completion date for the development phase is May 2015, assuming designation by April 2013 (i.e. duration of approximately 25 months). The proposed in-service date is December 2019. A list of what CNPI considers to be major schedule risks and mitigating measures was provided. CNPI proposed a quarterly progress reporting process with a limited level of detail which is likely insufficient. It also proposed potential consequences for missing major milestones involving extreme cases of negligence. CNPI also mentioned that a bonus/penalty scheme for contractors could be considered during the construction phase. CNPI initially provided a description of past schedule performance in a number of projects which showed good performance. However, the additional information provided by CNPI in response to interrogatory #32 showed average schedule performance.

RES (1)

RES provided a high level schedule for both the development and construction phases as well as a more detailed schedule for the development phase. Its proposed completion date for the development phase is June 2015, assuming designation by June 2013 (i.e. duration of approximately 25 months). The proposed in-service date is December 2018. A list of what RES considers to be major schedule risks and mitigating measures was provided for the overall project. RES proposed various progress reporting intervals and detail level (weekly, monthly, and quarterly). RES also provided

a description of past schedule performance in a number of projects which did not show good performance. Three projects were listed in response to interrogatory #32, all of which were significantly late (12 to 32 months).

Cost

The applicants were required to provide estimated costs for the development, construction, and operation and maintenance phases of the project. Further details were required for development costs including a cost breakdown, assumptions used, expenditure schedule, as well as risk assessment, mitigation and allocation. The construction cost estimate could be expressed as a range. The applicants were also required to provide information regarding risk and mitigation measures for the construction phase, information on cost performance for past projects, and proposals for how construction cost risk could be allocated between ratepayers and the applicant. For the operation and maintenance phase, the applicants were required to provide their estimated average annual cost, which could also be expressed as a range.

In order to facilitate cost comparison among applicants, they were asked in an interrogatory to provide the three cost estimates (development, construction, and operation and maintenance) broken down in certain common components, and to be expressed in 2012 dollars. This was intended to assist the Board in comparing the cost estimates on an equivalent basis, particularly the development phase budget. They were also required to provide more specific information about past cost performance for large transmission projects (greater than 100 km in length) over the past 10 years.

By designating one of the applicants, the Board will be approving the development costs, up to the budgeted amount, for recovery. The School Energy Coalition submitted that there is insufficient information for the Board to determine that the development costs are just and reasonable. The Board does not agree. The Board has had the benefit of six competitive proposals to undertake development work. In the Board's opinion, the competitive process drives the applicants to be efficient and diligent in the preparation of their proposals. With the exception of Iccon/TPT, the development cost proposals ranged from $18.2 million to $24.0 million which is relatively narrow given the overall size of the project. Therefore, the Board finds that the development costs for the

designated transmitter are reasonable, and will be recoverable subject to certain conditions.

In evaluating the applications in the area of Cost, the Board ranked applicants by considering the following factors:

Development Cost

- Rank order of the cost estimate.
- Clarity and completeness of the cost estimate.
- Thoroughness of the risk assessment and mitigation strategy.
- Any proposal for allocation of the development cost risk which could benefit ratepayers.

Construction Cost

- Clarity and completeness of the cost estimate.
- Thoroughness of the risk assessment and mitigation strategy.
- Any proposal for allocation of the construction cost risk which could benefit ratepayers.
- Past cost performance for similar projects.

Operation and Maintenance Cost

- Clarity and completeness of the cost estimate.

The Board's ranking was based on how thoroughly the proponents demonstrated the above characteristics. Below, the Board sets out the proponents in ranked order for Cost and provides a brief discussion of the main characteristics of each application.

Unless stated otherwise, all cost estimates presented in this section are in 2012 dollars. The cost estimates are provided below to the nearest $0.1 million for the development cost, $1 million for the construction cost, and $0.1 million for the operation and maintenance cost.

AltaLink (6)

AltaLink's development cost estimate is $18.2 million (the lowest among the applicants). Its construction cost estimate is $454 million and its estimated annual operation and maintenance cost is $1.7 million. AltaLink did not provide an expenditure schedule for the development cost. It provided a combined risk list and mitigation measures for the project's cost and schedule. AltaLink suggested two alternatives for dealing with development cost variances; the first is to seek recovery of incurred cost subject to prudence review, and the second is a risk/reward model where variances of up to 10% are shared 50/50, and variances above or below 10% are subject to prudence review. It also presented three alternatives for construction cost recovery; a traditional cost of service model, a negotiated target price with 50/50 risk/reward sharing up to a pre-determined cap (e.g. 10%) with costs in excess of the cap subject to prudence review, and a lump sum fixed price. AltaLink provided a general description of past performance in a number of projects, but the level of granularity was insufficient to make a definitive assessment (i.e. AltaLink indicated that the collective cost performance of 112 projects was within 10% of the total estimate but did not provide specific individual project information).

UCT (6)

UCT's development cost estimate is $22.2 million (third lowest among the applicants) which is the same for the Reference Plan and Recommended Plan. Its construction cost estimate is $409 million for the Reference Plan and $378 million for the Recommended Plan. Its estimated annual operation and maintenance cost is $4.4 million. UCT provided an expenditure schedule for the development costs as well as a detailed description of associated risks and mitigating measures. UCT proposed that the project's development phase be treated as a cost of service case whereby any expenditure in excess of the approved budget would be recoverable, subject to a prudence review. UCT's construction cost estimate is the mid-point of anticipated range of costs. The only cost difference between the Reference Plan and the Recommended Plan is the use of Guyed-Y steel-lattice towers instead of self-supported steel-lattice towers. UCT presented a detailed description of the risks associated with the construction phase and its plan to mitigate these risks. UCT indicated that, at the project's leave to construct stage, it will present to the Board a proposal for

performance-based ratemaking for the project's construction phase. UCT provided a description of past performance in a number of projects which showed average cost performance.

RES (4)

RES's development cost estimate is $21.4 million which is essentially the same for the Reference Design and the Preferred Design (second lowest among the applicants). As stated in its application, its construction cost estimate is $472 million ($2013) for the Reference Option / Preliminary Preferred Route and $392 million ($2013 according to its application and $2012 according to its response to interrogatory #26) for the Preferred Design / Preliminary Preferred Route. However, the submission from HONI suggested that the amounts estimated for the cost of work necessary at HONI's stations was not developed in consultation with HONI. RES' estimated annual operation and maintenance cost is $2.2 million for the Preferred Design and $2.8 million for the Reference Design (the latter not included in the original application). RES provided an expenditure schedule for the development cost as well as a description of associated risks and mitigating measures. RES stated in its application that it is prepared to offer a firm development and construction price of $413 million ($2013) for the preferred design / preferred route option or $494 million ($2013) for the reference design / preferred route option, based on an incentive bonus / penalty methodology. RES presented a description of the risks associated with the construction phase and its plan to mitigate these risks. RES also provided a description of past performance in a number of projects which showed average cost performance.

EWT LP (3)

In EWT LP's application, the development cost estimate was $22.1 million and the construction cost estimate was $427 million for the double circuit option. It was not clear whether these cost estimates were escalated or not. EWT LP indicated in its application that the accuracy of it estimates is ±8% and ±22% for the development and construction costs, respectively. In response to interrogatory #26, EWT LP increased its development cost estimate to $23.7 million in $2012 (third highest among the applicants) and also increased the construction cost estimate for the double circuit option to $490 million in $2012. It also provided a construction cost estimate for the

single circuit option ($350 million in $2012), but the submission from HONI suggested that the amounts estimated for the cost of work necessary at HONI's stations was not developed in consultation with HONI. EWT LP's estimated annual operation and maintenance cost is $7.1 million. EWT LP explained in its application that this estimate includes $1.9 million for "Administration and General" which, if excluded with its share of the contingency, would bring their estimate down to $4.9 million/year. EWT LP provided an expenditure schedule for the development cost as well as a detailed description of associated risks and mitigating measures. EWT LP did not propose any risk sharing arrangements with benefits for ratepayers. EWT LP also presented a detailed description of the risks associated with the construction phase and its plan to mitigate these risks. EWT LP provided a description of past performance in a number of projects which showed below average cost performance.

CNPI (2)

CNPI's development cost estimate is $24.0 million (second highest among the applicants) and its construction cost estimate is $527 million. In its application, CNPI's estimated annual operation and maintenance cost was approximately $1.0 million, but was increased to $1.7 million in response to interrogatory #26 to account for administration and regulatory costs that CNPI indicated were not included in the initial estimate. CNPI provided an expenditure schedule for the development cost as well as a brief description of associated risks and mitigating measures. CNPI did not propose any risk sharing arrangements with benefits for ratepayers. CNPI presented a brief description of the risks associated with the construction phase and its plan to mitigate these risks. CNPI provided a description of past performance in a number of Fortis projects which showed average cost performance.

Iccon/TPT (1)

In Iccon/TPT's application, the estimated development cost was $45.5 million (highest among the applicants). It was not clear in the application whether this cost estimate was escalated or not. This estimate was reduced by Iccon/TPT in response to interrogatory #26 to $30.7 million. Iccon/TPT explained that, in addition to de-escalation, the difference is due to the fact that the earlier estimate included post leave to construct activities. Iccon/TPT's construction cost estimate is $487 million and its

estimated annual operation and maintenance cost is $4.9 million. Iccon/TPT provided an expenditure schedule for the development cost as well as a combined risk register for both the development and construction phases. For development costs, Iccon/TPT did not propose any risk sharing arrangements with benefits for ratepayers. To reduce construction cost risk, Iccon/TPT intends to enter into a fixed fee EPC contract with Isolux Ingenieria. Iccon/TPT provided a description of past performance in a number of projects which showed average cost performance.

Landowner, Municipal, and Community Consultation

The applicants were required to demonstrate their ability to conduct successful consultations with landowners, municipalities and local communities, and to provide a consultation plan including potential significant issues and mitigating measures. Additional details such as an overview of land rights acquisition activities and a description of any proposed route, or plan for identifying a route, were also requested.

In evaluating the applications in this area, the Board ranked applicants by considering the following factors:

- Clarity of the consultation plan, including methodology and schedule.
- The breadth and scope of potential significant stakeholder issues identified and the suitability of proposed mitigating measures.
- Adequacy of the description of the line route (or alternatives) and demonstrated appreciation of challenges involved in the route(s).

The more of these characteristics which a proponent demonstrated through its application, the higher the Board ranked the proponent. Below, the Board sets out the proponents in ranked order for this criterion and provides a brief discussion of the main characteristics of each application.

EWT LP (6)

EWT LP provided a comprehensive consultation plan as part of the description of its proposed environmental assessment process, which included a description of key elements and a list of stakeholders. The plan conveyed a clear picture as to how

consultations would be conducted and how the communities would be approached. Details regarding land use rights acquisition approach by category, potential issues and proposed mitigation were provided. For the purposes of the application, EWT LP assumed a route adjacent to the existing line but indicated that the final route will be based on consultation with landowners, municipalities and communities. A detailed study of potential routes was provided where potential route options were identified and described, including the evaluation criteria, process, and a proposed schedule for route selection.

RES (5)

RES provided a consultation plan that included a schedule, issue identification and resolution strategy. The plan provided for the formation of a Municipal Advisory Group, if appropriate. RES provided an overview of the required land use rights and a two-phase plan for acquiring these rights (pre and post leave to construct). A detailed land valuation and acquisition plan was provided. Potential significant issues and mitigating measures were also identified. RES identified a preliminary preferred route and stated that some route refinements may be required as a result of stakeholder consultation.

UCT (5)

UCT provided a consultation plan which included a list of stakeholders, consultation activities and schedule. UCT also provided a mitigation strategy to deal with significant issues. It also provided a land acquisition plan which included methodology for various types of land rights as well as an approach to compensation and mitigation. One of the mitigating measures is to identify three route variances to the proposed route as contingencies. UCT identified a 3-stage approach to route determination; conceptual (already completed), preliminary, and final.

AltaLink (3)

A consultation plan was provided as part of AltaLink's draft environmental assessment terms of reference, including methods and schedules. AltaLink provided a list of required land use rights for the various project phases and a plan to obtain these rights, including compensation principles. Some issues associated with obtaining these rights

were identified and a plan to address them was provided based on AltaLink's experience in Alberta. Altalink's plans were generic in nature rather than specific to this project. AltaLink identified a proposed route and some of the environmental constraints associated with it, subject to detailed design, environmental assessment, and stakeholder input.

CNPI (2)

A brief consultation plan was provided for the different project phases, including potential issues and mitigation. CNPI provided a brief description of the various categories of right-of-way and land use rights and its plan for obtaining these rights. A short list of potential issues associated with land acquisition and permitting was provided and mitigating measures proposed. Although the proposed route has been identified, CNPI is prepared to consider an alternate route.

Iccon/TPT (1)

A description of the proposed consultation plan was provided which was generic and brief. Iccon/TPT provided an overview of the required land use rights in the various project phases and a plan for acquiring these rights. A brief description of associated risks and mitigating measures was also provided. Iccon/TPT has not identified a planned route for the line at this time, but has conducted a routing analysis and identified several potential routing corridors. A methodology and decision criteria were described which will be used to evaluate these routing options during the development of the terms of reference for the environmental assessment.

First Nations and Métis Consultation

The duty to consult, as described in the Supreme Court decision *Haida Nation* v. *British Columbia (Minister of Forests)*[2], arises where the Crown has knowledge, real or constructive, of the potential existence of Aboriginal right or title and contemplates conduct that might adversely affect it. In some cases, the duty to consult may lead to a duty to accommodate. The precise extent of the duty to consult and, possibly, accommodate will vary depending on the facts of each situation. The Crown can

[2] [2004] 3 S.C.R. 511

delegate certain aspects of consultation to a project proponent. The Deputy Minister of Energy issued a letter on November 26, 2012 stating the Ministry's expectation that the designated transmitter will enter into a Memorandum of Understanding with the Ministry that will set out the respective roles and responsibilities of the Crown and the transmitter in consultation. None of the applicants objected to this requirement.

The applicants were required to demonstrate their ability to conduct successful First Nation and Métis consultations and to provide a consultation plan including a list of affected First Nations and Métis communities. They were also required to describe their engagement approach as well as potential significant issues and mitigating measures.

In evaluating the applications in this area, the Board ranked proponents by considering the following factors:

- Clarity and comprehensiveness of the proposed consultation plan, including methodology and schedule.
- Identification of potential significant issues and proposed mitigating measures.
- Relevant successful past experience.

The Board's ranking is based on how well the proponents demonstrated the above characteristics. Below, the Board sets out the proponents in ranked order for this criterion and provides a brief discussion of the main characteristics of each application.

UCT (6)

UCT provided a comprehensive consultation plan for all project phases (pre-designation to operation). A record of actual communication (letters, phone calls) with the 18 affected communities was provided as well as a list of potential key issues and proposed mitigation. UCT referenced NextEra's First Nations and Métis Relationship Policy and Enbridge's Aboriginal and Native American Policy as the basis for its plan. UCT described existing relationships with a number of First Nations and Métis communities who would be engaged as part of this project. UCT also described its relevant past experience with a number of projects involving the engagement, consultation and economic participation of First Nations and Métis communities.

EWT LP (5)

EWT LP provided a comprehensive consultation and communication plan and stated that it will commence consultation upon designation. A comprehensive list of expected issues was provided and mitigating measures were suggested. Relevant past experience with consultation activities was described which involved EWT LP's partners and consultants. EWT LP indicated that the consultation process would be facilitated by BLP. Having some of the affected First Nations lead the consultation process with other affected First Nations and Métis communities on behalf of the owners may give rise to fairness concerns which would need to be addressed.

AltaLink (5)

Altalink provided a preliminary consultation plan including steps and milestones and indicated that the final plan will be developed and agreed to jointly with each of the communities. It also provided a plan for the Traditional Ecological Knowledge and Traditional Land Use studies for the project. AltaLink indicated that all 18 affected communities were contacted in 2012, and that it met with 12 of them (excluding the 6 involved with BLP). A short list of potential issues was provided as well as a general description of possible mitigation. AltaLink described its longstanding relationship and engagement approach with the Aboriginal communities in Alberta as well as SNC Lavalin's experience in Ontario and Manitoba.

RES (3)

RES provided a detailed but generic consultation plan and identified potentially affected First Nations and Métis communities which included the previously identified 18 communities plus others. RES contacted all 18 plus one more, met with three of them and received correspondence from two others. RES identified a short list of potential issues and a plan to deal with these issues. RES described its experience with similar consultation in a number of projects in Canada and the U.S.A.

Iccon/TPT (2)

Iccon/TPT provided a general engagement plan as well as a record of actual communication with some of the affected First Nations and Métis communities. A list of potential significant issues and a preliminary plan to address them were also provided. Iccon/TPT indicated that it plans to contract with TransCanada's Aboriginal and Stakeholder Engagement Group to lead its First Nations and Métis Consultation process in this project. Iccon/TPT's plan was less comprehensive than plans filed by other applicants and, as mentioned earlier, does not effectively distinguish between participation and consultation.

CNPI (1)

CNPI indicated that some contacts have been made with affected communities (the 2 involved in LHATC plus 6 others), but that all 18 affected communities will be included in the consultation process. CNPI stated that an Aboriginal Consultation and Engagement Plan will be developed at the start of the environmental assessment process. The application included only a very high level summary consultation plan identifying some potential issues and possible generic mitigating measures. The plan lacked the detail contained in the plans of other applicants. Relevant recent experience was described with some Fortis projects and other related activities.

CONCLUSION

Based on the evaluation methodology described earlier, and the ranking given to each applicant for the various decision criteria, the Board has determined the total score and the resulting overall ranking of the applicants, as shown below. Note that the maximum possible score is 540:

1. UCT (455)
2. EWT LP (385)
3. AltaLink (385)
4. RES (280)
5. CNPI (200)
6. Iccon/TPT (185)

Therefore, the Board has decided that the designated transmitter for the development phase of the proposed East-West Tie line is UCT. UCT either ranked first or was tied for first in 7 of the 9 decision criteria. AltaLink and EWT LP are tied. EWT LP stated that it is not willing to be named runner-up, and the Board names AltaLink as the runner-up.

The Board finds that the development costs budgeted by UCT of $22,187,022 (in $2012) are reasonable. The Board will establish a deferral account in which UCT is to record the actual costs of development. The Board expects that UCT, at the time it applies for leave to construct the East-West Tie line, will file a proposal for the disposition of the development cost account.

The licence of UCT will be amended to have an effective date and to include special conditions regarding reporting to the Board. The Board notes that per Section 3.1.1. of the Reporting and Record-keeping Requirements, UCT will be required to report balances in the deferral account to the Board on a quarterly basis.

UCT proposed certain milestones at page 100 of its application, and at page 59 of its argument in chief indicated that the milestones proposed by Board staff at page 4 of its Phase 2 submission were directionally appropriate. The Board requires UCT to prepare a revised schedule of development milestones including those from its application, as well as the milestones proposed by Board staff. In addition, UCT shall include proposed milestones related to: the development and finalization of its First Nations and Métis participation plan; progress on landowner, municipal and community consultation; progress on First Nations and Métis consultation; and progress towards finalization of structure engineering work and final choice of structure design. If any of these milestones are, for UCT's development plan, impractical or not demonstrative of progress, UCT may omit or rephrase the milestone and provide an explanation for the proposed change.

As part of the schedule of milestones, UCT must also indicate what filing, form or other document could be offered as proof of completion of the milestone if the Board so required. For example, UCT proposed the milestone "Substantial Land / Right-of-Way Rights Acquired". What could be filed with the Board if the Board called upon UCT to

demonstrate successful completion of that milestone? The schedule of milestones should be provided in the following format:

Milestone	Proof of Completion	Target Date

A consequence of this designation decision is that, if it meets its obligations, UCT will be able to recover the costs of project development (up to the budgeted amount) from transmission ratepayers, even if the final assessment of need indicates that the line is no longer required. The Board therefore believes that it is important to limit the risk to ratepayers from unnecessary development work. The Board recognizes that the OPA reaffirmed the continuing need for the East-West Tie line in its Phase 2 submission, but also notes that the OPA offered to provide a more detailed need assessment after the designation decision. The Board will require the OPA to file a schedule for the production of an early detailed need update (for example, 60 days from the date of this decision) and a further need update at the approximate mid-point of the development work. The Board recognizes that a final need assessment will also form part of the leave to construct application. The OPA's proposed schedule should be developed in consultation with UCT to co-ordinate with the development schedule.

The Board therefore orders that:

1. The licence of UCT is amended to have an effective date of August 7, 2013, with a term of 20 years.

2. The following special conditions will be included in the licence:

    a) UCT shall report to the Board on a monthly basis, beginning no more than 60 days from the date of this decision and ending when a leave to construct application is filed for the East-West Tie line, on the following matters:

        i. Overall project progress: An executive summary of work progress, cost and schedule status, and any emerging issues/risks and proposed mitigation.
        ii. Cost: Actual cost and cost variance relative to the original project budget, as well as an updated budget forecast projected

out to a leave to construct application. A description of the reasons for any projected variances and mitigating measures should be provided. The report must also indicate the percentage of budgeted development costs spent as at the time of the report.

iii. Schedule: The milestones completed and the status of milestones in-progress. For milestones that are overdue or delayed, the reasons for the delay, the magnitude and impact of the delay on the broader development schedule and cost, and any mitigating steps that have or will be taken to complete the task.

iv. Risks and Issues Log: An assessment of the risks and issues, potential impact on schedule, cost or scope, as well as potential options for mitigating or eliminating the risk or issue.

b) UCT shall advise the Board immediately of any change to its governance, or any change in its financial status, that adversely affects or is likely to adversely affect the completion of the East-West Tie line.

3. UCT shall, within 21 days of the date of this decision, file for review and approval of the Board a revised development schedule, identifying milestones, proposed proofs of completion and target completion dates as described above. The time span for the activities in the schedule must be consistent with the schedule filed in UCT's application, taking into account the actual date of this decision.

4. A deferral account is established for UCT in which the actual costs of development of the East-West Tie line are to be recorded, from the date of this decision up to the filing of a leave to construct application, or such other time as the Board may order. The account shall include sub-accounts for the development activities listed in Attachment 1 to UCT's response to interrogatory 26 in this proceeding.

5. UCT shall, within 21 days of the date of this decision, file for review and approval of the Board a draft accounting order for the account and sub-accounts described

in paragraph 4, with detailed descriptions of the account and sub-accounts and how they will be used.

The Board further orders that:

1. The OPA shall, within 21 days of the date of this decision, file with the Board a schedule for the production of an early detailed need update and a further need update at the approximate mid-point of development work, as described above.

The Board further orders that:

1. The cost awards to eligible intervenors and the Board's own costs will be recovered from licensed transmitters whose revenue requirements are presently recovered through the Ontario Uniform Transmission Rate (and the costs will be apportioned among the transmitters based on their respective transmission revenues).

2. Eligible parties shall submit their cost claims for Phase 2 of the designation proceeding by August 28, 2013. A copy of the cost claim must be filed with the Board and one copy is to be served on each of Canadian Niagara Power Inc., Five Nations Energy Inc., Great Lakes Power Transmission LP and Hydro One Networks Inc.

3. Canadian Niagara Power Inc., First Nations Energy Inc., Great Lakes Power Transmission LP and Hydro One Networks Inc. will have until September 16, 2013 to object to any aspect of the costs claimed. A copy of the objection must be filed with the Board and one copy must be served on the party against whose claim the objection is being made.

4. The party whose cost claim was objected to will have until September 25, 2013 to make a reply submission as to why its cost claim should be allowed. A copy of the submission must be filed with the Board and one copy must be served on the party who objected to the claim.

DATED at Toronto, August 7, 2013
ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary

APPENDIX A

TO BOARD DECISION AND ORDER

EAST-WEST TIE LINE DESIGNATION - PHASE 2

BOARD FILE NO.: EB-2011-0140

DATED August 7, 2013

LIST OF INTERVENORS

EAST-WEST TIE LINE DESIGNATION - PHASE 2

BOARD FILE NO.: EB-2011-0140

DATED August 07, 2013

LIST OF INTERVENORS

REGISTERED TRANSMITTERS:

AltaLink Ontario, LP

Canadian Niagara Power Inc.

EWT LP

Iccon Transmission, Inc.

RES Canada Transmission LP

TransCanada Power Transmission (Ontario) L.P.

Upper Canada Transmission, Inc.

Please note: Each of Iccon Transmission Inc. and TransCanada Power Transmission (Ontario) L.P. acted as intervenors in Phase 1 of the proceeding, but filed a joint application in Phase 2.

OTHER INTERVENORS:

Association of Major Power Consumers in Ontario

BayNiche Conservancy

Building Owners and Managers Association Toronto

Canadian Manufacturers and Exporters

City of Thunder Bay and Northwestern Ontario Associated Chambers of Commerce and Northwestern Ontario Municipal Association Energy Task Force

Consumers Council of Canada

Enbridge Inc.

Energy Probe Research Foundation

Great Lakes Power Transmission EWT LP

Great Lakes Power Transmission LP

Hydro One Inc.

Hydro One Networks Inc.

Independent Electricity System Operator

Lake Superior Action-Research-Conservation

Métis Nation of Ontario

Municipality of Wawa and the Algoma Coalition

National Chief's Office on Behalf of the Assembly of First Nations

Nishnawbe-Aski Nation

Northwatch

Ojibways of Pic River First Nation

Ontario Power Authority

Power Workers' Union

School Energy Coalition

Mr. Rod Taylor

Tab 9

Chippewas of the Thames First Nation v. Enbridge Pipelines Inc., [2017] 1 S.C.R. 1099

Supreme Court Reports

Supreme Court of Canada

Present: McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ.

Heard: November 30, 2016;

Judgment: July 26, 2017.

File No.: 36776.

[2017] 1 S.C.R. 1099 | *[2017] 1 R.C.S. 1099* | *[2017] S.C.J. No. 41* | *[2017] A.C.S. no 41* | *2017 SCC 41*

Chippewas of the Thames First Nation Appellant; v. Enbridge Pipelines Inc., National Energy Board and Attorney General of Canada Respondents, and Attorney General of Ontario, Attorney General of Saskatchewan, Nunavut Wildlife Management Board, Suncor Energy Marketing Inc., Mohawk Council of Kahnawà: ke, Mississaugas of the New Credit First Nation and Chiefs of Ontario Interveners

(66 paras.)

Appeal From:

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Case Summary

Catchwords:

Constitutional law — Aboriginal rights — Treaty rights — Crown — Duty to consult — Decision by federal independent regulatory agency which could impact Aboriginal and treaty rights — Pipeline crossing traditional territory of First Nation — National Energy Board approving modification of pipeline — Whether Board's contemplated decision on project's approval amounted to Crown conduct triggering duty to consult — Whether Crown consultation can be conducted through regulatory process — Role of regulatory tribunal when Crown not a party to regulatory process — Scope of duty to consult — Whether there was adequate notice to First Nation that Crown was relying on Board's process to fulfill its duty to consult — Whether Crown's consultation obligation fulfilled — Whether Board's written reasons were sufficient [page1100] to satisfy Crown's obligation — National Energy Board Act, R.S.C. 1985, c. N-7, s. 58.

Summary:

The National Energy Board (NEB), a federal administrative tribunal and regulatory agency, was the final decision maker on an application by Enbridge Pipelines Inc. for a modification to a pipeline that would reverse the flow of part of the pipeline, increase its capacity, and enable it to carry heavy crude. The NEB issued notice to Indigenous groups, including the Chippewas of the Thames First Nation (Chippewas), informing them of the project, the NEB's role, and the NEB's upcoming hearing process. The Chippewas were granted funding to participate in the process, and they filed evidence and delivered oral argument delineating their concerns that the project would increase the risk of pipeline ruptures and spills, which could adversely impact their use of the land. The NEB approved the project, and was satisfied that potentially affected Indigenous groups had received adequate information and had the opportunity to share their views. The NEB also found that potential project

impacts on the rights and interests of Aboriginal groups would likely be minimal and would be appropriately mitigated. A majority of the Federal Court of Appeal dismissed the Chippewas' appeal.

Held: The appeal should be dismissed.

When an independent regulatory agency such as the NEB is tasked with a decision that could impact Aboriginal or treaty rights, the NEB's decision would itself be Crown conduct that implicates the Crown's duty to consult. As a statutory body with the delegated executive responsibility to make a decision that could adversely affect Aboriginal and treaty rights, the NEB acted on behalf of the Crown in approving Enbridge's application. Because the authorized work could potentially adversely affect the Chippewas' asserted Aboriginal and treaty rights, the Crown had an obligation to consult.

The Crown may rely on steps taken by an administrative body to fulfill its duty to consult so long as the [page1101] agency possesses the statutory powers to do what the duty to consult requires in the particular circumstances, and so long as it is made clear to the affected Indigenous group that the Crown is so relying. However, if the agency's statutory powers are insufficient in the circumstances or if the agency does not provide adequate consultation and accommodation, the Crown must provide further avenues for meaningful consultation and accommodation prior to project approval. Otherwise, a regulatory decision made on the basis of inadequate consultation will not satisfy constitutional standards and should be quashed.

A regulatory tribunal's ability to assess the Crown's duty to consult does not depend on whether the government participated in the hearing process. The Crown's constitutional obligation does not disappear when the Crown acts to approve a project through a regulatory body such as the NEB. It must be discharged before the government proceeds with approval of a project that could adversely affect Aboriginal or treaty rights. As the final decision maker on certain projects, the NEB is obliged to consider whether the Crown's consultation was adequate if the concern is raised before it. The responsibility to ensure the honour of the Crown is upheld remains with the Crown. However, administrative decision makers have both the obligation to decide necessary questions of law and an obligation to make decisions within the contours of the state's constitutional obligations.

The duty to consult is not the vehicle to address historical grievances. The subject of the consultation is the impact on the claimed rights of the current decision under consideration. Even taking the strength of the Chippewas' claim and the seriousness of the potential impact on the claimed rights at their highest, the consultation undertaken in this case was manifestly adequate. Potentially affected Indigenous groups were given early notice of the NEB's hearing and were invited to participate in the process. The Chippewas accepted the invitation and appeared before the NEB. They were aware that the NEB was the final decision maker. Moreover, they understood that no other Crown entity was involved in the process for the purposes of carrying out consultation. The circumstances of this case made it sufficiently clear to the Chippewas that the NEB process was intended to constitute Crown consultation and accommodation. Notwithstanding the Crown's failure to provide timely notice that it intended to [page1102] rely on the NEB's process to fulfill its duty to consult, its consultation obligation was met.

The NEB's statutory powers under s. 58 of the *National Energy Board Act* were capable of satisfying the Crown's constitutional obligations in this case. Furthermore, the process undertaken by the NEB in this case was sufficient to satisfy the Crown's duty to consult. First, the NEB provided the Chippewas with an adequate opportunity to participate in the decision-making process. Second, the NEB sufficiently assessed the potential impacts on the rights of Indigenous groups and found that the risk of negative consequences was minimal and could be mitigated. Third, in order to mitigate potential risks, the NEB provided appropriate accommodation through the imposition of conditions on Enbridge.

Finally, where affected Indigenous peoples have squarely raised concerns about Crown consultation, the NEB must usually provide written reasons. What is necessary is an indication that the NEB took the asserted Aboriginal and treaty rights and interests into consideration and accommodated them where appropriate. In this case, the NEB's written reasons are sufficient to satisfy the Crown's obligation. Unlike the NEB's reasons in the companion case *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, *2017 SCC 40*, *[2017] 1 S.C.R. 1069*, the discussion of Aboriginal consultation was not subsumed within an environmental assessment. The NEB reviewed the written and oral evidence of numerous Indigenous groups and identified, in writing, the rights and interests at stake. It assessed the risks that the project posed to those rights and interests and concluded that

the risks were minimal. Nonetheless, it provided written and binding conditions of accommodation to adequately address any negative impacts on the asserted rights from the approval and completion of the project.

Cases Cited

Applied: *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40, [2017] 1 S.C.R. 1069; *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650; **referred to:** *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [page1103] [2004] 3 S.C.R. 511; *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159; *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52, [2001] 2 S.C.R. 781; *Standing Buffalo Dakota First Nation v. Enbridge Pipelines Inc.*, 2009 FCA 308, [2010] 4 F.C.R. 500; *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 257; *R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765; *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247, 18 B.C.L.R. (5th) 234; *Kainaiwa/Blood Tribe v. Alberta (Energy)*, 2017 ABQB 107; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.

Statutes and Regulations Cited

Constitution Act, 1982, s. 35.

National Energy Board Act, R.S.C. 1985, c. N-7, ss. 3, 22(1), Part III, 30(1), 52, 54(1), 58.

Oil Pipeline Uniform Accounting Regulations, C.R.C., c. 1058.

Authors Cited

Woodward, Jack. *Native Law*, vol. 1. Toronto: Thomson Reuters, 1994 (loose-leaf updated 2017, release 2).

History and Disposition:

APPEAL from a judgment of the Federal Court of Appeal (Ryer, Webb and Rennie JJ.A.), 2015 FCA 222, [2016] 3 F.C.R. 96, 390 D.L.R. (4th) 735, [2016] 1 C.N.L.R. 18, 479 N.R. 220, [2015] F.C.J. No. 1294 (QL), 2015 CarswellNat 5511 (WL Can.), affirming a decision of the National Energy Board, No. OH-002-2013, March 6, 2014, 2014 LNCNEB 4 (QL). Appeal dismissed.

Counsel

David C. Nahwegahbow and *Scott Robertson*, for the appellant.

Douglas E. Crowther, *Q.C.*, *Joshua A. Jantzi* and *Aaron Stephenson*, for the respondent Enbridge Pipelines Inc.

Jody Saunders and *Kristen Lozynsky*, for the respondent the National Energy Board.

Peter Southey and *Mark R. Kindrachuk*, *Q.C.*, for the respondent the Attorney General of Canada.

Manizeh Fancy and *Richard Ogden*, for the intervener the Attorney General of Ontario.

[page1104]

Richard James Fyfe, for the intervener the Attorney General of Saskatchewan.

Marie-France Major and *Thomas Slade*, for the intervener the Nunavut Wildlife Management Board.

Martin Ignasiak, *W. David Rankin* and *Thomas Kehler*, for the intervener Suncor Energy Marketing Inc.

Francis Walsh and *Suzanne Jackson*, for the intervener the Mohawk Council of Kahnawà: ke.

Nuri G. Frame, *Jason T. Madden* and *Jessica Labranche*, for the intervener the Mississaugas of the New Credit First Nation.

Maxime Faille, *Jaimie Lickers* and *Guy Régimbald*, for the intervener the Chiefs of Ontario.

The judgment of the Court was delivered by

KARAKATSANIS AND BROWN JJ.

I. Introduction

1 In this appeal and in its companion, *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, *2017 SCC 40*, *[2017] 1 S.C.R. 1069*, this Court must consider the Crown's duty to consult with Indigenous peoples prior to an independent regulatory agency's approval of a project that could impact their rights. As we explain in the companion case, the Crown may rely on regulatory processes to partially or completely fulfill its duty to consult.

2 These cases demonstrate that the duty to consult has meaningful content, but that it is limited in scope. The duty to consult is rooted in the need to avoid the impairment of asserted or recognized rights that flows from the implementation of the specific project at issue; it is not about resolving broader claims that transcend the scope of the proposed project. That said, the duty to consult requires [page1105] an informed and meaningful opportunity for dialogue with Indigenous groups whose rights may be impacted.

3 The Chippewas of the Thames First Nation has historically resided near the Thames River in southwestern Ontario, where its members carry out traditional activities that are central to their identity and way of life. Enbridge Pipelines Inc.'s Line 9 pipeline crosses their traditional territory.

4 In November 2012, Enbridge applied to the National Energy Board (NEB) for approval of a modification of Line 9 that would reverse the flow of part of the pipeline, increase its capacity, and enable it to carry heavy crude. These changes would increase the assessed risk of spills along the pipeline. The Chippewas of the Thames requested Crown consultation before the NEB's approval, but the Crown signalled that it was relying on the NEB's public hearing process to address its duty to consult.

5 The NEB approved Enbridge's proposed modification. The Chippewas of the Thames then brought an appeal from that decision to the Federal Court of Appeal, arguing that the NEB had no jurisdiction to approve the Line 9 modification in the absence of Crown consultation. The majority of the Federal Court of Appeal dismissed the

appeal, and the Chippewas of the Thames brought an appeal from that decision to this Court. For the reasons set out below, we would dismiss the appeal. The Crown is entitled to rely on the NEB's process to fulfill the duty to consult. In this case, in light of the scope of the project and the consultation process afforded to the Chippewas of the Thames by the NEB, the Crown's duty to consult and accommodate was fulfilled.

[page1106]

II. Background

A. *The Chippewas of the Thames First Nation*

6 The Chippewas of the Thames are the descendants of a part of the Anishinaabe Nation that lived along the shore of the Thames River in southwestern Ontario prior to the arrival of European settlers in the area at the beginning of the 18th century. Their ancestors' lifestyle involved hunting, fishing, trapping, gathering, growing corn and squash, performing ceremonies at sacred sites, and collecting animals, plants, minerals, maple sugar and oil in their traditional territory.

7 The Chippewas of the Thames assert that they have a treaty right guaranteeing their exclusive use and enjoyment of their reserve lands. They also assert Aboriginal harvesting rights as well as the right to access and preserve sacred sites in their traditional territory. Finally, they claim Aboriginal title to the bed of the Thames River, its airspace, and other lands throughout their traditional territory.

B. *Legislative Scheme*

8 The NEB is a federal administrative tribunal and regulatory agency established under s. 3 of the *National Energy Board Act*, R.S.C. 1985, c. N-7 (*NEB Act*), whose functions include the approval and regulation of pipeline projects. The *NEB Act* prohibits the operation of a pipeline unless a certificate of public convenience and necessity has been issued for the project and the proponent has been given leave under Part III to open the pipeline (s. 30(1)).

9 The NEB occupies an advisory role with respect to the issuance of a certificate of public convenience and necessity. Under ss. 52(1) and 52(2), it can submit a report to the Minister of Natural Resources setting out: (i) its recommendation on whether a certificate should be issued based on its consideration of certain criteria; and (ii) the terms [page1107] and conditions that it considers necessary or desirable in the public interest to be attached to the project should the certificate be issued. The Governor in Council may then direct the NEB either to issue the certificate or to dismiss the application (s. 54(1)).

10 Under s. 58 of the *NEB Act*, however, the NEB may make orders, on terms and conditions that it considers proper, exempting smaller pipeline projects or project modifications from various requirements that would otherwise apply under Part III, including the requirement for the issuance of a certificate of public convenience and necessity. Consequently, as in this case, smaller projects and amendments to existing facilities are commonly sought under s. 58. The NEB is the final decision maker on s. 58 exemptions.

C. *The Line 9 Pipeline and the Project*

11 The Line 9 pipeline, connecting Sarnia to Montreal, opened in 1976 with the purpose of transporting crude oil from western Canada to eastern refineries. Line 9 cuts through the Chippewas of the Thames' traditional territory and crosses the Thames River. It was approved and built without any consultation of the Chippewas of the Thames.

12 In 1999, following NEB approval, Line 9 was reversed to carry oil westward. In July 2012, the NEB approved an application from Enbridge, the current operator of Line 9, for the re-reversal (back to eastward flow) of the westernmost segment of Line 9, between Sarnia and North Westover, called "Line 9A".

13 In November 2012, Enbridge filed an application under Part III of the *NEB Act* for a modification to Line 9. The

project would involve reversing the flow (to eastward) in the remaining 639-kilometre segment of Line 9, called "Line 9B", between North Westover and Montreal; increasing the annual capacity of Line 9 from 240,000 [page1108] to 300,000 barrels per day; and allowing for the transportation of heavy crude. While the project involved a significant increase of Line 9's throughput, virtually all of the required construction would take place on previously disturbed lands owned by Enbridge and on Enbridge's right of way.

14 Enbridge also sought exemptions under s. 58 from various filing requirements which would otherwise apply under Part III of the *NEB Act*, the *Oil Pipeline Uniform Accounting Regulations*, C.R.C., c. 1058, and the NEB's Filing Manual. The most significant requested exemption was to dispense with the requirement for a certificate of public convenience and necessity, which as explained above is subject to the Governor in Council's final approval under s. 52 of the *NEB Act*. Without the need for a Governor in Council-approved certificate, the NEB would have the final word on the project's approval.

15 In December 2012, the NEB, having determined that Enbridge's application was complete enough to proceed to assessment, issued a hearing order, which established the process for the NEB's consideration of the project. This process culminated in a public hearing, the purpose of which was for the NEB to gather and review information that was relevant to the assessment of the project. Persons or organizations interested in the outcome of the project, or in possession of relevant information or expertise, could apply to participate in the hearing. The NEB accepted the participation of 60 interveners and 111 commenters.

D. *Indigenous Consultation on the Project*

16 In February 2013, after Enbridge filed its application and several months before the hearings, the NEB issued notice to 19 potentially affected Indigenous groups, including the Chippewas of the Thames, informing them of the project, the NEB's role, and the NEB's upcoming hearing process. [page1109] Between April and July 2013, it also held information meetings in three communities upon their request.

17 In September 2013, prior to the NEB hearing, the Chiefs of the Chippewas of the Thames and the Aamjiwnaang First Nation wrote a joint letter to the Prime Minister, the Minister of Natural Resources, and the Minister of Aboriginal Affairs and Northern Development. The letter described the asserted Aboriginal and treaty rights of both groups and the project's potential impact on them. The Chiefs noted that no Crown consultation with any affected Indigenous groups had taken place with respect to the project's approval, and called on the Ministers to initiate Crown consultation. No response arrived until after the conclusion of the NEB hearing.

18 In the meantime, the NEB's process unfolded. The Chippewas of the Thames were granted funding to participate as an intervener, and they filed evidence and delivered oral argument at the hearing delineating their concerns that the project would increase the risk of pipeline ruptures and spills along Line 9, which could adversely impact their use of the land and the Thames River for traditional purposes.

19 In January 2014, after the NEB's hearing process had concluded, the Minister of Natural Resources responded to the September 2013 letter. The response acknowledged the Government of Canada's commitment to fulfilling its duty to consult where it exists, and stated that the "[NEB's] regulatory review process is where the Government's jurisdiction on a pipeline project is addressed. The Government relies on the NEB processes to address potential impacts to Aboriginal and treaty rights stemming from projects under its mandate" (A.R., vol. VI, at p. 47). In sum, the Minister indicated that he would be relying solely on the NEB's process to fulfill the Crown's duty to consult Indigenous peoples on the project.

[page1110]

III. The Decisions Below

A. *The NEB's Decision, 2014 LNCNEB 4 (QL)*

20 The NEB approved the project, finding that it was in the public interest and consistent with the requirements in the *NEB Act*. It explained that the approval "enables Enbridge to react to market forces and provide benefits to Canadians, while at the same time implementing the Project in a safe and environmentally sensitive manner" (para. 20). The NEB imposed conditions on the project related to pipeline integrity, safety, environmental protection, and the impact of the project on Indigenous communities.

21 In its discussion of Aboriginal Matters (Chapter 7 of the NEB's reasons), the NEB explained that it "interprets its responsibilities, including those outlined in section 58 of the NEB Act, in a manner consistent with the *Constitution Act, 1982*, including section 35" (para. 293). It noted that proponents are required to make reasonable efforts to consult with Indigenous groups, and that the NEB hearing process is part of the consultative process. In deciding whether a project is in the public interest, the NEB "considers all of the benefits and burdens associated with the project, balancing the interests and concerns of Aboriginal groups with other interests and factors" (para. 301).

22 The NEB noted that, in this case, the scope of the project was limited. It was not an assessment of the current operating Line 9, but rather of the modifications required to increase the capacity of Line 9, transport heavy crude on Line 9, and reverse the flow of Line 9B. Enbridge would not need to acquire any new permanent land rights for the project. Most work would take place within existing Enbridge facilities and its existing right of way. Given the limited scope of the project, the NEB was satisfied that potentially affected Indigenous groups had received adequate information about the project. It was also satisfied that potentially affected Indigenous groups had the opportunity to share their views about the project through the NEB hearing process and through discussions with Enbridge. [page1111] The NEB expected that Enbridge would continue consultations after the project's approval.

23 While Enbridge acknowledged that the project would increase the assessed risk for some parts of Line 9, the NEB found that "any potential Project impacts on the rights and interests of Aboriginal groups are likely to be minimal and will be appropriately mitigated" (para. 343) given the project's limited scope, the commitments made by Enbridge, and the conditions imposed by the NEB. While the project would occur on lands used by Indigenous groups for traditional purposes, those lands are within Enbridge's existing right of way. The project was therefore unlikely to impact traditional land use. The NEB acknowledged that a spill on Line 9 could impact traditional land use, but it was satisfied that "Enbridge will continue to safely operate Line 9, protect the environment, and maintain comprehensive emergency response plans" (*ibid.*).

24 The NEB imposed three conditions on the project related to Indigenous communities. Condition 6 required Enbridge to file an Environmental Protection Plan for the project including an Archaeological Resource Contingency plan. Condition 24 required Enbridge to prepare an Ongoing Engagement Report providing details on its discussions with Indigenous groups going forward. Condition 26 "directs Enbridge to include Aboriginal groups in Enbridge's continuing education program (including emergency management exercises), liaison program and consultation activities on emergency preparedness and response" (*ibid.*).

B. *Appeal to the Federal Court of Appeal, 2015 FCA 222, [2016] 3 F.C.R. 96*

25 The Chippewas of the Thames brought an appeal from the NEB's decision to the Federal Court of Appeal pursuant to s. 22(1) of the *NEB Act*. They [page1112] argued that the decision should be quashed, as the NEB was "without jurisdiction to issue exemptions and authorizations to [Enbridge] prior to the Crown fulfilling its duty to consult and accommodate" (para. 2).

26 The majority of the Federal Court of Appeal (Ryer and Webb JJ.A.) dismissed the appeal. It concluded that the NEB was not required to determine, as a condition of undertaking its mandate with respect to Enbridge's application, whether the Crown had a duty to consult under *Haida Nation v. British Columbia (Minister of Forests)*, *2004 SCC 73*, *[2004] 3 S.C.R. 511*, and, if so, whether the Crown had fulfilled this duty.

27 The majority also concluded that the NEB did not have a duty to consult the Chippewas of the Thames. It noted

that while the NEB is required to carry out its mandate in a manner that respects s. 35(1) of the *Constitution Act, 1982*, the NEB had adhered to this obligation by requiring Enbridge to consult extensively with the Chippewas of the Thames and other First Nations.

28 Rennie J.A. dissented. He would have allowed the appeal. In his view, the NEB was required to determine whether the duty to consult had been triggered and fulfilled. Given that the NEB is the final decision maker for s. 58 applications, it must have the power and duty to assess whether consultation is adequate, and to refuse a s. 58 application where consultation is inadequate.

IV. Analysis

A. *Crown Conduct Triggering the Duty to Consult*

29 In the companion case to this appeal, *Clyde River*, we outline the principles which apply when an independent regulatory agency such as the NEB is tasked with a decision that could impact Aboriginal or treaty rights. In these circumstances, the NEB's decision would itself be Crown conduct that [page1113] implicates the Crown's duty to consult (*Clyde River*, at para. 29). A decision by a regulatory tribunal would trigger the Crown's duty to consult when the Crown has knowledge, real or constructive, of a potential or recognized Aboriginal or treaty right that may be adversely affected by the tribunal's decision (*Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, *2010 SCC 43*, *[2010] 2 S.C.R. 650*, at para. 31; *Clyde River*, at para. 25).

30 We do not agree with the suggestion that because the Crown, in the form of a representative of the relevant federal department, was not a party before the NEB, there may have been no Crown conduct triggering the duty to consult (see C.A. reasons, at paras. 57 and 69-70).

31 As the respondents conceded before this Court, the NEB's contemplated decision on the project's approval would amount to Crown conduct. When the NEB grants an exemption under s. 58 of the *NEB Act* from the requirement for a certificate of public convenience and necessity, which otherwise would be subject to Governor in Council approval, the NEB effectively becomes the final decision maker on the entire application. As a statutory body with the delegated executive responsibility to make a decision that could adversely affect Aboriginal and treaty rights, the NEB acted on behalf of the Crown in approving Enbridge's application. Because the authorized work - the increase in flow capacity and change to heavy crude - could potentially adversely affect the Chippewas of the Thames' asserted Aboriginal and treaty rights, the Crown had an obligation to consult with respect to Enbridge's project application.

B. *Crown Consultation Can Be Conducted Through a Regulatory Process*

32 The Chippewas of the Thames argue that meaningful Crown consultation cannot be carried out [page1114] wholly through a regulatory process. We disagree. As we conclude in *Clyde River*, the Crown may rely on steps taken by an administrative body to fulfill its duty to consult (para. 30). The Crown may rely on a regulatory agency in this way so long as the agency possesses the statutory powers to do what the duty to consult requires in the particular circumstances (*Carrier Sekani*, at para. 60; *Clyde River*, at para. 30). However, if the agency's statutory powers are insufficient in the circumstances or if the agency does not provide adequate consultation and accommodation, the Crown must provide further avenues for meaningful consultation and accommodation in order to fulfill the duty prior to project approval. Otherwise, the regulatory decision made on the basis of inadequate consultation will not satisfy constitutional standards and should be quashed on judicial review or appeal.

33 The majority of the Federal Court of Appeal in this case expressed concern that a tribunal like the NEB might be charged with both carrying out consultation on behalf of the Crown and then adjudicating on the adequacy of these consultations (para. 66). A similar concern was expressed in *Quebec (Attorney General) v. Canada (National Energy Board)*, *[1994] 1 S.C.R. 159*, where, in a pre-*Haida* decision, the Court held that quasi-judicial tribunals like the NEB do not owe Indigenous peoples a heightened degree of procedural fairness. The Court reasoned that

imposition of such an obligation would risk compromising the independence of quasi-judicial bodies like the NEB (pp. 183-84).

34 In our view, these concerns are answered by recalling that while it is the *Crown* that owes a constitutional obligation to consult with potentially affected Indigenous peoples, the NEB is tasked with making legal decisions that comply with the Constitution. When the NEB is called on to assess the adequacy of Crown consultation, it may consider what consultative steps were provided, but [page1115] its obligation to remain a neutral arbitrator does not change. A tribunal is not compromised when it carries out the functions Parliament has assigned to it under its Act and issues decisions that conform to the law and the Constitution. Regulatory agencies often carry out different, overlapping functions without giving rise to a reasonable apprehension of bias. Indeed this may be necessary for agencies to operate effectively and according to their intended roles (*Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52, [2001] 2 S.C.R. 781, at para. 41). Furthermore, the Court contemplated this very possibility in *Carrier Sekani*, when it reasoned that tribunals may be empowered with both the power to carry out the Crown's duty to consult and the ability to adjudicate on the sufficiency of consultation (para. 58).

C. *The Role of a Regulatory Tribunal When the Crown Is Not a Party*

35 At the Federal Court of Appeal, the majority and dissenting judges disagreed over whether the NEB was empowered to decide whether the Crown's consultation was adequate in the absence of the Crown participating in the NEB process as a party. The disagreement stems from differing interpretations of *Carrier Sekani* and whether it overruled *Standing Buffalo Dakota First Nation v. Enbridge Pipelines Inc.*, 2009 FCA 308, [2010] 4 F.C.R. 500. In *Standing Buffalo*, the Federal Court of Appeal held that the NEB was not required to consider whether the Crown's duty to consult had been discharged before approving a s. 52 pipeline application when the Crown did not formally participate in the NEB's hearing process. The majority in this case held that the principle from *Standing Buffalo* applied here. Because the Crown (meaning, presumably, a relevant federal ministry or department) had not participated in the NEB's hearing process, the majority reasoned that the NEB was under no obligation to consider whether the Crown's duty to consult had been discharged before it approved Enbridge's s. 58 application (para. 59). In dissent, Rennie J.A. [page1116] reasoned that *Standing Buffalo* had been overtaken by this Court's decision in *Carrier Sekani*. Even in the absence of the Crown's participation as a party before the NEB, he held that the NEB was *required* to consider the Crown's duty to consult before approving Enbridge's application (para. 112).

36 We agree with Rennie J.A. that a regulatory tribunal's ability to assess the Crown's duty to consult does not depend on whether the government participated in the NEB's hearing process. If the Crown's duty to consult has been triggered, a decision maker may only proceed to approve a project if Crown consultation is adequate. The Crown's constitutional obligation does not disappear when the Crown acts to approve a project through a regulatory body such as the NEB. It must be discharged before the government proceeds with approval of a project that could adversely affect Aboriginal or treaty rights (*Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 257, at para. 78).

37 As the final decision maker on certain projects, the NEB is obliged to consider whether the Crown's consultation with respect to a project was adequate if the concern is raised before it (*Clyde River*, at para. 36). The responsibility to ensure the honour of the Crown is upheld remains with the Crown (*Clyde River*, at para. 22). However, administrative decision makers have both the obligation to decide necessary questions of law raised before them and an obligation to make their decisions within the contours of the state's constitutional obligations (*R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765, at para. 77).

[page1117]

D. *Scope of the Duty to Consult*

38 The degree of consultation required depends on the strength of the Aboriginal claim, and the seriousness of the potential impact on the right (*Haida*, at paras. 39 and 43-45).

39 Relying on *Carrier Sekani*, the Attorney General of Canada asserts that the duty to consult in this case "is limited to the [p]roject" and "does not arise in relation to claims for past infringement such as the construction of a pipeline under the Thames River in 1976" (R.F., vol. I, at para. 80).

40 While the Chippewas of the Thames identify new impacts associated with the s. 58 application that trigger the duty to consult and delimit its scope, they also note that "[t]he potential adverse impacts to [the asserted] Aboriginal rights and title resulting from approval of Enbridge's application for modifications to Line 9 are cumulative and serious and could even be catastrophic in the event of a pipeline spill" (A.F., at para. 57). Similarly, the Mississaugas of the New Credit First Nation, an intervener, argued in the hearing that, because s. 58 is frequently applied to discrete pipeline expansion and redevelopment projects, there are no high-level strategic discussions or consultations about the broader impact of pipelines on the First Nations in southern Ontario.

41 The duty to consult is not triggered by historical impacts. It is not the vehicle to address historical grievances. In *Carrier Sekani*, this Court explained that the Crown is required to consult on "adverse impacts flowing from the specific Crown proposal at issue - not [on] larger adverse impacts of the project of which it is a part. The subject of the consultation is the impact on the claimed rights of the *current* decision under consideration" (*Carrier Sekani*, at para. 53 (emphasis in original)). *Carrier Sekani* also clarified that "[a]n order compelling consultation is only appropriate where the proposed Crown conduct, immediate or prospective, may [page1118] adversely impact on established or claimed rights" (para. 54).

42 That said, it may be impossible to understand the seriousness of the impact of a project on s. 35 rights without considering the larger context (J. Woodward, *Native Law* (loose-leaf), vol. 1, at pp. 5-107 to 5-108). Cumulative effects of an ongoing project, and historical context, may therefore inform the scope of the duty to consult (*West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, *2011 BCCA 247*, *18 B.C.L.R. (5th) 234*, at para. 117). This is not "to attempt the redress of past wrongs. Rather, it is simply to recognize an existing state of affairs, and to address the consequences of what may result from" the project (*West Moberly*, at para. 119).

43 Neither the Federal Court of Appeal nor the NEB discussed the degree of consultation required. That said, and as we will explain below, even taking the strength of the Chippewas of the Thames' claim and the seriousness of the potential impact on the claimed rights at their highest, the consultation undertaken in this case was manifestly adequate.

E. *Was There Adequate Notice That the Crown Was Relying on the NEB's Process in This Case?*

44 As indicated in the companion case *Clyde River*, the Crown may rely on a regulatory body such as the NEB to fulfill the duty to consult. However, where the Crown intends to do so, it should be made clear to the affected Indigenous group that the Crown is relying on the regulatory body's processes to fulfill its duty (*Clyde River*, at para. 23). The Crown's constitutional obligation requires a meaningful consultation process that is carried out in good faith. Obviously, notice helps ensure the appropriate participation of Indigenous groups, because it makes clear to them that consultation [page1119] is being carried out through the regulatory body's processes (*ibid.*).

45 In this case, the Chippewas of the Thames say they did not receive explicit notice from the Crown that it intended to rely on the NEB's process to satisfy the duty. In September 2013, the Chippewas of the Thames wrote to the Prime Minister, the Minister of Natural Resources and the Minister of Aboriginal Affairs and Northern Development requesting a formal Crown consultation process in relation to the project. It was not until January 2014, after the NEB's hearing process was complete, that the Minister of Natural Resources responded to the Chippewas of the Thames on behalf of the Crown advising them that it relied on the NEB's process. At the hearing before this Court, the Chippewas of the Thames conceded that the Crown may have been entitled to rely on the

NEB to carry out the duty had they received the Minister's letter indicating the Crown's reliance prior to the NEB hearing (transcript, at pp. 34-35). However, having not received advance notice of the Crown's intention to do so, the Chippewas of the Thames maintain that consultation could not properly be carried out by the NEB.

46 In February 2013, the NEB contacted the Chippewas of the Thames and 18 other Indigenous groups to inform them of the project and of the NEB's role in relation to its approval. The Indigenous groups were given early notice of the hearing and were invited to participate in the NEB process. The Chippewas of the Thames accepted the invitation and appeared before the NEB as an intervener. In this role, they were aware that the NEB was the final decision maker under s. 58 of the *NEB Act*. Moreover, as is evidenced from their letter of September 2013, they understood that no other Crown entity was involved in the process for the purposes of carrying out consultation. In our view, the circumstances of this case made it sufficiently clear to the Chippewas of the Thames that the NEB process was intended to constitute Crown consultation and [page1120] accommodation. Notwithstanding the Crown's failure to provide timely notice, its consultation obligation was met.

F. *Was the Crown's Consultation Obligation Fulfilled?*

47 When deep consultation is required, the duty to consult may be satisfied if there is "the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision" (*Haida*, at para. 44). As well, this Court has recognized that the Crown may wish to "adopt dispute resolution procedures like mediation or administrative regimes with impartial decision-makers" (*ibid.*). This list is neither exhaustive nor mandatory. As we indicated above, neither the NEB nor the Federal Court of Appeal assessed the depth of consultation required in this case. However, the Attorney General of Canada submitted before this Court that the NEB's statutory powers were capable of satisfying the Crown's constitutional obligations in this case, accepting the rights as asserted by the Chippewas of the Thames and the potential adverse impact of a spill. With this, we agree.

48 As acknowledged in its reasons, the NEB, as a quasi-judicial decision maker, is required to carry out its responsibilities under s. 58 of the *NEB Act* in a manner consistent with s. 35 of the *Constitution Act, 1982*. In our view, this requires it to take the rights and interests of Indigenous groups into consideration before it makes a final decision that could impact them. Given the NEB's expertise in the supervision and approval of federally regulated pipeline projects, the NEB is particularly well positioned to assess the risks posed by such projects to Indigenous groups. Moreover, the NEB has broad [page1121] jurisdiction to impose conditions on proponents to mitigate those risks. Additionally, its ongoing regulatory role in the enforcement of safety measures permits it to oversee long-term compliance with such conditions. Therefore, we conclude that the NEB's statutory powers under s. 58 are capable of satisfying the Crown's duty to consult in this case.

49 However, a finding that the NEB's statutory authority allowed for it to satisfy the duty to consult is not determinative of whether the Crown's constitutional obligations were upheld in this case. The Chippewas of the Thames maintain that the process carried out by the NEB was not an adequate substitute for Crown consultation. In particular, the Chippewas of the Thames argue that the NEB's regulatory process failed to engage affected Indigenous groups in a "meaningful way in order for adverse impacts to be understood and minimized" (A.F., at para. 110). They allege that the NEB's process did not "apprehend or address the seriousness" of the potential infringement of their treaty rights and title, nor did it "afford a genuine opportunity for accommodation by the Crown" (A.F., at para. 113). By minimizing the rights of the affected Indigenous groups and relying upon the proponent to mitigate potential impacts, they allege the process undertaken by the NEB allowed for nothing more than "blowing off steam" (*ibid.*).

50 Enbridge, on the other hand, argues not only that the NEB was capable of satisfying the Crown's duty to consult but that, in fact, it did so here. In support of its position, Enbridge points to the Chippewas of the Thames' early notice of, and participation in, the NEB's formal hearing process as well as the NEB's provision of written reasons. Moreover, Enbridge submits that far from failing [page1122] to afford a genuine opportunity for accommodation by the Crown, the NEB's process provided "effective accommodation" through the imposition of conditions on Enbridge to mitigate the risk and effect of potential spills arising from the project (R.F., at para. 107).

51 In our view, the process undertaken by the NEB in this case was sufficient to satisfy the Crown's duty to consult. First, we find that the NEB provided the Chippewas of the Thames with an adequate opportunity to participate in the decision-making process. Second, we find that the NEB sufficiently assessed the potential impacts on the rights of Indigenous groups and found that the risk of negative consequences was minimal and could be mitigated. Third, we agree with Enbridge that, in order to mitigate potential risks to the rights of Indigenous groups, the NEB provided appropriate accommodation through the imposition of conditions on Enbridge.

52 First, unlike the Inuit in the companion case of *Clyde River*, the Chippewas of the Thames were given a sufficient opportunity to make submissions to the NEB as part of its independent decision-making process (consistent with *Haida*, at para. 44). Here, the NEB held an oral hearing. It provided early notice of the hearing process to affected Indigenous groups and sought their formal participation. As mentioned above, the Chippewas of the Thames participated as an intervener. The NEB provided the Chippewas of the Thames with participant funding which allowed them to prepare and tender evidence including an expertly prepared "preliminary" traditional land use study (C.A. reasons, at para. 14). Additionally, as an intervener, the Chippewas of the Thames were able to pose formal information requests to Enbridge, to which they received written responses, and to make closing oral submissions to the NEB.

[page1123]

53 Contrary to the submissions of the Chippewas of the Thames, we do not find that the NEB minimized or failed to apprehend the importance of their asserted Aboriginal and treaty rights. Before the NEB, the Chippewas of the Thames asserted rights that had the potential to be impacted by the project: (a) Aboriginal harvesting and hunting rights; (b) the right to access and preserve sacred sites; (c) Aboriginal title to the bed of the Thames River and its related airspace or, in the alternative, an Aboriginal right to use the water, resources and airspace in the bed of the Thames River; and (d) the treaty right to the exclusive use of their reserve lands. In its written reasons, the NEB expressly recognized these rights. Moreover, in light of the rights asserted, the NEB went on to consider whether affected Indigenous groups had received adequate information regarding the project and a proper opportunity to express their concerns to Enbridge. It noted that the project was to occur within Enbridge's existing right of way on previously disturbed land. No additional Crown land was required. Given the scope of the project and its location, the NEB was satisfied that all Indigenous groups had been adequately consulted.

54 Second, the NEB considered the potential for negative impacts on the rights and interests of the Chippewas of the Thames. It identified potential consequences that could arise from either the construction required for the completion of the project or the increased risk of spill brought about by the continued operation of Line 9.

55 The NEB found that any potential negative impacts on the rights and interests of the Chippewas of the Thames from the modification of Line 9 were minimal and could be reasonably mitigated. The NEB found that it was unlikely that the completion of the project would have any impact on the traditional land use rights of Indigenous groups. Given the location of the project and its limited scope, as well as the conditions that the NEB imposed on Enbridge, the NEB was satisfied that the risk of [page1124] negative impact through the completion of the project was negligible.

56 Similarly, the NEB assessed the increased risk of a spill or leak from Line 9 as a result of the project. It recognized the potential negative impacts that a spill could have on traditional land use, but found that the risk was low and could be adequately mitigated. Given Enbridge's commitment to safety and the conditions imposed upon it by the NEB, the NEB was confident that Line 9 would be operated in a safe manner throughout the term of the project. The risk to the rights asserted by the Chippewas of the Thames resulting from a potential spill or leak was therefore minimal.

57 Third, we do not agree with the Chippewas of the Thames that the NEB's process failed to provide an opportunity for adequate accommodation. Having enumerated the rights asserted by the Chippewas of the Thames and other Indigenous groups, the adequacy of information provided to the Indigenous groups from Enbridge in light

of those rights, and the risks to those rights posed by the construction and ongoing operation of Line 9, the NEB imposed a number of accommodation measures that were designed to minimize risks and respond directly to the concerns posed by affected Indigenous groups. To facilitate ongoing communication between Enbridge and affected Indigenous groups regarding the project, the NEB imposed Condition 24. This accommodation measure required Enbridge to continue to consult with Indigenous groups and produce Ongoing Engagement Reports which were to be provided to the NEB. Similarly, Condition 29 required Enbridge to file a plan for continued engagement with persons and groups during the operation of Line 9. Therefore, we find that the NEB carried out a meaningful process of consultation including the imposition of appropriate accommodation measures where necessary.

[page1125]

58 Nonetheless, the Chippewas of the Thames argue that any putative consultation that occurred in this case was inadequate as the NEB "focused on balancing multiple interests" which resulted in the Chippewas of the Thames' "Aboriginal and treaty rights [being] weighed by the Board against a number of economic and public interest factors" (A.F., at paras. 95 and 104). This, the Chippewas of the Thames assert, is an inadequate means by which to assess Aboriginal and treaty rights that are constitutionally guaranteed by s. 35 of the *Constitution Act*, *1982*.

59 In *Carrier Sekani*, this Court recognized that "[t]he constitutional dimension of the duty to consult gives rise to a special public interest" which surpasses economic concerns (para. 70). A decision to authorize a project cannot be in the public interest if the Crown's duty to consult has not been met (*Clyde River*, at para. 40; *Carrier Sekani*, at para. 70). Nevertheless, this does not mean that the interests of Indigenous groups cannot be balanced with other interests at the accommodation stage. Indeed, it is for this reason that the duty to consult does not provide Indigenous groups with a "veto" over final Crown decisions (*Haida*, at para. 48). Rather, proper accommodation "stress[es] the need to balance competing societal interests with Aboriginal and treaty rights" (*Haida*, at para. 50).

60 Here, the NEB recognized that the impact of the project on the rights and interests of the Chippewas of the Thames was likely to be minimal. Nonetheless, it imposed conditions on Enbridge to accommodate the interests of the Chippewas of the Thames and to ensure ongoing consultation between the proponent and Indigenous groups. The Chippewas of the Thames are not entitled to a one-sided process, but rather, a cooperative one with a view towards reconciliation. Balance and compromise are inherent in that process (*Haida*, at para. 50).

[page1126]

G. *Were the NEB's Reasons Sufficient?*

61 Finally, in the hearing before us, the Chippewas of the Thames raised the issue of the adequacy of the NEB's reasons regarding consultation with Indigenous groups. The Chippewas of the Thames asserted that the NEB's process could not have constituted consultation in part because of the NEB's failure to engage in a *Haida*-style analysis. In particular, the NEB did not identify the strength of the asserted Aboriginal and treaty rights, nor did it identify the depth of consultation required in relation to each Indigenous group. As a consequence, the Chippewas of the Thames submit that the NEB could not have fulfilled the Crown's duty to consult.

62 In *Haida*, this Court found that where deep consultation is required, written reasons will often be necessary to permit Indigenous groups to determine whether their concerns were adequately considered and addressed (para. 44). In *Clyde River*, we note that written reasons foster reconciliation (para. 41). Where Aboriginal and treaty rights are asserted, the provision of reasons denotes respect (*Kainaiwa/Blood Tribe v. Alberta (Energy)*, *2017 ABQB 107*, at para. 117 (CanLII)) and encourages proper decision making (*Baker v. Canada (Minister of Citizenship and Immigration)*, *[1999] 2 S.C.R. 817*, at para. 39).

63 We agree with the Chippewas of the Thames that this case required the NEB to provide written reasons. Additionally, as we recognized in the companion case *Clyde River*, where affected Indigenous peoples have squarely raised concerns about Crown consultation with the NEB, the NEB must usually provide written reasons (*Clyde River*, at para. 41). However, this requirement does not necessitate a formulaic "*Haida* analysis" in all

circumstances (para. 42). Instead, where deep consultation is required and the issue of Crown consultation is raised with the NEB, the NEB will be obliged to "explain how it considered and addressed" Indigenous concerns (*ibid.*). What is necessary is an indication that [page1127] the NEB took the asserted Aboriginal and treaty rights into consideration and accommodated them where appropriate.

64 In our view, the NEB's written reasons are sufficient to satisfy the Crown's obligation. It is notable that, unlike the NEB's reasons in the companion case *Clyde River*, the discussion of Aboriginal consultation in this case was not subsumed within an environmental assessment. The NEB reviewed the written and oral evidence of numerous Indigenous interveners and identified, in writing, the rights and interests at stake. It assessed the risks that the project posed to those rights and interests and concluded that the risks were minimal. Nonetheless, it provided written and binding conditions of accommodation to adequately address the potential for negative impacts on the asserted rights from the approval and completion of the project.

65 For these reasons, we reject the Chippewas of the Thames' assertion that the NEB's reasons were insufficient to satisfy the Crown's duty to consult.

V. Conclusion

66 We are of the view that the Crown's duty to consult was met. Accordingly, we would dismiss this appeal with costs to Enbridge.

Appeal dismissed with costs to Enbridge Pipelines Inc.

Solicitors:

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Solicitors for the respondent Enbridge Pipelines Inc.: Dentons Canada, Calgary; Enbridge Law Department, Calgary.

[page1128]

Solicitor for the respondent the National Energy Board: National Energy Board, Calgary.

Solicitor for the respondent the Attorney General of Canada: Attorney General of Canada, Toronto.

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

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

Solicitors for the intervener the Nunavut Wildlife Management Board: Supreme Advocacy, Ottawa.

Solicitors for the intervener Suncor Energy Marketing Inc.: Osler, Hoskin & Harcourt, Calgary; Suncor Law Department, Calgary.

Solicitor for the intervener the Mohawk Council of Kahnawà: ke: Mohawk Council of Kahnawake Legal Services, Mohawk Territory of Kahnawà: ke, Quebec.

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Solicitors for the intervener the Chiefs of Ontario: Gowling WLG (Canada), Ottawa.

End of Document

Tab 10

Clyde River (Hamlet) v. Petroleum Geo-Services Inc., [2017] 1 S.C.R. 1069

Supreme Court Reports

Supreme Court of Canada

Present: McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ.

Heard: November 30, 2016;

Judgment: July 26, 2017.*

File No.: 36692.

[2017] 1 S.C.R. 1069 | *[2017] 1 R.C.S. 1069* | *[2017] S.C.J. No. 40* | *[2017] A.C.S. no 40* | *2017 SCC 40*

Hamlet of Clyde River, Nammautaq Hunters & Trappers Organization - Clyde River and Jerry Natanine Appellants v. Petroleum Geo-Services Inc. (PGS), Multi Klient Invest As (MKI), TGS-NOPEC Geophysical Company ASA (TGS) and Attorney General of Canada Respondents, and Attorney General of Ontario, Attorney General of Saskatchewan, Nunavut Tunngavik Incorporated, Makivik Corporation, Nunavut Wildlife Management Board, Inuvialuit Regional Corporation and Chiefs of Ontario Interveners

(53 paras.)

Appeal From:

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Case Summary

Subsequent History:

* The judgment was amended on October 30, 2017, by adding the footnotes that now appear at paras. 31 and 47 of the English and French versions of the reasons.

Catchwords:

Constitutional law — Inuit — Treaty rights — Crown — Duty to consult — Decision by federal independent regulatory agency which could impact upon treaty rights — Offshore seismic testing for oil and gas resources potentially affecting Inuit treaty rights — National Energy Board authorizing project — Whether Board's approval process triggered Crown's duty to consult - Whether [page1070] Crown can rely on Board's process to fulfill its duty — Role of Board in considering Crown consultation before approval of project — Whether consultation was adequate in this case — Canada Oil and Gas Operations Act, R.S.C. 1985, c. O-7, s. 5(1)(b).

Summary:

The National Energy Board (NEB), a federal administrative tribunal and regulatory agency, is the final decision maker for issuing authorizations for activities such as exploration and drilling for the production of oil and gas in

certain designated areas. The proponents applied to the NEB to conduct offshore seismic testing for oil and gas in Nunavut. The proposed testing could negatively affect the treaty rights of the Inuit of Clyde River, who opposed the seismic testing, alleging that the duty to consult had not been fulfilled in relation to it. The NEB granted the requested authorization. It concluded that the proponents made sufficient efforts to consult with Aboriginal groups and that Aboriginal groups had an adequate opportunity to participate in the NEB's process. The NEB also concluded that the testing was unlikely to cause significant adverse environmental effects. Clyde River applied for judicial review of the NEB's decision. The Federal Court of Appeal found that while the duty to consult had been triggered, the Crown was entitled to rely on the NEB to undertake such consultation, and the Crown's duty to consult had been satisfied in this case by the NEB's process.

Held: The appeal should be allowed and the NEB's authorization quashed.

The NEB's approval process, in this case, triggered the duty to consult. Crown conduct which would trigger the duty to consult is not restricted to the exercise by or on behalf of the Crown of statutory powers or of the royal prerogative, nor is it limited to decisions that have an immediate impact on lands and resources. The NEB is not, strictly speaking, "the Crown" or an agent of the Crown. However, it acts on behalf of the Crown when making a final decision on a project application. In this context, the NEB is the vehicle through which the Crown acts. It therefore does not matter whether the final decision maker is Cabinet or the NEB. In either case, the decision constitutes Crown action that may trigger the duty to consult. [page1071] The substance of the duty does not change when a regulatory agency holds final decision-making authority.

It is open to legislatures to empower regulatory bodies to play a role in fulfilling the Crown's duty to consult. While the Crown always holds ultimate responsibility for ensuring consultation is adequate, it may rely on steps undertaken by a regulatory agency to fulfill its duty to consult. Where the regulatory process being relied upon does not achieve adequate consultation or accommodation, the Crown must take further measures. Also, where the Crown relies on the processes of a regulatory body to fulfill its duty in whole or in part, it should be made clear to affected Indigenous groups that the Crown is so relying. The NEB has the procedural powers necessary to implement consultation, and the remedial powers to, where necessary, accommodate affected Aboriginal claims, or Aboriginal and treaty rights. Its process can therefore be relied on by the Crown to completely or partially fulfill the Crown's duty to consult.

The NEB has broad powers to hear and determine all relevant matters of fact and law, and its decisions must conform to s. 35(1) the *Constitution Act, 1982*. It follows that the NEB can determine whether the Crown's duty has been fulfilled. The public interest and the duty to consult do not operate in conflict here. The duty to consult, being a constitutional imperative, gives rise to a special public interest that supersedes other concerns typically considered by tribunals tasked with assessing the public interest. A project authorization that breaches the constitutionally protected rights of Indigenous peoples cannot serve the public interest. When affected Indigenous groups have squarely raised concerns about Crown consultation with the NEB, the NEB must usually address those concerns in reasons. The degree of consideration that is appropriate will depend on the circumstances of each case. Above all, any decision affecting Aboriginal or treaty rights made on the basis of inadequate consultation will not be in compliance with the duty to consult. Where the Crown's duty to consult remains unfulfilled, the NEB must withhold project [page1072] approval. Where the NEB fails to do so, its approval decision should be quashed on judicial review.

While the Crown may rely on the NEB's process to fulfill its duty to consult, the consultation and accommodation efforts in this case were inadequate and fell short in several respects. First, the inquiry was misdirected. The consultative inquiry is not properly into environmental effects *per se*. Rather, it inquires into the impact on the right itself. No consideration was given in the NEB's environmental assessment to the source of the Inuit's treaty rights, nor to the impact of the proposed testing on those rights. Second, although the Crown relies on the processes of the NEB as fulfilling its duty to consult, that was not made clear to the Inuit. Finally, and most importantly, the process provided by the NEB did not fulfill the Crown's duty to conduct the deep consultation that was required here. Limited opportunities for participation and consultation were made available. There were no oral hearings and there was no participant funding. While these procedural safeguards are not always necessary, their absence in this case significantly impaired the quality of consultation. As well, the proponents eventually responded to questions raised during the environmental assessment process in the form of a practically inaccessible document months after the questions were asked. There was no mutual understanding

on the core issues -- the potential impact on treaty rights, and possible accommodations. As well, the changes made to the project as a result of consultation were insignificant concessions in light of the potential impairment of the Inuit's treaty rights. Therefore, the Crown breached its duty to consult in respect of the proposed testing.

Cases Cited

Applied: *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650; **distinguished:** *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550; **referred to:** *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2017 SCC 41, [2017] 1 S.C.R. 1099; *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511; *R. [page1073] v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483; *Ross River Dena Council v. Yukon*, 2012 YKCA 14, 358 D.L.R. (4th) 100; *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103; *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2015 FCA 222, [2016] 3 F.C.R. 96; *McAteer v. Canada (Attorney General)*, 2014 ONCA 578, 121 O.R. (3d) 1; *Town Investments Ltd. v. Department of the Environment*, [1978] A.C. 359; *R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765; *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159; *Standing Buffalo Dakota First Nation v. Enbridge Pipelines Inc.*, 2009 FCA 308, [2010] 4 F.C.R. 500; *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 257; *Kainaiwa/Blood Tribe v. Alberta (Energy)*, 2017 ABQB 107; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *Qikiqtani Inuit Assn. v. Canada (Minister of Natural Resources)*, 2010 NUCJ 12, 54 C.E.L.R. (3d) 263.

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History and Disposition:

APPEAL from a judgment of the Federal Court of Appeal (Nadon, Dawson and Boivin JJ.A.), *2015 FCA 179*, *[2016] 3 F.C.R. 167*, *474 N.R. 96*, *94 C.E.L.R. (3d) 1*, *[2015] F.C.J. No. 991* (QL), *2015 CarswellNat 3750* (WL Can.), affirming a decision of the National Energy Board, No. 5554587, June 26, 2014. Appeal allowed.

Counsel

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Sandy Carpenter and *Ian Breneman*, for the respondents Petroleum Geo-Services Inc. (PGS), Multi Klient Invest As (MKI) and TGS-NOPEC Geophysical Company ASA (TGS).

Mark R. Kindrachuk, *Q.C.*, and *Peter Southey*, for the respondent the Attorney General of Canada.

Manizeh Fancy and *Richard Ogden*, for the intervener the Attorney General of Ontario.

Richard James Fyfe, for the intervener the Attorney General of Saskatchewan.

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Written submissions only by *David Schulze* and *Nicholas Dodd*, for the intervener the Makivik Corporation.

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Kate Darling, *Lorraine Land*, *Matt McPherson* and *Krista Nerland*, for the intervener the Inuvialuit Regional Corporation.

[page1075]

Maxime Faille, *Jaimie Lickers* and *Guy Régimbald*, for the intervener the Chiefs of Ontario.

The judgment of the Court was delivered by

KARAKATSANIS AND BROWN JJ.

I. Introduction

1 This Court has on several occasions affirmed the role of the duty to consult in fostering reconciliation between Canada's Indigenous peoples and the Crown. In this appeal, and its companion *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, *2017 SCC 41*, *[2017] 1 S.C.R. 1099*, we consider the Crown's duty to consult with Indigenous peoples before an independent regulatory agency authorizes a project which could impact upon their rights. The Court's jurisprudence shows that the substance of the duty does not change when a regulatory agency holds final decision-making authority in respect of a project. While the Crown always owes the duty to consult, regulatory processes can partially or completely fulfill this duty.

2 The Hamlet of Clyde River lies on the northeast coast of Baffin Island, in Nunavut. The community is situated on a flood plain between Patricia Bay and the Arctic Cordillera. Most residents of Clyde River are Inuit, who rely on marine mammals for food and for their economic, cultural, and spiritual well-being. They have harvested marine mammals for generations. The bowhead whale, the narwhal, the ringed, bearded, and harp seals, and the polar bear are of particular importance to them. Under the *Nunavut Land Claims Agreement* (1993), the Inuit of Clyde River ceded all Aboriginal claims, rights, title, and interests in the Nunavut Settlement Area, including Clyde River, in exchange for defined treaty rights, including the right to harvest marine mammals.

[page1076]

3 In 2011, the respondents TGS-NOPEC Geophysical Company ASA, Multi Klient Invest As and Petroleum Geo-Services Inc. (the proponents) applied to the National Energy Board (NEB) to conduct offshore seismic testing for oil and gas resources. It is undisputed that this testing could negatively affect the harvesting rights of the Inuit of Clyde River. After a period of consultation among the project proponents, the NEB, and affected Inuit communities, the NEB granted the requested authorization.

4 While the Crown may rely on the NEB's process to fulfill its duty to consult, considering the importance of the established treaty rights at stake and the potential impact of the seismic testing on those rights, we agree with the appellants that the consultation and accommodation efforts in this case were inadequate. For the reasons set out below, we would therefore allow the appeal and quash the NEB's authorization.

II. Background

A. *Legislative Framework*

5 The *Canada Oil and Gas Operations Act*, R.S.C. 1985, c. O-7 (*COGOA*), aims, in part, to promote responsible exploration for and exploitation of oil and gas resources (s. 2.1). It applies to exploration and drilling for the production, conservation, processing, and transportation of oil and gas in certain designated areas, including Nunavut (s. 3). Engaging in such activities is prohibited without an operating licence under s. 5(1)(a) or an authorization under s. 5(1)(b).

6 The NEB is a federal administrative tribunal and regulatory agency established by the *National Energy Board Act*, R.S.C. 1985, c. N-7 (*NEB Act*). In this case, it is the final decision maker for issuing an authorization under s. 5(1)(b) of *COGOA*. The NEB has broad discretion to impose requirements for authorization under s. 5(4), and can ask parties to [page1077] provide any information it deems necessary to comply with its statutory mandate (s. 5.31).

B. *The Seismic Testing Authorization*

7 In May 2011, the proponents applied to the NEB for an authorization under s. 5(1)(b) of *COGOA* to conduct seismic testing in Baffin Bay and Davis Strait, adjacent to the area where the Inuit have treaty rights to harvest marine mammals. The proposed testing contemplated towing airguns by ship through a project area. These airguns

produce underwater sound waves, which are intended to find and measure underwater geological resources such as petroleum. The testing was to run from July through November, for five successive years.

8 The NEB launched an environmental assessment of the project.[1]

9 Clyde River opposed the seismic testing, and filed a petition against it with the NEB in May 2011. In 2012, the proponents responded to requests for further information from the NEB. They held meetings in communities that would be affected by the testing, including Clyde River.

10 In April and May 2013, the NEB held meetings in Pond Inlet, Clyde River, Qikiqtarjuaq, and Iqaluit to collect comments from the public on the project. Representatives of the proponents attended these meetings. Community members asked basic questions about the effects of the survey on marine mammals in the region, but the proponents were unable to answer many of them. For example, in [page1078] Pond Inlet, a community member asked the proponents which marine mammals would be affected by the survey. The proponents answered: "That's a very difficult question to answer because we're not the core experts" (A.R., vol. III, at p. 541). Similarly, in Clyde River, a community member asked how the testing would affect marine mammals. The proponents answered:

> ... a lot of work has been done with seismic surveys in other places and a lot of that information is used in doing the environmental assessment, the document that has been submitted by the companies to the National Energy Board for the approval process. It has a section on, you know, marine mammals and the effects on marine mammals.

(A.R., vol. III, at p. 651)

11 These are but two examples of multiple instances of the proponents' failure to offer substantive answers to basic questions about the impacts of the proposed seismic testing. That failure led the NEB, in May 2013, to suspend its assessment. In August 2013, the proponents filed a 3,926-page document with the NEB, purporting to answer those questions. This document was posted on the NEB website and delivered to the hamlet offices. The vast majority of this document was not translated into Inuktitut. No further efforts were made to determine whether this document was accessible to the communities, and whether their questions were answered. After this document was filed, the NEB resumed its assessment.

12 Throughout the environmental assessment process, Clyde River and various Inuit organizations filed letters of comment with the NEB, noting the inadequacy of consultation and expressing concerns about the testing.

[page1079]

13 In April 2014, organizations representing the appellants and Inuit in other communities wrote to the Minister of Aboriginal Affairs and Northern Development and to the NEB, stating their view that the duty to consult had not been fulfilled in relation to the testing. This could be remedied, they said, by completing a strategic environmental assessment[2] before authorizing any seismic testing. In May, the Nunavut Marine Council also wrote to the NEB, with a copy to the Minister, asking that any regulatory decisions affecting the Nunavut Settlement Area's marine environment be postponed until completion of the strategic environmental assessment. This assessment was necessary, in the Council's view, to understand the baseline conditions in the marine environment and to ensure that seismic tests are properly regulated.

14 In June 2014, the Minister responded to both letters, "disagree[ing] with the view that seismic exploration of the region should be put on hold until the completion of a strategic environmental assessment" (A.R., vol. IV, at p. 967). A Geophysical Operations Authorization letter from the NEB soon followed, advising that the environmental assessment report was completed and that the authorization had been granted.

15 In its environmental assessment report, the NEB discussed consultation with, and the participation of, Aboriginal groups in the NEB process. It concluded that the proponents "made sufficient efforts to consult with potentially-

impacted Aboriginal groups and to address concerns raised" and that [page1080] "Aboriginal groups had an adequate opportunity to participate in the NEB's [environmental assessment] process" (A.R., vol. I, at p. 24). It also determined that the testing could change the migration routes of marine mammals and increase their risk of mortality, thereby affecting traditional harvesting of marine mammals including bowhead whales and narwhals, which are both identified as being of "Special Concern" by the Committee on the Status of Endangered Wildlife in Canada (COSEWIC). The NEB concluded, however, that the testing was unlikely to cause significant adverse environmental effects given the mitigation measures that the proponents would implement.

C. *The Judicial Review Proceedings*

16 Clyde River applied to the Federal Court of Appeal for judicial review of the NEB's decision to grant the authorization. Dawson J.A. (Nadon and Boivin JJ.A. concurring) found that the duty to consult had been triggered because the NEB could not grant the authorization without the minister's approval (or waiver of the requirement for approval) of a benefits plan for the project, pursuant to s. 5.2(2) of *COGOA* (*2015 FCA 179*, *[2016] 3 F.C.R. 167*). The Federal Court of Appeal characterized the degree of consultation owed in the circumstances as deep, as that concept was discussed in *Haida Nation v. British Columbia (Minister of Forests)*, *2004 SCC 73*, *[2004] 3 S.C.R. 511*, at para. 44, and found that the Crown was entitled to rely on the NEB to undertake such consultation.

17 The Court of Appeal also concluded that the Crown's duty to consult had been satisfied by the nature and scope of the NEB's processes. The conditions upon which the authorization had been granted showed that the interests of the Inuit had been sufficiently considered and that further consultation would be expected to occur were the proposed testing to be followed by further development [page1081] activities. In the circumstances, a strategic environmental assessment report was not required.

III. Analysis

18 The following issues arise in this appeal:

1. Can an NEB approval process trigger the duty to consult?
2. Can the Crown rely on the NEB's process to fulfill the duty to consult?
3. What is the NEB's role in considering Crown consultation before approval?
4. Was the consultation adequate in this case?

A. *The Duty to Consult - General Principles*

19 The duty to consult seeks to protect Aboriginal and treaty rights while furthering reconciliation between Indigenous peoples and the Crown (*Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, *2010 SCC 43*, *[2010] 2 S.C.R. 650*, at para. 34). It has both a constitutional and a legal dimension (*R. v. Kapp*, *2008 SCC 41*, *[2008] 2 S.C.R. 483*, at para. 6; *Carrier Sekani*, at para. 34). Its constitutional dimension is grounded in the honour of the Crown (*Kapp*, at para. 6). This principle is in turn enshrined in s. 35(1) of the *Constitution Act, 1982*, which recognizes and affirms existing Aboriginal and treaty rights (*Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, *2004 SCC 74*, *[2004] 3 S.C.R. 550*, at para. 24). And, as a legal obligation, it is based in the Crown's assumption of sovereignty over lands and resources formerly held by Indigenous peoples (*Haida*, at para. 53).

[page1082]

20 The content of the duty, once triggered, falls along a spectrum ranging from limited to deep consultation, depending upon the strength of the Aboriginal claim, and the seriousness of the potential impact on the right. Each case must be considered individually. Flexibility is required, as the depth of consultation required may change as the process advances and new information comes to light (*Haida*, at paras. 39 and 43-45).

21 This Court has affirmed that it is open to legislatures to empower regulatory bodies to play a role in fulfilling the Crown's duty to consult (*Carrier Sekani*, at para. 56; *Haida*, at para. 51). The appellants argue that a regulatory process alone cannot fulfill the duty to consult because at least some direct engagement between "the Crown" and the affected Indigenous community is necessary.

22 In our view, while the Crown may rely on steps undertaken by a regulatory agency to fulfill its duty to consult in whole or in part and, where appropriate, accommodate, the Crown always holds ultimate responsibility for ensuring consultation is adequate. Practically speaking, this does not mean that a minister of the Crown must give explicit consideration in every case to whether the duty to consult has been satisfied, or must directly participate in the process of consultation. Where the regulatory process being relied upon does not achieve adequate consultation or accommodation, the Crown must take further measures to meet its duty. This might entail filling any gaps on a case-by-case basis or more systemically through legislative or regulatory amendments (see e.g. *Ross River Dena Council v. Yukon*, 2012 YKCA 14, 358 D.L.R. (4th) 100). Or, it might require making submissions to the regulatory body, requesting reconsideration of a decision, or seeking a postponement in order to carry out further consultation in a separate process before the decision is rendered. And, if an affected Indigenous group is (like the Inuit of Nunavut) a party to a modern treaty and perceives the process to be deficient, it should, as it did here, request such direct Crown engagement in a timely manner (since parties to treaties [page1083] are obliged to act diligently to advance their respective interests) (*Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103, at para. 12).

23 Further, because the honour of the Crown requires a meaningful, good faith consultation process (*Haida*, at para. 41), where the Crown relies on the processes of a regulatory body to fulfill its duty in whole or in part, it should be made clear to affected Indigenous groups that the Crown is so relying. Guidance about the form of the consultation process should be provided so that Indigenous peoples know how consultation will be carried out to allow for their effective participation and, if necessary, to permit them to raise concerns with the proposed form of the consultations in a timely manner.

24 Above all, and irrespective of the process by which consultation is undertaken, any decision affecting Aboriginal or treaty rights made on the basis of inadequate consultation will not be in compliance with the duty to consult, which is a constitutional imperative. Where challenged, it should be quashed on judicial review. That said, judicial review is no substitute for adequate consultation. True reconciliation is rarely, if ever, achieved in courtrooms. Judicial remedies may seek to undo past infringements of Aboriginal and treaty rights, but adequate Crown consultation *before* project approval is always preferable to after-the-fact judicial remonstration following an adversarial process. Consultation is, after all, "[c]oncerned with an ethic of ongoing relationships" (*Carrier Sekani*, at para. 38, quoting D. G. Newman, *The Duty to Consult: New Relationships with Aboriginal Peoples* (2009), at p. 21). As the Court noted in *Haida*, "[w]hile Aboriginal claims can be and are pursued through litigation, negotiation is a preferable way of reconciling state and Aboriginal [page1084] interests" (para. 14). No one benefits - not project proponents, not Indigenous peoples, and not non-Indigenous members of affected communities - when projects are prematurely approved only to be subjected to litigation.

B. *Can an NEB Approval Process Trigger the Duty to Consult?*

25 The duty to consult is triggered when the Crown has actual or constructive knowledge of a potential Aboriginal claim or Aboriginal or treaty rights that might be adversely affected by Crown conduct (*Haida*, at para. 35; *Carrier Sekani*, at para. 31). Crown conduct which would trigger the duty is not restricted to the exercise by or on behalf of the Crown of statutory powers or of the royal prerogative, nor is it limited to decisions that have an immediate impact on lands and resources. The concern is for adverse impacts, however made, upon Aboriginal and treaty rights and, indeed, a goal of consultation is to identify, minimize and address adverse impacts where possible (*Carrier Sekani*, at paras. 45-46).

26 In this appeal, all parties agreed that the Crown's duty to consult was triggered, although agreement on *just*

what Crown conduct triggered the duty has proven elusive. The Federal Court of Appeal saw the trigger in *COGOA*'s requirement for ministerial approval (or waiver of the requirement for approval) of a benefits plan for the testing. In the companion appeal of *Chippewas of the Thames*, the majority of the Federal Court of Appeal concluded that it was not necessary to decide whether the duty to consult was triggered since the Crown was not a party before the NEB, but suggested the only Crown action involved might have been the 1959 enactment [page1085] of the *NEB Act*[3] (*Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2015 FCA 222, [2016] 3 F.C.R. 96). In short, the Federal Court of Appeal in both cases was of the view that only action by a minister of the Crown or a government department, or a Crown corporation, can constitute Crown conduct triggering the duty to consult. And, before this Court in *Chippewas of the Thames*, the Attorney General of Canada argued that the duty was triggered by the NEB's approval of the pipeline project, because it was state action with the potential to affect Aboriginal or treaty rights.

27 Contrary to the Federal Court of Appeal's conclusions on this point, we agree that the NEB's approval process, in this case, as in *Chippewas of the Thames*, triggered the duty to consult.

28 It bears reiterating that the duty to consult is owed by the Crown. In one sense, the "Crown" refers to the personification in Her Majesty of the Canadian state in exercising the prerogatives and privileges reserved to it. The Crown also, however, denotes the sovereign in the exercise of her formal legislative role (in assenting, refusing assent to, or reserving legislative or parliamentary bills), and as the head of executive authority (*McAteer v. Canada (Attorney General)*, 2014 ONCA 578, 121 O.R. (3d) 1, at para. 51; P. W. Hogg, P. J. Monahan and W. K. Wright, *Liability of the Crown* (4th ed. 2011), at pp. 11-12; but see *Carrier Sekani*, at para. 44). For this reason, the term "Crown" is commonly used to symbolize and denote executive power. This was described by Lord Simon of Glaisdale in *Town Investments Ltd. v. Department of the Environment*, [1978] A.C. 359 (H.L.), at p. 397:

[page1086]

> The crown as an object is a piece of jewelled headgear under guard at the Tower of London. But it symbolises the powers of government which were formerly wielded by the wearer of the crown; so that by the 13th century crimes were committed not only against the king's peace but also against "his crown and dignity": *Pollock and Maitland, History of English Law*, 2nd ed. (1898), vol. I, p. 525. The term "the Crown" is therefore used in constitutional law to denote the collection of such of those powers as remain extant (the royal prerogative), together with such other powers as have been expressly conferred by statute on "the Crown."

29 By this understanding, the NEB is not, strictly speaking, "the Crown". Nor is it, strictly speaking, an agent of the Crown, since - as the NEB operates independently of the Crown's ministers - no relationship of control exists between them (Hogg, Monahan and Wright, at p. 465). As a statutory body holding responsibility under s. 5(1)(b) of *COGOA*, however, the NEB acts on behalf of the Crown when making a final decision on a project application. Put plainly, once it is accepted that a regulatory agency exists to exercise executive power as authorized by legislatures, any distinction between its actions and Crown action quickly falls away. In this context, the NEB is the vehicle through which the Crown acts. Hence this Court's interchangeable references in *Carrier Sekani* to "government action" and "Crown conduct" (paras. 42-44). It therefore does not matter whether the final decision maker on a resource project is Cabinet or the NEB. In either case, the decision constitutes Crown action that may trigger the duty to consult. As Rennie J.A. said in dissent at the Federal Court of Appeal in *Chippewas of the Thames*, "[t]he duty, like the honour of the Crown, does not evaporate simply because a final decision has been made by a tribunal established by Parliament, as opposed to Cabinet" (para. 105). The action of the NEB, taken in furtherance of its statutory powers under s. 5(1)(b) of *COGOA* to make final [page1087] decisions respecting such testing as was proposed here, clearly constitutes Crown action.

C. *Can the Crown Rely on the NEB's Process to Fulfill the Duty to Consult?*

30 As we have said, while ultimate responsibility for ensuring the adequacy of consultation remains with the Crown, the Crown may rely on steps undertaken by a regulatory agency to fulfill the duty to consult. Whether, however, the

Crown is capable of doing so, in whole or in part, depends on whether the agency's statutory duties and powers enable it to do what the duty requires in the particular circumstances (*Carrier Sekani*, at paras. 55 and 60). In the NEB's case, therefore, the question is whether the NEB is able, to the extent it is being relied on, to provide an appropriate level of consultation and, where necessary, accommodation to the Inuit of Clyde River in respect of the proposed testing.

31 We note that the NEB and *COGOA* each predate judicial recognition of the duty to consult. However, given the flexible nature of the duty, a process that was originally designed for a different purpose may be relied on by the Crown so long as it affords an appropriate level of consultation to the affected Indigenous group (*Beckman*, at para. 39; *Taku River*, at para. 22). Under *COGOA*, the NEB has a significant array of powers that permit extensive consultation. It may conduct hearings, and has broad discretion to make orders or elicit information in furtherance of *COGOA* and the public interest (ss. 5.331, 5.31(1) and 5.32). It can also require [page1088] studies to be undertaken and impose preconditions to approval (s. 5(4)). In the case of designated projects, it can also (as here) conduct environmental assessments, and establish participant funding programs to facilitate public participation (s. 5.002).[4]

32 *COGOA* also grants the NEB broad powers to accommodate the concerns of Indigenous groups where necessary. The NEB can attach any terms and conditions it sees fit to an authorization issued under s. 5(1)(b), and can make such authorization contingent on their performance (ss. 5(4) and 5.36(1)). Most importantly, the NEB may require accommodation by exercising its discretion to deny an authorization or by reserving its decision pending further proceedings (ss. 5(1)(b), 5(5) and 5.36(2)).

33 The NEB has also developed considerable institutional expertise, both in conducting consultations and in assessing the environmental impacts of proposed projects. Where the effects of a proposed project on Aboriginal or treaty rights substantially overlap with the project's potential environmental impact, the NEB is well situated to oversee consultations which seek to address these effects, and to use its technical expertise to assess what forms of accommodation might be available.

34 In sum, the NEB has (1) the procedural powers necessary to implement consultation; and (2) the remedial powers to, where necessary, accommodate affected Aboriginal claims, or Aboriginal and treaty rights. Its process can therefore be relied on by the Crown to completely or partially fulfill [page1089] the Crown's duty to consult. Whether the NEB's process did so in this case, we consider below.

D. *What Is the NEB's Role in Considering Crown Consultation Before Approval?*

35 The appellants argue that, as a tribunal empowered to decide questions of law, the NEB *must* exercise its decision-making authority in accordance with s. 35(1) of the *Constitution Act, 1982* by evaluating the adequacy of consultation before issuing an authorization for seismic testing. In contrast, the proponents submit that there is no basis in this Court's jurisprudence for imposing this obligation on the NEB. Although the Attorney General of Canada agrees with the appellants that the NEB has the legal capacity to decide constitutional questions when doing so is necessary to its decision-making powers, she argues that the NEB's environmental assessment decision in this case appropriately considered the adequacy of the proponents' consultation efforts.

36 Generally, a tribunal empowered to consider questions of law must determine whether such consultation was constitutionally sufficient if the issue is properly raised. The power of a tribunal "to decide questions of law implies a power to decide constitutional issues that are properly before it, absent a clear demonstration that the legislature intended to exclude such jurisdiction from the tribunal's power" (*Carrier Sekani*, at para. 69). Regulatory agencies with the authority to decide questions of law have both the duty and authority to apply the Constitution, unless the authority to decide the constitutional issue has been clearly withdrawn (*R. v. Conway*, *2010 SCC 22*, *[2010] 1 S.C.R. 765*, at para. 77). It follows that they must ensure their decisions comply with s. 35 of the *Constitution Act, 1982* (*Carrier Sekani*, at para. 72).

37 The NEB has broad powers under both the *NEB Act* and *COGOA* to hear and determine all relevant matters of fact and law (*NEB Act*, s. 12(2); *COGOA*, s. 5.31(2)). No provision in either statute suggests an intention to withhold from the NEB the power to decide the adequacy of consultation. And, in *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159, this Court concluded that NEB decisions must conform to s. 35(1) of the *Constitution Act, 1982*. It follows that the NEB can determine whether the Crown's duty to consult has been fulfilled.

38 We note that the majority at the Federal Court of Appeal in *Chippewas of the Thames* considered that this issue was not properly before the NEB. It distinguished *Carrier Sekani* on the basis that the Crown was not a party to the NEB hearing in *Chippewas of the Thames*, while the Crown (in the form of BC Hydro, a Crown corporation) was a party in the utilities commission proceedings in *Carrier Sekani*. Based on the authority of *Standing Buffalo Dakota First Nation v. Enbridge Pipelines Inc.*, 2009 FCA 308, [2010] 4 F.C.R. 500, the majority of the Federal Court of Appeal in *Chippewas of the Thames* reasoned that the NEB is not required to evaluate whether the Crown's duty to consult had been triggered (or whether it was satisfied) before granting a resource project authorization, except where the Crown is a party before the NEB.

39 The difficulty with this view, however, is that - as we have explained - action taken by the NEB in furtherance of its powers under s. 5(1)(b) of *COGOA* to make final decisions is *itself* Crown conduct which triggers the duty to consult. Nor, respectfully, can we agree with the majority of the Federal Court of Appeal in *Chippewas of the Thames* that an NEB decision will comply with s. 35(1) of the *Constitution Act, 1982* so long as the NEB ensures the proponents engage in a "dialogue" with potentially affected Indigenous groups (para. 62). If the Crown's duty to consult has been [page1091] triggered, a decision maker may only proceed to approve a project if Crown consultation is adequate. Although in many cases the Crown will be able to rely on the NEB's processes as meeting the duty to consult, because the NEB is the final decision maker, the key question is whether the duty is fulfilled prior to project approval (*Haida*, at para. 67). Accordingly, where the Crown's duty to consult an affected Indigenous group with respect to a project under *COGOA* remains unfulfilled, the NEB must withhold project approval. And, where the NEB fails to do so, its approval decision should (as we have already said) be quashed on judicial review, since the duty to consult must be fulfilled prior to the action that could adversely affect the right in question (*Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 257, at para. 78).

40 Some commentators have suggested that the NEB, in view of its mandate to decide issues in the public interest, cannot effectively account for Aboriginal and treaty rights and assess the Crown's duty to consult (see R. Freedman and S. Hansen, "Aboriginal Rights vs. The Public Interest", prepared for Pacific Business & Law Institute Conference, Vancouver, B.C. (February 26-27, 2009) (online), at pp. 4 and 14). We do not, however, see the public interest and the duty to consult as operating in conflict. As this Court explained in *Carrier Sekani*, the duty to consult, being a constitutional imperative, gives rise to a special public interest that supersedes other concerns typically considered by tribunals tasked with assessing the public interest (para. 70). A project authorization that breaches the constitutionally protected rights of Indigenous peoples cannot serve the public interest (*ibid.*).

41 This leaves the question of what a regulatory agency must do where the adequacy of Crown [page1092] consultation is raised before it. When affected Indigenous groups have squarely raised concerns about Crown consultation with the NEB, the NEB must usually address those concerns in reasons, particularly in respect of project applications requiring deep consultation. Engagement of the honour of the Crown does not predispose a certain outcome, but promotes reconciliation by imposing obligations on the manner and approach of government (*Haida*, at paras. 49 and 63). Written reasons foster reconciliation by showing affected Indigenous peoples that their rights were considered and addressed (*Haida*, at para. 44). Reasons are "a sign of respect [which] displays the requisite comity and courtesy becoming the Crown as Sovereign toward a prior occupying nation" (*Kainaiwa/Blood Tribe v. Alberta (Energy)*, 2017 ABQB 107, at para. 117 (CanLII)). Written reasons also promote better decision making (*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 39).

42 This does not mean, however, that the NEB is always required to review the adequacy of Crown consultation by

applying a formulaic "*Haida* analysis", as the appellants suggest. Nor will explicit reasons be required in every case. The degree of consideration that is appropriate will depend on the circumstances of each case. But where deep consultation is required and the affected Indigenous peoples have made their concerns known, the honour of the Crown will usually oblige the NEB, where its approval process triggers the duty to consult, to explain how it considered and addressed these concerns.

E. *Was the Consultation Adequate in This Case?*

43 The Crown acknowledges that deep consultation was required in this case, and we agree. As [page1093] this Court explained in *Haida*, deep consultation is required "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" (para. 44). Here, the appellants had *established treaty rights* to hunt and harvest marine mammals. These rights were acknowledged at the Federal Court of Appeal as being extremely important to the appellants for their economic, cultural, and spiritual well-being (para. 2). Jerry Natanine, the former mayor of Clyde River, explained that hunting marine mammals "provides us with nutritious food; enables us to take part in practices we have maintained for generations; and enables us to maintain close relationships with each other through the sharing of what we call 'country food'" (A.R., vol. II, at p. 197). The importance of these rights was also recently recognized by the Nunavut Court of Justice:

> The Inuit right which is of concern in this matter is the right to harvest marine mammals. Many Inuit in Nunavut rely on country food for the majority of their diet. Food costs are very high and many would be unable to purchase food to replace country food if country food were unavailable. Country food is recognized as being of higher nutritional value than purchased food. But the inability to harvest marine mammals would impact more than ... just the diet of Inuit. The cultural tradition of sharing country food with others in the community would be lost. The opportunity to make traditional clothing would be impacted. The opportunity to participate in the hunt, an activity which is fundamental to being Inuk, would be lost. The Inuit right which is at stake is of high significance. This suggests a significant level of consultation and accommodation is required.

(*Qikiqtani Inuit Assn. v. Canada (Minister of Natural Resources)*, 2010 NUCJ 12, 54 C.E.L.R. (3d) 263, at para. 25)

[page1094]

44 The risks posed by the proposed testing to these treaty rights were also high. The NEB's environmental assessment concluded that the project could increase the mortality risk of marine mammals, cause permanent hearing damage, and change their migration routes, thereby affecting traditional resource use. Given the importance of the rights at stake, the significance of the potential impact, and the risk of non-compensable damage, the duty owed in this case falls at the highest end of the spectrum.

45 Bearing this in mind, the consultation that occurred here fell short in several respects. First, the inquiry was misdirected. While the NEB found that the proposed testing was not likely to cause significant adverse environmental effects, and that any effects on traditional resource use could be addressed by mitigation measures, the consultative inquiry is not properly into environmental effects *per se*. Rather, it inquires into the impact on the *right*. No consideration was given in the NEB's environmental assessment to the source - in a treaty - of the appellants' rights to harvest marine mammals, nor to the impact of the proposed testing on those rights.

46 Furthermore, although the Crown relies on the processes of the NEB as fulfilling its duty to consult, that was not made clear to the Inuit. The significance of the process was not adequately explained to them.

47 Finally, and most importantly, the process provided by the NEB did not fulfill the Crown's duty to conduct deep consultation. Deep consultation "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" (*Haida*, at para. 44). Despite the NEB's broad

powers under *COGOA* to afford those advantages, limited opportunities for participation and consultation were made available to the appellants. [page1095] Unlike many NEB proceedings, including the proceedings in *Chippewas of the Thames*, there were no oral hearings. Although the appellants submitted scientific evidence to the NEB, this was done without participant funding. Again, this stands in contrast to *Chippewas of the Thames*, where the consultation process was far more robust. In that case, the NEB held oral hearings, the appellants received funding to participate in the hearings, and they had the opportunity to present evidence and a final argument.[5] While these procedural protections are characteristic of an adversarial process, they may be required for meaningful consultation (*Haida*, at para. 41) and do not transform its underlying objective: fostering reconciliation by promoting an ongoing relationship (*Carrier Sekani*, at para. 38).

48 The consultation in this case also stands in contrast to *Taku River* where, despite its entitlement to consultation falling only at the midrange of the spectrum (para. 32), the Taku River Tlingit First Nation, with financial assistance (para. 37), fully participated in the assessment process as a member of the project committee, which was "the primary engine driving the assessment process" (paras. 3, 8 and 40).

49 While these procedural safeguards are not always necessary, their absence in this case significantly impaired the quality of consultation. Although the appellants had the opportunity to question the proponents about the project during the NEB meetings in the spring of 2013, the proponents were unable to answer many questions, including [page1096] basic questions about the effect of the proposed testing on marine mammals. The proponents did eventually respond to these questions; however, they did so in a 3,926 page document which they submitted to the NEB. This document was posted on the NEB website and delivered to the hamlet offices in Pond Inlet, Clyde River, Qikiqtajuak and Iqaluit. Internet speed is slow in Nunavut, however, and bandwidth is expensive. The former mayor of Clyde River deposed that he was unable to download this document because it was too large. Furthermore, only a fraction of this enormous document was translated into Inuktitut. To put it mildly, furnishing answers to questions that went to the heart of the treaty rights at stake in the form of a practically inaccessible document dump months after the questions were initially asked in person is not true consultation. "'[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). No mutual understanding on the core issues - the potential impact on treaty rights, and possible accommodations - could possibly have emerged from what occurred here.

50 The fruits of the Inuit's limited participation in the assessment process here are plain in considering the accommodations recorded by the NEB's environmental assessment report. It noted changes made to the project as a result of consultation, such as a commitment to ongoing consultation, the placement of community liaison officers in affected communities, and the design of an Inuit Qaujimajatuqangit (Inuit traditional knowledge) study. The proponents also committed to installing passive acoustic monitoring on the ship to be used in the proposed testing to avoid collisions with marine mammals.

[page1097]

51 These changes were, however, insignificant concessions in light of the potential impairment of the Inuit's treaty rights. Further, passive acoustic monitoring was no concession at all, since it is a requirement of the Statement of Canadian Practice With Respect to the Mitigation of Seismic Sound in the Marine Environment which provides "minimum standards, which will apply in all non-ice covered marine waters in Canada" (A.R., vol. I, at p. 40), and which would be included in virtually all seismic testing projects. None of these putative concessions, nor the NEB's reasons themselves, gave the Inuit any reasonable assurance that their constitutionally protected treaty rights were considered as *rights*, rather than as an afterthought to the assessment of environmental concerns.

52 The consultation process here was, in view of the Inuit's established treaty rights and the risk posed by the proposed testing to those rights, significantly flawed. Had the appellants had the resources to submit their own scientific evidence, and the opportunity to test the evidence of the proponents, the result of the environmental assessment could have been very different. Nor were the Inuit given meaningful responses to their questions regarding the impact of the testing on marine life. While the NEB considered potential impacts of the project on marine mammals and on Inuit traditional resource use, its report does not acknowledge, or even mention, the Inuit

treaty rights to harvest wildlife in the Nunavut Settlement Area, or that deep consultation was required.

IV. Conclusion

53 For the foregoing reasons, we conclude that the Crown breached its duty to consult the appellants in respect of the proposed testing. We would allow the appeal with costs to the appellants, and quash the NEB's authorization.

Appeal allowed with costs.

[page1098]

Solicitors:

Solicitors for the appellants: Stockwoods, Toronto.

Solicitors for the respondents Petroleum Geo-Services Inc. (PGS), Multi Klient Invest As (MKI) and TGS-NOPEC Geophysical Company ASA (TGS): Blake, Cassels & Graydon, Calgary.

Solicitor for the respondent the Attorney General of Canada: Attorney General of Canada, Saskatoon.

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

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

Solicitors for the intervener Nunavut Tunngavik Incorporated: Woodward & Company, Victoria; Nunavut Tunngavik Incorporated, Iqaluit.

Solicitors for the intervener the Makivik Corporation: Dionne Schulze, Montréal.

Solicitors for the intervener the Nunavut Wildlife Management Board: Supreme Advocacy, Ottawa.

Solicitors for the intervener the Inuvialuit Regional Corporation: Inuvialuit Regional Corporation, Inuvik; Olthuis Kleer Townshend, Toronto.

Solicitors for the intervener the Chiefs of Ontario: Gowling WLG (Canada), Ottawa.

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1 This assessment was initially required under the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37. Since its repeal and replacement by the *Canadian Environmental Assessment Act, 2012*, S.C. 2012, c. 19, s. 52, the NEB has continued to conduct environmental assessments in relation to proposed projects, taking the position that it is still empowered to do so under *COGOA*.

2 At the time, the Department of Aboriginal Affairs and Northern Development was preparing a strategic environmental assessment - specifically, the "Eastern Arctic Strategic Environmental Assessment" - for Baffin Bay and Davis Strait, meant to examine "all aspects of future oil and gas development." Once complete, it would "inform policy decisions around if, when, and where oil and gas companies may be invited to bid on parcels of land for exploration drilling rights in Baffin Bay/Davis Strait" (Letter to Cathy Towtongie et al. from the Honourable Bernard Valcourt, A.R., vol. IV, at pp. 966-67).

3 *National Energy Board Act*, S.C. 1959, c. 46.

4 While s. 5.002 (participant funding) and s. 5.331 (public hearings) of *COGOA* were not in force at the time the NEB considered and authorized the project at issue here, they were added later (see S.C. 2015, c. 4, ss. 7 and 13).

5 The NEB process in *Chippewas of the Thames* was undertaken pursuant to the *NEB Act*, not *COGOA*. Under the *NEB Act*, the NEB had at the relevant time, and still has today, explicit statutory powers to conduct public hearings (s. 24) and provide participant funding for such hearings (s. 16.3). As noted above. Parliament conferred similar powers upon the NEB under *COGOA* in 2015.

End of Document

Tab 11

Daniels v. Canada (Indian Affairs and Northern Development), [2016] 1 S.C.R. 99

Supreme Court Reports

Supreme Court of Canada

Present: McLachlin C.J. and Abella, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon, Côté and Brown JJ.

Heard: October 8, 2015;

Judgment: April 14, 2016.

File No.: 35945.

[2016] 1 S.C.R. 99 | *[2016] 1 R.C.S. 99* | *[2016] S.C.J. No. 12* | *[2016] A.C.S. no 12* | *2016 SCC 12*

Harry Daniels, Gabriel Daniels, Leah Gardner, Terry Joudrey and Congress of Aboriginal Peoples, Appellants/Respondents on cross-appeal; v. Her Majesty The Queen as represented by the Minister of Indian Affairs and Northern Development and Attorney General of Canada, Respondents/Appellants on cross-appeal, and Attorney General for Saskatchewan, Attorney General of Alberta, Native Council of Nova Scotia, New Brunswick Aboriginal Peoples Council, Native Council of Prince Edward Island, Metis Settlements General Council, Te'mexw Treaty Association, Métis Federation of Canada, Aseniwuche Winewak Nation of Canada, Chiefs of Ontario, Gift Lake Métis Settlement, Native Alliance of Quebec, Assembly of First Nations and Métis National Council, Interveners.

(58 paras.)

Appeal From:

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Case Summary

Catchwords:

Constitutional law — Aboriginal law — Métis — Non-status Indians — Whether declaration should be issued [page100] that Métis and non-status Indians are "Indians" under s. 91(24) of Constitution Act, 1867 — Whether declaration would have practical utility — Whether, for purposes of s. 91(24), Métis should be restricted to definitional criteria set out in R. v. Powley, *[2003] 2 S.C.R. 207* — Constitution Act, 1867, s. 91(24) — Constitution Act, 1982, s. 35.

Summary:

Three declarations are sought in this case: (1) that Métis and non-status Indians are "Indians" under s. 91(24) of the *Constitution Act, 1867*; (2) that the federal Crown owes a fiduciary duty to Métis and non-status Indians; and (3) that Métis and non-status Indians have the right to be consulted and negotiated with.

The trial judge's conclusion was that "Indians" under s. 91(24) is a broad term referring to all Indigenous peoples in Canada. He declined, however, to grant the second and third declarations. The Federal Court of Appeal accepted that "Indians" in s. 91(24) included all Indigenous peoples generally. It upheld the first declaration, but narrowed its scope to exclude non-status Indians and include only those Métis who satisfied the three criteria from *R. v. Powley*, *[2003] 2 S.C.R. 207*. It also declined to grant the second and third declarations. The

appellants sought to restore the first declaration as granted by the trial judge, and asked that the second and third declarations be granted. The Crown cross-appealed, arguing that none of the declarations should be granted. It conceded that non-status Indians are "Indians" under s. 91(24).

Held: The first declaration should be granted: Métis and non-status Indians are "Indians" under s. 91(24). The appeal should therefore be allowed in part. The Federal Court of Appeal's conclusion that the first declaration should exclude non-status Indians or apply only to those Métis who meet the *Powley* criteria, should be set aside, and the trial judge's decision restored. The trial judge's and Federal Court of Appeal's decision not to grant the second and third declarations should be upheld. The cross-appeal should be dismissed.

[page101]

A declaration can only be granted if it will have practical utility, that is, if it will settle a "live controversy" between the parties. The first declaration, whether non-status Indians and Métis are "Indians" under s. 91(24), would have enormous practical utility for these two groups who have found themselves having to rely more on noblesse oblige than on what is obliged by the Constitution. A declaration would guarantee both certainty and accountability. Both federal and provincial governments have, alternately, denied having legislative authority over non-status Indians and Métis. This results in these Indigenous communities being in a jurisdictional wasteland with significant and obvious disadvantaging consequences. While finding Métis and non-status Indians to be "Indians" under s. 91(24) does not create a duty to legislate, it has the undeniably salutary benefit of ending a jurisdictional tug-of-war.

There is no need to delineate which mixed-ancestry communities are Métis and which are non-status Indians. They are all "Indians" under s. 91(24) by virtue of the fact that they are all Aboriginal peoples. "Indians" has long been used as a general term referring to all Indigenous peoples, including mixed-ancestry communities like the Métis. Before and after Confederation, the government frequently classified Aboriginal peoples with mixed European and Aboriginal heritage as Indians. Historically, the purpose of s. 91(24) in relation to the broader goals of Confederation also indicates that since 1867, "Indians" meant all Aboriginal peoples, including Métis.

As well, the federal government has at times assumed that it could legislate over Métis as "Indians", and included them in other exercises of federal authority over "Indians", such as sending many Métis to Indian Residential Schools -- a historical wrong for which the federal government has since apologized. Moreover, while it does not define the scope of s. 91(24), s. 35 of the *Constitution Act, 1982* states that Indian, Inuit, and Métis peoples are Aboriginal peoples for the purposes of the Constitution. This Court has noted that ss. 35 and 91(24) should be read together. "Indians" in the constitutional context, therefore, has two meanings: a broad meaning, as used in s. 91(24), that includes both Métis and Inuit and can be equated with the term "aboriginal peoples of [page102] Canada" used in s. 35, and a narrower meaning that distinguishes Indian bands from other Aboriginal peoples. It would be constitutionally anomalous for the Métis to be the only Aboriginal people to be recognized and included in s. 35 yet excluded from the constitutional scope of s. 91(24).

The jurisprudence also supports the conclusion that Métis are "Indians" under s. 91(24). It demonstrates that intermarriage and mixed-ancestry do not preclude groups from inclusion under s. 91(24). The fact that a group is a distinct people with a unique identity and history whose members self-identify as separate from Indians, is not a bar to inclusion within s. 91(24). Determining whether particular individuals or communities are non-status Indians or Métis and therefore "Indians" under s. 91(24), is a fact-driven question to be decided on a case-by-case basis in the future.

As to whether, for purposes of s. 91(24), Métis should be restricted to the three definitional criteria set out in *Powley* in accordance with the decision of the Federal Court of Appeal, or whether the membership base should be broader, there is no principled reason for presumptively and arbitrarily excluding certain Métis from Parliament's protective authority on the basis of the third criterion, a "community acceptance" test. The criteria in *Powley* were developed specifically for purposes of applying s. 35, which is about protecting historic community-held rights. Section 91(24) serves a very different constitutional purpose.

The constitutional changes, the apologies for historic wrongs, a growing appreciation that Aboriginal and non-Aboriginal people are partners in Confederation, as well as the *Report of the Royal Commission on Aboriginal Peoples* and the *Final Report of the Truth and Reconciliation Commission of Canada*, all indicate that

reconciliation with *all* of Canada's Aboriginal peoples is Parliament's goal.

The historical, philosophical, and linguistic contexts establish that "Indians" in s. 91(24) includes *all* Aboriginal peoples, including non-status Indians and Métis. The first declaration should accordingly be granted.

[page103]

Federal jurisdiction over Métis and non-status Indians does not mean that all provincial legislation pertaining to Métis and non-status Indians is inherently *ultra vires*. As this Court has recognized, courts should favour, where possible, the operation of statutes enacted by both levels of government.

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Distinguished: *R. v. Powley*, 2003 SCC 43, [2003] 2 S.C.R. 207; *R. v. Blais*, 2003 SCC 44, [2003] 2 S.C.R. 236; **considered:** *Reference as to whether "Indians" in s. 91(24) of the B.N.A. Act includes Eskimo inhabitants of the Province of Quebec*, [1939] S.C.R. 104; *Attorney General of Canada v. Canard*, [1976] 1 S.C.R. 170; **referred to:** *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44; *Solosky v. The Queen*, [1980] 1 S.C.R. 821; *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342; *Lovelace v. Ontario*, 2000 SCC 37, [2000] 1 S.C.R. 950; *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103; *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388; *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2011 SCC 56, [2011] 3 S.C.R. 535; *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*, 2011 SCC 37, [2011] 2 S.C.R. 670; *Reference re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 S.C.R. 698; *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3; *NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union*, 2010 SCC 45, [2010] 2 S.C.R. 696; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511; *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 257.

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Constitution Act, 1982, ss. 35, 37, 37.1.

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History and Disposition:

APPEAL and CROSS-APPEAL from a judgment of the Federal Court of Appeal (Noel, Dawson and Trudel JJ.A.), *2014 FCA 101*, *[2014] 4 F.C.R. 97*, *371 D.L.R. (4th) 725*, *457 N.R. 347*, *[2014] 3 C.N.L.R. 139*, *309 C.R.R. (2d) 200*, *[2014] F.C.J. No. 383* (QL), *2014 CarswellNat 1076* (WL Can.), setting aside in part a decision of Phelan J., *2013 FC 6*, *[2013] 2 F.C.R. 268*, *357 D.L.R. (4th) 47*, *426 F.T.R. 1*, *[2013] 2 C.N.L.R. 61*, *[2013] F.C.J. No. 4* (QL), *2013 CarswellNat 8* (WL Can.). Appeal allowed in part and cross-appeal dismissed.

Counsel

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[page106]

Written submissions only by *D. Bruce Clarke*, *Q.C.*, for the interveners the Native Council of Nova Scotia, the New Brunswick Aboriginal Peoples Council and the Native Council of Prince Edward Island.

Garry Appelt and *Keltie Lambert*, for the intervener the Metis Settlements General Council.

Written submissions only by *Robert J. M. Janes* and *Elin R. S. Sigurdson*, for the intervener the Te'mexw Treaty Association.

Christopher G. Devlin, *John Gailus* and *Cynthia Westaway*, for the intervener the Métis Federation of Canada.

Karey M. Brooks and *Claire Truesdale*, for the intervener the Aseniwuche Winewak Nation of Canada.

Scott Robertson, for the intervener the Chiefs of Ontario.

Paul Seaman and *Maxime Faille*, for the intervener the Gift Lake Métis Settlement.

Marc Watters and *Lina Beaulieu*, for the intervener the Native Alliance of Quebec.

Guy Régimbald and *Jaimie Lickers*, for the intervener the Assembly of First Nations.

Jason T. Madden, *Clément Chartier*, *Q.C.*, *Kathy Hodgson-Smith* and *Marc Leclair*, for the intervener the Métis National Council.

The judgment of the Court was delivered by

ABELLA J.

1 As the curtain opens wider and wider on the history of Canada's relationship with its Indigenous peoples, inequities are increasingly revealed and remedies urgently sought. Many revelations have resulted in good faith policy and legislative responses, but the list of disadvantages remains robust. This case represents another chapter in the [page107] pursuit of reconciliation and redress in that relationship.

Background

2 Three declarations were sought by the plaintiffs when this litigation was launched in 1999:

1. That Métis and non-status Indians are "Indians" under s. 91(24);
2. That the federal Crown owes a fiduciary duty to Métis and non-status Indians; and
3. That Métis and non-status Indians have the right to be consulted and negotiated with, in good faith, by the federal government on a collective basis through representatives of their choice, respecting all their rights, interests and needs as Aboriginal peoples.

3 Section 91(24) of the *Constitution Act, 1867* states that

> **91.**... it is hereby declared that ... the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated ...
>
> ...
>
> 24. Indians, and Lands reserved for the Indians.

4 The trial judge, Phelan J., made a number of key factual findings in his thoughtful and thorough reasons.[1] As early as 1818, the government used "Indian" as a general term to refer to communities of mixed Aboriginal and European background. The federal government considered Métis to be "Indians" in various treaties and pre-Confederation statutes, and considered Métis to be "Indians" under s. 91(24) in various statutes and policy initiatives spanning from Confederation to modern day. Moreover, the [page108] purpose of s. 91(24) was closely related to the expansionist goals of Confederation. The historical and legislative evidence shows that expanding the country across the West was one of the primary goals of Confederation. Building a national railway was a key component of this plan.

5 Accordingly, the purposes of s. 91(24) were "to control Native people and communities where necessary to

facilitate development of the Dominion; to honour the obligations to Natives that the Dominion inherited from Britain ... [and] eventually to civilize and assimilate Native people": para. 353. Since much of the North-Western Territory was occupied by Métis, only a definition of "Indians" in s. 91(24) that included "a broad range of people sharing a Native hereditary base" (para. 566) would give Parliament the necessary authority to pursue its agenda.

6 His conclusion was that in its historical, philosophical, and linguistic contexts, "Indians" under s. 91(24) is a broad term referring to all Indigenous peoples in Canada, including non-status Indians and Métis.

7 He found that since neither the federal nor provincial governments acknowledged that they had jurisdiction over Métis and non-status Indians, the declaration would alleviate the constitutional uncertainty and the resulting denial of material benefits. There was therefore practical utility to the first declaration being granted, namely, that Métis and non-status Indians are included in what is meant by "Indians" in s. 91(24). He did not restrict the definition of either group.

8 He declined, however, to grant the second and third declarations on the grounds that they were vague and redundant. It was already well established in Canadian law that the federal government [page109] was in a fiduciary relationship with Canada's Aboriginal peoples and that the federal government had a duty to consult and negotiate with them when their rights were engaged. Restating this in declarations would be of no practical utility.

9 The Federal Court of Appeal accepted the trial judge's findings of fact, including that "Indians" in s. 91(24) included all Indigenous peoples generally. It therefore upheld the trial judge's decision to grant the first declaration, but narrowed its scope to exclude non-status Indians and include only those Métis who satisfied the three criteria from *R. v. Powley*, *[2003] 2 S.C.R. 207*. While it was of the view that non-status Indians were clearly "Indians", setting this out in a declaration would be redundant and of no practical usefulness. For the same reasons as the trial judge, it declined to grant the second and third declarations.

10 Before this Court, the appellants sought to restore the first declaration as granted by the trial judge, not as restricted by the Federal Court of Appeal. In addition, they asked that the second and third declarations be granted. The Crown cross-appealed, arguing that none of the declarations should be granted. For the following reasons, I agree generally with the trial judge.

Analysis

11 This Court most recently restated the applicable test for when a declaration should be granted in *Canada (Prime Minister) v. Khadr*, *[2010] 1 S.C.R. 44*. The party seeking relief must establish that the court has jurisdiction to hear the issue, that the question is real and not theoretical, and that the party raising the issue has a genuine interest in its resolution. A declaration can only be [page110] granted if it will have practical utility, that is, if it will settle a "live controversy" between the parties: see also *Solosky v. The Queen*, *[1980] 1 S.C.R. 821*; *Borowski v. Canada (Attorney General)*, *[1989] 1 S.C.R. 342*.

12 The first disputed issue in this case is whether the declarations would have practical utility. There can be no doubt, in my respectful view, that granting the first declaration meets this threshold. Delineating and assigning constitutional authority between the federal and provincial governments will have enormous practical utility for these two groups who have, until now, found themselves having to rely more on noblesse oblige than on what is obliged by the Constitution.

13 Both federal and provincial governments have, alternately, denied having legislative authority over non-status Indians and Métis. As the trial judge found, when Métis and non-status Indians have asked the federal government to assume legislative authority over them, it tended to respond that it was precluded from doing so by s. 91(24). And when Métis and non-status Indians turned to provincial governments, they were often refused on the basis that the issue was a federal one.

14 This results in these Indigenous communities being in a jurisdictional wasteland with significant and obvious

disadvantaging consequences, as was recognized by Phelan J.:

> One of the results of the positions taken by the federal and provincial governments and the "political football - buck passing" practices is that financially [Métis and non-status Indians] have been deprived of significant funding for their affairs... .
>
> [page111]
>
> ... the political/policy wrangling between the federal and provincial governments has produced a large population of collaterally damaged [Métis and non-status Indians]. They are deprived of programs, services and intangible benefits recognized by all governments as needed. [paras. 107-8]

See also *Lovelace v. Ontario*, *[2000] 1 S.C.R. 950*, at para. 70.

15 With federal and provincial governments refusing to acknowledge jurisdiction over them, Métis and non-status Indians have no one to hold accountable for an inadequate status quo. The Crown's argument, however, was that since a finding of jurisdiction under s. 91(24) does not create a duty to legislate, it is inappropriate to answer a jurisdictional question in a legislative vacuum. It is true that finding Métis and non-status Indians to be "Indians" under s. 91(24) does not create a duty to legislate, but it has the undeniably salutary benefit of ending a jurisdictional tug-of-war in which these groups were left wondering about where to turn for policy redress. The existence of a legislative vacuum is self-evidently a reflection of the fact that neither level of government has acknowledged constitutional responsibility. A declaration would guarantee both certainty and accountability, thereby easily reaching the required jurisprudential threshold of offering the tangible practical utility of the resolution of a longstanding jurisdictional dispute.

16 We are left then to determine whether Métis and non-status Indians are in fact included in the scope of s. 91(24).

17 There is no consensus on who is considered Métis or a non-status Indian, nor need there be. Cultural and ethnic labels do not lend themselves to neat boundaries. 'Métis' can refer to the historic Métis community in Manitoba's Red River Settlement or it can be used as a general term for anyone with mixed [page112] European and Aboriginal heritage. Some mixed-ancestry communities identify as Métis, others as Indian:

> There is no one exclusive Metis People in Canada, anymore than there is no one exclusive Indian people in Canada. The Metis of eastern Canada and northern Canada are as distinct from Red River Metis as any two peoples can be... . As early as 1650, a distinct Metis community developed in LeHeve [*sic*], Nova Scotia, separate from Acadians and Micmac Indians. All Metis are aboriginal people. All have Indian ancestry.

(R. E. Gaffney, G. P. Gould and A. J. Semple, *Broken Promises: The Aboriginal Constitutional Conferences* (1984), at p. 62, quoted in Catherine Bell, "Who Are The Metis People in Section 35(2)?" *(1991), 29 Alta. L. Rev. 351*, at p. 356.)

18 The definitional contours of 'non-status Indian' are also imprecise. Status Indians are those who are recognized by the federal government as registered under the *Indian Act*, R.S.C. 1985, c. I-5. Non-status Indians, on the other hand, can refer to Indians who no longer have status under the *Indian Act*, or to members of mixed communities who have never been recognized as Indians by the federal government. Some closely identify with their Indian heritage, while others feel that the term Métis is more reflective of their mixed origins.

19 These definitional ambiguities do not preclude a determination into whether the two groups, however they are defined, are within the scope of s. 91(24). I agree with the trial judge and Federal Court of Appeal that the historical, philosophical, and linguistic contexts establish that "Indians" in s. 91(24) includes *all* Aboriginal peoples, including non-status Indians and Métis.

[page113]

20 To begin, it is unnecessary to explore the question of non-status Indians in a full and separate analysis because the Crown conceded in oral argument, properly in my view, that they are recognized as "Indians" under s. 91(24), a concession that reflects the fact that the federal government has used its authority under s. 91(24) in the past to legislate over non-status Indians as "Indians".[2] While a concession is not necessarily determinative, it does not, on the other hand, make the granting of a declaration redundant, as the Crown suggests. Non-status Indians have been a part of this litigation since it started in 1999. Earlier in these proceedings, the Crown took the position that non-status Indians did *not* fall within federal jurisdiction under s. 91(24). As the intervener Aseniwuche Winewak Nation of Canada submitted in oral argument, excluding non-status Indians from the first declaration would send them "[b]ack to the drawing board". To avoid uncertainty in the future, therefore, there is demonstrable utility in a declaration that confirms their inclusion.

21 We are left then to consider primarily whether the Métis are included.

22 The prevailing view is that Métis are "Indians" under s. 91(24). Prof. Hogg, for example, sees the word "Indians" under s. 91(24) as having a wide compass, likely including the Métis:

> The Métis people, who originated in the west from intermarriage between French Canadian men and Indian women during the fur trade period, received "half-breed" land grants in lieu of any right to live on reserves, and [page114] were accordingly excluded from the charter group from whom Indian status devolved. However, they are probably "Indians" within the meaning of s. 91(24).

(Peter W. Hogg, *Constitutional Law of Canada* (5th ed. Supp.), at p. 28-4)

See also Joseph Eliot Magnet, "Who are the Aboriginal People of Canada?", in Dwight A. Dorey and Joseph Eliot Magnet, eds., *Aboriginal Rights Litigation* (2003), 23, at p. 44; Clem Chartier, "'Indian': An Analysis of the Term as Used in Section 91(24) of the British North America Act, 1867" (1978-79), 43 Sask. L. Rev. 37; Mark Stevenson, "Section 91(24) and Canada's Legislative Jurisdiction with Respect to the Métis" *(2002), 1 Indigenous L.J. 237*; Noel Lyon, "Constitutional Issues in Native Law", in Bradford W. Morse, ed., *Aboriginal Peoples and the Law: Indian, Metis and Inuit Rights in Canada* (rev. 1st ed. 1989), 408, at p. 430.

23 In fact, "Indians" has long been used as a general term referring to all Indigenous peoples, including mixed-ancestry communities like the Métis. The term was created by European settlers and applied to Canada's Aboriginal peoples without making any distinction between them. As author Thomas King explains in *The Inconvenient Indian*:[3]

> No one really believed that there was only one Indian. No one ever said there was only one Indian. But as North America began to experiment with its "Indian programs," it did so with a "one size fits all" mindset. Rather than see tribes as an arrangement of separate nation states in the style of the Old World, North America imagined that Indians were basically the same. [p. 83]

24 Before and after Confederation, the government frequently classified Aboriginal peoples with mixed European and Aboriginal heritage as Indians. Métis were considered "Indians" for pre-Confederation treaties such as the Robinson Treaties [page115] of 1850. Many post-Confederation statutes considered Métis to be "Indians", including the 1868 statute entitled *An Act providing for the organisation of the Department of the Secretary of State of Canada, and for the management of Indian and Ordnance Lands*, S.C. 1868, c. 42.

25 Historically, the purpose of s. 91(24) in relation to the broader goals of Confederation also indicates that since 1867, "Indians" meant all Aboriginal peoples, including Métis. The trial judge found that expanding British North America across Rupert's Land and the North-West Territories was a major goal of Confederation and that building a national railway was a key component of this plan. At the time, that land was occupied by a large and diverse

Aboriginal population, including many Métis. A good relationship with all Aboriginal groups was required to realize the goal of building "the railway and other measures which the federal government would have to take." With jurisdiction over Aboriginal peoples, the new federal government could "protect the railway from attack" and ensure that they did not resist settlement or interfere with construction of the railway. Only by having authority over *all* Aboriginal peoples could the westward expansion of the Dominion be facilitated.

26 The work of Prof. John Borrows supports this theory:

> The Métis Nation was ... crucial in ushering western and northern Canada into Confederation and in increasing the wealth of the Canadian nation by opening up the prairies to agriculture and settlement. These developments could not have occurred without Métis intercession and legal presence.

(*Canada's Indigenous Constitution* (2010), at pp. 87-88)

[page116]

In his view, it would have been impossible for Canada to accomplish its expansionist agenda if "Indians" under s. 91(24) did not include Métis. The threat they posed to Canada's expansion was real. On many occasions Métis "blocked surveyors from doing their work" and "prevented Canada's expansion into the region" when they were unhappy with the Canadian government: Borrows, at p. 88.

27 In fact, contrary to its position in this case, the federal government has at times assumed that it could legislate over Métis as "Indians". The 1876 *Indian Act*[4] banned the sale of intoxicating liquor to "Indians". In 1893 the North-West Mounted Police wrote to the federal government, expressing their difficulty in distinguishing between "Half-breeds and Indians in prosecutions for giving liquor to the latter". To clarify this issue, the federal government amended the *Indian Act*[5] in 1894 to broaden the ban on the sale of intoxicating liquor to Indians or any person "who follows the Indian mode of life", which included Métis.

28 In October 1899, Indian Affairs Minister Clifford Sifton wrote a memorandum that would become the basis of the federal government's policy regarding Métis and Indian Residential Schools for decades. He wrote that "I am decidedly of the opinion that all children, even those of mixed blood ... should be eligible for admission to the schools": *The Final Report of the Truth and Reconciliation Commission of Canada*, vol. 3, *The Métis Experience* (2015), at p. 16. This policy was applied haphazardly. Provincial public school systems were reluctant to admit Métis students, as the provinces saw them as a federal responsibility: p. 26. Many Métis attended Residential Schools because they were the only educational option open to them.

[page117]

29 In some cases, the federal government directly financed these projects. In the 1890s, the federal government provided funding for a reserve and industrial school at Saint-Paul-des-Métis in Alberta, run by Oblate missionaries: *The Final Report of the Truth and Reconciliation in Canada*, vol. 3, at p. 16. The reserve consisted of two townships, owned by the Crown, and included a school for teaching trades to the Métis. As long as the project lasted, it functioned equivalently to similar reserves for Indian peoples.

30 Many Métis were also sent to Indian Residential Schools, another exercise of federal authority over "Indians", as *The Final Report of the Truth and Reconciliation Commission of Canada* documents. According to the Report, "[t]he central goal of the Canadian residential school system was to 'Christianize' and 'civilize' Aboriginal people ... . In the government's vision, there was no place for the Métis Nation": vol. 3, at p. 3. The Report notes that

> [t]he existing records make it impossible to say how many Métis children attended residential school. But they did attend almost every residential school discussed in this report at some point. They would have undergone the same experiences - the high death rates, limited diets, crowded and unsanitary housing, harsh discipline, heavy workloads, neglect, and abuse ... . [p. 4]

The federal government has since acknowledged and apologized for wrongs such as Indian Residential Schools.

31 Moreover, throughout the early twentieth century, many Métis whose ancestors had taken scrip continued to live on Indian reserves and to participate in Indian treaties. In 1944, a Commission of Inquiry in Alberta was launched to investigate this issue, headed by Justice William Macdonald. He concluded that the federal government had the constitutional authority to allow these Métis to participate in treaties and recommended that the federal [page118] government take steps to clarify the status of these Métis with respect to treaties and reserves: *Report of Mr. Justice W.A. Macdonald Following an Enquiry Directed Under Section 18 of the Indian Act*, August 7, 1944 (online).

32 Justice Macdonald noted that the federal government had been willing to recognize Métis as Indians whenever it was convenient to do so:

> It would appear that whenever it became necessary or expedient to extinguish Indian rights in any specific territory, the fact that Halfbreeds also had rights by virtue of their Indian blood was invariably recognized. ...
>
> ...
>
> ... mixed blood did not necessarily establish white status, nor did it bar an individual from admission into treaty. The welfare of the individual and his own desires in the matter were given due weight, no cast-iron rule was adopted. [pp. 557-58]

In 1958, the federal government amended the *Indian Act*,[6] enacting Justice Macdonald's recommendation that Métis who had been allotted scrip but were already registered as Indians (and their descendants), remain registered under the *Indian Act*, thereby clarifying their status with respect to treaties and reserves. In so legislating, the federal government appeared to assume that it had authority over Métis under s. 91(24).

33 Not only has the federal government legislated over Métis as "Indians", but it appears to have done so in the belief it was acting within its constitutional authority. In 1980, the Department of Indian Affairs and Northern Development wrote a document for Cabinet entitled *Natives and the Constitution*. This document clearly expressed the federal [page119] government's confidence that it had constitutional authority to legislate over Métis under s. 91(24):

> Métis people ... are presently in the same legal position as other Indians who signed land cession treaties. Those Métis who have received scrip or lands are excluded from the provisions of the *Indian Act*, but are still "Indians" within the meaning of the *BNA Act*... .
>
> ...
>
> Should a person possess "sufficient" racial and social characteristics to be considered a "native person", that individual will be regarded as an "Indian" ... within the legislative jurisdiction of the federal government, regardless of the fact that he or she may be excluded from the coverage of the *Indian Act*. [p. 43]

34 Moreover, while it does not define the scope of s. 91(24), it is worth noting that s. 35[7] of the *Constitution Act, 1982* states that Indian, Inuit, *and* Métis peoples are Aboriginal peoples for the purposes of the Constitution. This Court recently explained that the "grand purpose" of s. 35 is "[t]he reconciliation of Aboriginal and non-Aboriginal Canadians in a mutually respectful long-term relationship": *Beckman v. Little Salmon/Carmacks First Nation*, [2010] 3 S.C.R. 103, at para. 10. And in *R. v. Sparrow*, [1990] 1 S.C.R. 1075, this Court noted that ss. 35 and 91(24) should be read together: p. 1109, cited in *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, [2013] 1 S.C.R. 623, at para. 69.

35 The term "Indian" or "Indians" in the constitutional context, therefore, has two meanings: a broad meaning, as used in s. 91(24), that includes [page120] both Métis and Inuit and can be equated with the term "aboriginal

peoples of Canada" used in s. 35, and a narrower meaning that distinguishes Indian bands from other Aboriginal peoples. As will be noted later in these reasons, this Court in *Reference as to whether "Indians" in s. 91(24) of the B.N.A. Act includes Eskimo inhabitants of the Province of Quebec*, [1939] S.C.R. 104 ("*Re Eskimo*"), held that s. 91(24) includes the Inuit. Since the federal government concedes that s. 91(24) includes non-status Indians, it would be constitutionally anomalous, as the Crown also conceded, for the Métis to be the only Aboriginal people to be recognized and included in s. 35 yet excluded from the constitutional scope of s. 91(24).

36 The *Report of the Royal Commission on Aboriginal Peoples*, released in 1996, stressed the importance of rebuilding the Crown's relationship with Aboriginal peoples in Canada, including the Métis: see vol. 3, *Gathering Strength*. The Report called on the federal government to "recognize that Métis people ... are included in the federal responsibilities set out in section 91(24) of the *Constitution Act, 1867*": vol. 2, *Restructuring the Relationship*, at p. 66. The importance of this reconstruction was also recognized in the final report of the Truth and Reconciliation Commission of Canada: *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (2015), at p. 183; see also *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388, at para. 1, and *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, [2011] 3 S.C.R. 535, at para. 12.

37 The constitutional changes, the apologies for historic wrongs, a growing appreciation that Aboriginal and non-Aboriginal people are partners in Confederation, the *Report of the Royal Commission on Aboriginal Peoples*, and the *Final Report of the Truth and Reconciliation Commission of Canada*, all indicate that reconciliation with *all* of Canada's Aboriginal peoples is Parliament's goal.

[page121]

38 The jurisprudence also supports the conclusion that Métis are "Indians" under s. 91(24). There is no case directly on point, but by identifying which groups have already been recognized as "Indians" under this head of power and by establishing principles governing who can be considered "Indians", the existing cases provide guidance.

39 In *Re Eskimo*, this Court had to determine whether the Inuit were "Indians" under s. 91(24) of the *Constitution Act, 1867*. Relying on historical evidence to determine the meaning of "Indians" in 1867, the Court drew heavily from the 1858 *Report from the Select Committee on the Hudson's Bay Company*. Acting on behalf of the federal government, the Hudson's Bay Company had conducted a survey of Rupert's Land and the North-Western Territories in which the Inuit were classified as Indians. The Court found that while the Inuit had their own language, culture, and identities separate from that of the "Indian tribes" in other parts of the country, they were "Indians" under s. 91(24) on the basis of this survey. It follows from this case that a unique culture and history, and self-identification as a distinct group, are not bars to being included as "Indians" under s. 91(24).

40 In *Attorney General of Canada v. Canard*, [1976] 1 S.C.R. 170, this Court traced the outer limits of the "Indian" power under s. 91(24). An Indian couple lived on a reserve most of the year except for a few weeks each summer during which they lived off the reserve and the husband worked on a farm. The husband died during one of the weeks he was away from the reserve. This resulted in the superintendent in charge of the Indian district (which included their reserve) being appointed as administrator of his estate, pursuant to s. 43 of the *Indian Act*.[8] His wife challenged s. 43 on the grounds that it violated the *Canadian Bill of Rights*, S.C. 1960, c. 44. While the Court held that s. 43 of the *Indian Act* did not violate the *Bill of Rights*, [page122] Beetz J. concluded that in determining who are "Indians" under s. 91(24), "it would not appear unreasonable to count marriage and filiation and, unavoidably, intermarriages": p. 207.

41 These two cases left jurisprudential imprints that assist in deciding whether Métis are part of what is included in s. 91(24). As stated above, *Canard* shows that intermarriage and mixed-ancestry do not preclude groups from inclusion under s. 91(24). And *Re Eskimo* establishes that the fact that a group is a distinct people with a unique identity and history whose members self-identify as separate from Indians, is not a bar to inclusion within s. 91(24).

42 There is no doubt that the Métis are a distinct people. Their distinctiveness was recognized in two recent cases from this Court - *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*, [2011] 2 S.C.R. 670, and *Manitoba Metis Federation*. The issue in *Cunningham* was whether Alberta's *Metis Settlements Act*, R.S.A. 2000, c. M-14, violated s. 15 of the *Canadian Charter of Rights and Freedoms* by terminating the membership of Métis who voluntarily registered as Indians under the *Indian Act*. The Court concluded that the *Metis Settlements Act* was justified as an ameliorative program. In commenting on the unique history of the Métis, the Court noted that they are "widely recognized as a culturally distinct Aboriginal people living in culturally distinct communities": para. 7.

43 And in *Manitoba Metis Federation*, this Court granted declaratory relief to the descendants of Manitoba's Red River Métis Settlement. The federal *Manitoba Act, 1870*, S.C. 1870, c. 3, promised [page123] land to the children of the Métis. Errors and delays resulted in many of them receiving inadequate scrip rather than land. The Court held that Canada had a fiduciary relationship with the Métis, and that the Crown's promise to implement the land grant engaged the honour of the Crown. This created a duty of diligent implementation. In so deciding, the Court stated that the Métis of the Red River Settlement are a "distinct community": para. 91.

44 The Crown, however, submits that including Métis as "Indians" under s. 91(24) is contrary to this Court's decision in *R. v. Blais*, [2003] 2 S.C.R. 236. With respect, I think *Blais* can be easily distinguished. The issue in *Blais* was whether a provision of Manitoba's *Natural Resources Transfer Agreement*, which allowed "Indians" to hunt out of season, included Métis. It is true that the Court concluded that "Indians" in the *Natural Resources Transfer Agreement* did not include Métis, but what was at issue was a constitutional agreement, not the Constitution. This, as this Court noted in *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698, is a completely different interpretive exercise:

> ... it is submitted that the intention of the framers should be determinative in interpreting the scope of the heads of power enumerated in ss. 91 and 92 given the decision in *R. v. Blais*, [2003] 2 S.C.R. 236, 2003 SCC 44. That case considered the interpretive question in relation to a particular constitutional agreement, as opposed to a head of power which must continually adapt to cover new realities. It is therefore distinguishable and does not apply here. [para. 30]

45 While there was some overlapping evidence between *Blais* and this case, the interpretation of [page124] a different record in *Blais* directed at different issues cannot trump the extensive and significantly broader expert testimony and the findings of Phelan J. Of most significance, however, is the fact that this Court itself expressly stated in *Blais* that it was *not* deciding whether s. 91(24) included the Métis. Far from seeing *Blais* as dispositive of the constitutional scope of s. 91(24), the Court emphasized that it left "open for another day the question of whether the term 'Indians' in s. 91(24) of the *Constitution Act, 1867* includes the Métis - an issue not before us in this appeal": para. 36.

46 A broad understanding of "Indians" under s. 91(24) as meaning 'Aboriginal peoples', resolves the definitional concerns raised by the parties in this case. Since s. 91(24) includes all Aboriginal peoples, including Métis and non-status Indians, there is no need to delineate which mixed-ancestry communities are Métis and which are non-status Indians. They are all "Indians" under s. 91(24) by virtue of the fact that they are all Aboriginal peoples.

47 Determining whether particular individuals or communities are non-status Indians or Métis and therefore "Indians" under s. 91(24), is a fact-driven question to be decided on a case-by-case basis in the future, but it brings us to whether, for purposes of s. 91(24), Métis should be restricted to the definitional criteria set out in *Powley* in accordance with the decision of the Federal Court of Appeal, or whether, as the appellants and some of the interveners urged, the membership base should be broader.

48 The issue in *Powley* was who is Métis under s. 35 of the *Constitution Act, 1982*. The case involved [page125] two Métis hunters who were charged with violating the *Game and Fish Act*, R.S.O. 1990, c. G.1. They claimed that the Métis had an Aboriginal right to hunt for food under s. 35(1). The Court agreed and suggested three criteria for

defining who qualifies as Métis for purposes of s. 35(1):

1. Self-identification as Métis;
2. An ancestral connection to an historic Métis community; and
3. Acceptance by the modern Métis community.

49 The third criterion - community acceptance - raises particular concerns in the context of this case. The criteria in *Powley* were developed specifically for purposes of applying s. 35, which is about protecting historic community-held rights: para. 13. That is why acceptance by the community was found to be, for purposes of who is included as Métis under s. 35, a prerequisite to holding those rights. Section 91(24) serves a very different constitutional purpose. It is about the federal government's relationship with Canada's Aboriginal peoples. This includes people who may no longer be accepted by their communities because they were separated from them as a result, for example, of government policies such as Indian Residential Schools. There is no principled reason for presumptively and arbitrarily excluding them from Parliament's protective authority on the basis of a "community acceptance" test.

50 The first declaration should, accordingly, be granted as requested. Non-status Indians and Métis are "Indians" under s. 91(24) and it is the federal government to whom they can turn.

[page126]

51 But federal jurisdiction over Métis and non-status Indians does not mean that all provincial legislation pertaining to Métis and non-status Indians is inherently *ultra vires*. This Court has recognized that courts "should favour, where possible, the ordinary operation of statutes enacted by *both* levels of government": *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3, at para. 37 (emphasis in original). Moreover, this Court has been clear that federal authority under s. 91(24) does not bar valid provincial schemes that do not impair the core of the "Indian" power: *NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union*, [2010] 2 S.C.R. 696, at para. 3.

52 I agree, however, with both the trial judge and the Federal Court of Appeal that neither the second nor third declaration should be granted.

53 The second declaration sought is to recognize that the Crown owes a fiduciary duty to Métis and non-status Indians. *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, accepted that Canada's Aboriginal peoples have a fiduciary relationship with the Crown and *Manitoba Metis Federation* accepted that such a relationship exists between the Crown and Métis. As a result, the declaration lacks practical utility because it is restating settled law.

54 The third declaration sought is that Métis and non-status Indians have the right to be consulted and negotiated with, in good faith, by the federal government on a collective basis through representatives of their choice, respecting all their rights, interests and needs as Aboriginal peoples.

55 The claim is that the First Ministers' conferences anticipated by ss. 37 and 37.1 of the *Constitution* [page127] *Act, 1982*[9] did not yield the hoped-for results in identifying and defining Aboriginal rights. The subsequent lack of progress implies that the federal government has not fulfilled its constitutional obligations.

56 However, *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, *Tsilhqot'in Nation v. British Columbia*, [2014] 2 S.C.R. 257, and *Powley* already recognize a context-specific duty to negotiate when Aboriginal rights are engaged. Because it would be a restatement of the existing law, the third declaration too lacks practical utility.

[page128]

57 For the foregoing reasons, while I agree with the Federal Court of Appeal and the trial judge that the second and third declarations should not be granted, I would restore the trial judge's decision that the word "Indians" in s. 91(24) includes Métis and non-status Indians.

58 The appeal is therefore allowed in part and the Federal Court of Appeal's conclusion that the first declaration should exclude non-status Indians or apply only to those Métis who meet the *Powley* criteria, is set aside. It follows that the cross-appeal is dismissed. The appellants are entitled to their costs.

Appeal allowed in part and cross-appeal dismissed, with costs.

Solicitors:

Solicitors for the appellants/respondents on cross-appeal: University of Ottawa, Ottawa; Paliare Roland Rosenberg Rothstein, Toronto.

Solicitor for the respondents/appellants on cross-appeal: Attorney General of Canada, Saskatoon, Ottawa and Edmonton.

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

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

Solicitors for the interveners the Native Council of Nova Scotia, the New Brunswick Aboriginal Peoples Council and the Native Council of Prince Edward Island: Burchells, Halifax.

Solicitors for the intervener the Metis Settlements General Council: Witten, Edmonton.

Solicitors for the intervener the Te'mexw Treaty Association: JFK Law Corporation, Vancouver.

Solicitors for the intervener the Métis Federation of Canada: Devlin Gailus Westaway, Victoria.

[page129]

Solicitors for the intervener the Aseniwuche Winewak Nation of Canada: JFK Law Corporation, Vancouver and Victoria.

Solicitors for the intervener the Chiefs of Ontario: Nahwegahbow, Corbiere Genoodmagejig, Rama, Ontario.

Solicitors for the intervener the Gift Lake Métis Settlement: Gowling WLG (Canada) Inc., Ottawa.

Solicitors for the intervener the Native Alliance of Quebec: Gagné Letarte, Québec.

Solicitors for the intervener the Assembly of First Nations: Gowling WLG (Canada) Inc., Ottawa.

Solicitor for the intervener the Métis National Council: Métis National Council, Ottawa.

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1 *[2013] 2 F.C.R. 268*.

2 When Newfoundland and Labrador joined Confederation in 1949, for example, they brought with them many Aboriginal peoples who were obviously not - and had never been - registered under the federal *Indian Act* and were therefore non-

status Indians. The federal government nonetheless assumed jurisdiction over them and many were incorporated into the *Indian Act* in 1984 and 2008.

3 *The Inconvenient Indian: A Curious Account of Native People in North America* (2013), winner of the 2014 RBC Taylor Prize.

4 *The Indian Act, 1876*, S.C. 1876, c. 18.

5 *An Act further to amend "The Indian Act"*, S.C. 1894, c. 32.

6 *An Act to amend the Indian Act*, S.C. 1958, c. 19.

7 **35.** (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

8 R.S.C. 1970, c. I-6.

9 **37.** (1) A constitutional conference composed of the Prime Minister of Canada and the first ministers of the provinces shall be convened by the Prime Minister of Canada within one year after this Part comes into force.

(2) The conference convened under subsection (1) shall have included in its agenda an item respecting constitutional matters that directly affect the aboriginal peoples of Canada, including the identification and definition of the rights of those peoples to be included in the Constitution of Canada, and the Prime Minister of Canada shall invite representatives of those peoples to participate in the discussions on that item.

(3) The Prime Minister of Canada shall invite elected representatives of the governments of the Yukon Territory and the Northwest Territories to participate in the discussions on any item on the agenda of the conference convened under subsection (1) that, in the opinion of the Prime Minister, directly affects the Yukon Territory and the Northwest Territories.

37.1 (1) In addition to the conference convened in March 1983, at least two constitutional conferences composed of the Prime Minister of Canada and the first ministers of the provinces shall be convened by the Prime Minister of Canada, the first within three years after April 17, 1982 and the second within five years after that date.

(2) Each conference convened under subsection (1) shall have included in its agenda constitutional matters that directly affect the aboriginal peoples of Canada, and the Prime Minister of Canada shall invite representatives of those peoples to participate in the discussions on those matters.

(3) The Prime Minister of Canada shall invite elected representatives of the governments of the Yukon Territory and the Northwest Territories to participate in the discussions on any item on the agenda of a conference convened under subsection (1) that, in the opinion of the Prime Minister, directly affects the Yukon Territory and the Northwest Territories.

(4) Nothing in this section shall be construed so as to derogate from subsection 35(1).

End of Document

Tab 12

Gitxsan First Nation v. British Columbia (Minister of Forests), [2002] B.C.J. No. 2761

British Columbia and Yukon Judgments

British Columbia Supreme Court

Smithers and Vancouver, British Columbia Tysoe J.

Heard: September 23 - 27 and October 21 - 23, 2002.

Judgment: December 10, 2002.

Smithers Registry No. 12437

Vancouver Registry Nos. L021279, L021243

[2002] B.C.J. No. 2761 | *2002 BCSC 1701* | *10 B.C.L.R. (4th) 126* | *48 Admin. L.R. (3d) 225* | *[2003] 2 C.N.L.R. 142* | *118 A.C.W.S. (3d) 481*

Between Yal also known as Aubrey Jackson, Djogaslee also known as Ted Mowatt, Lelt also known as Lloyd Ryan, Geel also known as Walter Harris, Wii Eelast also known as Jim Angus, Tsabux also known as Wilmer Johnson, Tenimgyet also known as Art Mathews Jr., and Sakxum Higookw also known as Vernon Smith, on behalf of themselves and in their capacity as Gitxsan House Chiefs and on behalf of all members of the Gitxsan Houses having their principal office at P.O. Box 229, 1650 Omineca Street, Hazelton B.C. V0J 2N0, petitioners, and Minister of Forests of the Province of British Columbia and Skeena Cellulose Inc., respondents (Smithers Registry No. 12437) And between The Lax Kw'alaams Indian Band, by Chief Councillor Garry Reece on his own behalf and on behalf of the members of the Lax Kw'alaams Indian Band, and the Metlakatla Indian Band, by Chief Councillor Harold Leighton, on his own behalf and on behalf of the members of the Metlakatla Indian Band, and the Allied Tsimshian Tribes Association, petitioners, and 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, and Skeena Cellulose Inc. and NWBC Timber & Pulp Ltd., respondents (Vancouver Registry No. L021279) And between Gwasslam also known as George Phillip Daniels, Gwinuu also known as Godfrey Good, Gamlaxyeltxw also known as Edger Good, Sindihl also known as Robert Good, Widaxhayetsxw also known as Agatha Bright, Wiilitsque also known as Morris Derrick, Malii also known as Gordon Johnson, on behalf of themselves and in their capacity as the Gitanyow Hereditary Chiefs and on behalf of all members of the Gitanyow First Nation having their principal office at P.O. Box 148, Kitwanga, British Columbia, V0J 2A0, petitioners, and The Minister of Forests for the Province of British Columbia, Skeena Cellulose Inc. and NWBC Timber & Pulp Ltd., respondents (Vancouver Registry No. L021243)

(116 paras.)

Case Summary

Forest and forest products — Forest regulation — Licensing — Transfer — Indians, Inuit and Metis — Lands — Aboriginal rights — Protection of — Duties of Crown Re — Judicial review — Scope of review.

Application by aboriginal Nations to set aside a consent granted by the respondent Minister of Forests to the change of control of Skeena Cellulose. Skeena operated pulp and saw mills. It also held several licences issued under the Forest Act. Skeena encountered financial problems. It sought protection under the Companies' Creditors Arrangement Act. The Crown became one of its two shareholders. In February 2002, the Crown agreed to sell its shares to NWBC Timber. The closing of the share transaction and the implementation of Skeena's restructuring plan was scheduled for April 29, 2002. If the restructuring was not completed by April 30, Skeena would be assigned into bankruptcy. Section 54 of the Forest Act required the Minister to consent to the chance of control of a licence holder. The Ministry of Forests contacted the Nations to inform them of the change

of control. Meetings were held between the Ministry and some of the applicants. The Minister consented to the transaction on April 30. The Nations asserted aboriginal title and rights regarding the area covered by the licenses.

HELD: The application was adjourned.

The Nations established strong or prima facie claims of aboriginal title or rights regarding all the areas claimed by them. If Skeena had declared bankruptcy, the licenses could have been sold and the Nations would have been able to acquire them. As a result, they established a prima facie infringement of aboriginal title or rights. This gave rise to the Minister's duty. There was no meaningful consultation by the Crown with the applicants. No attempt was made to accommodate their concerns. The court did not want to set aside the Minister s consent. This was too drastic as it could have a detrimental effect on the public interest. It was best to give the Minister an opportunity to properly fulfil his duty. If the process did not succeed, the applicants could return to the court for further relief.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, *R.S.C. 1985, c. C-36*. Forest Act, *R.S.B.C. 1996, c. 157, ss. 36*, 54, 55.

Counsel

Gordon Sebastian, Bertha Joseph and Cynthia Joseph, for the petitioners (Smithers Registry No. 12437). Gregory J. McDade, Q.C., and James P. Tate, for the petitioners (Vancouver Registry No. L021279). Peter R.A. Grant and David Kalmakoff, for the petitioners (Vancouver Registry No. L021243). Paul J. Pearlman, Q.C., and Paul Yearwood, for the respondents, Minister of Forests and Attorney General of the Province of British Columbia. Charles F. Willms, for the respondents, Skeena Cellulose Inc. and NWBC Timber & Pulp Ltd. (Smithers Registry No. 12437 and Vancouver Registry No. L021279). Charles F. Willms and Kevin G. O'Callaghan, for the respondent, Skeena Cellulose Inc. (Vancouver Registry No. L021243).

TYSOE J.

INDEX

FACTS

INTRODUCTION

1 In each of these three proceedings, the Petitioners challenge the decision of the Minister of Forests (the "Minister") to consent to the change of control of Skeena Cellulose Inc. ("Skeena") by which NWBC Timber & Pulp Ltd. ("NWBC") became the owner of all of the shares in the capital of Skeena. The Gitanyow First Nation also challenges other actions related to Skeena and makes additional requests for relief.

2 The Petitioners in each proceeding are aboriginal people who assert aboriginal title and rights in respect of lands covered by a tree farm licence and several forest licences issued to Skeena and its subsidiaries pursuant to the Forest Act, *R.S.B.C. 1996, c. 157* (the "Act"). Section 54 of the Act provides that, among other things, the Minister

must consent before a licence issued under the Act is transferred or before there is a change of control of the holder of such a licence. The Petitioners assert that in giving his consent to the change of control of Skeena, the Minister failed to fulfil his duty of consultation and accommodation as articulated by the Supreme Court of Canada in Delgamuukw v. British Columbia, *[1997] 3 S.C.R. 1010* ("Delgamuukw") and as elaborated upon by, among others, the B.C. Court of Appeal in Halfway River First Nation v. British Columbia (Ministry of Forests), *[1999] B.c.J. No. 1880*, *1999 BCCA 470*, Taku River Tlingit First Nation v. Tulsequah Chief Mine Project, *[2002] B.C.J. No. 155*, *2002 BCCA 59*, leave to appeal to S.C.C. granted *[2002] S.C.C.A. No. 148* ("Taku River"), Haida Nation v. British Columbia (Minister of Forests), *[2002] B.C.J. No. 378*, *2002 BCCA 147* ("Haida No. 1") and Haida Nation v. British Columbia (Minister of Forests), *[2002] B.C.J. No. 1882*, *2002 BCCA 462* ("Haida No. 2") (together "Haida"), leave to appeal to S.C.C. requested.

3 Despite the fact that there are different facts in each proceeding, I have decided that it is appropriate to issue a single set of Reasons for Judgment in respect of all three proceedings. None of the factual differences or additional challenges affect my reasoning or overall conclusions. It will still be necessary for counsel to draw up separate Orders in each of the proceedings to reflect the declarations and orders flowing from these Reasons. Although I am issuing a single set of Reasons for Judgment, I have only relied on the evidence in each proceeding to reach my conclusions with respect to the issues involved in that proceeding.

FACTS

Recent History of Skeena

4 Skeena has been involved in the forestry industry in northwestern British Columbia for many years. It has a pulp mill in Prince Rupert and, either directly or indirectly through subsidiaries, it operates several saw mills. Skeena holds several licences issued under the Act in connection with its operations.

5 The main licence held by Skeena is a tree farm licence which gives it the exclusive right to harvest timber in three areas covered by it to the extent of the annual allowable cut attached to the licence in the approximate amount of 600,000 cubic metres of timber. Parts of the areas covered by the tree farm licence are among the lands claimed by each of the petitioning First Nations. As with all other tree farm licences issued under the Act, Skeena's tree farm licence has a term of 25 years. Section 36 of the Act sets out a procedure for the replacement of a tree farm licence every five years. Each replacement licence has a term of 25 years, so that the practical effect of a replacement is to extend the term by five years. If a licence is not replaced at the end of the five year period, the licence continues in existence for the remaining 20 years of its term and it then expires with no right of replacement.

6 Skeena also holds at least six forest licences and a seventh forest licence is held by Buffalo Head Forest Products Ltd. ("Buffalo Head"), a company which was owned by Skeena until the transaction in question. Forest licences give the holder the right to harvest an annual volume of timber within timber supply areas. Unlike a tree farm licence, a forest licence does not give its holder the exclusive right to harvest timber within a timber supply area. The chief forester determines the allowable annual cut for a particular timber supply area and the volume is then apportioned among the holders of licences. A holder of a forest licence harvests timber in particular areas within the timber supply area in accordance with cutting permits issued by the Ministry of Forests. Forest licences held by Skeena (and the forest licence held by Buffalo Head) relate to timber supply areas within the territories claimed by the petitioning First Nations.

7 Skeena has been encountering financial difficulties for the past decade. It sought the protection of the Companies' Creditors Arrangement Act, *R.S.C. 1985, c. C-36* (the "CCAA") in the mid-1990s and its two principal creditors, the Crown and The Toronto-Dominion Bank, became its shareholders through a numbered holding company (with an agreement to give shares to Skeena's employees in consideration of a 10% wage cut over 7 years). When there was a change in the provincial government in May 2001, the Ministry holding Skeena's shares was given the mandate of returning Skeena to private sector ownership.

8 Skeena's financial difficulties were continuing and it sought protection under the CCAA for a second time on

September 5, 2001. These proceedings were supervised by Brenner C.J.S.C. A stay of proceedings was granted in the CCAA proceedings and it was extended several times while Skeena attempted to reorganize its financial affairs, principally through the mechanism of a sale of its assets or shares.

9 On February 20, 2002, the Crown executed a purchase agreement with NWBC for the sale of its shares in Skeena to NWBC. Based on the purchase agreement, a restructuring plan was formulated to give a limited recovery to Skeena's creditors ($6 million for the secured creditors and $2 million, or 10 cents on the dollar, for the unsecured creditors). Skeena's creditors approved the restructuring plan at creditor meetings on April 2. The plan was sanctioned by Brenner C.J.S.C. on April 4.

10 The closing of the share transaction and the implementation of Skeena's restructuring plan were scheduled for April 29. The latest extension of the stay in the CCAA proceedings was set to expire on April 30 and, if the restructuring was not completed by April 30, Skeena was to be assigned into bankruptcy. These deadlines were capable of further extension but it is not known whether Brenner C.J.S.C. or NWBC would have been prepared to grant an extension of any significant length.

11 One of the conditions of the purchase agreement was that the Minister consent to the change of control of Skeena. As the transaction was scheduled to complete by April 29, the Minister was required to make his decision by this date.

Communications Between the Ministry and the Petitioners

12 By letters dated March 27, 2002, the Ministry of Forests wrote to the First Nations which it considered would be potentially impacted by the transfer of control of Skeena to NWBC. The letters stated that the Ministry would arrange a meeting with each First Nation between April 3 and 12, at which it proposed to outline the transaction, and that it would then look forward to hearing from the First Nation regarding the nature and extent of any aboriginal interests that the First Nation felt may be impacted by the proposed transaction. Representatives of the Ministry subsequently met with some of the First Nations between April 9 and 22. A representative of NWBC also attended these meetings.

13 I will now outline the events from the perspective of each of the four First Nations which are Petitioners in these proceedings. There was some affidavit evidence regarding the conversations which took place at the meetings but, for the most part, I have relied on minutes of the meetings prepared by a consultant hired by the Ministry of Forests who attended all but one of the meetings, together with minutes prepared by another government representative in respect of the meeting not attended by the consultant.

(a) Gitxsan

14 Representatives of the Ministry of Forests met with representatives of the Gitxsan (also spelled Gitksan) First Nation on April 12 and 19. The April 12 meeting was public and it was attended by non-Gitxsan persons as well as Gitxsan representatives. It is unclear whether the meeting was expressed as a consultation on aboriginal rights and title. A Gitxsan representative asked to see a copy of the agreement between the Crown and NWBC, and was told that it was confidential. One of the Gitxsan speakers expressed the view that there was nothing upon which the Gitxsan could make a decision to approve or disapprove of the transaction. Another Gitxsan speaker stated that some of the Gitxsan Houses opposed the transfer because they were not consulted on activities occurring within their territories. Employment concerns were also raised by the Gitxsan. At the conclusion of the meeting, the Gitxsan stated that there had to be a thorough consultation process and that "mere consultation" was not sufficient.

15 On April 15, the Chair of the Gitxsan Treaty Society wrote to the Minister about the April 12 meeting and future meetings. The letter stated that there must be a discussion of the process for consultation and accommodation. The letter listed a number of issues in respect of which the Gitxsan wished to be consulted. It requested seven items of information. The letter concluded by expressing the view that the Gitxsan needed to be fully informed of the

implications of the transaction before they could be properly consulted. The Gitxsan First Nation have never received a reply to this letter.

16 The April 19 meeting lasted approximately 1 1/2 hours. A number of Gitxsan speakers expressed concerns about such matters as unemployment, the lack of any offers of partnership and the removal of resources from their territories. The meeting concluded with a Gitxsan speaker stating that the Gitxsan did not view the meeting as a consultation meeting and that they were prepared to enter into proper consultation when they had full information. One of the Ministry's representatives responded that the concerns expressed by the Gitxsan at the meeting would be forwarded to the Minister.

(b) Lax Kw'alaams

17 No meetings occurred between representatives of the Ministry and the Lax Kw'alaams First Nation. A meeting was scheduled for April 16 but it was postponed by the First Nation after a letter dated April 9 was written to the Minister by the Chief Councillor of the Lax Kw'alaams Indian Band and the President of the Allied Tsimshian Tribes Association (the "Association"). The letter requested that the Minister withhold his consent to the transfer of control of the forest tenures until he had completed a full and appropriate consultation process with the Lax Kw'alaams Indian Band. It expressed the view that a proper consultation would (i) involve a distinct and separate process, (ii) involve a full discussion of the proper allocation of forest resources in the aboriginal title lands of the Lax Kw'alaams and (iii) involve discussion of compensation for past and future infringements of their aboriginal rights and title. No response to this correspondence was received until May 8, when the Minister sent a letter in which he stated, among other things, that he had consented to the proposed change of control after reviewing all of the information provided to him.

18 On April 23, legal counsel for the Lax Kw'alaams and the Association wrote to the lawyer with the Ministry of Attorney General who was involved in the meetings with the other First Nations. The lack of response to the April 9 letter was noted and a request was made for a consultation meeting with the Minister or his representative. No meeting took place. The Lax Kw'alaams band manager was told by a Ministry official on April 24 that there was no point in holding a meeting and that nothing could be done in view of the timetable for the transaction.

(c) Metlakatla

19 One meeting was held on April 15 between representatives of the Metlakatla Indian Band and Ministry officials. The meeting lasted for approximately one hour.

20 At the outset of the meeting, a Metlakatla representative stated that it was a highly flawed consultation process with inadequate time frames and that the Metlakatla could not support the transaction or the process without proper and meaningful consultation. The representative stated that he considered the meeting to be an information sharing meeting.

21 When one of the Metlakatla asked if the meeting was a result of the Haida case consultation ruling (Haida No. 1 had been issued less than two months earlier), the lawyer from the Ministry of Attorney General responded that it was and she concurred that the process was less than adequate as far as consultation was concerned. She also stated that the government officials were not at the meeting to request approval of either the transaction or the process.

22 Concerns were expressed by the Metlakatla at the meeting about such matters as the management of their own resources, the environment and unemployment. A request was made for more specific accommodation of the Metlakatla concerns. The Attorney General lawyer said that the concerns, including the concerns about the short time frame and lack of information, would be presented to the Minister.

(d) Gitanyow

23 Although the communications between the Ministry of Forests and the other First Nations commenced with the Ministry's March 27 letter, the Gitanyow's legal counsel had written an earlier letter to the Minister. By letter dated March 19, the Gitanyow's counsel wrote to the Minister making reference to media reports of a sale of Skeena to NWBC and requesting confirmation that the forest tenures held by Skeena would not be transferred until the completion of "legally required consultation with a view of accommodating the Aboriginal rights and title of the Gitanyow". As with the April 9 letter written to the Minister by the Lax Kw'alaams, there was no response to this letter until May 8, when the Minister wrote a letter stating that he had consented to the change of control of Skeena.

24 On April 5, the chief treaty negotiator for the Gitanyow wrote to the Attorney General enclosing a copy of the March 19 letter and requesting that he arrange a timely response from the government with respect to its constitutional obligation to consult with the Gitanyow. The Attorney General responded by letter dated April 8. He acknowledged the concern around adequate consultation and stated that he appreciated the significance of the recent decisions of the B.C. Court of Appeal (which were presumably the Taku River and Haida No. 1 decisions). The Attorney General recorded his understanding that a meeting between representatives of the Gitanyow and the Ministry of Forests was scheduled for April 12 and stated that he looked forward to the results of the meeting.

25 On April 9, the Gitanyow tabled a draft of a framework agreement for consultation and accommodation with the B.C. treaty negotiators (a copy was also given to NWBC). The purpose of this draft agreement was to set out a process for consultation and accommodation with respect to forestry operations and the granting or transferring of forest tenures affecting the territory claimed by the Gitanyow. No comments on the form of the agreement have been made by the Crown (although a letter written by the Deputy Minister of Forests on the business day immediately preceding the hearing of the Gitanyow's Petition on October 21 has indicated a willingness to hold a workshop to discuss the draft agreement).

26 The April 12 meeting lasted approximately 2 1/2 hours. The meeting began with a statement on behalf of the Gitanyow that they did not view the meeting as a consultation. It is alleged in an affidavit filed in these proceedings that the President of NWBC, who was in attendance at the meeting, agreed that the meeting was not a consultation, although the minutes of the meeting taken by the consultant hired by the Ministry do not reflect a statement to this effect.

27 There were further discussions throughout the meeting about the topic of consultation. A Gitanyow representative made reference to the decisions in Taku River and Haida No. 1, and stated that the Ministry had an obligation to consider their cultural and economic interest. A Ministry representative responded that the Ministry of Attorney General was working on an analysis of those decisions and would be developing guidelines for consulting, which would then be incorporated into the Ministry's own policies. The Ministry representative acknowledged that the Crown was still looking into how it would approach consultation. He subsequently stated that the Ministry needed to ensure that it had a meaningful consultative process and time would be required to work on it as a result of cutbacks having the effect of reducing capacity within the Ministry.

28 During the meeting, the Gitanyow expressed concerns about the environment, unemployment of their people, a dwindling of resources and the effect of logging on fishing and game. A Gitanyow speaker raised the topic of NWBC's business plan and was told that NWBC was not prepared to discuss its business plan in detail until the transaction closed. An issue was also raised about the fact that the Buffalo Head tenure was being excluded from the transaction and NWBC's President replied that it was expedient to exclude it.

29 On April 21, the chief treaty negotiator for the Gitanyow wrote to the Minister requesting certain information with respect to the proposed change of control of Skeena. The letter stated that the April 12 meeting did not constitute even a beginning of consultation and that the requested information was needed to start the consultation process. The only response to this letter was the Minister's May 8 letter stating that he had consented to the change of control of Skeena.

The Injunction Application

30 As mentioned above, the closing of the sale and the implementation of Skeena's restructuring plan were scheduled for April 29. On April 23, the Gitanyow proceeding was commenced, and the Lax Kw'alaams proceeding was initiated on April 25. An application was then brought by the Gitanyow and Lax Kw'alaams First Nations in their proceedings and Skeena's CCAA proceedings for an interlocutory injunction to restrain the Minister from giving his consent to the change of control of Skeena. The application was heard by Brenner C.J.S.C., who dismissed it on April 30 (cited as In the Matter of CCAA and Skeena Cellulose, et al, *[2002] B.C.J. No. 991*, *2002 BCSC 597*, leave to appeal granted but stayed until the determination of these proceedings, Lax Kw'alaams Indian Band v. British Columbia (Minister of Forests), *[2002] B.C.J. No. 1420*, *2002 BCCA 403*). I gather that the closing of the sale and implementation of the restructuring plan were postponed for one day in order to give Brenner C.J.S.C. an opportunity to give a considered decision.

31 In dismissing the injunction application, Brenner C.J.S.C. applied the well known three-part test set out in RJR-MacDonald Inc. v. Canada (Attorney General), *[1994] 1 S.C.R. 311* ("RJR - MacDonald") for the granting of interim relief. It was conceded by opposing counsel that the first part of the test was satisfied in view of the serious question to be tried. In dealing with the second part of the test, Brenner CJ.S.C. held that the applicants had failed to demonstrate any significant prejudice or irreparable harm but, as there was some prejudice, he went on to consider the final leg of the test. In considering the balance of convenience, Brenner C.J.S.C. said the following:

> The potential prejudice to [Skeena], to NWBC, to the creditors, employees and contractors dependent upon [Skeena], and indeed to many members of the public of British Columbia should the sale not close, in my view, considerably outweighs any prejudice that the petitioners might suffer as a consequence of the Minister giving his final consent to the change in control. (para. 23)

Brenner C.J.S.C. concluded that the balance of convenience did not favour the granting of the injunction, and that the Minister should not be restrained from giving his consent to the change in control.

Consent of the Minister

32 The Minister's consent to the change of control of Skeena was required pursuant to s. 54 of the Act. In addition to stipulating that the Minister must consent to a disposition of a licence issued pursuant to the Act, s. 54 requires his prior consent to be obtained for an amalgamation of a licence holder with another company and for a change of control of a licence holder.

33 As previously mentioned, a consultant retained by the Ministry of Forests attended all of the meetings with the First Nation groups (with the exception of the meeting with the Metlakatla Band, which was attended by another government representative who took notes of the meeting). The consultant prepared a report to the Minister for his consideration in deciding whether to consent to the change in control. The body of the report was 10 pages long and the minutes of the various meetings were attached as an appendix to the report. It summarized the concerns expressed by the First Nation groups at the meetings (including the concern about the lack of proper consultation).

34 The Minister gave his approval in principle to Skeena's change of control on April 24 and he gave his final consent on April 30. The Minister's consent was given subject to three conditions, the terms of which were contained in the Minister's April 24 letter, as amended by responding correspondence from Skeena/NWBC. The conditions, as amended, were as follows:

> [Skeena] and NWBC must:
>
> 1. acknowledge that [Skeena's] licences issued under the Forest Act and their ancillary permits may be affected by land use planning decisions, aboriginal interests, and treaty negotiations with First Nations;
> 2. acknowledge that the change of control of [Skeena] will be without prejudice to any aboriginal rights or title that may exist in or over the land supporting the licences. For the purposes of clarity,

this is not an acknowledgement that there are aboriginal rights or title in or over any of the affected land. Rather, this is an acknowledgement that the proposed change of control is neutral with respect to any aboriginal right or title; and

3. agree in writing to provide, within 60 days of the change in control of [Skeena] becoming effective, copies of a business plan for [Skeena] to the Regional Manager, Prince Rupert Forest Region, and to a representative of each First Nation asserting aboriginal or treaty rights within the operating area of [Skeena].

The consent letter, as amended, also contained the following paragraph immediately following the three conditions:

> The rights and responsibilities described in this letter are for the sole benefit of, and binding on [Skeena], NWBC and the Ministry of Forests, and are subject to enforcement by them solely and may not be used or relied upon by third parties for any purpose, except aboriginals in respect of their existing aboriginal rights or title.

After the Minister gave his consent, the sale transaction completed and all of the shares in the capital of Skeena were acquired by NWBC. The business plan described in the third condition was not delivered within the 60 day time limit but it was subsequently provided within a 30 day extension granted by the Minister.

Aboriginal Claims of the Petitioners

35 Each of the Petitioners assert aboriginal title and aboriginal rights in the areas covered by Skeena's tree farm licence and forest licences. Before summarizing each of their claims, I will deal briefly with the status of their treaty negotiations.

36 In 1992, Canada, British Columbia and representatives of the First Nations Summit entered into the British Columbia Treaty Commission Agreement. This Agreement incorporated the following six-stage treaty process:

Stage 1:	Submission of Statement of Intent to negotiate a treaty
Stage 2:	Preparation for negotiations
Stage 3:	Negotiation of Framework Agreement
Stage 4:	Negotiation of Agreement in Principle
Stage 5:	Negotiation to finalize a treaty
Stage 6:	Implementation of the treaty

Each of the petitioning First Nations is currently at Stage 4 of the treaty process.

37 The chief treaty negotiator of the Gitanyow had deposed that the Crown's chief negotiator has stated that the Gitanyow treaty negotiations are one of the most advanced treaty negotiations in British Columbia. One of the claims made by the Gitanyow in the present proceedings is for a declaration that the Crown has breached its duty to conduct treaty negotiations in good faith. None of the other petitioning First Nation groups seek this form of relief, although it was evident from the materials and submissions of counsel that at least the Gitxsan First Nation is quite frustrated with the negotiations.

38 In the Taku River decision, the chambers judge pointed out that the federal government had agreed to negotiate land claims with the Tlingit First Nation in 1984 on the basis of a preliminary determination that it had aboriginal rights in the territory claimed by it. The chief treaty negotiator under the B.C. treaty process has deposed that any information submitted by a First Nation in which they assert the existence of aboriginal rights and title is used by the Province for the purpose of identifying the interests or areas which the First Nation wishes to negotiate, and is not for the purpose of evaluating or assessing whether the information is sufficient to meet the legal criteria for the proof of aboriginal rights and title.

39 The Gitanyow say that they are in the same position as the Tlingit First Nation. The Gitanyow submitted a claim to the federal government in 1977 with respect to their rights in and to the territory claimed by them. The claim was accepted for negotiation by the federal government in 1981. The policy of the federal government at the time was that comprehensive claims would be denied or accepted for settlement after they were analyzed in terms of both their historical accuracy and legal merit by the Office of Native Claims and the Department of Justice.

40 I will now summarize the evidence in support of aboriginal title and rights as proffered by each of the petitioning First Nations.

(a) Gitxsan Claims

41 The Gitxsan Houses were one set of the plaintiffs in Delgamuukw, where the duty of consultation and accommodation was discussed by the Supreme Court of Canada. Hence, it is instructive to briefly review the decisions in that case at each of the three levels of court. At trial, *[1991] B.C.J. No. 525*, the Hereditary Chiefs of 71 Gitxsan and Wet'suwet'en Houses claimed separate portions of 58,000 square kilometres of British Columbia. The trial judge did not accept the evidence of oral histories of the plaintiffs showing attachment to the claimed lands. He dismissed the claims for ownership, jurisdiction and aboriginal rights on the basis that the Crown had extinguished aboriginal rights to all lands in the colony.

42 On appeal, *[1993] B.C.J. No. 1395*, the individual claims by each of the Houses were amalgamated into two claims, one by the Gitxsan and one by the Wet'suwet'en. In addition, the claims for ownership and jurisdiction were replaced with claims for aboriginal title and self-government. The appeal to the B.C. Court of Appeal was dismissed by a majority of the Court.

43 The Supreme Court of Canada ordered a new trial on two bases. The first basis was the fact that there had been no amendment to the pleadings to reflect the changed claims being pursued on appeal. The second basis was that the trial judge had incorrectly refused to give any independent weight to the oral histories recited by the plaintiffs. In the course of its decision, the Court held that aboriginal rights had not been extinguished by the Crown.

44 In this proceeding, the affidavit evidence recounted that the Gitxsan First Nation consists of four clans which are known as the frog, wolf, eagle and fireweed clans or phraties. Each clan has a number of wilps, which are extended family or house groups. There are a total of 65 Gitxsan Houses (53 of which participated in the Delgamuukw litigation).

45 Affidavits of members of the Gitxsan Houses were filed in support of the claims for aboriginal title and rights. The affidavits describe oral histories of the Gitxsan such as the adaawk and family recollections (adaawk are

described as ancient oral histories recounting origins and migrations since the ice ages). Based on the oral histories, the Gitxsan say that since time immemorial they have exercised aboriginal rights and title over approximately 30,471 square kilometres of territories located mainly in the Upper Skeena and Upper Nass watersheds. They say that they have occupied these territories exclusively and according to their laws. Attached to one of the affidavits were excerpts from the transcript of the Delgamuukw trial where the aboriginal rights of hunting and fishing were discussed. Attached to another of the affidavits was an affidavit filed in the Delgamuukw trial setting out the territory claimed by one of the Gitxsan Houses on the basis of instructions given to the deponent by persons who are now deceased. One of the deponents prepared a map showing the relationship between the territories claimed by the Gitxsan Houses and Skeena's tree farm and forest licences.

(b) Lax Kw'alaams and Metlakatla Claims

46 The affidavit evidence describes the relationship between the Lax Kw'alaams band and the Metlakatla band. They are two modern Indian Act bands which substantially represent the membership of nine Tsimshian tribes. The nine Tsimshian tribes formed the Association, one of the Petitioners in these proceedings, to be their representative. The Association is governed by the current Hereditary Chiefs of the original nine tribes.

47 The affidavits allege that the nine tribes have used and occupied certain territories shown on a map attached to the affidavits. The affidavits state that the deponents were told about their territories and rights at feasts and meetings or by their grandparents. The deponents say that before contact with the European people, the tribes occupied their territories and possessed the natural resources located in the territories to the exclusion of other people unless permission was granted to allow others to use the territories.

48 One of the affidavits was sworn by a professor who specializes in Tsimshian culture and language. Attached to her affidavit was a report dealing with the use and occupation of the lands covered by Skeena's tree farm licence by the Lax Kw'alaams and Metlakatla Indian Bands. Based on research done by the professor, the report concludes that some areas covered by Skeena's tree farm licence fall within the territory claimed to be owned by Tsimshian tribes and the territory claimed to be the hunting and berry grounds of one or more Tsimshian tribes.

(c) Gitanyow Claims

49 Several affidavits were sworn by Gitanyow persons. Similar to the Gitxsan, the Gitanyow have two clans comprised of eight Houses. They also have oral histories called adaawks.

50 The chief treaty negotiator for the Gitanyow (who is a Hereditary Chief of one of the Houses) swore an affidavit to which he has attached three publications, (i) Totem Poles of the Gitksan, Upper Skeena, British Columbia, (ii) Histories, Territories and Laws of the Kitwancool and (iii) Tribal Boundaries in the Nass Watershed. The first of these works was prepared in 1929 by Marius Barbeau and published as Bulletin No. 61 of the National Museum of Canada. The second work was published in 1959 by Wilson Duff under the auspices of the Department of Education of the B.C. Provincial Museum. The third work was a report issued in 1995 for the Gitanyow Treaty Office. It was prepared by five persons (including counsel for the Gitanyow in these proceedings). The co-ordinator, researcher and principal writer of the report is a Gitxsan person who swore two affidavits describing the process by which the report was prepared. In the affidavit of the chief treaty negotiator, it is deposed that these three works, the adaawk taught to him and the testimony in Delgamuukw all uphold that the Gitanyow have occupied the territory claimed by them prior to the arrival of the first white man and that the Gitanyow have continued to occupy the territory since 1846 (the year in which it was determined in Delgamuukw that British sovereignty over British Columbia was conclusively established).

51 Two other Hereditary Chiefs of Gitanyow Houses also swore affidavits. They say that they were taught various things by deceased relatives and a former chief. These teachings included the whereabouts of the boundaries of the territories of their respective Houses, the utilization and occupation of the territories and the Gitanyow laws.

Subsequent Events Affecting the Gitanyow

52 As mentioned in the introduction of these Reasons for Judgment, the Gitanyow First Nation challenges actions of the Crown in addition to the Minister's decision to consent to the change of control of Skeena. The Amended Petition of the Gitanyow requests a declaration that the failure of the Minister to ensure meaningful consultation with respect to forestry development which may affect the Gitanyow's aboriginal rights and title constitutes a breach of the Minister's constitutional and fiduciary duties towards the Gitanyow.

53 This additional claim relates to two proposed actions affecting Skeena's forest licences. The first involves an application by one of Skeena's subsidiaries for a major amendment to the forest licence held by the subsidiary. The second involves a proposed 2002-2011 forest development plan for a small business forest enterprise program in which Skeena (or one of its subsidiaries) would participate. The Gitanyow First Nation allege a failure of the Crown to ensure proper consultation with respect to these two proposed actions.

ISSUES

54 The common issues raised at the hearings of each of the three Petitions are as follows:

(a) what is the appropriate standard of review to be applied by the Court in respect of the Minister's decision to consent to the change of control of Skeena?

(b) have each of the Petitioners established a prima facie claim of aboriginal title or rights in respect of lands covered by Skeena's licences?

(c) have each of the Petitioners established a prima facie infringement of the aboriginal title or rights which they claim?

(d) if a duty of consultation and accommodation was owed to each of the Petitioners by the Minister before he made his decision whether to consent to the change of control of Skeena, did he fulfil his duty?

(e) if the Minister had such a duty and failed to fulfil it, what are the appropriate remedies?

55 The Amended Petition of the Gitanyow First Nation raises two additional issues. The first relates to the request for a declaration that the Minister has failed to ensure meaningful consultation with respect to the proposed actions involving a major amendment to the forest licence of one of Skeena's subsidiaries and a proposed 2002-2011 forest development plan for a small business forest enterprise program. The second additional issue is whether the decision of the Minister to give his consent to the change of control of Skeena constituted a breach of the Crown's duty to conduct treaty negotiations with the Gitanyow in good faith.

56 Counsel for the Crown did not argue that the Minister does not owe a duty of consultation until the aboriginal title or rights are established by a treaty or a court determination, presumably because the decisions of the B.C. Court of Appeal in Taku River and Haida are binding on me with respect to this point. The Crown has been granted leave to appeal Taku River to the Supreme Court of Canada and I understand that the Crown is seeking leave to appeal Haida as well. I do not take the Crown's silence to represent a concession on the merits of the issue. There are other issues that were not conceded by counsel for the Minister and Skeena/NWBC in respect of which I also consider these decisions to be binding upon me.

DISCUSSION

57 Before I address the specific issues raised by these proceedings, it is useful in my view to review the leading authorities in this area. The duty of consultation was first discussed by the Supreme Court of Canada in Delgamuukw. Although the Court ordered a new trial, it undertook an extensive discussion of aboriginal title and rights. The Court stated that aboriginal rights, including aboriginal title, are not absolute and they may be infringed

by the federal and provincial governments if the infringements satisfy a test of justification. The test of justification has two parts, the first of which is the requirement that the infringement must be in furtherance of a legislative objective that is compelling and substantial. The second part of the test involves an assessment of whether the infringement is consistent with the special fiduciary relationship between the Crown and aboriginal peoples.

58 In discussing the topic of justification of an infringement of aboriginal title, Lamer C.J.C. said the following:

> ... aboriginal title encompasses within it a right to choose to what ends a piece of land can be put. The aboriginal right to fish for food, by contrast, does not contain within it the same discretionary component. This aspect of aboriginal title suggests that the fiduciary relationship between the Crown and aboriginal peoples may be satisfied by the involvement of aboriginal peoples in decisions taken with respect to their lands. There is always a duty of consultation. Whether the aboriginal group has been consulted is relevant in determining whether the infringement of aboriginal title is justified ... 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. (para. 168)

59 In Halfway River, a cutting permit was issued in respect of lands adjacent to a reserve established by a treaty. The First Nation was concerned that logging under the permit would infringe its treaty right to hunt moose. The B.C. Court of Appeal upheld the decision of the chambers judge to quash the cutting permit on the basis that the infringement of the treaty rights was not justified because the Ministry of Forests had failed in its fiduciary duty to engage in adequate consultation with the First Nation.

60 The next decision on the topic by the B.C. Court of Appeal was Taku River. A mining company wished to reopen a mine and to build an access road which would cross a portion of the territory claimed by the First Nation. The Court of Appeal upheld the decision of the chambers judge to quash the granting of a project approval certificate to the mining company by the responsible Ministers pursuant to the Environmental Assessment Act. The Court agreed with the chambers judge that the Crown owed the First Nation a constitutional or fiduciary duty of consultation despite the fact that the aboriginal rights or title had not yet been established in court proceedings.

61 The two most recent decisions of the B.C. Court of Appeal on the topic of consultation, Haida No. 1 and Haida No. 2, arise from the same case. Similar to the case at bar, Haida involved the transfer of a tree farm licence and its replacement under s. 36 of the Act. The chambers judge had dismissed the petition on the basis that questions of infringement and justification could not be decided until the claims of aboriginal title and rights had been determined conclusively by legal proceedings. This was contrary to the subsequent holding of the Court of Appeal in Taku River, which was released one week before the Haida appeal was set for hearing. In Haida No. 1, Lambert J.A., on behalf of the Court, held that the decision in Taku River was binding and determinative of the outcome of the appeal. However, he went on at some length discussing the duty to consult and the appropriate remedy for that case. The Court did not rule the actions of the Minister of Forests to be invalid at that stage and declared that the Crown and the recipient of the licence, Weyerhaeuser Company Limited, had a duty to consult with the Haida people and to endeavour to seek workable accommodations.

62 Haida No. 2 was decided as a result of the objection of Weyerhaeuser to being included in the declaration of consultation/accommodation. The majority of the Court of Appeal confirmed the inclusion of Weyerhaeuser in the declaration. In the course of the reasons of the two judges comprising the majority, there was additional discussion about the duty of consultation/accommodation.

63 I now turn to the specific issues raised in the course of these proceedings.

Standard of Review

64 Counsel for the Crown made submissions with respect to the standard of review to be applied by the Court in reviewing the Minister's decision. He argued that the Court should give the highest standard of deference and should only interfere with the Minister's decision if it was patently unreasonable. Counsel says that the Minister was required to balance competing interests in a limited time frame and that his decision was reasonable in all of the circumstances. At the hearing of the Gitanyow Petition, counsel cited Suresh v. Canada (Minister of Citizenship and Immigration), *[2002] S.C.J. No. 3*, *2002 SCC 1* ("Suresh") in support of the proposition that the patently unreasonable standard of review applies to decisions made by ministers even if they involve constitutional considerations.

65 In my view, these submissions confuse the standard of review to be applied when considering a decision made by a minister and the fulfilment of a constitutional duty which must be satisfied before a minister makes a decision. This case deals with the fulfilment of the constitutional duty. The issue is whether the constitutional prerequisite to the decision was satisfied and it is not a question of applying a standard of review to the decision. In Suresh, the standard of review was being applied to the Minister's decision which was required to conform with the Constitution, and it did not involve a separate and distinct constitutional duty.

66 In any event, even if it is a question of the standard of review to be applied to a consideration of the Minister's decision, the Court of Appeal decided in Halfway River that the issues of the nature before me are questions of law and that the test to be applied to the decision is that of correctness. Finch J.A. (as he then was) held at para. 86 that if the government official was afforded the deference entailed in the patently unreasonable standard of review, he would be the judge in his own cause. The circumstances of Halfway River are much closer to the present situation than the Suresh circumstances, and I consider Halfway River to be binding on me in this regard. I also note that while the applicability of a standard of review was not discussed in Taku River or Haida, no deference was afforded to the government official in either of those cases.

Prima Facie Claims

67 Counsel for the Crown disputes that the Petitioners have established strong or good prima facie claims of aboriginal title or rights in respect of all of the areas claimed by them. Counsel for Skeena/NWBC did not expressly take a position on this issue but made submissions which were generally supportive of the Crown's position. In particular, counsel for Skeena/NWBC challenges the admissibility of portions of affidavits sworn in support of the claim of aboriginal title and rights (counsel for the Crown joined in support of most of these challenges).

68 Counsel for the Crown makes a distinction between a prima facie case simpliciter and a strong or good prima facie case. I agree that there is a distinction based on the following paragraph from Haida No. 1:

> The strength of the Haida case gives content to the obligation to consult and the obligation to seek an accommodation. I am not saying that if there is something less than a good prima facie case then there is no obligation to consult. I do not have to deal with such a case on this appeal. But certainly the scope of the consultation and the strength of the obligation to seek an accommodation will be proportional to the potential soundness of the claim for aboriginal title and aboriginal rights. (para. 51)

Lambert J.A. made these comments after quoting from the chambers judge who spoke of certain claims having degrees of success ranging from "reasonable possibility" to "reasonable probability" to "substantial probability".

69 In making submissions with respect to the nature of the prima facie case required to be established by the Petitioners, counsel for the Crown made comparisons to the criteria applied on interim stay applications (which are, in turn, similar to interlocutory injunction applications). He made reference to RJR- MacDonald, where the Court stated that in considering whether there is a serious case to be tried, the motions judge should not undertake a prolonged examination of the merits. It is necessary, however, to make an evaluation of the strength of the First Nation's prima facie claim for the purpose of assessing the adequacy of the Crown's efforts to consult and

accommodate. I agree with the submission of counsel for the Crown that the Court is not in a position to do anything more than make a preliminary, general assessment of the strength of the prima facie claim.

70 Similarly, it is also my view that the Court should not make detailed rulings on evidentiary matters unless it is essential to do so for the purpose of making the decision on the existence of a prima facie claim and the strength of it. For example, in Delgamuukw, the Supreme Court of Canada held that the trial judge erred because he refused to give independent weight to oral histories. As with the evidence before me, the oral histories consisted of the adaawk of the Gitxsan, personal recollections of deceased members of the First Nations and territorial affidavits. Lamer C.J.C. observed at para. 107 that the findings of facts might have been very different if the oral histories had been assessed correctly. An informative discussion of evidentiary difficulties in cases involving aboriginal rights is also found in Mitchell v. Canada (Minister of National Revenue), *[2001] S.C.J. No. 33*, *2001 SCC 33*. In my opinion, it would be inappropriate for me, on the basis of affidavits only and without the benefit of viva voce evidence, to make critical findings of admissibility and to assess the weight to be given to oral histories. This should be left to a trial judge, who will have the task of making the final determinations on the claims of aboriginal title and rights, without being encumbered by any opinions expressed by me on the basis of affidavit evidence. I will treat the oral histories at face value for the purpose of determining whether the Petitioners have prima facie claims of aboriginal title and rights.

71 I agree with the submissions of counsel for Skeena/NWBC that many statements in the affidavits are irrelevant or are inadmissible hearsay, opinion or argument, and I have disregarded these statements. In reaching my conclusions on the existence and strength of the Petitioners' prima facie claims of aboriginal title and rights, I have relied only on direct evidence and the oral histories contained within the affidavits. It has not been necessary for me to rely on expert opinion evidence in this regard and I express no view on its admissibility.

72 On the basis of the direct evidence and oral histories, I am satisfied that each of the petitioning First Nations has a good prima facie claim of aboriginal title and a strong prima facie claim of aboriginal rights with respect to at least part of the areas claimed by them and that these parts are included within the lands covered by Skeena's tree farm and forest licences. The claims for aboriginal rights are stronger than the claims for aboriginal title because they do not require an element of exclusivity, but each claim qualifies for a classification as a good or strong prima facie claim. In reaching my conclusion in this regard, I have not found it necessary to rely on the fact that the claim of the Gitanyow was accepted for treaty negotiation by the federal government (which is not a party to these proceedings) or the fact that the claims of each of the petitioning First Nations have been the subject of treaty negotiations with the provincial government (which entered into the negotiations without assessing the validity of the claims).

73 Counsel for the Crown argued that the Petitioners do not have strong or good prima facie claims of aboriginal title or rights in respect of all of the territories claimed by them for two principal reasons, the second of which only applies to the Gitxsan proceeding. First, counsel points to the fact that there are two types of overlapping claims with respect to the territories claimed by the First Nation groups. There are internal overlapping claims in the sense that within the overall area claimed by the Gitxsan, some portions of the territory are claimed by two or more Gitxsan Houses. There are external overlapping claims in the sense that parts of the territories claimed by the each of the petitioning First Nations are also claimed by other First Nation groups. The second reason asserted by counsel for the Crown is that the findings of the trial judge in Delgamuukw undermine the assertion of the Gitxsan First Nation of a strong prima facie claim of aboriginal title to the whole of the territory claimed by them.

74 There is no requirement that a First Nation group establish a good prima facie claim of aboriginal title or rights with respect to all of the area claimed by it. The overlapping claims certainly preclude each competing group from being successful in proving aboriginal title to the areas which are the subject matter of the overlapping claims because, as stated at para. 155 of Delgamuukw, it would be absurd for two or more groups to have the right of exclusive use and occupation to the same area. However, as pointed out at para. 156 of Delgamuukw, the common law principle of exclusivity should be imported into the concept of aboriginal title with caution and the presence of other aboriginal groups does not necessarily preclude a finding of exclusivity. One group may be successful over another group in proving exclusivity to establish aboriginal title. In addition, in the event that the overlapping claims

result in a finding that aboriginal title to a disputed area has not been established, it is still possible for the Court to conclude that the competing groups have each established aboriginal rights in respect of the area.

75 In Haida, for instance, the Haida Nation claimed title to all of the Queen Charlotte Islands. The chambers judge concluded that there was a reasonable probability that the Haida would be able to establish aboriginal title to some parts of the Islands and that there was a reasonable possibility that they would be able to establish aboriginal title to other parts of the Islands. He also concluded that there was a substantial probability that the Haida would be able to establish the aboriginal right to harvest red cedar trees in areas covered by the tree farm licence in question. Roughly speaking, I would equate (i) the term "reasonable possibility" to a prima facie case, (ii) the term "reasonable probability" to a good prima facie case and (iii) the term "substantial probability" to a strong prima facie case. The fact that the Haida Nation did not have a good prima facie claim of aboriginal title in respect of all of the territory claimed by it was of no consequence because they had established good or strong prima facie claims of aboriginal title and rights in respect of some of the lands covered by the tree farm licence. The same situation exists in this case.

76 With respect to the other arm of the argument, it would not be appropriate, in my view, to rely on the findings of the trial judge in Delgamuukw to conclude that the Gitxsan First Nation does not have a good prima facie claim of aboriginal title or rights. One of the reasons for ordering a new trial was the conclusion of the Supreme Court of Canada that the trial judge erred in refusing to give independent weight to the oral histories. As mentioned above, Lamer C.J.C. stated at para. 107 that the trial judge's conclusions on the issues of occupation and use of the disputed territory might have been very different if he had assessed the oral histories correctly.

Prima Facie Infringement

77 Counsel for the Minister and counsel for Skeena/NWBC each argues that the Petitioners have not established that the Minister's decision constituted a prima facie case of infringement. They say that the present circumstances are different from the Haida situation because there was no replacement of any forest tenure and there was no transfer of forest tenure from one party to another. They maintain that, as stated in the letter giving the Minister's consent, the change of control was neutral with respect to aboriginal title and rights. Counsel say that if there was no prima facie infringement, there was no requirement for the Minister to consult the petitioning First Nations before consenting to the change of control of Skeena. Counsel further submit that there has been ongoing consultation regarding operation issues and that there will be an opportunity for consultation in connection with the pending decision of the Minister to replace Skeena's tree farm licence pursuant to s. 36 of the Act.

78 In my view, the Haida decisions are binding upon me with respect to this issue. At the trial level, the Haida Nation had alleged numerous instances of infringement but on appeal it confined its claim to two actions (see para. 48 of Haida No. 1). Those two actions were a s. 36 replacement of a tree farm licence in 1999 and the transfer of the tree farm licence in 2000 from MacMillan Bloedel Limited to Weyerhaeuser Company Limited. In each of the Haida decisions and especially in Haida No. 2, it is clear that the Court of Appeal considered both of these actions to constitute a prima facie infringement of aboriginal title and rights. There is no practical distinction between a transfer of a tree farm licence from one party to another (as occurred in Haida) and a change of control of the holder of tree farm and forest licences such that the holder becomes a wholly owned subsidiary of another corporation (as occurred in this case). In each situation, a different party will, either directly or indirectly, have the ability to make decisions with respect to forest tenure licences. This is why the Legislature included a change of control of the licence holder, as well as a transfer of the licence itself, in s. 54 as a circumstance requiring the consent of the Minister. If a change of control was not included in s. 54, parties could circumvent the requirement for the Minister's consent to a transfer of the licence by maintaining the licence in a shell company and transferring the shares in the shell company rather than the licence itself.

79 However, it is my view that the Haida decisions go further than holding that a transfer of a forest tenure licence (or the equivalent change of control of the licence holder) is a prima facie infringement of aboriginal title or rights. Although the Haida Nation confined their claim on appeal to the 1999 and 2000 actions of the Minister, the Court of Appeal took a broader view of the infringement. At para. 84 of Haida No. 2, Lambert J.A. stated that the potential

infringements extended to the passing of the Act and the issuance of the tree farm licence. He said the following at para. 91:

> The provincial Crown may infringe on the aboriginal title and aboriginal rights of the Haida people if it can justify the infringement. The infringement would consist in establishing a legislative and administrative scheme under the Forest Act, granting Weyerhaeuser an exclusive right to harvest timber in the area covered by T.F.L. 39, renewing the issuance of T.F.L. 39, transferring T.F.L. 39 to Weyerhaeuser, approving management plans, and issuing cutting permits, all in furtherance of the same legislative scheme, and all in violation of the aboriginal title and aboriginal rights of the Haida people. The provincial Crown may justify its actions by meeting the tests for justification. Among the tests is a requirement that the Haida people be consulted before the infringement actions are taken. In this case, the Crown provincial did not consult the Haida people in any effective way at any stage of the furtherance of the legislative and administrative scheme, and so is in breach of its obligation of consultation at every stage where a justification test would require effective consultation.

And at para. 64, Lambert J.A. observed that the Crown's fiduciary duty is a continuing and ever present duty which continues unimpaired until the next time it must be observed.

80 Finch C.J.B.C. expressed a similar view at para. 123 of Haida No. 2. He said that the circumstances giving rise to a duty to consult on the part of Weyerhaeuser included the issuance by the Minister of a tree farm licence in breach of the Crown's duty to consult (and the receipt by Weyerhaeuser of a licence which suffered a legal defect).

81 Each of Finch C.J.B.C. and Lambert J.A. made reference to the issuance of the tree farm licence being a prima facie infringement of aboriginal title or rights. Lambert J.A. stated that the fiduciary duty continues until the next time it must be observed. There is no suggestion in the present case that the Crown previously consulted the petitioning First Nations when the forest tenure licences were initially issued to Skeena or previously replaced under s. 36 of the Act. If a forest tenure licence has been issued in breach of the Crown's duty to consult, the duty continues and the Crown is obliged to honour its duty each time it has a dealing with the licence. This includes each occasion when the Minister's consent is required under s. 54. There is an obligation on the Minister to ensure that the Crown's continuing duty has been fulfilled before the infringement is perpetuated by a further transaction involving the licence. The Minister cannot simply ignore the previous breaches of the duty to consult and give his consent to a transaction under s. 54 without giving the aboriginal people an opportunity to provide their views with respect to the infringement.

82 I do not accept the submission that the decision of the Minister to give his consent to Skeena's change in control had no impact on the Petitioners. While it is true that the change in control was neutral in the sense that it did not affect the theoretical tenure of the tree farm and forest licences or any of the conditions attached to them, the change in control was not neutral from a practical point of view. First, it changed the identity of the controlling mind of Skeena, and the philosophy of the persons making the decisions associated with the licences may have changed correspondingly. Second, Skeena was on the brink of bankruptcy and it may have gone into bankruptcy if the Minister had not given his consent by April 30. If Skeena had gone into bankruptcy, it would no longer have been able to utilize the licences. It is possible that the trustee in bankruptcy or Skeena's secured creditors would have been able to sell the licences but any sale would have required the Minister's consent and there can be no doubt that he would have been required to consult the Petitioners before giving his consent to any sale of the licenses. There was also a possibility that the tree farm licence would not be sold, in which case the Petitioners would have had the opportunity of pursuing their own ventures for logging some or all of the lands covered by the licence.

83 The sale transaction had an added impact on the Gitanyow. The transaction specifically excluded Skeena's subsidiary, Buffalo Head. Skeena transferred the shares in Buffalo Head to a numbered company owned by the Crown. There are issues with respect to the silviculture obligations in relation to the areas harvested by Buffalo Head pursuant to its forest licence and it has not been clarified as to whether the Crown will assume those obligations. The affected areas fall within the territory claimed by the Gitanyow.

84 Counsel for each of the Crown and Skeena/NWBC relied on the decision of the Supreme Court of Canada in Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture), *[2002] S.C.J. No. 33*, *2002 SCC 31*. Counsel for Skeena/NWBC relied on it in making his submission that the change of control was neutral by referring to the passage at para. 71 stating that the Heritage Conservation Act was tailored so that it did not affect the established rights of aboriginal peoples. As I have stated, I disagree with the submission that the change of control was neutral.

85 Counsel for the Crown relied on the Kitkatla decision in making a comparison to the balancing of interests recognized by the Court in that decision to the balancing of interests undertaken by the Minister in this case. He also relied on R. v. Nikal, *[1996] 1 S.C.R. 1013* for the proposition that the government is ultimately entitled to balance competing rights. Counsel went on to submit that the Minister's decision to consent to the change of control struck a reasonable balance of the competing interests. I agree that the Minister is required to balance competing interests but he is first required to fulfil his duty of consultation and accommodation. It is no answer to say that consultation was not required because the Minister considered the competing interests. One of the principal purposes of consultation is to enable the Minister to gain a proper understanding of the aboriginal interests and to seek ways to accommodate those interests.

86 I hold that each of the petitioning First Nations has established a prima facie infringement of aboriginal title or rights giving rise to a duty on the Minister to consult them prior to consenting to the change of control of Skeena. The fact that there may be a duty of consultation on him prior to a replacement of the tree farm licence under s. 36 does not diminish from the requirement that he was required to fulfil his duty of consultation prior to deciding whether to consent to Skeena's change in control. It is a continuing duty which must be observed each time the Crown has a dealing with the licence. Similarly, the consultation on operating issues in the past did not fulfil the Minister's duty of consultation in connection with the change in control.

Adequacy of Consultation and Accommodation

87 In my view, there was no meaningful consultation by the Crown of the petitioning First Nations with respect to the Minister's decision and there was no attempt whatsoever to accommodate their concerns.

88 It was stated in Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), *[2001] F.C.J. No. 1877*, *2001 FCT 1426* ("Mikisew") that consultation must be undertaken with the genuine intention of substantially addressing First Nation concerns (para. 154) and that it is not sufficient for the communication to be the same as the communication with other interested stakeholders (para. 141). In Halfway River, the B.C. Court of Appeal said that the duty to consult imposes on the Crown the obligation to reasonably ensure that the aboriginal peoples are provided with all necessary information in a timely way and to ensure that their representations are seriously considered and, where possible, integrated into the proposed course of action (para. 160). I find as follows in these regards:

(a) the level of communication by the Crown with the petitioning First Nations was not significantly different from the level of communication with other stakeholders;

(b) the petitioning First Nations were not provided with all necessary information in a timely way (or at all) prior to the Minister's decision (two examples are the refusal of the Crown to disclose any of the terms of the sale agreement and the fact that the Minister did not require a business plan to be produced until after the change in control had taken place); and

(c) the Crown did not undertake the consultation with a genuine intention of substantially addressing the concerns of the petitioning First Nations because, as reflected in the letters comprising the Minister's consent, the Crown considered the transaction to be neutral with respect to any aboriginal right or title.

89 There was no consultation of any sort with the Lax Kw'alaams. It was not unreasonable for the Lax Kw'alaams

to decline to meet until they had received a response to their April 9 letter (although I am not suggesting that the Crown was required to accept the positions expressed by the Lax Kw'alaams in the letter). Their request for a consultation meeting by way of the letter dated April 23 from their legal counsel was essentially ignored.

90 At the meeting with the Metlakatlas on April 15, legal counsel for the Crown effectively conceded that the meeting did not constitute consultation as required by Haida No. 1. I agree with this concession, and it is my view that there was no significant difference between this meeting and the meetings held with the Gitxsan and the Gitanyow, where objections about the sufficiency of the meetings for the purposes of the duty of consultation were also expressed.

91 In his submissions, counsel for the Crown made reference to the time constraints facing the Minister in view of the April 29 deadline and he argued that the Minister acted reasonably in striking a balance between the concerns of the First Nations and the interests of creditors, employees and contractors of Skeena. On a factual basis, I observe that the Crown did not initiate any communication with the First Nation groups until over a month after it entered into the sale agreement with NWBC. The sale agreement was signed on February 20 and the first letter to the First Nations was sent on March 27 (which was more than half way to the April 29 deadline). Hence, the Crown itself contributed to the short length of the time constraints. On a legal basis, the shortness of time and economic interests are not sufficient to obviate the duty of consultation: see R. v. Noel, *[1995] 4 C.N.L.R. 78* (N.T.T.C.) at p. 95, Mikisew at para. 132 and Haida No. 1 at para. 55.

92 I find that the Minister did not satisfy his duty of consultation and accommodation as it relates to the petitioning First Nations before he made his decision to consent to the change of control of Skeena.

Other Proposed Actions

93 The Gitanyow First Nation seeks a declaration that the Minister has failed to ensure meaningful consultation with respect to the proposed actions involving a major amendment to the forest licence of one of Skeena's subsidiaries and a proposed 2002-2011 forest development plan for a small business forest enterprise program.

94 I set out the facts related to these proposed actions very briefly and it is not necessary to provide any further details because it is my view that the claim is premature and may become academic. It is premature because no decisions have been made on the proposed actions (at least as they affect the territory claimed by the Gitanyow). In addition, there have been revisions to each of the proposed actions which convert or classify the cutblocks within the territory claimed by the Gitanyow as "information" blocks only. This means that no harvesting can occur in these cutblocks unless a new forest development plan or major amendment is put forward and approved. Any such new plan or amendment would be subject to consultation with the Gitanyow.

95 As a result, the facts do not support a finding that the Crown has failed to ensure meaningful consultation with respect to any decision made by the Crown. No decision has been made on the proposed actions and they have both been revised to effectively exclude the territory claimed by the Gitanyow First Nation. Accordingly, I refuse to make the requested declaration.

Duty to Negotiate in Good Faith

96 Relying on, among others, the decision in Gitanyow v. Canada and British Columbia, *[1999] 3 C.N.L.R. 89* (B.C.S.C.) and the cases referred to therein, the Gitanyow First Nation alleges that the Crown has breached its obligation to negotiate a treaty with it in good faith on the basis that the Minister's consent to the change of control of Skeena now prevents the Crown from agreeing to give things to the Gitanyow First Nation as part of their treaty negotiations. In his oral submissions, counsel for the Gitanyow asserted that the Crown had unilaterally taken issues "off the negotiating table". In his reply submissions, counsel for the Gitanyow argued that during treaty negotiations the Crown has an obligation to maintain the status quo and cannot change the status quo by granting new rights to new actors.

97 There are two answers to this allegation. First, the Gitanyow have not presented evidence of any matter being negotiated with the Crown in the treaty negotiations which has been affected by the change in control of Skeena. Indeed, it is difficult to envisage how any matter under negotiation could have been affected. Although I disagree with the argument of the Crown that the Minister's decision to consent to the change in control was neutral with respect to aboriginal rights or title, it is my view that the change in control was neutral to the treaty negotiations. The Crown was in no better position before the change in control to make a concession to the Gitanyow in respect of any matter affected by the tree farm or forest licences. The change in control did not affect any of the rights under the licences. The Minister's consent simply allowed a change of control of Skeena to take place and it did not give any new rights under the licences to Skeena or NWBC. Although a refusal by the Minister to give his consent to the change of control may potentially have resulted in the Crown being in a better position to make concessions to the Gitanyow in the treaty negotiations, the duty to negotiate in good faith does not require the Crown to effectively expropriate rights from third parties without compensation so that they may be given to aboriginal people.

98 Second, the conditions attached to the Minister's giving of consent put the Crown in a better, not a worse, negotiating position. The first condition required Skeena and NWBC to acknowledge that the licences could be affected by, among other things, treaty negotiations with First Nations. This acknowledgment potentially gives the Crown the ability to make concessions in the treaty negotiations with the Gitanyow which it would not have been able to make prior to the change in control.

99 I conclude that it has not been demonstrated that the Crown has breached its duty to negotiate a treaty in good faith with the Gitanyow.

Remedies

100 As I have held that the Minister had a duty to consult and accommodate the petitioning First Nations prior to deciding whether to consent to the change of control of Skeena and that he did not fulfil his duty, it is necessary to consider the appropriate remedies in the circumstances. In addition to requesting a declaration that the Minister did not fulfil his duty of consultation and accommodation, the principal remedy sought by each of the Petitioners is a setting aside or quashing of the decision of the Minister to consent to the change in control. In his reply submissions, counsel for the Gitxsan First Nation requested that he be given the opportunity to make further submissions on alternate remedies if I did not quash the "tenure transfer". I interject to comment that I have no jurisdiction to invalidate or reverse the transfer of Skeena's shares to NWBC. At most, I can set aside the Minister's decision to give his consent to the change in control.

101 On the other hand, each of counsel for the Minister and Skeena/NWBC submit that I should exercise my discretion to decline to grant any relief and that I should dismiss the Petitions. In this regard, counsel for the Crown relies on the decision in Klahoose First Nation v. British Columbia (Minister of Forests) *(1995), 13 B.C.L.R. (3d) 59* (S.C.) ("Klahoose"), as well as two other factors. Counsel for Skeena/NWBC takes the same position and submits that a setting aside of the Minister's consent will render Skeena bankrupt and will result in massive economic damage to the employees of Skeena, its customers and to the northwest part of the Province.

102 In the Haida case, the Court of Appeal declined to set aside the transfer of the tree farm licence at that stage of the proceeding and limited the relief granted by it to an interim declaration that the Crown and Weyerhaeuser had a duty to consult with the Haida people and to seek workable accommodations. In Haida No. 1, the Court of Appeal declined to make a determination of whether the replacement of the tree farm licence or its transfer to Weyerhaeuser were either invalid or void on the basis that the issue was not sufficiently argued on the appeal. Lambert J.A. also commented that the issue could more readily be argued after the extent of any infringement of aboriginal title and rights had been determined by a court of competent jurisdiction. He went on to say that it seemed to him that the proper time to determine the question of validity would be at the same time as the determination of aboriginal title and rights.

103 In Haida No. 2, when Weyerhaeuser challenged its inclusion in the duty to consult declaration, Lambert J.A.

described the reasoning somewhat differently. He said the Court had been concerned by Weyerhaeuser's principal submission during the initial appeal hearing that the Court should exercise its discretion against granting a declaration that the tree farm licence was invalid. He then said the following:

> It seemed reasonable to think that once it had been established that the duty of consultation arose, in the circumstances of this case, before aboriginal title had been proven in court, a declaration to that effect, on an interim basis, would be sufficient to require the establishment of a procedure for future consultation and would serve to produce a framework for dealing with and protecting the Haida claim to aboriginal title and aboriginal rights over the period until the title and rights had been established by treaty or by a court of competent jurisdiction, while at the same time protecting Weyerhaeuser's interests in T.F.L. 39 and the Crown's interest in safeguarding the public forests. (para. 13).

Lambert J.A. then stated that the declaration which had been granted seemed to be the most minimal remedy and that if proper consultation and accommodation did not occur, the Haida people could renew the request for a declaration that the tree farm licence be declared invalid.

104 I have concluded that I should exercise my discretion in the same fashion as occurred in Haida No. 1. In my opinion, the setting aside of the Minister's decision to give his consent to the change in control would be too potentially drastic at this stage. I do not accept that Skeena would necessarily be thrust into bankruptcy if I did set aside the Minister's decision but the consequences could be far reaching and the public interest could be detrimentally affected.

105 In contrast, the setting aside of the Minister's decision could possibly have no consequences. Unlike the Haida case, Skeena's tree farm licence was not replaced or transferred. In the Haida situation, if the Minister's decision to replace the licence or consent to its transfer was set aside, it could be more forcibly argued that the licence should be cancelled or transferred back to MacMillan Bloedel. In the present case, Skeena has continued to hold the licence at all material times. The share transfer has occurred and neither this Court nor the Minister has the jurisdiction to reverse it. It may be that the Minister would have the ability to cancel Skeena's licences under s. 55 of the Act if his consent to the change in control is rendered nugatory but no submissions were made to me to the effect that this Court has the power to force him to exercise such an ability.

106 In light of the uncertainty of the consequences flowing from the setting aside the Minister's decision to give his consent to the transaction, it is my view that it is preferable to first make a declaration with respect to the duty of consultation on an interim basis and to then allow the parties to undertake a proper process of consultation and accommodation. If the process does not succeed, the matter can be brought back before the Court for further directions or further declarations. For example, if the Minister fails to properly consult with the Petitioners following the issuance of these Reasons for Judgment, it will be open to the Petitioners to renew their request that the Minister's decision be set aside.

107 In addition to the uncertainty aspect, there is another principal reason why I have decided to exercise my discretion to make a declaration with respect to the duty of consultation on an interim basis without at the same time setting aside the Minister's decision. I have held that the Ministry's attempt at consultation was insufficient. Part of the reason for the insufficiency was the time constraints involved in the Skeena's CCAA proceedings and the sale transaction. These time constraints do not relieve the Minister of his obligation to consult the petitioning First Nations, but they make his breach of the duty more understandable. The remedy which I am granting will allow the parties to engage in the consultation/accommodation process within a more adequate time frame without first causing potentially drastic consequences.

108 In submitting that I should exercise my discretion to dismiss the Petitions, counsel for the Crown and Skeena/NWBC cited the Klahoose decision. In that case, Mackenzie J. dismissed a petition seeking judicial review of the Minister's decision to consent to a transfer of a tree farm licence by balancing the potential prejudice to the parties. However, there is a significant distinguishing factor between Klahoose and the case at bar. The main factor relied upon by Mackenzie J. was the reliance in good faith by the purchaser of the licence on the consent given by

the Minister. It was not contemplated by the purchaser in that case that the Minister's consent would be potentially invalid. In the present case, NWBC was aware that the Petitioners were challenging the Minister's decision to consent to Skeena's change in control prior to the completion of the sale. In addition, a term of the Minister granting consent was the acknowledgment by Skeena and NWBC that the change in control was without prejudice to aboriginal rights or title. In contrast to Klahoose, it cannot be said that NWBC relied in good faith on the Minister's consent as it relates to aboriginal issues.

109 In addition to the Klahoose decision, counsel for the Crown pointed to two other factors favouring the exercise of my discretion against the Petitioners. One was a "flood gates" type argument (i.e., it would invite judicial review of every decision by the Minister affecting major licences) and the other was the fact that the consent to the change in control was given without prejudice to aboriginal rights and title, coupled with the existence of continuing opportunities to consult. It is not clear to me whether counsel was relying on these factors to argue that I should dismiss the Petitions or to submit that I should not quash the Minister's decision. I have decided for other reasons that I should not set aside the Minister's decision at this stage. Suffice it to say that these two factors do not persuade me that I should exercise my discretion to dismiss the Petitions.

110 As I mentioned above, counsel for the Gitxsan requested in his reply that he be given the opportunity to make further submissions on alternate remedies if I did not, in effect, set aside the Minister's consent to the change of control of Skeena. I believe that I have heard sufficient submissions from all counsel to deal with the relief sought in the three Petitions and I do not think that anything would be gained by hearing further arguments at this stage.

111 One of the forms of relief sought by the Lax Kw'alaams and Metlakatla First Nations is a declaration that Skeena, as well as the Minister, had a duty of consultation in respect of the change in control. This claim is based on the Haida case, where the Court of Appeal held, in Haida No. 2, after hearing further submissions, that Weyerhaeuser had such a duty in that case. Lambert J.A. based his conclusion in this regard on the concept of "knowing receipt" in situations dealing with breach of fiduciary duty. Finch C.J.B.C. relied on the fact that Weyerhaeuser possessed a licence with a fundamental legal defect which could only be remedied by a declaration of invalidity or participation by Weyerhaeuser in the consultation process.

112 The focus of these proceedings has been the change of control of Skeena by which it became a wholly owned subsidiary of NWBC. Skeena did not knowingly receive a new licence or any other forest tenure rights as a result of the change in control. Although the issuance of the licences represented a prima facie infringement of aboriginal title or rights giving rise to an ongoing duty of consultation, there is no evidence in these proceedings that Skeena initially received the licences with knowledge of a breach of fiduciary duty. It may be that Skeena possesses licences having a legal defect but I do not consider it necessary at this stage to impose a formal obligation on Skeena to participate in the process of consultation/accommodation between the petitioning First Nations and the Crown. If the licences do have a legal defect, Skeena will be practically motivated to participate in the process in order to facilitate the removal of the defect. In view of these factors and the nature of these judicial review proceedings, I exercise my discretion against the inclusion of Skeena in the declaration of the duty of consultation/ accommodation.

113 One of the forms of relief sought by the Gitxsan and Gitanyow First Nations is an order requiring the Minister to provide information, including specified documents, prior to the consultation with them. As noted above, the B.C. Court of Appeal stated in Halfway River that the duty to consult included an obligation on the Crown to reasonably ensure that the aboriginal peoples are provided with necessary information. I am prepared to make a general declaration that the Minister is required to provide the Petitioners with all relevant information reasonably requested by them. However, it is my view that the exact type and extent of information to be provided by the Crown to the First Nations should be discussed between them before the Court makes determinations as to whether specific documents should be provided. The Gitanyow have tabled a draft of a framework agreement for consultation and accommodation, and the Deputy Minister of Forests has indicated a willingness to hold a workshop to discuss the draft agreement. In their letter dated April 15, 2002 to the Minister, the Gitxsan stated that there must be a discussion of the process of consultation and accommodation. I agree that the first step of the consultation process is to discuss the process itself, and the discussion in that regard would logically include the provision of relevant

information. If an impasse is reached on whether specific documents should be provided, there will be liberty to re-apply for a determination of the issue.

114 Finally on the aspect of the relief claimed in the Petitions, some of the requested relief has become academic or is not being pursued, and each of the Gitxsan and the Gitanyow seek other declarations which I do not feel are necessary or appropriate. For instance, each of them requested a declaration that they have a good prima facie case to aboriginal rights and title to their territory and that a significant part or portion of their territory is covered by the forest tenures held by Skeena. Although it was necessary for me to determine whether they had made out good prima facie cases, no purpose is served in making the requested declaration. The second part of the requested declaration requires a finding that the territory claimed by them is their territory, which would involve a definitive ruling on aboriginal title. I am not in a position to make such a definitive ruling.

CONCLUSION

115 The following orders and declarations are made:

(a) I declare that the Minister had in April 2002 and continues to have a legally enforceable duty to each of the petitioning First Nations to consult with them in good faith and to endeavour to seek workable accommodations between the aboriginal interests of each of the petitioning First Nations, on the one hand, and the short-term and the long-term objectives of the Crown and Skeena to manage such of the lands covered by the licences issued to Skeena under the Act as are claimed by the petitioning First Nations in accordance with the public interest, both aboriginal and non-aboriginal, on the other hand;

(b) I declare that that the Minister is required to provide the Petitioners with all relevant information reasonably requested by them;

(c) I order that the parties have liberty to apply to this Court with respect to any question relating to the duty of consultation and accommodation, including the production of documents and other provision of information;

(d) I order that the relief in the Petitions seeking to quash or set aside the decision of the Minister to consent to the change of control of Skeena is adjourned generally, with liberty to re-apply in the event that any of the Petitioners do not believe that the Minister is fulfilling the duty which I have declared in clause (a);

(e) I order that the Petitioners are entitled to their party and party costs of their respective proceedings up to the date hereof; and

(f) order that the balance of the relief sought in the Petitions, including the request by the Gitanyow for a declaration that the Minister breached a duty to negotiate a treaty in good faith and the claim of the Gitanyow relating to the major amendment of the forest licence of one of Skeena's subsidiaries and the plan for the small business forest enterprise program, is dismissed.

116 No submissions were made with respect to the scale at which costs of these proceedings should be granted. Without the benefit of submissions, my inclination is to grant the costs at scale 4 of Appendix B of the Rules of Court. If counsel cannot agree, there is liberty to apply to fix the appropriate scale of the costs.

TYSOE J.

End of Document

Tab 13

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

Supreme Court Reports

Supreme Court of Canada

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

Heard: March 24, 2004;

Judgment: November 18, 2004.

File No.: 29419.

[page512]

[2004] 3 S.C.R. 511 | *[2004] 3 R.C.S. 511* | *[2004] S.C.J. No. 70* | *[2004] A.C.S. no 70* | *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.

(80 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Case Summary

Catchwords:

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.

Summary:

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 [page513] 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 [page514] 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*; [page515] 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*.

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History and Disposition:

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*, [page516] 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.

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[page517]

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The judgment of the Court was delivered by

McLACHLIN C.J.

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 [page518] 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 [page519] 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*.

[page520]

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 [page521] 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 [page522] 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 [page523] 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 [page524] 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).

[page525]

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.

[page526]

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 [page527] 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 [page528] 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 [page529] 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 [page530] 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 [page531] 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.

[page532]

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 [page533] 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 [page534] 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 Maori* (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 Maori opinion on those proposals
- informing Maori of all relevant information upon which those proposals are based
- not promoting but listening with an open mind to what Maori 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, [page535] 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 [page536] 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.

[page537]

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. [page538] 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 [page539] 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 [page540] 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 [page541] 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 [page542] 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).

[page543]

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 [page544] 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.

[page545]

(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 [page546] 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.

[page547]

(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.

[page548]

Solicitors

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.

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[page549]

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

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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.

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Tab 14

Long Plain First Nation v. Canada (Attorney General), [2015] F.C.J. No. 961

Federal Court Judgments

Federal Court of Appeal

Winnipeg, Manitoba

Pelletier, Dawson and Stratas JJ.A.

Heard: January 13, 2014.

Judgment: August 14, 2015.

Docket: A-34-13

[2015] F.C.J. No. 961 | *[2015] A.C.F. no 961* | *2015 FCA 177* | *388 D.L.R. (4th) 209* | *2015 CarswellNat 3463* | *256 A.C.W.S. (3d) 502* | *[2015] 4 C.N.L.R. 14* | *475 N.R. 142* | *476 N.R. 233*

Between Her Majesty the Queen, represented by the Attorney General of Canada, The Hon. Chuck Strahl in his capacity as Minister of Indian Affairs and Northern Development, The Hon. Vic Toews in his capacity as President of Treasury Board, The Hon. Peter MacKay in his capacity as Minister of National Defence, The Hon. Lawrence Cannon in his capacity as Minister Responsible for Canada Lands Company, Appellants, and Long Plain First Nation, Peguis First Nation, Roseau River Anishinabe First Nation, Sagkeeng First Nation, Sandy Bay Ojibway First Nation, Swan Lake First Nation, Collectively being Signatories to Treaty No. 1 and known as "Treaty One First Nations", Respondents

(164 paras.)

Case Summary

Aboriginal law — Aboriginal status and rights — Duties of the Crown — Fair dealing and reconciliation — Consultation and accommodation — Appeal by Crown from order setting aside Crown's transfer of property to non-agent Crown corporation allowed in part and cross-appeal by two first nations from finding that Crown did not owe them duty to consult dismissed — Property lay within first nation territory, to which first nations were successors — Respondent first nations claimed to have right to purchase property in priority to other potential purchasers — No evidence that two first nations had any land claim — Canada breached duty to consult with four other first nations as it did not provide timely information — Remedy inappropriate.

Aboriginal law — Communities and governance — Duties of the Crown — Fair dealing and reconciliation — Consultation and accommodation — Appeal by Crown from order setting aside Crown's transfer of property to non-agent Crown corporation allowed in part and cross-appeal by two first nations from finding that Crown did not owe them duty to consult dismissed — Property lay within first nation territory, to which first nations were successors — Respondent first nations claimed to have right to purchase property in priority to other potential purchasers — No evidence that two first nations had any land claim — Canada breached duty to consult with four other first nations as it did not provide timely information — Remedy inappropriate.

Aboriginal law — Aboriginal lands — Duties of the Crown — Fair dealing and reconciliation — Consultation and accommodation — Appeal by Crown from order setting aside Crown's transfer of property to non-agent Crown corporation allowed in part and cross-appeal by two first nations from finding that Crown did not owe them duty to consult dismissed — Property lay within first nation territory, to which first nations were successors — Respondent first nations claimed to have right to purchase property in priority to other

potential purchasers — No evidence that two first nations had any land claim — Canada breached duty to consult with four other first nations as it did not provide timely information — Remedy inappropriate.

Appeal by the Federal Crown from an order setting aside its transfer of property to a non-agent Crown corporation and cross-appeal by two first nations from finding that Crown did not owe them a duty to consult. In November 2007, the Crown sold a property in Winnipeg, known as the Kapyong Operational Barracks, to the Canada Lands Company Limited, a non-agent Crown corporation, for the purpose of disposal by that corporation. The property, which was used for military purposes, lay within territory that was dealt with in a treaty that was entered into in 1871 between the Crown and certain aboriginal bands located within that territory. The respondents, several first nations, were successors to the treaty signatories. They made various claims as to their interest in the property, including that they had the right to purchase the property in priority to other potential purchasers. The Crown took the position that the interests of the first nations in the property did not take priority as the property had been classified as strategic. The Crown elected to sell the property to the Canada Lands Company. The first nations applied for judicial review seeking a declaration that the Crown breached its duty to consult and restraining the sale. The federal court allowed the application with respect to four of the first nations. It found that the Crown had a duty to consult with them about the sale and it failed to consult meaningfully within the scope of that duty. The court dismissed the applications of two of the first nations finding that there was insufficient evidence to support their claims.

HELD: Appeal allowed in part and cross-appeal dismissed.

With respect to the two first nations whose application was dismissed, there was no evidence that they had a land claim or any unfulfilled per capita reserve land entitlement. The Crown conceded that it had a duty to consult. Given the treaty and the agreements between Canada and the other four first nations, the duty to consult went beyond the minimal level of consultation. The Crown must be in close and meaningful communication with those four fist nation, given them relevant information in a timely way, respond to relevant questions, consider carefully their fully-informed concerns, representations and proposals and, in the end, advise as to the ultimate course of action it would adopt and why. The Crown failed to fulfil its duty to consult as it did not provide timely notice of the possibility of the availability of the property or provide information about the property. The restraining order could not be sustained. There was on reason to believe the Crown, now aware of its obligations, would not govern itself accordingly. The supervision order was inappropriate as it was not requested and it was unnecessary as the Crown had not refused its responsibilities, but rather was unsure of them.

Statutes, Regulations and Rules Cited:

Constitution Act, 1930, s. 11

Appeal From:

Appeal from a judgment of the Honourable Mr. Justice Hughes dated December 20, 2012, No. T-139-08.

Counsel

Jeff Dodgson, Dayna Anderson, for the Appellants.

Harley Schachter, Kaitlyn Lewis, for the Respondents, Long Plain First Nation and Roseau River Anishinabe First Nation.

Jeffrey R.W. Rath, for the Respondent, Peguis First Nation.

Uzma Saeed, Bradley Regehr, for the Respondents, Swan Lake First Nation and Sagkeeng First Nation.

J.R. Norman Boudreau, Earl Stevenson, for the Respondent, Sandy Bay Ojibway First Nation.

REASONS FOR JUDGMENT

The judgment of the Court was delivered by

STRATAS J.A.

A. Introduction

1 This is an appeal from the judgment dated December 20, 2012 of the Federal Court (*per* Justice Hughes): *2012 FC 1474*.

2 Before the Federal Court was an application for judicial review brought by the respondents. The respondents sought to set aside a decision by the appellants ("Canada") to transfer a property called the Kapyong Barracks to a non-agent Crown corporation. The Barracks are located on lands which the respondents claimed to have the right to purchase in priority to other potential purchasers.

3 The six respondents alleged that Canada owed them a duty to consult with them before the sale and Canada had not fulfilled that duty. They applied for judicial review to the Federal Court for a declaration to that effect and an order restraining the sale.

4 The Federal Court found that Canada owed a duty to consult four of the respondents and, further, that Canada had failed to fulfil that duty. It restrained the sale until Canada demonstrated that it had fulfilled that duty and imposed a form of court supervision. Canada appeals the Federal Court's judgment.

5 The Federal Court held that Canada did not owe two of the respondents, Sagkeeng First Nation and Sandy Bay Ojibway First Nation, a duty to consult. Both Sagkeeng and Sandy Bay Ojibway cross-appeal this aspect of the Federal Court's judgment.

6 For the reasons that follow, I would allow the appeal only on the issue of remedy and would dismiss the cross-appeals with costs.

B. Facts

7 As will be seen, a number of questions determined by the Federal Court fall to be reviewed in this Court on the basis of the correctness standard of review. Therefore, a full understanding of the facts giving rise to the Federal Court's judgment is required.

8 At a broad level of generality, this case is about whether Canada should have consulted with the respondent Aboriginal bands and should have considered their interests when deciding how to deal with the Kapyong Barracks.

9 This issue does not sit in isolation. Surrounding it is a larger context. For over a century, Canada had broken a treaty promise to provide certain Aboriginal bands with lands. And to remedy the broken promise, Canada entered into certain agreements with some of the bands, including four of the respondent bands, to facilitate their acquisition of lands.

10 These agreements and their purpose in remedying the broken treaty promise are a large part of the backdrop against which Canada's actions must be judged.

(1) The treaty promise: Treaty No. 1

11 In 1871, certain Aboriginal First Nations in Manitoba signed Treaty No. 1 with Canada. Under that Treaty, these First Nations agreed to give up their title to land that now comprises a large portion of southern Manitoba, including all of the present City of Winnipeg. In the words of the Treaty, they did "cede, release, surrender and yield up to Her Majesty the Queen and successors forever" their lands. This was meant to facilitate immigration and the acquisition and development of land by immigrants.

12 In return, Canada was to set aside a certain amount of land in specific areas for their exclusive use. None of that land was in the City of Winnipeg. The amount of land to be set aside was 160 acres for every family of five. Over the years, this requirement has been called the "per capita provision."

(2) Canada's broken promise

13 The Aboriginal bands fulfilled their side of the bargain under Treaty No. 1. But Canada did not. It never fulfilled the per capita provision. It broke the solemn promise it had made.

(3) Initial efforts to remedy the broken promise

14 Roughly sixty years later, the *Constitution Act, 1930* came into force. Section 11 of the *Constitution Act, 1930* provided for the setting aside of lands for reserves to enable treaty obligations to be fulfilled.

15 It was not until the 1990's, some 120 years later, that Canada took concrete steps to remedy its breach of Treaty No. 1.

(4) Recognition of the land claims of five First Nations

16 These concrete steps to remedy Canada's breach of Treaty No. 1 began with Canada's recognition of the land claims of five Aboriginal bands. Four of these are respondents to this appeal: the Long Plain First Nation, the Swan Lake First Nation, the Roseau River Anishinabe First Nation and the Peguis First Nation.

(5) The development of treaty lands entitlement agreements

17 In the 1990's, a committee comprised of representatives of First Nations, Canada and Manitoba drafted a treaty lands entitlement framework agreement. This framework agreement was signed in 1997 and became a template for specific treaty lands entitlement agreements.

18 Some First Nations chose not to participate in the treaty land entitlement framework agreement process and negotiated their own agreements. Thus, the Long Plain First Nation concluded its treaty land entitlement agreement

in 1994, the Swan Lake First Nation signed its own treaty land entitlement agreement in 1995 while the Roseau River Anishinabe First Nation's treaty land entitlement agreement was signed in 1996. Only the Peguis First Nation participated in the framework agreement process and signed a treaty land entitlement agreement based on the framework agreement. There are significant differences between the earlier agreements and the Peguis First Nation's agreement.

19 A fifth band whose land claim was recognized, the Brokenhead Ojibway Nation, ultimately discontinued its claim. Although Brokenhead was involved in many of the events giving rise to this matter, ultimately its involvement has no bearing on this matter and so it will not be referred to further in these reasons.

20 In the rest of these reasons, the remaining four respondents who had signed treaty land entitlement agreements with Canada shall be referred to collectively as the "four respondents."

(6) Sagkeeng First Nation and Sandy Bay Ojibway First Nation

21 Canada did not recognize the land claims of two Aboriginal bands who are respondents to this appeal: the Sagkeeng First Nation and the Sandy Bay Ojibway First Nation.

22 The claim of Sagkeeng remains outstanding, with Canada awaiting further submissions and evidence concerning it. In the present case, Sagkeeng has not filed any evidence in support of an unfulfilled per capita reserve land entitlement under Treaty No. 1.

23 In the case of Sandy Bay, both Canada and the Indian Claims Commission have rejected its claim on the ground that its treaty land entitlement has already been fulfilled. Accordingly, Canada has not entered into treaty land entitlement agreements with Sagkeeng and Sandy Bay.

(7) The four treaty land entitlement agreements

24 The agreements with Long Plain First Nation and Swan Lake First Nation provide that Canada will provide the First Nations with a sum of money (which has been paid) to enable each First Nation to purchase land on the open market (within certain limits). Canada also undertakes to take all necessary steps to set the purchased land aside as a reserve for the benefit of the First Nations, if certain conditions are met, one of which is that the purchased land is located in the First Nation's traditional territory.

25 In the case of the Roseau River Anishinabe First Nation, Canada entered into a more detailed agreement. Like the agreements with Long Plain and Swan Lake, Roseau River was provided with funds with which to acquire lands which Canada undertook to set aside as reserve lands, if certain conditions were met, one of which was that the purchased land was in Roseau River's traditional territory or in the Treaty 1 territory. However, the agreement went further. Under section 4.10 of the agreement, Canada promised that in fulfilling its obligations under the agreement that it would reasonably exercise any discretions that are preconditions to its acts, it would perform its obligations on a timely basis and it would "use its best efforts" to achieve the agreement's objectives. Further in section 4.12, Canada promised Roseau River that it could acquire at fair market value land under Canada's administration and control that Canada was prepared to make available.

26 The agreement with the Peguis First Nation is substantially different. Peguis can select a specified amount of unoccupied provincial land and subject to certain conditions, land anywhere in Manitoba, which includes surplus federal land. Under subsection 3.09(6) of the treaty land entitlement agreement, Canada agreed that "wherever possible" title to surplus federal land should be transferred to Peguis, subject to the claims of other bands. Subsection 3.09(7) confirmed that an expression of interest by Peguis in land "does not provide a right or create a guarantee that the land will be available" or that it can be set aside as a reserve. In sections 28.01 and 28.02 of the agreement, Canada also agreed that it would "in good faith, use [its] best efforts to fulfil the terms" of the agreement and to act on a timely basis. Canada is obligated to provide funding to Peguis so that it could purchase land. The

Peguis Agreement also requires Canada to provide notice whenever it intends to dispose of certain surplus federal land: see subclause 1.01(82). Like the other agreements, the Peguis agreement does not obligate Canada to sell surplus federal land to Peguis. Rather, Peguis can acquire such land on a willing buyer / willing seller basis.

27 Canada did not ratify the agreement with the Peguis First Nation until April 2008. Although the agreement became effective only after Canada made the decision being reviewed (in 2007), the Kapyong Barracks today remain in Canada's possession, unsold. Peguis submits, and I agree, that Canada is now obligated to deal with the Barracks in accordance with the agreement.

28 All four agreements contain a broad release in favour of Canada. While the wording of each is somewhat different, all mirror the terminology used in the release provision in the agreement with Long Plain. Under that provision, Long Plain "cede[d], release[d] and surrender[ed] to Canada all claims, rights, title and interest it ever had, now has or may hereafter have by reason of or in any way arising out of the Per Capita Provision." It also "release[d] and forever discharge[d] Canada...from... all obligations imposed on and promises and undertakings made by Canada relating to land entitlement under the Per Capita Provision."

(8) The Kapyong Barracks

29 The Kapyong Barracks, located in the City of Winnipeg, is in two parts. One part, roughly 160 acres, has a former armed forces base on it. This part of the Barracks, which I shall call the "Barracks property" for the remainder of these reasons, was the subject of the application for judicial review before the Federal Court. The other part, roughly 62 acres and containing quarters for married personnel, was not part of the application. The Barracks property lies within the lands covered by Treaty No. 1.

30 From the perspective of the four respondents, the Barracks property is unique and important. It is a large parcel of land in an urban area that is available for sale and could be redeveloped by the respondents. Some of the traditional lands formerly inhabited by some of the four respondents now constitute the City of Winnipeg. These days, large pieces of available land in an urban area are not commonplace.

(9) The announcement of the closing of the Barracks

31 In April 2001, the Department of National Defence announced that it was closing the military base located on the Kapyong Barracks. The four respondents learned of the decision through the news media--Canada did not advise them of the decision.

(10) Initial expressions of interest in the Barracks property

32 Later in April 2001, two First Nations, the Brokenhead Ojibway Nation and the Long Plain First Nation, expressed interest in the Barracks property. Over a year later, in August 2002, Long Plain wrote again, expressing interest in the Barracks property and observing that it had not received a response to its initial expression of interest.

33 At this time, Long Plain could do nothing more than make a general expression of interest. Canada had not advised any of the four respondents how much of the Barracks property it was selling, the characteristics of the land or any information bearing upon the value of the land.

(11) Canada's initial plans

34 Around the time of these initial expressions of interest, Canada went ahead with certain decisions about the Barracks property.

35 In November 2001, Canada decided that the Barracks property would be dealt with through a Treasury Board policy entitled "Treasury Board Policy on the Disposal of Surplus Real Property" and a "strategic disposal process" within the meaning of the policy. The significance of this is discussed immediately below.

36 In September 2002, Canada finally responded to the Long Plain First Nation's initial expression of interest in April 2001. Canada notified it that it had classified the Barracks property as "strategic" under the Treasury Board policy.

(12) The Treasury Board policy

37 The Treasury Board policy governed the disposition of surplus federal property. Under section 7.5 of that policy, surplus federal land fell into two categories, "routine" and "strategic."

38 Properties of lesser value that could be sold easily and without any substantial investment fell within the "routine" classification. For these properties, interests expressed by the Department of Indian Affairs and Northern Development would be taken into account.

39 Properties with potential for enhanced value or that were highly sensitive or a combination of the two fell within the "strategic" classification. Under the "strategic" classification, input could be had from "government agencies." The end result of the properties in the "strategic" classification is usually their transfer to the Canada Lands Company Limited. This company, a federal non-agent corporation, disposes of property for the federal government to third parties.

40 Canada placed the Barracks property into the "strategic" category. This meant that the Barracks property was not going to be made available to the four respondents on a priority basis. Instead, as a "strategic" property, Canada could assess the value of the Barracks property and could transfer it to the Canada Lands Company.

41 In this case, the parties have proceeded on the basis that, on the current state of the law, the Canada Lands Company is not subject to any duties to consult with Aboriginal peoples. This is open to question, as the Government of Canada controls the Canada Lands Company and, in appropriate circumstances, could be ordered to cause the Canada Lands Company to act or not act in a particular way. Nevertheless, the parties before us have proceeded on the basis that dealing with the Barracks property through a "strategic disposal process" could have a significant practical effect: the Barracks property would be transferred from an entity subject to duties to consult with Aboriginal peoples (Canada) to a private entity free from any such duties (Canada Lands Company). On this view of things, the Canada Lands Company could then transfer the Barracks property to any third party free from any need to consult with Aboriginal peoples.

(13) Canada's conduct immediately after classifying the Barracks property as "strategic"

42 A few months after the Barracks property was classified as "strategic," Long Plain renewed with Canada its expression of interest.

43 Canada replied that any disposal of the Barracks property would take place as a "strategic disposal process" through the Canada Lands Company.

44 Despite that position, Canada was well aware that the four respondents might have an interest in the Barracks property. The four respondents obtained access to information documents evidencing communications between the Department of Indian Affairs and Northern Development and the Department of National Defence. These show that Canada knew that Aboriginal bands with treaty land entitlement agreements might express interest in the Barracks property.

45 Despite that knowledge, in December 2002 the Department of Indian Affairs and Northern Development sent a letter to each of the four respondents notifying them that the Barracks property had been classified as "strategic" and so their interests would not be considered on a priority basis. However, the Department advised them that if they had an interest in the Barracks property, they should contact a particular person at the Department of National Defence. The Department offered no information about the land itself.

(14) Responses to Canada's invitation to express interest

46 The Long Plain First Nation was the only one of the four respondents to respond to Canada's December 2002 letter. It told Canada that it was still interested in the Barracks property. Having no information about the land, it offered no particulars as to its interest.

(15) Canada invites Long Plain to disclose its plans

47 In March 2003, Canada invited the Long Plain First Nation to advise how much of the Barracks property it was interested in acquiring, what it was willing to pay for it, and what it was going to do with the land. This was an empty invitation--Long Plain had been given no information about the Barracks property, no appraisals, no environmental assessments, no photos. At this time, Long Plain was not even invited to view the Barracks property.

48 In June 2003, a representative of Canada met with Long Plain. Canada provided Long Plain with aerial photographs of the Barracks property and information about the buildings on it. Around this time, Canada reconfirmed that the Barracks property would be dealt with as a strategic disposal. During the summer of 2003, Long Plain requested more time to provide Canada with information about its desire to acquire the Barracks property.

49 By September 2003, the Department of National Defence had in hand an appraisal of the Barracks property. This appraisal was not provided to any of the First Nations.

50 An important meeting took place at this same time. Representatives of Canada met with representatives of Long Plain and Roseau River. Canada asked them to prepare their proposals for the development of the Barracks property so that their interest could be taken into account by the Department of National Defence when it prepared its submission to Treasury Board regarding the disposition of the Barracks property. Again, though, by this time Canada had already advised the four respondents that the Barracks property would be dealt with through the strategic disposal process involving Canada Lands Company.

51 Notes of the meeting taken by Canada's representative show that Long Plain and Roseau River took a strong position in response:

> [The First Nations] [w]ould not entertain any notion of a balancing of Crown interest in the disposal; their interest comes first and must be addressed before all others. Would similarly not accept the idea that the property was to be re-integrated into the community employing local (that is, City of Winnipeg) planning processes. The perspective of balancing of interests was rejected out of hand.

At this time, Canada had never consulted with any of the four respondents about any of its desires concerning the future use of the Barracks property, including its desire that local planning processes be followed and the Barracks property be re-integrated into the community.

52 In his notes, Canada's representative also noted that Long Plain and Roseau River considered Canada's policy considerations to be irrelevant when it comes to treaty obligations. Nor did they "once talk about their vision for the property," preferring instead to offer "polemical" views. He recorded that Long Plain and Roseau River wanted

Canada to acquire the property for them or they should be allowed to purchase it at less than market value, and that they should be able to "develop the property as they see fit."

53 At the same time, the notes of Canada's representative reveal that Long Plain and Roseau River found it difficult to make any offer based on the information given and needed a site visit. In the words of the notes, "[a] site visit was seen to be a pre-condition for a proposal."

54 Several meetings followed between Long Plain and the Department of Indian Affairs and Northern Development.

55 In January and February 2004, representatives of Long Plain were given a tour of the Barracks property. At no time were they given a copy of the appraisal of the property. In fact, during the events giving rise to these proceedings, none of the four respondents had ever been given a copy of the appraisal to assist them. There is no evidence in the record showing why they could not be given the appraisal.

56 In January 2004, counsel for Canada wrote to counsel for Long Plain, advising as follows:

> ...Long Plain has been asked, if it is interested in doing so, to provide a proposal to acquire some, or all, of the land. That proposal, if one is made, could be considered before a final decision is made on disposal. It is my understanding that no proposal has yet been submitted by your client. [If] Long Plain is interested in acquiring some or all of the property, this proposal should be submitted as soon as possible. Any proposal should be submitted to [the Department of National Defence]."

57 For a while after January 2004, matters fell silent. In Canada's case, it had no further communication with any of the four respondents for three years. But it continued to work its way towards a disposal of the Barracks property.

(16) Treasury Board's approval of the sale of the Barracks property to the Canada Lands Company

58 On May 10, 2005, in furtherance of the decision taken long ago to dispose of the Barracks property through the strategic disposition process, Treasury Board approved the sale of the Barracks property to the Canada Lands Company. Canada did not advise any of the four respondents of this development.

(17) The Treasury Board policy is replaced

59 In November 2006, Treasury Board issued a directive entitled "Directive on the sale or Transfer of Surplus Real Property." It replaced the 2001 policy referred to in paragraph 35, above. It maintained the classification of properties as "routine" and "strategic." But it added a new requirement: the disposal of "strategic" property was subject to an "assessment of federal and other stakeholder interests." Canada did not disclose this to the four respondents.

60 At this point, the Barracks property had not actually been transferred to the Canada Lands Company, though that transfer had already been approved. In the Federal Court, there was no evidence to the effect that although the Barracks property had been classified as "strategic," it could not be reclassified under the new policy. In this Court, in response to questioning, Canada could not point to any impediment to reclassifying the Barracks property in order to facilitate their acquisition by the four respondents under their treaty land entitlement agreements.

(18) The bands pursue their interests

61 In November 2006, a number of the respondents--not knowing that the sale of the Barracks property had already been approved--wrote to the Treasury Board asking for assurances that their rights would be respected. They requested a meeting. In January 2007, Treasury Board replied stating that there was "no change to the approach through which priority interests have an opportunity to express an interest in surplus lands."

62 In August 2007, the respondents wrote to the Department of Indian Affairs and Northern Development, asserting a claim against the Barracks property as part of their rights under their treaty land entitlement agreements. Initially, the respondents asserted a claim to Aboriginal title to the whole City of Winnipeg. Later, in legal proceedings, they asserted a right to be consulted stemming from the unfulfilled per capita provision in Treaty No. 1. The respondents sought assurances that their claims would be respected and requested a meeting to discuss the matter. Having received no response, the respondents wrote again in September and November 2007.

(19) Canada confirms the approval of the transfer of the Barracks property to the Canada Lands Company

63 As mentioned above, in May 2005 Treasury Board had already approved the transfer of the Barracks property to the Canada Lands Company. On November 23, 2007, Treasury Board confirmed that approval.

64 It appears that confirmation was required because the Department of National Defence had submitted revised plans. The revised plans did not affect the thrust of the matter. As far as Canada was concerned--as it had intended from the very outset--the Barracks property was to be transferred to the Canada Lands Company for disposal.

65 Canada did this without meeting any representatives of the respondents or responding to their August, September and November letters.

66 The November 23, 2007 confirmation of approval became the subject-matter of the respondents' application for judicial review, the Federal Court's judgment in this case and this appeal.

(20) Canada responds to the respondents' letters

67 In December 2007, Canada finally replied to the respondents' letters of August, September and November 2007. It told them that Aboriginal title to the Barracks property had been surrendered by Treaty No. 1.

68 In its December 2007 letter, Canada added that once the Barracks property was transferred to the Canada Lands Company, the respondents should approach that corporation. Seen from the perspective of the four respondents, this was an empty offer: they were concerned that if the Canada Lands Company were free from any duties to consult they would simply be treated as one group of bidders among so many other bidders.

(21) Legal proceedings begin

69 The respondents challenged the Treasury Board's decision by way of judicial review. Among other things, they sought a declaration that Canada had a legal duty to consult and accommodate them before transferring the Barracks property. They also sought an order restraining the transfer of the Barracks property to the Canada Lands Company.

70 Having been told little about Canada's plans for the Barracks property, the respondents were driven during the litigation to pursue access to information requests to find out what had happened behind the scenes. Broadly speaking, that information showed a measure of confusion among various departments and ministries of Canada concerning the proper process to follow concerning the sale of the Barracks property.

(22) Initial determinations by the Federal Court and this Court

71 The Federal Court (*per* Justice Campbell) held that Canada had a legal duty to consult before it disposed of the Barracks property and Canada did not fulfil that duty: *2009 FC 982*.

72 This Court reversed the judgment of the Federal Court: *2011 FCA 148*, *419 N.R. 289*. It held that the Federal Court's reasons were inadequate. Rather than finding facts itself, this Court remitted the matter to the Federal Court

for re-decision. The judgment of the Federal Court in that re-decision is the matter now before us.

(23) The Federal Court's re-decision: the matter now before us

73 During the second hearing in the Federal Court, for the first time Canada conceded that it owed a duty to the four respondents to consult with them. However, it submitted that Canada had fulfilled that duty.

74 The Federal Court rejected that submission and allowed the application for judicial review as it pertained to the four respondents.

75 The Federal Court held that the scope of the duty was fairly demanding, around the middle of the spectrum of consultation outlined by the Supreme Court in *Haida Nation v. British Columbia (Minister of Forests)*, *2004 SCC 73*, *[2004] 3 S.C.R. 511*. This meant that Canada had to give notice, disclose information, meet with the First Nations to hear and discuss their concerns, take their concerns into meaningful consideration and advise of the course of action taken and why.

76 According to the Federal Court, Canada fell way short of the mark (at paragraphs 78-80). It described Canada's conduct as "egregious" (at paragraph 79). In its view, Canada did not respond in a meaningful way to the concerns raised by the respondents from 2001-2004 (at paragraphs 76-78). From 2006-2007, Canada simply ignored the respondents who were later told to take their concerns to Canada Lands Company.

77 In its judgment, the Federal Court set aside the Treasury Board's November 23, 2007 confirmation of approval of the sale of the Barracks property to the Canada Lands Company. It restrained Canada from selling the Barracks property to the Canada Lands Company or anyone else "until [it] can demonstrate to the Court that [it has] fulfilled in a meaningful way [its] duty to consult with the [First Nations]." In effect, this was not just a restraining order; it was also a supervision order.

78 As for the Sagkeeng First Nation and Sandy Bay Ojibway First Nation, the Federal Court held that Canada owed them no duty to consult. On the evidence before it (see paragraphs 21-23 above), Sagkeeng and Sandy Bay had not established any rights or interests necessary to establish such a duty. In particular, neither had demonstrated any unfulfilled per capita reserve land entitlement under Treaty No. 1 and neither had a treaty land entitlement agreement.

79 Other specific aspects of the Federal Court's reasons will be commented upon in the course of these reasons.

C. The issues

80 In this case, the Federal Court was reviewing the Treasury Board's November 23, 2007 decision approving the transfer of the Barracks property to the Canada Lands Company. The question before the Federal Court was whether that decision could stand on the basis of the consultations undertaken by Canada.

81 In the circumstances of this case, that general question resolved itself into a number of particular questions:

(1) Did Canada owe duties to Sagkeeng First Nation and Sandy Bay Ojibway First Nation to consult with them?

(2) To the extent that duties were owed (and Canada conceded the existence of duties to consult owed to the four respondents), what is the content and scope of those duties?

(3) On the facts of this case, were those duties fulfilled?

(4) If not, what remedy should be ordered?

82 In these reasons, I shall deal with the Federal Court's answers to these questions in that order. But first, some comments about the standard of review are apposite.

D. The standard of review

83 The first task for this Court on an appeal from a judgment on an application for judicial review is to determine whether the Federal Court judge chose the proper standard of review: *Agraira v. Canada (Public Safety and Emergency Preparedness*), 2013 SCC 36, [2013] 2 S.C.R. 559 at paragraphs 46-47.

84 Taking the first three questions set out above, the Federal Court held that the standard of review was correctness on the first two questions and reasonableness on the third question (at paragraph 20).

85 Before us, the parties agree that the Federal Court properly chose the standard of review.

86 Although this Court is not bound by the parties' agreement concerning the standard of review (see *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, 2004 SCC 54, [2004] 3 S.C.R. 152), I agree with the parties. The standard of review adopted by the Federal Court is consistent with holdings on this point by the Supreme Court: *Haida Nation*, above at paragraph 61; *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650 at paragraphs 63-65; *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103 at paragraph 48. I would add only one gloss to this. To the extent that the existence, content and scope of the duties to consult depends upon factual findings, a "degree of deference" to those findings "may be appropriate": *Haida Nation* at paragraph 61.

87 There remains one final standard of review issue to be resolved. Having set aside the November 23, 2007 decision approving the sale of the Barracks property to the Canada Lands Company, the Federal Court had to consider what remedy to give. As mentioned above, among other things, it decided to restrain Canada from selling the Barracks property until such time as Canada demonstrated that it had fulfilled its duty to consult. Its choice of remedy was a factually-suffused exercise of discretion. What is the standard of review for that sort of remedial decision?

88 Remedial decisions by the Federal Court on judicial review fall into a special category. They are decisions not about what the administrative decision-maker has decided--a realm where the administrative law standards of review in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 hold sway--but rather what the Court should do, not unlike decisions it makes itself on preliminary objections to the hearing of the judicial review, such as the existence of an adequate alternative forum, mootness or prematurity. This Court has ruled that the appellate standard of review set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 should apply to those decisions: *Budlakoti v. Canada (Citizenship and Immigration)*, 2015 FCA 139 at paragraphs 37-39; *Wilson v. Atomic Energy of Canada Limited*, 2015 FCA 17, 467 N.R. 201 at paragraphs 25-26.

89 It seems to me that remedial decisions of the Federal Court as a reviewing court fall into the same category. Thus, consistent with *Housen*, where the remedy depends upon the factual appreciation and discretion of the court--a question of mixed fact and law where facts and discretion predominate--the appellate court should accord deference to the remedial decision. This standpoint is consistent with other decisions of this Court: see, *e.g.*, *Canada (Attorney General) v. Jodhan*, 2012 FCA 161, 350 D.L.R. (4th) 400 at paragraph 75.

90 The Supreme Court has not definitively and overtly resolved the standard of review for remedial decisions in administrative law. However, it does seem to accord deference to the factually-suffused decisions of reviewing courts that smack of remedial discretion, provided there is no error in principle: see, *e.g.*, *Strickland v. Canada (Attorney General)*, 2015 SCC 37 at paragraph 39 ("deference" for this Court's decision to dismiss an application for judicial review because of the existence of an adequate alternative forum); see also *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3 at paragraph 87 (absent any error in an extricable

legal principle, deference should be given to an exercise of remedial discretion in favour of ongoing court supervision).

91 Accordingly, for the purposes of the Federal Court's remedial decision in this case, absent any error in legal principle the standard of review shall be one of deference.

E. Should the Federal Court's judgment stand?

92 Having found that the Federal Court chose the proper standard of review on the various questions it had to address, we must ask whether the Federal Court properly applied the standard of review: *Agraira*, above at paragraphs 46-47. If it did, then, subject to its choice of remedy, its judgment must stand.

93 In the case of the questions that we review for correctness, we simply assess whether the Federal Court erred. In the case of those questions subject to reasonableness review, we re-do the reasonableness analysis to see if we reach the same conclusion as the Federal Court. In *Agraira* at paragraph 46, the Supreme Court likened this to "step[ping] into the shoes' of the lower court."

(1) Did Canada owe duties to Sagkeeng First Nation and Sandy Bay Ojibway First Nation to consult with them?

94 As mentioned above, we are to review the Federal Court's answer to this question for correctness.

95 The Federal Court concluded that Canada did not owe duties to Sagkeeng and Sandy Bay. It relied upon the facts summarized at paragraphs 21-23 above. Simply put, there was no evidence in the record to support that either had a land claim or an unfulfilled per capita reserve land entitlement under Treaty No. 1. In fact, in Sandy Bay's case, Canada and the Indian Claims Commission have found that its treaty land entitlement has already been fulfilled. Therefore, the Federal Court did not find that any of the necessary prerequisites for a duty to consult were met.

96 I find no error on the part of the Federal Court on this issue. Therefore, I would dismiss the cross-appeals of Sagkeeng and Sandy Bay.

97 At the beginning of the hearing of the application in the Federal Court, Canada conceded that it owed the other four respondents a duty to consult, a concession which it re-affirmed before this Court. As the respondents framed their case in terms of the duty to consult, and the Federal Court initially decided the case on that basis, this concession did not appear to require any justification. However, this case may or may not fall within the ambit of the jurisprudence in which a duty to consult has been found because government action threatened to permanently interfere with lands in which First Nations claimed an aboriginal right or title. In light of Canada's concession, the way in which this case has been developed to date, and the undesirability of seeking further submissions at this point, I am proceeding on the basis that the issues before us--to be assessed according to the standard of review above--are the content and scope of Canada's duty to consult with the other four respondents, whether Canada fulfilled that duty and, if not, what remedy should be granted.

98 Whether or not cases such as this one come within the duty to consult as articulated in *Haida*, above, *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, *2005 SCC 69*, *[2005] 3 S.C.R. 388*, and *Beckman*, above, I leave to be decided in a future case. I might add that it seems to me that the result is largely the same when the matter is viewed through the lens of the Crown's obligation to act to preserve the honour of the Crown.

(2) What is the content and scope of Canada's duty to consult with the four respondents?

99 As mentioned in paragraphs 84-86, above, we are to review the Federal Court's answer to this question for correctness, giving some deference to any related factual-findings.

100 On this question, examining the circumstances of this case, the Federal Court held that the duty to consult entailed not just the minimal aspects of the obligation of giving notice, disclosing information and responding to concerns raised but extended to a duty to meet, a duty to hear and discuss, a duty to take the First Nation's concerns into meaningful consideration and a duty to advise as to the course of action taken and why.

101 Broadly, I agree with this conclusion of the Federal Court subject to certain modifications discussed below. However, I do so for reasons different than those offered by the Federal Court.

102 In reaching its conclusion, the Federal Court properly charged itself as to the applicable law (at paragraph 71). That applicable law provides that the content and scope of the duty to consult varies with the circumstances. It is best thought of as a spectrum of duties, at one end minimal and at the other end maximal. 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": *Haida Nation* at paragraph 39; *Carrier Sekani*, above at paragraphs 48 and 51; *Sambaa K'e Dene Band v. Duncan*, 2012 FC 204, 405 F.T.R. 182 at paragraphs 113-114; *Adams Lake Indian Band v. Lieutenant Governor in Council*, 2012 BCCA 333, 35 B.C.L.R. (5th) 253 at paragraphs 59 and 74-79.

103 Even at the lower end of the spectrum, the duty can require significant conduct by the Crown: providing notice to the First Nation, engaging directly with the First Nation, providing timely information about matters relevant to known First Nation interests, providing information about potential adverse impacts on those interests so that concerns can be expressed, listening to concerns expressed, considering those concerns, and attempting to minimize any adverse effects: *Mikisew*, above at paragraph 64.

104 The scope and nature of the duty to consult is also affected by the entire factual matrix of this case--in this case guided by the treaty land entitlement agreements and the case law on the duty to consult but also by the concepts of honour, reconciliation and fair dealing that underlie those agreements and the duty to consult. When kept front of mind, these concepts help to inform the nature and scope of the duty: *Haida Nation*, above at paragraphs 27 and 36. The Supreme Court explained this idea in the following way:

> 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" [*sic.*] (emphasis in original).

(*Haida Nation*, above at paragraph 32.)

105 The honour of the Crown in its dealings with Aboriginal peoples is of paramount importance in matters such as this. In the *Royal Proclamation* of 1763 (reproduced in R.S.C. 1985, App. II, No. 1), the British Crown pledged its honour to the protection of Aboriginal peoples from exploitation by non-Aboriginal peoples. Repeatedly, this idea has been held to pervade this area of law: see, e.g., *R. v. Taylor* (1981), 34 O.R. (2d) 360, 62 C.C.C. (2d) 227 (Ont. C.A.), leave to appeal refused, [1981] S.C.C.A. No. 377 [1981] 2 S.C.R. xi; *R. v. Sparrow*, [1990] 1 S.C.R. 1075, 70 D.L.R. (4th) 385; *R. v. Nikal*, [1996] 1 S.C.R. 1013, 133 D.L.R. (4th) 658; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, 153 D.L.R. (4th) 193; *R. v. Badger*, [1996] 1 S.C.R. 771, 133 D.L.R. (4th) 324; *R. v. Marshall*, [1999] 3 S.C.R. 456, 177 D.L.R. (4th) 513; *Mikisew Cree First Nation*, above. Indeed, today the honour of the Crown has been confirmed as a constitutional principle: *Beckman*, above at paragraph 42. The honour of the Crown "is always at stake in its dealings with Aboriginal peoples" and "is not a mere incantation, but rather a core precept that finds its application in concrete practices": *Haida Nation*, above at paragraphs 16-19.

106 Because the concepts of honour, reconciliation and fair dealing are relevant, "[t]he history of dealings between the Crown and a particular First Nation" are also relevant: *Mikisew Cree First Nation*, above at paragraph 63.

107 To date, the Supreme Court has developed the law concerning the scope and nature of the duty to consult as a special body of law, divorced from normal administrative law principles. To me, however, administrative law remains relevant and the special body of law developed by the Supreme Court is consistent with it. It may be useful in cases like the present to think of the duty to consult within the rubric of administrative law. After all, the matter before us is an administrative law matter--an appeal of an application for judicial review brought to challenge the Treasury Board's November 23, 2007 discretionary decision to sell the Barracks property to the Canada Lands Company.

108 As a general matter, where the legal and practical interests of a party may be affected by a discretionary decision, the decision-maker must afford procedural fairness: see, *e.g.*, *Cardinal v. Director of Kent Institution*, *[1985] 2 S.C.R. 643*, *24 D.L.R. (4th) 44*. A higher level of procedures is often accorded where the legal and practical interests are higher: *Baker v. Canada (Minister of Citizenship and Immigration)*, *[1999] 2 S.C.R. 817*, *174 D.L.R. (4th) 193* at paragraph 25. Where the decision-maker has undertaken that certain procedures will be followed, for example in an agreement, the decision-maker will be held to them: *Baker* at paragraph 26. And where Aboriginal peoples are concerned, the concepts of honour, reconciliation and fair dealing--matters of constitutional import--may bear upon the matter, sometimes significantly, affecting the level of procedures to be afforded.

109 In this case, Canada, the owner of the Barracks property, seeks to divest itself of that property. In doing so, it has a discretion concerning how to go about that. To the four respondents, this is unique and important land: see paragraph 30, above. And the concepts of honour, reconciliation and fair dealing are very much in play in this case.

110 On this last-mentioned point, I note that in lieu of full satisfaction of the four respondents' unfulfilled right to receive lands under the per capita provision of Treaty No. 1--which is now impossible--the four respondents now have rights under the treaty land entitlement agreements concerning lands that may come available. As land buying opportunities arise over time, the four respondents may be able to acquire lands, presently unascertained, in substitution for the lands promised under the unsatisfied per capita provision of Treaty No. 1. The treaty land entitlement agreements work to facilitate the realization of those opportunities.

111 It is true that, putting aside arguments that might be made in a future case on the basis of specific wording in some of the agreements, the four respondents do not have rights to demand specific conveyances of particular lands in Manitoba that become available. However, the purpose of the agreements is clear: over time, the four respondents will acquire as yet unascertained lands in Manitoba to fulfil the unmet promise of Treaty No. 1. By signing the treaty land entitlement agreements, Canada has committed to that purpose.

112 In this case, the Barracks property owned by Canada has become available for disposition. To the extent that each of the First Nations' treaty land entitlement agreement applies to the Barracks property, Canada is no ordinary vendor. Canada's exercise of discretion concerning how to go about the sale of the Barracks property must be guided by the treaty land entitlement agreements it has signed, its commitment to the purpose of those agreements, and the concepts of honour, reconciliation and fair dealing. In this case, honour, reconciliation and fair dealing--often expressed as the obligation to avoid sharp dealing--are particularly important because of Canada's broken promise in Treaty No. 1. The agreements, designed to redress that, are not just commercial agreements whose meaning is divined by parsing the technical meaning of particular words in the agreement.

113 For this reason, I am not persuaded by Canada's primary submissions on this point. Canada says that the extent of its duty to consult must be found in the written words of the treaty land entitlement agreements. In particular, "the consultative obligations which arose were in respect of those First Nations with Treaty Land Entitlement Agreements, to the extent as stipulated therein" [my emphasis]: Canada's Memorandum of Fact and Law at paragraph 3. The agreements exclusively establish "the specific nature and extent of the parties' rights and obligations regarding Per Capita Provision reserve land entitlement" and "the manner in which those rights and

obligations are to be implemented": Canada's Memorandum of Fact and Law at paragraph 43. In the case of the three treaty land entitlement agreements other than the one with the Peguis First Nation, "the only obligation upon Canada that would arise [from them] would be to give due/fair consideration to any offer made by one of these First Nations for the purchase of the property": Canada's Memorandum of Fact and Law at paragraph 45. In the case of the agreement with Peguis First Nation, "[s]lightly more expansive rights/obligations are provided" but these trigger duties to consult only "at the low end of the spectrum": Canada's Memorandum of Fact and Law at paragraph 46. Canada adds (at paragraph 47 of its Memorandum) that the relevant question is whether "transfer of the property to [the Canada Lands Company would] render the reserve land entitlement of any First Nation unattainable, or adversely impact upon the ability of First Nation to achieve its reserve land entitlement"?

114 As a result of this analysis, Canada says that in the case of Long Plain, Swan Lake and Roseau River, Canada was only obligated "to give due/fair consideration to any offer made by one of [them] for the purchase of the Property": Canada's Memorandum of Fact and Law at paragraph 45. In the case of the Peguis First Nation, Canada admits that its treaty land entitlement agreement contains "[s]lightly more expansive rights/obligations" when Canada intends to sell surplus federal land: Canada's Memorandum of Fact and Law at paragraph 46. Under that agreement, Canada must give notice that it intends to dispose of the land, provide an appraisal of the fair market value of the land and be afforded with an opportunity to purchase the land. But, in the end, Canada is not obligated to sell the land to the Peguis First Nation.

115 Canada assures us that its position does not mean that the treaty land entitlement agreements "were intended to effect a contracting out of its duty of honourable dealing" or that they "serve to extinguish Per Capita Provision treaty rights": Canada's Memorandum of Fact and Law at paragraph 43. Canada's position is that while the mere execution of the treaty land entitlement agreements does extinguish Per Capita Provision treaty rights, the fulfillment of the rights and obligations to any particular First Nation under its agreement discharges Canada's obligations to that First Nation under the Per Capita provisions of Treaty No. 1.

116 The problem is that Canada has focused too much upon a technical non-purposive interpretation of the terms of the treaty land entitlement agreements and in particular the specific wording of the release provisions. In Canada's view, the sum total of its duty to consult the four respondents is set out in the treaty land entitlement agreements and those agreements must be read narrowly according to their precise text without regard to the broader considerations described above.

117 In my view, the treaty land entitlement agreements, seen in their proper historical context, reveal a genuine, *bona fide* desire, intention and commitment on the part of Canada--consistent with its obligations of honourable conduct, reconciliation and fair dealing with Aboriginal peoples--to engage in a process to rectify Canada's broken promise in Treaty No. 1 over time. To fulfil that desire, intention and commitment, Canada must act like the willing seller contemplated in the treaty land entitlement agreements. It must make its intentions concerning its property known to parties which, to its knowledge, have an interest in acquiring the property, provide them relevant information, give them the opportunity to make their intentions known, and consider their proposals carefully. While specific language in the treaty land entitlement agreements ousting that level of interaction between Canada and the four respondents would have to be respected (see *Quebec (Attorney General) v. Moses*, [2010] 1 S.C.R. 557, 2010 SCC 17 at paragraph 7), I note that there is no such language here. In the end, as Canada frequently reminds us in its Memorandum, Canada is under no obligation to convey the lands. But the process Canada must follow is more involved than it urges upon us.

118 Agreements such as these are not be interpreted like commercial contracts. Instead, they must be interpreted in accordance with the objectives of honourable conduct, reconciliation and fair dealing with Aboriginal peoples:

> The reconciliation of Aboriginal and non-Aboriginal Canadians in a mutually respectful long-term relationship is the grand purpose of s. 35 of the *Constitution Act, 1982*. The modern treaties, including those at issue here, attempt to further the objective of reconciliation not only by addressing grievances over the land claims but by creating the legal basis to foster a positive long-term relationship between Aboriginal and non-Aboriginal communities. Thoughtful administration of the treaty will help manage, even if it fails to

> eliminate, some of the misunderstandings and grievances that have characterized the past. Still, as the facts of this case show, the treaty will not accomplish its purpose if it is interpreted by territorial officials in an ungenerous manner or as if it were an everyday commercial contract. The treaty is as much about building relationships as it is about the settlement of ancient grievances. The future is more important than the past. A canoeist who hopes to make progress faces forwards, not backwards.

(*Beckman*, above at paragraph 10; and see also paragraphs 12, 67 and 71.)

119 As well, Canada cannot contract out of its obligations to act honourably, to deal fairly and to consult with First Nations. Put another way, agreements it enters into with Aboriginal peoples should be interpreted as much as possible to ensure consistency with those obligations. As the Supreme Court has said:

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

(*Beckman*, above at paragraph 61.)

120 I note that except for the treaty land entitlement agreement with the Peguis Nation--which does require specific forms of consultation--the other agreements are silent on the issue. Given the wider context behind the agreements--in particular, their purpose in redressing Canada's broken promise under Treaty No. 1-- and given the larger obligations to act honourably, to deal fairly and to consult with First Nations, I do not take silence on the issue of consultation in the agreements to be a positive statement that the consultation in this case with the four respondents can be as limited as Canada says.

121 In these circumstances, Canada's obligation was not just to give notice to the four respondents that it was selling the Barracks property and offer a bit of information to them about it. In these circumstances, given the background of Treaty No. 1, the purposes behind the treaty land entitlement agreements, and the concepts of honour, reconciliation and fair dealing, much more was needed. As the British Columbia Court of Appeal has said:

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

(*Halfway River First Nation v. British Columbia (Ministry of Forests)*, *1999 BCCA 470*, *178 D.L.R. (4th) 666* at paragraphs 159-160 cited with approval by the Supreme Court in *Mikisew Cree First Nation*, above at paragraph 64.)

122 In the end, defining the level of the duty of consultation or the requirements imposed by the duty to act honourably are, in light of the above principles, a matter of some subjectivity and impression. The cases help, but only to some extent.

123 The cases show that at the lower end of consultation, Canada must "...give notice, disclose information and discuss any issues raised in response to the notice": *Haida Nation* at paragraph 43. This means that Canada must engage with the respondents, meaning it must "solicit and listen carefully" to the respondents' concerns: *Mikisew Cree First Nation*, above at paragraph 64.

124 After much reflection guided by the cases, for the reasons I have given above, I agree with the Federal Court that Canada's obligation went beyond that minimal level of consultation. Canada must be in close and meaningful communication with the four respondents, give them relevant information in a timely way, respond to relevant questions, consider carefully their fully-informed concerns, representations and proposals, and, in the end, advise as to the ultimate course of action it will adopt and why.

125 If the issue is approached from the perspective of the obligations flowing from the honour of the Crown, the result is much the same.

126 In both cases, Canada's conduct in relation to each of the four respondents will have to be guided by the specific provisions in the treaty land entitlement agreement with that respondent.

127 The matter can be put differently. It is useful to remember that this Court in fact is sitting in appeal of an application for judicial review brought to challenge the Treasury Board's November 23, 2007 decision to transfer the Barracks property to the Canada Lands Company. That decision is a discretionary decision.

128 In reviewing the exercise of that discretion, one must first consider what factors the Treasury Board (or, more generally, Canada) had to take into account. Here, there are several factors. Canada cannot transfer the Barracks property to the Canada Lands Company until the duty to consult is fulfilled. Canada must also have regard to the specific terms of the treaty land entitlement agreements. Against these considerations, Canada may also have regard to other policy considerations. For example, perhaps Canada has a legitimate interest in the future use of the land and the consistency of that use with municipal bylaws and requirements. Perhaps it has other legitimate concerns. Put another way, "[a]boriginal concerns [are to] be balanced reasonably with the potential impact of the particular decision on those concerns and with competing societal concerns": *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550 at paragraph 2.

129 Precisely what factors might have to come to bear in the decision and how they might be weighed need not be fully enumerated and settled upon in this case. However, to reiterate, the foregoing analysis suggests that in assessing whether to sell the land and to whom, Canada must be in close and meaningful communication with the four respondents, give them relevant information in a timely way, respond to relevant questions, consider carefully their fully-informed concerns, representations and proposals, follow any relevant provisions in treaty land entitlement agreements and, in the end, advise as to the ultimate course of action it will adopt and why. In circumstances such as these, as long as the consultation is meaningful, Canada has no obligation to reach an agreement with the four respondents: *Taku River*, above at paragraph 2. But the decision Canada makes, like all administrative decisions, must at a minimum be acceptable and defensible on the facts and the law: *Dunsmuir*, above at paragraph 47.

130 Finally, before concluding this section of my reasons, I wish to address one last submission made by Canada. Canada complains that the Federal Court failed to adequately assess the nature of the claims of each of the four respondents. It notes that in a twenty-three page decision, it devoted only one page to the issue. It complains that the Federal Court simply adopted what the four respondents said to it, without undertaking an independent analysis of the nature or strength of the claims asserted or the effect of Canada's conduct on the four respondents' interests.

131 The short answer to this is that the need for an analysis of the nature and strength of each First Nation's claim was overtaken by Canada's concession at the outset of the hearing in the Federal Court that it had a duty to consult. Once Canada made that concession, the content of the duty to consult, described above, was informed by the terms of the treaty land entitlement agreements, the purposes underlying those agreements (*i.e.*, the need to facilitate the four respondents' ability to purchase land to redress the broken promise in Treaty No. 1), and the unique and important nature of the Barracks property.

(3) Did Canada fulfil its duty to consult?

132 As mentioned in paragraphs 84-86, above, we conduct reasonableness review ourselves to see whether we agree with the Federal Court's decision that the November 23, 2007 approval of the sale to Canada Lands Company was unreasonable, *i.e.*, neither acceptable nor defensible because duties to consult were not fulfilled.

133 In doing this, we must ensure that we are not applying too exacting a standard. Situations such as the one in this case are complicated and dynamic, involving many parties and concerning issues that are legally and factually difficult. Even in healthy relationships where there is mutual trust and ample communication over simple issues, there can be isolated innocent omissions, misunderstandings, accidents and mistakes. As this Court put it in *Ahousaht v. Canada (Minister of Fisheries and Oceans)*, 2008 FCA 212, 297 D.L.R. (4th) 722 at paragraph 54, in determining whether the duty to consult has been fulfilled, "perfect satisfaction is not required": see also *Haida Nation* at paragraph 62.

134 In the previous section of these reasons, I have defined the scope of Canada's duty to consult. In this case, Canada did not fulfil the duty so defined:

* When Canada closed the Barracks and realized it had surplus land, it did not notify the four respondents and call for discussions: see paragraph 31 above.
* Long Plain expressed interest in the Barracks property and asked for discussions in April 2001, but Canada did not respond for nearly eighteen months: see paragraphs 32-33 and 36 above.
* In November 2001, Canada decided to pursue a "strategic" disposal process, one that would place the Barracks property in the hands of the Canada Lands Company: see paragraphs 35 and 40-41 above. Consultation must take place before important decisions like this are made: *Sambaa K'e Dene First Nation*, above at paragraph 165.
* Access to information documents show that Canada was aware of First Nations' interest in the Barracks property. But despite knowing of that interest, it did not consult: see paragraph 44 above.
* Long Plain renewed its expression of interest in the Barracks property following Canada's decision to pursue a "strategic" disposal process. Canada responded only by reasserting its decision to pursue a "strategic" disposal process: see paragraphs 42-43 and 46 above.
* Canada wrote the respondents in December 2002 notifying them that the decision to pursue a "strategic" disposal process had been made and informing them that their interests would not be considered on a priority basis: see paragraph 45 above. This is only an assertion of a position, not a form of discussion consistent with consultation.
* At the same time, Canada invited the respondents to contact a particular person at the Department of National Defence if they had an interest in the Barracks property: see paragraphs 50 and 53 above. But at this point, Canada had not provided the respondents with any information about the Barracks property so that they could determine the extent of their interest and whether they wanted to proceed further.
* Long Plain again expressed its interest in the Barracks property but in March 2003 Canada asked it to provide detailed information about what portion of the Barracks property it wanted, what it was willing to pay, and what it was going to do with the Barracks property: see paragraph 47 above. Having not been given any information about the Barracks property, Long Plain could not respond to Canada's invitation.
* Canada had an appraisal of the Barracks property by September 2003 but it did not provide it to Long Plain, which had already expressed its interest: see paragraph 49 above. There is nothing in the record to suggest that the appraisal could not have been given to Long Plain or to any of the other three respondents.

* Later in 2003, meetings and site visits took place. But by then important decisions about the Barracks property had already been made. Canada did not disclose the appraisal to assist it with its consideration of the matter: see paragraph 55 above.

* There was a period of three years where Canada fell completely silent, not engaging in any form of consultation: see paragraph 57 above.

* In May 2005, Treasury Board approved of the sale of the Barracks property to the Canada Lands Company. This was done before any meaningful consultations with the four respondents had taken place. However, that approval was not final: the final approval was not until November 23, 2007. Canada could still consult with the four respondents see paragraph 58 above.

* In November 2006, further expressions of interest from a number of the respondents were made. Rather than meeting with them and providing them with information, the Barracks property remained classified as "strategic" land to be sold to the Canada Lands Company: see paragraph 61. After all, Treasury Board had already given its approval.

* From August to November, 2007, the four respondents wrote seeking assurances their interests would be respected and they requested a meeting to discuss the matter. Canada did not respond in a meaningful way to these concerns. It did not reply until after the final decision to sell the lands to Canada Lands Company on November 23. 2007 was made: see paragraphs 62-63 above.

* In that reply, Canada told the four respondents to consult with the Canada Lands Company, an entity it may have believed had no legal obligation to consult with Aboriginal peoples: see paragraph 68 above. This is an open question.

* Further, in the case of the Peguis First Nation, Canada broke specific obligations under the treaty land entitlement agreement it had with it: see paragraphs 26-28 above.

135 Summarizing the 2006-2007 period, the Federal Court held as follows (at paragraph 79):

> The matter is more egregious in the 2006 to 2007 period. Canada simply ignored correspondence written by and on behalf of the [four respondents]. It ignored a request for a meeting. It did not provide any information such as the appraisal or basis of the selling arrangements negotiated with Canada Lands Company. The [four respondents] were simply ignored. After the fact, the [four respondents] were told to take their concerns to the Canada Lands Company. I find the treatment of the concerns raised by the [four respondents] and other [A]boriginal bands to be far short of the scope of even the minimum duty to consult.

136 I agree with the Federal Court, though I do not see the evidentiary basis for finding that this matter is "egregious." This affects my later analysis of the remedy the Federal Court granted.

137 Examining the record myself, I see no particular *animus* on the part of Canada. Instead, fairly read, the record shows a repeated lack of understanding on the part of Canada about the nature and scope of the duty to consult in the particularly unusual circumstances of this case. At the time the events of this case took place, the case law on the nature and scope of the duty to consult was embryonic. Canada first approved the transfer of the Barracks property to the Canada Lands Company in 2005 just after the Supreme Court released its seminal but very general decision in *Haida Nation*. After approving the transfer, Canada acted consistently with that approval, reluctant to alter its course. As these reasons suggest, it should have altered its course. But that sort of inertia is not enough to warrant the use of the term "egregious." I also note Canada's concession before the Federal Court, albeit belated, that it does have a duty to consult. I also note that although Canada could have tried to transfer the Barracks property at any time after 2005, it did not do so. We are not dealing with an intransigent, defiant party.

138 Canada complains that with the possible exception of Long Plain, some of the four respondents were insufficiently active in asserting their interests. Here, Canada has a point. There were occasions when some of the four respondents should have come forward and participated actively in a process of consultation. At the end of these reasons, I return to this point.

139 But for present purposes, without timely notice of the possible availability of the Barracks property and without provision of information about the land to the four respondents, they could hardly have been expected to come forward and constructively dialogue. And, after a while, Canada's conduct set out above may well have led some of the four respondents to withdraw entirely from the matter and advance extreme positions of entitlement, as they did in the September 2003 meeting with Canada, and afterward. As is often the case when relationships become dysfunctional, fault can be found on both sides.

(5) The Federal Court's choice of remedy

140 In paragraph 4 of its judgment, the Federal Court restrained Canada from selling the Barracks property to the Canada Lands Company or anyone else until Canada could demonstrate to it that it has fulfilled the duty to consult. In effect, this was a restraining order and a supervision order. As mentioned at paragraph 91, above, this choice of remedy--one that was fact-based and discretionary--is entitled to deference.

141 At the outset, Canada asks this Court to quash the restraining order and the supervision order in paragraph 4 of the Federal Court's judgment because the Federal Court did not offer adequate reasons. Canada says that, without adequate reasons, this Court cannot be sure that the Federal Court charged itself correctly on the law and did not commit any palpable and overriding error on the facts.

142 In my view the Federal Court's reasons were adequate.

143 We are not to insist that courts explicitly address every last issue, set out the obvious or show how they arrived at their conclusion in a "watch me think" fashion: *R. v. R.E.M.*, *2008 SCC 51*, *[2008] 3 S.C.R. 3* at paragraphs 17 and 43-44; *R. v. Dinardo*, *2008 SCC 24*, *[2008] 1 S.C.R. 788* at paragraph 25; *R. v. Walker*, *2008 SCC 34*, *[2008] 2 S.C.R. 245* at paragraph 27. Instead, we are to adopt a very practical and functional approach to the adequacy of reasons: see, *e.g.*, *R. v. Sheppard*, *2002 SCC 26*, *[2002] 1 S.C.R. 869* at paragraph 55; *R.E.M.*, above at paragraph 35; *Hill v. Hamilton-Wentworth Police Services Board*, *2007 SCC 41*, *[2007] 3 S.C.R. 129* at paragraph 101. Reasons must be read as a whole in their overall context, including the evidentiary record before the court, the submissions made, the issues that were live before the court and the fact that judges are presumed to know the law on basic points: *R.E.M.*, above at paragraphs 35 and 45. The main concern is whether the reasons, short as they may be, are intelligible or capable of being made out and permit meaningful appellate review: *Sheppard*, above at paragraph 25; *R. v. Gagnon*, *2006 SCC 17*, *[2006] 1 S.C.R. 621*; *R.E.M.*, above at paragraph 35. Here, the Federal Court met the standard.

144 It is evident from the reasoning of the Federal Court and the record before it why it restrained the sale of the Barracks property. If it did not do so, at some time in the future Canada, believing it had discharged its duty to consult, could sell the Barracks property to the Canada Lands Company or to a third party. But Canada's belief might be wrong. If Canada proceeded in that way and if, in fact, it had not discharged its duty to consult, the Barracks property would be gone and any later proceeding to redress Canada's failure to discharge its failure would be moot. The Federal Court's restraining order protects against any unilateral conduct by Canada that would render any later challenge by the four respondents moot.

145 It is also evident why the Federal Court made a supervision order. It considered Canada's conduct to be "egregious."

146 Aside from the allegedly insufficient reasons offered by the Federal Court, Canada also submits that the restraining order and supervision order cannot be sustained on this record. In Canada's view, they are overly-intrusive and trench upon the operation of the executive branch of government. Canada also says that the supervision order violates the *functus officio* principle: the prohibition against a Court from reopening or amending a final decision, except for where there has been a slip in drawing up the judgment or an error in expressing the

Court's intention in its judgment. Further, the four respondents did not specifically ask for a supervision order in their notice of application.

147 Although we must show deference to remedial choices made by the Federal Court, in my view there was no basis in principle or on the facts of this case for the Federal Court to make the restraining order and the supervision order. Thus, I would set aside paragraph 4 of the judgment of the Federal Court.

148 First, the restraining order. In my view, on this evidentiary record, it cannot be sustained. One cannot say that Canada will not obey the letter and spirit of this Court's decision. For many years leading up to the judgment of the Federal Court, Canada was free to transfer the Barracks property to the Canada Lands Company but did not. There is no reason to think that Canada will now act unfairly or unilaterally concerning the Barracks property. Further, as a result of these reasons, Canada is now well-aware of its obligations, and there is no evidence to suggest that it will not govern itself accordingly.

149 Next, the supervision order. The Supreme Court has told us that in appropriate circumstances, supervision orders can be made in order to ensure the proper implementation of their orders: *Doucet-Boudreau*, above. In *Doucet-Boudreau*, the Supreme Court considered that the trial judge's supervision order was appropriate because of the Government of Nova Scotia's long-standing pattern of disregard for French language educational rights. In this case, the Federal Court had a similar concern, describing Canada's conduct as "egregious" (at paragraph 79). But, as I have said above, one cannot say that Canada's conduct is "egregious" on the record before us.

150 Supervision orders are "a remedy of last resort, to be employed only against governments who have refused to carry out their...responsibilities": *Jodhan*, above at paragraph 171, quoting Peter Hogg, *Constitutional Law of Canada*, Vol. 2, 5th ed., Supp. 2007, at page 40-45. On this record, Canada has not refused its responsibilities. Rather, it has been unsure about its responsibilities.

151 Finally, the four respondents did not specifically request a supervision order, nor did the Federal Court advise the parties that it was contemplating such an order and invite submissions as to whether it should make such an order.

152 It is true that the four respondents did make a general request in their notice of application for any other orders that are appropriate. But that sort of general request does not always empower a court to grant relief not specifically asked for. This is especially true where the relief is unusual and intrusive.

153 In this case, it appears that the supervision order--an unusual and intrusive sort of order--came as a surprise to the parties. In the circumstances of this case, the four respondents should have specifically requested it or the Federal Court should have raised the possibility of it in advance so that the parties could have made submissions on it.

154 Overall, the circumstances in this case are much like those in *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, *2000 SCC 69*, *[2000] 2 S.C.R. 1120* where the Supreme Court found repeated infringements of Charter rights. It issued a declaration recognizing those infringements, but decided that no other remedies needed to be granted. Here, in my view, a quashing of Canada's decision to convey the Barracks property to the Canada Lands Company along with these reasons is a sufficient remedy and no other remedies needed to be given.

155 I add that if Canada were to misconduct itself, many other remedies could be available. For example, if Canada were to transfer the Barracks property to the Canada Lands Company, the four respondents might be able to obtain remedies on short notice, where justified and appropriate, to prevent further disposition of the land or to require Canada to cause the land to be conveyed back to it. There may also be real estate remedies existing under Manitoba law, but I need not explore these here.

156 In light of the foregoing, I conclude that the restraining order and the supervision order in paragraph 4 of the Federal Court's judgment should be set aside.

F. Postscript

157 I wish to offer one final comment about fulfillment of duties to consult.

158 Consultation is not a one-way street. All parties must actively engage in the process:

> 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), *[1994] B.C.J. No. 2642*, Smithers No. 7855, affirmed *(1994), 40 B.C.A.C. 91*.

(*Halfway River*, above at paragraph 161; *Ahousaht*, above at paragraphs 50-53; see also *Brokenhead Ojibway Nation v. Canada (Attorney General)*, *2009 FC 484*, *345 F.T.R. 119* at paragraph 42.)

159 Both parties must act to advance their respective rights in a prompt and conciliatory way:

> It is up to the parties, when...issues arise, to act diligently to advance their respective interests. Good government requires that decisions be taken in a timely way.

(*Beckman*, above at paragraph 12.)

160 The record shows that on occasion some of the four respondents have been dilatory in investigating the Barracks property, asking questions of Canada, and pursuing their interests in the Barracks property. On occasion, some of them were not responsive to invitations by Canada to engage in consultative activities.

161 A continuation of this sort of conduct in the future by any of the four respondents exposes them to risk. If they behave uncooperatively or recalcitrantly, they may be foreclosed in the future from complaining that they were not sufficiently consulted.

162 As for Canada, it now has the guidance given by these reasons.

163 Finally, it is to be hoped that whatever rancour, bitterness and mistrust among the parties may have existed in the past, the parties will now proceed to engage in constructive, respectful consultations concerning the Barracks property for the benefit of all.

G. Proposed disposition

164 For the foregoing reasons, I would allow the appeal in part and set aside paragraph 4 of the judgment dated December 20, 2012 of the Federal Court in file T-139-08. As the four respondents have been largely successful on most of the major issues in the appeal, I would grant them their costs of the appeal. I would dismiss the cross-appeal with costs.

STRATAS J.A.
PELLETIER J.A.:— I agree.
DAWSON J.A.:— I agree.

End of Document

Tab 15

Manitoba Metis Federation Inc. v. Canada (Attorney General), [2013] 1 S.C.R. 623

Supreme Court Reports

Supreme Court of Canada

Present: McLachlin C.J. and LeBel, Deschamps,* Fish, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

Heard: December 13, 2011;

Judgment: March 8, 2013.

File No.: 33880.

[2013] 1 S.C.R. 623 | *[2013] 1 R.C.S. 623* | *[2013] S.C.J. No. 14* | *[2013] A.C.S. no 14* | *2013 SCC 14*

Manitoba Metis Federation Inc., Yvon Dumont, Billy Jo De La Ronde, Roy Chartrand, Ron Erickson, Claire Riddle, Jack Fleming, Jack McPherson, Don Roulette, Edgar Bruce Jr., Freda Lundmark, Miles Allarie, Celia Klassen, Alma Belhumeur, Stan Guiboche, Jeanne Perrault, Marie Banks Ducharme and Earl Henderson, Appellants; v. Attorney General of Canada and Attorney General of Manitoba, Respondents, and Attorney General for Saskatchewan, Attorney General of Alberta, Métis National Council, Métis Nation of Alberta, Métis Nation of Ontario, Treaty One First Nations and Assembly of First Nations, Interveners.

(303 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Case Summary

Subsequent History:

* Editor's Note: Deschamps J. took no part in the judgment.

Catchwords:

Aboriginal law — Métis — Crown law — Honour of the Crown — Canadian government agreeing in 1870 to grant Métis children shares of 1.4 million acres of land and to recognize existing Métis landholdings — Promises set out in ss. 31 and 32 of the Manitoba Act, 1870, a constitutional document — Errors and delays interfering with division and granting of land among eligible [page624] recipients — Whether Canada failing to comply with the honour of the Crown in the implementation of ss. 31 and 32 of the Manitoba Act, 1870.

Aboriginal law — Métis — Fiduciary duty — Canadian government agreeing in 1870 to grant Métis children shares of 1.4 million acres of land and to recognize existing Métis landholdings — Promises set out in ss. 31 and 32 of the Manitoba Act, 1870, a constitutional document — Errors and delays interfering with division and granting of land among eligible recipients — Whether Canada in breach of fiduciary duty to Métis.

Limitation of actions — Declaration — Appellants seeking declaration in the courts that Canada breached

obligations to implement promises made to the Métis people in the Manitoba Act, 1870 — Whether statute of limitations can prevent courts from issuing declarations on the constitutionality of Crown conduct — Whether claim for declaration barred by laches.

Civil procedure — Parties — Standing — Public interest standing — Manitoba Act, 1870, providing for individual land entitlements — Whether federation advancing collective claim on behalf of Métis people should be granted public interest standing.

Summary:

After Confederation, the first government of Canada embarked on a policy aimed at bringing the western territories within the boundaries of Canada, and opening them up to settlement. Canada became the titular owner of Rupert's Land and the Red River Settlement; however, the French-speaking Roman Catholic Métis, the dominant demographic group in the Red River Settlement, viewed with alarm the prospect of Canadian control leading to a wave of English-speaking Protestant settlers that would threaten their traditional way of life. In the face of armed resistance, Canada had little choice but to adopt a diplomatic approach. The Red River settlers agreed to become part of Canada, and Canada agreed to grant 1.4 million acres of land to the Métis children (subsequently set out in s. 31 of the *Manitoba Act*) and to recognize existing landholdings (subsequently set out in s. 32 of the *Manitoba Act*). The Canadian government began the process of implementing s. 31 in early [page625] 1871. The land was set aside, but a series of errors and delays interfered with dividing the land among the eligible recipients. Initially, problems arose from errors in determining who had a right to a share of the land promised. As a result, two successive allotments were abandoned; the third and final allotment was not completed until 1880. The lands were distributed randomly to the eligible Métis children living within each parish.

While the allotment process lagged, speculators began acquiring the Métis children's yet-to-be granted interests in the s. 31 lands, aided by a range of legal devices. During the 1870s and 1880s, Manitoba passed five statutes, now long spent and repealed, dealing with the technical requirements to transfer interests in s. 31 lands. Initially, Manitoba moved to curb speculation and improvident sales of the children's interests, but in 1877, it changed course, allowing sales of s. 31 entitlements.

Eventually, it became apparent that the number of eligible Métis children had been underestimated. Rather than starting a fourth allotment, the Canadian government provided that remaining eligible children would be issued with scrip redeemable for land. The scrip was based on 1879 land prices; however, when the scrip was delivered in 1885, land prices had increased so that the excluded children could not acquire the same amount of land granted to other children. In the decades that followed, the position of the Métis in the Red River Settlement deteriorated. White settlers soon constituted a majority in the territory and the Métis community began to unravel.

The Métis sought a declaration that (1) in implementing the *Manitoba Act*, the federal Crown breached fiduciary obligations owed to the Métis; (2) the federal Crown failed to implement the *Manitoba Act* in a manner consistent with the honour of the Crown; and (3) certain legislation passed by Manitoba affecting the implementation of the *Manitoba Act* was *ultra vires*. The trial judge dismissed the claim for a declaration on the ground that ss. 31 and 32 of the *Manitoba Act* gave rise to neither a fiduciary duty nor a duty based on the honour of the Crown. He also found that the challenged Manitoba [page626] statutes were constitutional, and, in any event, the claim was barred by limitations and the doctrine of laches. Finally, he found that the Manitoba Metis Federation Inc. ("MMF") should not be granted standing in the action, since the individual plaintiffs were capable of bringing the claims forward. A five-member panel of the Manitoba Court of Appeal dismissed the appeal.

Held (Rothstein and Moldaver JJ. dissenting): The appeal should be allowed in part. The federal Crown failed to implement the land grant provision set out in s. 31 of the *Manitoba Act, 1870* in accordance with the honour of the Crown.

Per McLachlin C.J. and LeBel, Fish, Abella, Cromwell and Karakatsanis JJ.: The MMF should be granted standing. The action advanced is a collective claim for declaratory relief for the purposes of reconciling the descendants of the Métis people of the Red River Valley and Canada. It merits allowing the body representing

the collective Métis interest to come before the court.

The obligations enshrined in ss. 31 and 32 of the *Manitoba Act* did not impose a fiduciary duty on the government. In the Aboriginal context, a fiduciary duty may arise in two ways. First, it may arise as a result of the Crown assuming discretionary control over specific Aboriginal interests. Where the Crown administers lands or property in which Aboriginal peoples have an interest, such a duty may arise if there is (1) a specific or cognizable Aboriginal interest, and (2) a Crown undertaking of discretionary control over that interest. The interest must be a communal Aboriginal interest in land that is integral to the nature of the Métis distinctive community and their relationship to the land. It must be predicated on historic use and occupation, and cannot be established by treaty or by legislation. Second, and more generally, a fiduciary duty may arise if there is (1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary; (2) a defined person or class of persons vulnerable to a fiduciary's control; and (3) a legal or substantial practical interest of the beneficiary that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control.

[page627]

Although the Crown undertook discretionary control of the administration of the land grants under ss. 31 and 32 of the *Manitoba Act*, the Métis are Aboriginal, and they had an interest in the land, the first test for fiduciary duty is not made out because neither the words of s. 31 nor the evidence establish a pre-existing communal Aboriginal interest held by the Métis. Their interests in land arose from their personal history, not their shared distinct Métis identity. Nor was a fiduciary duty established on the basis of an undertaking by the Crown. While s. 31 shows an intention to benefit the Métis children, it does not demonstrate an undertaking to act in their best interests, in priority to other legitimate concerns. Indeed, the discretion conferred by s. 31 to determine "such mode and on such conditions as to settlement and otherwise" belies a duty of loyalty and an intention to act in the best interests of the beneficiary, forsaking all other interests. Section 32 simply confirmed the continuance of different categories of landholdings in existence shortly before or at the creation of the new province. It did not constitute an undertaking on the part of the Crown to act as a fiduciary in settling the titles of the Métis landholders.

However, the Métis are entitled to a declaration that the federal Crown failed to act with diligence in implementing the land grant provision set out in s. 31 of the *Manitoba Act*, in accordance with the honour of the Crown. The ultimate purpose of the honour of the Crown is the reconciliation of pre-existing Aboriginal societies with the assertion of Canadian sovereignty. Where this is at stake, it requires the Crown to act honourably in its dealings with the Aboriginal peoples in question. This flows from the guarantee of Aboriginal rights in s. 35(1) of the Constitution. The honour of the Crown is engaged by an explicit obligation to an Aboriginal group enshrined in the Constitution. The Constitution is not a mere statute; it is the very document by which the Crown asserted its sovereignty in the face of prior Aboriginal occupation. An explicit obligation to an Aboriginal group in the Constitution engages the honour of the Crown.

The honour of the Crown speaks to *how* obligations that attract it must be fulfilled, so the duties that flow from it vary with the situation. In the context of the implementation of a constitutional obligation to an Aboriginal people, the honour of the Crown requires that [page628] the Crown: (1) take a broad purposive approach to the interpretation of the promise; and (2) act diligently to fulfill it. The question is whether, viewing the Crown's conduct as a whole in the context of the case, it acted with diligence to pursue the fulfillment of the purposes of the obligation. The duty to act diligently is a narrow and circumscribed duty. Not every mistake or negligent act in implementing a constitutional obligation to an Aboriginal people brings dishonour to the Crown, and there is no guarantee that the purposes of the promise will be achieved. However, a persistent pattern of errors and indifference that substantially frustrates the purposes of a solemn promise may amount to a betrayal of the Crown's duty to act honourably in fulfilling its promise.

Section 31 of the *Manitoba Act* is a solemn constitutional obligation to the Métis people of Manitoba, an Aboriginal people, and it engaged the honour of the Crown. Its immediate purpose was to give the Métis children a head start over the expected influx of settlers from the east. Its broader purpose was to reconcile the Métis' Aboriginal interests in the Manitoba territory with the assertion of Crown sovereignty over the area that was to become the province of Manitoba. By contrast, s. 32 was a benefit made generally available to all settlers and did not engage the honour of the Crown.

Although the honour of the Crown obliged the government to act with diligence to fulfill s. 31, it acted with persistent inattention and failed to act diligently to achieve the purposes of the s. 31 grant. This was not a matter of occasional negligence, but of repeated mistakes and inaction that persisted for more than a decade, substantially defeating a purpose of s. 31. This was inconsistent with the behaviour demanded by the honour of the Crown: a government sincerely intent on fulfilling the duty that its honour demanded could and should have done better.

None of the government's other failures -- failing to prevent Métis from selling their land to speculators, issuing scrip in place of land, and failing to cluster family allotments -- were in themselves inconsistent with the honour of the Crown. That said, the impact of these measures was exacerbated by the delay inconsistent with [page629] the honour of the Crown: it increased improvident sales to speculators; it meant that when the children received scrip, they obtained significantly less than the 240 acres provided to those who took part in the initial distribution, because the price of land had increased in the interim; and it made it more difficult for Métis to trade grants amongst themselves to achieve contiguous parcels.

It is unnecessary to consider the constitutionality of the implementing statutes because they are moot.

The Métis claim based on the honour of the Crown is not barred by the law of limitations. Although claims for personal remedies flowing from unconstitutional statutes may be time-barred, the Métis seek no personal relief and make no claim for damages or for land. Just as limitations acts cannot prevent the courts from issuing declarations on the constitutionality of legislation, limitations acts cannot prevent the courts from issuing a declaration on the constitutionality of the Crown's conduct. So long as the constitutional grievance at issue here remains outstanding, the goals of reconciliation and constitutional harmony remain unachieved. In addition, many of the policy rationales underlying limitations statutes do not apply in an Aboriginal context. A declaration is a narrow remedy and, in some cases, may be the only way to give effect to the honour of the Crown.

Nor is the claim barred by the equitable doctrine of laches. Given the context of this case, including the historical injustices suffered by the Métis, the imbalance in power that followed Crown sovereignty, and the negative consequences following delays in allocating the land grants, delay on the part of the appellants cannot, by itself, be interpreted as some clear act which amounts to acquiescence or waiver. It is rather unrealistic to suggest that the Métis sat on their rights before the courts were prepared to recognize those rights. Furthermore, Canada has not changed its position as a result of the delay. This suffices to find that the claim is not barred by laches. However, it is difficult to see how a court, in its role as guardian of the Constitution, could apply an equitable doctrine to defeat a claim for a declaration that a Constitutional provision has not been fulfilled as required by the honour of the Crown.

[page630]

Per Rothstein and Moldaver JJ. (dissenting): There is agreement with the majority that there was no fiduciary duty here, that no valid claims arise from s. 32 of the *Manitoba Act*, that any claims that might have arisen from the now repealed Manitoba legislation on the land grants are moot, that the random allocation of land grants was an acceptable means for Canada to implement the s. 31 land grants, and that the MMF has standing to bring these claims. However, the majority proposes a new common law constitutional obligation derived from the honour of the Crown. The courts below did not consider this issue and the parties did not argue it before this Court. This is an unpredictable expansion of the scope of the duties engaged under the honour of the Crown. The claim based on the honour of the Crown is also barred by both limitations periods and laches.

While a duty of diligent fulfillment may well prove to be an appropriate expansion of Crown obligations, and while a faster process would most certainly have been better, the duty crafted by the majority creates an unclear rule that is unconstrained by laches or limitation periods and immune from legislative redress, making the extent and consequences of the Crown's new obligations impossible to predict. It is not clear when an obligation rises to the "solemn" level that triggers the duty, what types of legal documents will give rise to solemn obligations, whether an obligation with a treaty-like character imposes higher obligations than other constitutional provisions, and whether it is sufficient for the obligation to be owed to an Aboriginal group. The idea that how the government is obliged to perform a constitutional obligation depends on how closely it resembles a treaty should be rejected. It would be a significant expansion of Crown liability to permit a claimant to seek relief so long as the promise was

made to an Aboriginal group, without proof of an Aboriginal interest sufficient to ground a fiduciary duty, and based on actions that would not constitute a breach of fiduciary duty.

Even if the honour of the Crown was engaged and required the diligent implementation of s. 31, and even if this duty was not fulfilled, any claims arising from such a cause of action have long been barred by statutes of limitations and the equitable doctrine of laches. [page631] Limitations and laches cannot fulfill their purposes if they are not universally applicable. Limitations periods apply to the government as they do to all other litigants both generally and in the area of Aboriginal claims. This benefits the legal system by creating certainty and predictability, and serves to protect society at large by ensuring that claims against the Crown are made in a timely fashion so that the Crown is able to defend itself adequately.

Limitations periods have existed in Manitoba continuously since 1870, and, since 1931, Manitoba limitations legislation has provided a six-year limitation period for all causes of action, whether the cause of action arose before or after the legislation came into force. Manitoba has a 30-year ultimate limitation period. The Crown is entitled to the benefit of those limitations periods. The policy rationales underlying limitations periods do not support the creation of an exemption from those periods in this case. Manitoba legislation does not contain an exception from limitations periods for declaratory judgments and no such exception should be judicially created. In this case, the risk that a declaratory judgment will lead to additional remedies is fully realized: the Métis plan to use the declaration in extra-judicial negotiations with the Crown, so the declaration exposes the Crown to an obligation long after the time when the limitations period expired.

Moreover, this Court has never recognized a general exception from limitations for constitutionally derived claims. Rather, it has consistently held that limitations periods apply to factual claims with constitutional elements. While limitations periods do not apply to prevent a court from declaring a statute unconstitutional, the Métis' claim about unconstitutional statutes is moot. The remaining declaration sought concerns factual issues and alleged breaches of obligations which have always been subject to limitation periods. In suggesting that the goal of reconciliation must be given priority in the Aboriginal context, it appears that the majority has departed from the principle that the same policy rationales that support limitations generally should apply to Aboriginal claims.

These claims are also subject to laches. Laches can be used to defend against equitable claims that have [page632] not been brought in a sufficiently timely manner, and as breaches of fiduciary duty can be subject to laches, it would be fundamentally inconsistent to permit certain claims based on the honour of the Crown to escape the imputation of laches. Both branches of laches are satisfied: the Métis have knowingly delayed their claim by over a hundred years and in so doing have acquiesced to the circumstances and invited the government to rely on that, rendering the prosecution of this action unreasonable. As to acquiescence, the trial judge found that the Métis had the required knowledge in the 1870s, and that finding has not been shown to be an error. The suggestion that it is "unrealistic" to expect someone to have enforced their claim before the courts were prepared to recognize those rights is fundamentally at odds with the common law approach to changes in the law. Delay in making the grants cannot be both the wrong alleged and the reason the Crown cannot access the defence of laches: laches are always invoked as a defence by a party alleged to have wronged the plaintiff. If assessing conscionability is reduced to determining if the plaintiff has proven the allegations, the defence of laches is rendered illusory. The imbalance in power between the Métis and the government did not undermine their knowledge, capacity or freedom to the extent required to prevent a finding of acquiescence. The inference that delays in the land grants caused the vulnerability of the Métis was neither made by the trial judge nor supported by the record. In any event, laches are imputed against vulnerable people just as limitations periods are applied against them.

As to reliance, had the claim been brought promptly, the unexplained delays referred to as evidence for the Crown acting dishonourably may well have been accounted for, or the government might have been able to take steps to satisfy the Métis community.

Finally, while not doing so explicitly, the majority departs from the factual findings of the trial judge, absent a finding of palpable and overriding error, in two main areas: (1) the extent of the delay in distributing the land, and (2) the effect of that delay on the Métis. Manifestly, the trial judge made findings of delay. Nonetheless these findings and the evidence do not reveal a pattern of inattention, a lack of diligence, or that the purposes of the

land grant were frustrated. That alone would nullify any claim the Métis might have based on a breach of duty [page633] derived from the honour of the Crown, assuming that any such duty exists.

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By Rothstein J. (dissenting)

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APPEAL from a judgment of the Manitoba Court of Appeal (Scott C.J.M. and Monnin, Steel, Hamilton and Freedman JJ.A.), *2010 MBCA 71*, *255 Man. R. (2d) 167*, 486 W.A.C. 167, *[2010] 12 W.W.R. 599*, *[2010] 3 C.N.L.R. 233*, *216 C.R.R. (2d) 144*, 94 R.P.R. (4) 161, *[2010] M.J. No. 219* (QL), *2010 CarswellMan 322*, affirming a decision of MacInnes J., *2007 MBQB 293*, *223 Man. R. (2d) 42*, *[2008] 4 W.W.R. 402*, *[2008] 2 C.N.L.R. 52*, *[2007] M.J. No. 448* (QL), 2007 CarswellMan 500. Appeal allowed in part, Rothstein and Moldaver JJ. dissenting.

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[page637]

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The judgment of McLachlin C.J. and LeBel, Fish, Abella, Cromwell and Karakatsanis JJ. was delivered by

McLACHLIN C.J. and KARAKATSANIS J.

I. Overview

1 Canada is a young nation with ancient roots. The country was born in 1867, by the consensual union of three colonies - United Canada (now Ontario and Quebec), Nova Scotia and New Brunswick. Left unsettled was whether the new nation would be expanded to include the vast territories to the west, stretching from modern Manitoba to British Columbia. The Canadian government, led by Prime Minister John A. Macdonald, embarked on a policy aimed at bringing the western territories within the boundaries of Canada, and opening them up to settlement.

2 This meant dealing with the indigenous peoples who were living in the western territories. On the prairies, these consisted mainly of two groups - the First Nations, and the descendants of unions between white traders and explorers and Aboriginal women, now known as Métis.

3 The government policy regarding the First Nations was to enter into treaties with the various bands, whereby they agreed to settlement of their lands in exchange for reservations of land and other promises.

4 The government policy with respect to the Métis population - which, in 1870, comprised 85 percent of the population of what is now Manitoba - was less clear. Settlers began pouring into the region, displacing the Métis' social and political [page638] control. This led to resistance and conflict. To resolve the conflict and assure peaceful annexation of the territory, the Canadian government entered into negotiations with representatives of the Métis-led provisional government of the territory. The result was the *Manitoba Act, 1870*, S.C. 1870, c. 3 ("*Manitoba Act*"), which made Manitoba a province of Canada.

5 This appeal is about obligations to the Métis people enshrined in the *Manitoba Act*, a constitutional document. These promises represent the terms under which the Métis people agreed to surrender their claims to govern themselves and their territory, and become part of the new nation of Canada. These promises were directed at enabling the Métis people and their descendants to obtain a lasting place in the new province. Sadly, the expectations of the Métis were not fulfilled, and they scattered in the face of the settlement that marked the ensuing decades.

6 Now, over a century later, the descendants of the Métis people seek a declaration in the courts that Canada breached its obligation to implement the promises it made to the Métis people in the *Manitoba Act*.

7 More particularly, the appellants seek a declaration that (1) in implementing the *Manitoba Act*, the federal Crown

breached fiduciary obligations owed to the Métis; (2) the federal Crown failed to implement the *Manitoba Act* in a manner consistent with the honour of the Crown; and (3) certain legislation passed by Manitoba affecting the implementation of the *Manitoba Act* was *ultra vires*.

8 It is not disputed that there was considerable delay in implementing the constitutional provisions. The main issues are (1) whether Canada failed to act in accordance with its legal obligations, and (2) whether the Métis' claim is too late and thus barred by the doctrine of laches or by any [page639] limitations law, be it the English limitations law in force at the time the claims arose, or the subsequent limitations acts enacted by Manitoba: *The Limitation of Actions Act, 1931*, S.M. 1931, c. 30; *The Limitation of Actions Act, 1931*, R.S.M. 1940, c. 121; *The Limitation of Actions Act*, R.S.M. 1970, c. L150; collectively referred to as "*The Limitation of Actions Act*".

9 We conclude that s. 31 of the *Manitoba Act* constitutes a constitutional obligation to the Métis people of Manitoba, an Aboriginal people, to provide the Métis children with allotments of land. The immediate purpose of the obligation was to give the Métis children a head start over the expected influx of settlers from the east. Its broader purpose was to reconcile the Métis' Aboriginal interests in the Manitoba territory with the assertion of Crown sovereignty over the area that was to become the province of Manitoba. The obligation enshrined in s. 31 of the *Manitoba Act* did not impose a fiduciary or trust duty on the government. However, as a solemn constitutional obligation to the Métis people of Manitoba aimed at reconciling their Aboriginal interests with sovereignty, it engaged the honour of the Crown. This required the government to act with diligence in pursuit of the fulfillment of the promise. On the findings of the trial judge, the Crown failed to do so and the obligation to the Métis children remained largely unfulfilled. The Métis claim based on the honour of the Crown is not barred by the law of limitations or the equitable doctrine of laches. We therefore conclude that the Métis are entitled to a declaration that Canada failed to implement s. 31 as required by the honour of the Crown.

[page640]

10 We agree with the courts below that the s. 32 claim is not established, and find it unnecessary to consider the constitutionality of the implementing statutes.

II. The Constitutional Promises and the Legislation

11 Section 31 of the *Manitoba Act*, known as the children's grant, set aside 1.4 million acres of land to be given to Métis children:

> **31.** And whereas, it is expedient, towards the extinguishment of the Indian Title to the lands in the Province, to appropriate a portion of such ungranted lands, to the extent of one million four hundred thousand acres thereof, for the benefit of the families of the half-breed residents, it is hereby enacted, that, under regulations to be from time to time made by the Governor General in Council, the Lieutenant-Governor shall select such lots or tracts in such parts of the Province as he may deem expedient, to the extent aforesaid, and divide the same among the children of the half-breed heads of families residing in the Province at the time of the said transfer to Canada, and the same shall be granted to the said children respectively, in such mode and on such conditions as to settlement and otherwise, as the Governor General in Council may from time to time determine.

12 Section 32 of the *Manitoba Act* provided for recognition of existing landholdings, where individuals asserting ownership had not yet been granted title:

> **32.** For the quieting of titles, and assuring to the settlers in the Province the peaceable possession of the lands now held by them, it is enacted as follows:-
>
> (1) All grants of land in freehold made by the Hudson's Bay Company up to the eighth day of March, in the year 1869, shall, if required by the owner, be confirmed by grant from the Crown.

> (2) All grants of estates less than freehold in land made by the Hudson's Bay Company up to the eighth day of March aforesaid, shall, if required by the owner, be converted into an estate in freehold by grant from the Crown.
>
> [page641]
>
> (3) All titles by occupancy with the sanction and under the license and authority of the Hudson's Bay Company up to the eighth day of March aforesaid, of land in that part of the Province in which the Indian Title has been extinguished, shall, if required by the owner, be converted into an estate in freehold by grant from the Crown.
>
> (4) All persons in peaceable possession of tracts of land at the time of the transfer to Canada, in those parts of the Province in which the Indian Title has not been extinguished, shall have the right of pre-emption of the same, on such terms and conditions as may be determined by the Governor in Council.
>
> (5) The Lieutenant-Governor is hereby authorized, under regulations to be made from time to time by the Governor General in Council, to make all such provisions for ascertaining and adjusting, on fair and equitable terms, the rights of Common, and rights of cutting Hay held and enjoyed by the settlers in the Province, and for the commutation of the same by grants of land from the Crown.

13 During the 1870s and 1880s, Manitoba passed five statutes, now long spent and repealed, dealing with the technical requirements to transfer interests in s. 31 lands. The appellants seek to have the statutes declared *ultra vires* pursuant to the *Constitution Act, 1867*. Alternatively, they argue that the statutes were inoperative by virtue of federal paramountcy.

III. Judicial Decisions

14 The trial judge, MacInnes J. (as he then was), engaged in a thorough review of the facts: *2007 MBQB 293*, *223 Man. R. (2d) 42*. He found that while dishonesty and bad faith were not established, government error and inaction led to lengthy delay in implementing ss. 31 and 32, and left 993 Métis children who were entitled to a grant with scrip instead of land. However, he dismissed the claim for a declaration on the ground that ss. 31 and 32 of the *Manitoba Act* gave rise to neither a fiduciary duty nor a duty based on the honour of the Crown. [page642] The trial judge took the view that a fiduciary duty required proof that the Aboriginal people held the land collectively prior to 1870. Since the evidence established only individual landholdings by the Métis, their claim was "fundamentally flawed". He said of the action that "[i]t seeks relief that is in essence of a collective nature, but is underpinned by a factual reality that is individual": para. 1197.

15 The trial judge concluded that, in any event, the claim was barred by *The Limitation of Actions Act* and the doctrine of laches. He also found that Manitoba's various legislative initiatives regarding the land grants were constitutional. Finally, he held that the Manitoba Metis Federation Inc. ("MMF") should not be granted standing in the action, since the individual plaintiffs were capable of bringing the claims forward.

16 A five-member panel of the Manitoba Court of Appeal, *per* Scott C.J.M., dismissed the appeal: *2010 MBCA 71*, *255 Man. R. (2d) 167*. It rejected the trial judge's view that collective Aboriginal title to land was essential to a claim that the Crown owed a fiduciary duty to Aboriginal peoples. However, the court found it unnecessary to determine whether the Crown in fact owed a fiduciary duty to the Métis, since the trial judge's findings of fact concerning the conduct of the Crown did not support any breach of such a duty.

17 The Court of Appeal also rejected the assertion that the honour of the Crown had been breached. The honour of the Crown, in its view, was [page643] subsidiary to the fiduciary claim and did not itself give rise to an independent duty in this situation.

18 Finally, the court held that the Métis' claim for a declaration was, in any event, statute-barred, and that the issue of the constitutional validity of the Manitoba legislation was moot. It also declined to interfere with the trial judge's

discretionary decision to deny standing to the MMF.

IV. Facts

19 This appeal concerns events that occurred over a century ago. Despite the difficulties imposed by the lack of live witnesses and distant texts, the trial judge made careful and complete findings of fact on all the elements relevant to the legal issues. The Court of Appeal thoroughly reviewed these findings and, with limited exceptions, confirmed them.

20 The completeness of these findings, which stand largely unchallenged, make it unnecessary to provide a detailed narrative of the Métis people, the Red River Settlement, and the conflict that gave rise to the *Manitoba Act* and Manitoba's entry into Canada - events that have inspired countless tomes and indeed, an opera. We content ourselves with a brief description of the origins of the Red River Settlement and the events that give rise to the appellants' claims.

21 The story begins with the Aboriginal peoples who inhabited what is now the province of Manitoba - the Cree and other less populous nations. In the late 17th century, European adventurers and explorers passed through. The lands were claimed nominally by England which granted the Hudson's Bay Company, a company of fur traders operating out of London, control over a vast territory called Rupert's Land, which included modern Manitoba. Aboriginal peoples continued to occupy the territory. In addition to the original First Nations, a new Aboriginal group, the Métis, arose - people [page644] descended from early unions between European adventurers and traders, and Aboriginal women. In the early days, the descendants of English-speaking parents were referred to as half-breeds, while those with French roots were called Métis.

22 A large - by the standards of the time - settlement developed the forks of the Red and Assiniboine Rivers on land granted to Lord Selkirk by the Hudson's Bay Company in 1811. By 1869, the settlement consisted of 12,000 people, under the governance of the Hudson's Bay Company.

23 In 1869, the Red River Settlement was a vibrant community, with a free enterprise system and established judicial and civic institutions, centred on the retail stores, hotels, trading undertakings and saloons of what is now downtown Winnipeg. The Métis were the dominant demographic group in the Settlement, comprising around 85 percent of the population, and held leadership positions in business, church and government.

24 In the meantime, Upper Canada (now Ontario), Lower Canada (now Quebec), Nova Scotia and New Brunswick united under the *British North America Act* of 1867 (now *Constitution Act, 1867*) to become the new country of Canada. The country's first government, led by Sir John A. Macdonald, was intent on westward expansion, driven by the dream of a nation that would extend from the Atlantic to the Pacific and provide vast new lands for settlement. England agreed to cede Rupert's Land to Canada. In recognition of the Hudson's Bay Company's interest, Canada paid it GBP300,000 and allowed it to retain some of the land around its trading posts in the Northwest. In 1868, the Imperial Parliament cemented the deal with *Rupert's Land Act, 1868* (U.K.), 31 & 32 Vict., c. 105.

[page645]

25 Canada, as successor to the Hudson's Bay Company, became the titular owner of Rupert's Land and the Red River Settlement. However, the reality on the ground was more complex. The French-speaking Roman Catholic Métis viewed with alarm the prospect of Canadian control leading to a wave of English-speaking Protestant settlers that would threaten their traditional way of life. When two survey parties arrived in 1869 to take stock of the land, the matter came to a head.

26 The surveyors were met with armed resistance, led by a French-speaking Métis, Louis Riel. On November 2, 1869, Canada's proposed Lieutenant Governor of the new territory, William McDougall, was turned back by a

mounted French Métis patrol. On the same day, a group of Métis, including Riel, seized Upper Fort Garry (now downtown Winnipeg), the Settlement's principle fortification. Riel called together 12 representatives of the English-speaking parishes and 12 representatives of the French-speaking Métis parishes, known as the "Convention of 24". At their second meeting, he announced the French Métis intended to form a provisional government, and asked for the support of the English. The English representatives asked for time to confer with the people of their parishes. The meeting was adjourned until December 1, 1869.

27 When the meeting reconvened, they were confronted with a proclamation made earlier that day by McDougall that the region was under the control of Canada. The group rejected the claim. The French Métis drafted a list of demands that Canada must satisfy before the Red River settlers would accept Canadian control.

28 The Canadian government adopted a conciliatory course. It invited a delegation of "at least two residents" to Ottawa to present the demands of the settlers and confer with Parliament. The provisional government responded by delegating [page646] a priest, Father Ritchot, a judge, Judge Black, and a local businessman named Alfred Scott to go to Ottawa. The delegates - none of whom were Métis, although Riel nominated them - set out for Ottawa on March 24, 1870.

29 Canada had little choice but to adopt a diplomatic approach to the Red River settlers. As MacInnes J. found at trial:

> Canada had no authority to send troops to the Settlement to quell the French Métis insurrection. Nor did it have the necessary troops. Moreover, given the time of year, there was no access to the Settlement other than through the United States. But, at the time, there was a concern in Canada about possible annexation of the territory by the United States and hence a reluctance on the part of Canada to seek permission from the United States to send troops across its territory to quell the insurrection and restore authority. [para. 78]

30 The delegates arrived in Ottawa on April 11, 1870. They met and negotiated with Prime Minister Macdonald and the Minister of Militia and Defence, George-Étienne Cartier. The negotiations were part of a larger set of negotiations on the terms on which Manitoba would enter Canada as a province. It emerged that Canada wanted to retain ownership of public lands in the new province. This led to the idea of providing land for Métis children. The parties settled on a grant to Métis children of 1.4 million acres of land (s. 31) and recognition of existing landholdings (s. 32). Parliament, after vigorous debate and the failure of a motion to delete the section providing the children's grant, passed the *Manitoba Act* on May 10, 1870.

31 The delegates returned to the Red River Settlement with the proposal, and, on June 24, 1870, Father Ritchot addressed the Convention of 40, now called the Legislative Assembly of Assiniboia, to [page647] advocate for the adoption of the *Manitoba Act*. The Assembly was read a letter from Minister Cartier which promised that any existing land interest contemplated in s. 32 of the *Manitoba Act* could be converted to title without payment. Minister Cartier guaranteed that the s. 31 children's grants would "be of a nature to meet the wishes of the half-breed residents" and the division of grant land would be done "*in the most effectual and equitable manner*": A.R., vol. XI, at p. 196 (emphasis added). On this basis, the Assembly voted to accept the *Manitoba Act*, and enter the Dominion of Canada. Manitoba became part of Canada by Order in Council of the Imperial government effective July 15, 1870.

32 The Canadian government began the process of implementing s. 31 in early 1871. The first step was to set aside 1.4 million acres, and the second was to divide the land among the eligible recipients. A series of errors and delays interfered with accomplishing the second step in the "effectual" manner Minister Cartier had promised.

33 The first problem was the erroneous inclusion of all Métis, including heads of families, in the allotment, contrary to the terms of s. 31, which clearly provided the lands were to be divided among the children of the Métis heads of families. On March 1, 1871, Parliament passed an Order in Council declaring that all Métis had a right to a share in the 1.4 million acres promised in s. 31 of the *Manitoba Act*. This order, which would have created more grants of smaller acreage, was made over the objections raised by McDougall, then the former Lieutenant Governor of

Rupert's Land, in the House of Commons. Nevertheless, the federal government began planning townships based on 140-acre lots, dividing the 1.4 million acres among approximately 10,000 recipients. This was the first allotment.

[page648]

34 In 1873, the federal government changed its position, and decided that only Métis children would be entitled to s. 31 grants. The government also decided that lands traditionally used for haying by the Red River settlers could not be used to satisfy the children's land grant, as was originally planned, requiring additional land to be set aside to constitute the 1.4 million acres. The 1873 decision was clearly the correct decision. The problem is that it took the government over three years to arrive at that position. This gave rise to the second allotment.

35 In November 1873, the government of Sir John A. Macdonald was defeated and a new Liberal government formed in early 1874. The new government, without explanation, did not move forward on the allotments until early 1875. The Liberal government finally, after questions in Parliament about the delay and petitions from several parishes, appointed John Machar and Matthew Ryan to verify claimants entitled to the s. 31 grants. The process of verifying those entitled to grants commenced five years after the *Manitoba Act* was passed.

36 The next set of problems concerned the Machar/Ryan Commission's estimate of the number of eligible Métis children. Though a census taken in 1870 estimated 7,000 Métis children, Machar and Ryan concluded the number was lower, at 5,088, which was eventually rounded up to 5,833 to allow for even 240-acre plots. This necessitated a third and final allotment, which began in 1876, but was not completed until 1880.

37 While the allotment process lagged, speculators began acquiring the Métis children's yet-to-be granted interests in the s. 31 lands, aided by a range of legal devices. Initially, the Manitoba legislature moved to block sales of the children's interests to speculators, but, in 1877, it passed legislation [page649] authorizing sales of s. 31 interests once the child obtained the age of majority, whether or not the child had received his or her allotment, or even knew of its location. In 1878, Manitoba adopted further legislation which allowed children between 18 and 21 to sell their interests, so long as the transaction was approved by a judicial officer and the child's parents. Dr. Thomas Flanagan, an expert who testified at trial, found returns on judicial sales were the poorest of any type of s. 31 sale: C.A., at para. 152.

38 Eventually, it became apparent that the Acting Agent of Dominion Lands, Donald Codd had underestimated the number of eligible Métis children - 993 more Métis children were entitled to land than Codd had counted on. In 1885, rather than start the allotment yet a fourth time, the Canadian government provided by Order in Council that the children for whom there was no land would be issued with $240 worth of scrip redeemable for land. Fifteen years after the passage of the *Manitoba Act*, the process was finally complete.

39 The position of the Métis in the Red River Settlement deteriorated in the decades following Manitoba's entry into Confederation. White settlers soon constituted a majority in the territory and the Métis community began to unravel. Many Métis sold their promised interests in land and moved further west. Those left amounted to a small remnant of the original community.

V. Issues

40 The appellants seek numerous declarations, including: (1) in implementing the *Manitoba Act*, the federal Crown breached fiduciary obligations owed to the Métis; (2) the federal Crown failed to implement the *Manitoba Act* in a manner [page650] consistent with the honour of the Crown; and (3) certain legislation passed by Manitoba affecting the implementation of the *Manitoba Act* was *ultra vires.* These claims give rise to the following issues:

A. Does the Manitoba Metis Federation have standing in the action?

B. Is Canada in breach of a fiduciary duty to the Métis?

C. Did Canada fail to comply with the honour of the Crown in the implementation of ss. 31 and 32 of the *Manitoba Act*?

D. Were the Manitoba statutes related to implementation unconstitutional?

E. Is the claim for a declaration barred by limitations?

F. Is the claim for a declaration barred by laches?

VI. Discussion

A. *Does the Manitoba Metis Federation Have Standing in the Action?*

41 Canada and Manitoba take no issue with the private interest standing of the individual appellants. However, they argue that the MMF has no private interest in the litigation and fails the established test for public interest standing on the third step of the test set out in *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, *[1992] 1 S.C.R. 236*, as the individual plaintiffs clearly demonstrate another reasonable and effective manner for the case to be heard.

[page651]

42 The courts below denied the MMF public interest standing to bring this action. At trial, MacInnes J. found that the MMF would fail the third step of the test set out in *Canadian Council of Churches*, on the ground that the individual plaintiffs demonstrate another reasonable and effective manner for the case to be heard. The Court of Appeal declined to interfere with MacInnes J.'s discretionary standing ruling.

43 The courts below did not have the benefit of this Court's decision in *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, *2012 SCC 45*, *[2012] 2 S.C.R. 524*. In that case, the Court rejected a strict approach to the third requirement for standing. The presence of other claimants does not necessarily preclude public interest standing; the question is whether this litigation is a reasonable and effective means to bring a challenge to court. The requirements for public interest standing should be addressed in a flexible and generous manner, and considered in light of the underlying purposes of setting limits on who has standing to bring an action before a court. Even if there are other plaintiffs with a direct interest in the issue, a court may consider whether the public interest plaintiff will bring any particularly useful or distinct perspective to the resolution of the issue at hand.

44 As discussed below, the action advanced is not a series of claims for individual relief. It is rather a collective claim for declaratory relief for the purposes of reconciliation between the descendants of the Métis people of the Red River Valley and Canada. The *Manitoba Act* provided for individual entitlements, to be sure. But that does not negate the fact that the appellants advance a collective claim of the Métis people, based on a promise made to them in return for their agreement to recognize Canada's sovereignty over them. This collective claim merits allowing the body representing the collective Métis [page652] interest to come before the Court. We would grant the MMF standing.

45 For convenience, from this point forward in these reasons, we will refer to both the individual plaintiffs and the MMF collectively as "the Métis".

B. *Is Canada in Breach of a Fiduciary Duty to the Métis?*

(1) When a Fiduciary Duty May Arise

46 The Métis say that Canada owed them a fiduciary duty to implement ss. 31 and 32 of the *Manitoba Act* as their trustee. This duty, they say, arose out of their Aboriginal interest in lands in Manitoba, or directly from the promises made in ss. 31 and 32.

47 Fiduciary duty is an equitable doctrine originating in trust. Generally speaking, a fiduciary is required to act in

the best interests of the person on whose behalf he is acting, to avoid all conflicts of interest, and to strictly account for all property held or administered on behalf of that person. See *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, at pp. 646-47.

48 The relationship between the Métis and the Crown, viewed generally, is fiduciary in nature. However, not all dealings between parties in a fiduciary relationship are governed by fiduciary obligations.

49 In the Aboriginal context, a fiduciary duty may arise as a result of the "Crown [assuming] discretionary control over specific Aboriginal interests": *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, at para. 18. The focus is on the particular interest that [page653] is the subject matter of the dispute: *Wewaykum Indian Band v. Canada*, 2002 SCC 79, [2002] 4 S.C.R. 245, at para. 83. The content of the Crown's fiduciary duty towards Aboriginal peoples varies with the nature and importance of the interest sought to be protected: *Wewaykum*, at para. 86.

50 A fiduciary duty may also arise from an undertaking, if the following conditions are met:

> (1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary or beneficiaries; (2) a defined person or class of persons vulnerable to a fiduciary's control (the beneficiary or beneficiaries); and (3) a legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control.

(*Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261, at para. 36)

(2) Did the Métis Have a Specific Aboriginal Interest in the Land Giving Rise to a Fiduciary Duty?

51 As discussed, the first way a fiduciary duty may arise is where the Crown administers lands or property in which Aboriginal peoples have an interest: *Guerin v. The Queen*, [1984] 2 S.C.R. 335, at p. 384. The duty arises if there is (1) a specific or cognizable Aboriginal interest, and (2) a Crown undertaking of discretionary control over that interest: *Wewaykum*, at paras. 79-83; *Haida Nation*, at para. 18.

52 There is little dispute that the Crown undertook discretionary control of the administration of the land grants under ss. 31 and 32 of the *Manitoba Act*, meeting the second requirement. The issue is whether the first condition is met - is there a "specific or cognizable Aboriginal interest"? The trial judge held that the Métis failed to establish a specific, cognizable interest in land. The Court of Appeal found it unnecessary to decide the point, in [page654] view of its conclusion that in any event, no breach was established.

53 The fact that the Métis are Aboriginal and had an interest in the land is not sufficient to establish an Aboriginal interest in land. The interest (title or some other interest) must be distinctly Aboriginal; it must be a communal Aboriginal interest in the land that is integral to the nature of the Métis distinctive community and their relationship to the land: see *R. v. Powley*, 2003 SCC 43, [2003] 2 S.C.R. 207, at para. 37. The key issue is thus whether the Métis *as a collective* had a specific or cognizable *Aboriginal* interest in the ss. 31 or 32 land.

54 The Métis argue that s. 31 of the *Manitoba Act* confirms that they held a pre-existing specific Aboriginal interest in the land designated by s. 31. Section 31 states that the land grants were directed "*towards the extinguishment of the Indian Title to the lands in the Province*", and that the land grant was for "*the benefit of the families of the half-breed residents*". This language, the Métis argue, acknowledges that the Métis gave the Crown control over their homeland in the Red River Settlement in exchange for a number of provisions in the *Manitoba Act*, a constitutional document. The Métis say speeches in the House of Commons by the framers of the *Manitoba Act*, Prime Minister Macdonald and George-Étienne Cartier, confirm that the purpose of s. 31 was to extinguish the "Indian Title" of the Métis. The Métis urge that the *Manitoba Act* must be read broadly in light of its purpose of bringing Manitoba

peaceably into Confederation and assuring a future for the Métis as landholders and settlers in the new province: see *R. v. Blais*, *2003 SCC 44*, *[2003] 2 S.C.R. 236*, at para. 17.

55 Canada replies that s. 31 does not establish pre-existing Aboriginal interest in land. It was an [page655] instrument directed at settling grievances, and the reference to "Indian Title" does not establish that such title actually existed. It was up to the Métis to prove that they held an Aboriginal interest in land prior to the *Manitoba Act*, and they have not done so, Canada argues. Canada acknowledges that individual Métis people held individual parcels of land, but it denies that they held the collective Aboriginal interest necessary to give rise to a fiduciary duty.

56 The trial judge's findings are fatal to the Métis' argument. He found as a fact that the Métis used and held land individually, rather than communally, and permitted alienation. He found no evidence that the Métis asserted they held Indian title when British leaders purported to extinguish Indian title, first in the Settlement belt and then throughout the province. He found that the Red River Métis were descended from many different bands. While individual Métis held interests in land, those interests arose from their personal history, not their shared Métis identity. Indeed the trial judge concluded Métis ownership practices were incompatible with the claimed Aboriginal interest in land.

57 The Métis argue that the trial judge and the Court of Appeal erred in going behind the language of s. 31 and demanding proof of a collective Aboriginal interest in land. They assert that Aboriginal title was historically uncertain, and that the Crown's practice was to accept that any organized Aboriginal group had title and to extinguish that title by treaty, or in this case, s. 31 of the *Manitoba Act*.

58 Even if this was the Crown's practice (a doubtful assumption in the absence of supporting evidence), it does not establish that the Métis held either Aboriginal title or some other Aboriginal interest in specific lands as a group. An Aboriginal interest in land giving rise to a fiduciary duty cannot be established by treaty, or, by extension, [page656] legislation. Rather, it is predicated on historic use and occupation. As Dickson J. stated in *Guerin*:

> The "political trust" cases concerned essentially the distribution of public funds or other property held by the government. In each case the party claiming to be beneficiary under a trust depended entirely on statute, ordinance or treaty as the basis for its claim to an interest in the funds in question. The situation of the Indians is entirely different. Their interest in their lands is a pre-existing legal right not created by Royal Proclamation, by s. 18(1) of the *Indian Act*, or by any other executive or legislative provision. [Emphasis added; p. 379.]

59 In summary, the words of s. 31 do not establish pre-existing communal Aboriginal title held by the Métis. Nor does the evidence: the trial judge's findings of fact that the Métis had no communal Aboriginal interest in land are fatal to this contention. It follows that the argument that Canada was under a fiduciary duty in administering the children's land because the Métis held an Aboriginal interest in the land must fail. The same reasoning applies to s. 32 of the *Manitoba Act*.

(3) Did the Crown Undertake to Act in the Best Interests of the Métis, Giving Rise to a Fiduciary Duty?

60 This leaves the question of whether a fiduciary duty is established on the basis of an undertaking by the Crown. To recap, this requires:

> (1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary or beneficiaries; (2) a defined person or class of persons vulnerable to a fiduciary's control (the beneficiary or beneficiaries); and (3) a legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely [page657] affected by the alleged fiduciary's exercise of discretion or control.

(*Elder Advocates*, at para. 36)

61 The first question is whether an undertaking has been established. In order to elevate the Crown's obligations to a fiduciary level, the power retained by the Crown must be coupled with an undertaking of loyalty to act in the beneficiaries' best interests in the nature of a private law duty: *Guerin*, at pp. 383-84. In addition, "[t]he party asserting the duty must be able to point to a forsaking by the alleged fiduciary of the interests of all others in favour of those of the beneficiary, in relation to the specific legal interest at stake": *Elder Advocates*, at para. 31.

62 While s. 31 shows an intention to benefit the Métis children, it does not demonstrate an undertaking to act in their best interests, in priority to other legitimate concerns, such as ensuring land was available for the construction of the railway and opening Manitoba for broader settlement. Indeed, the discretion conferred by s. 31 to determine "such mode and on such conditions as to settlement and otherwise" belies a duty of loyalty and an intention to act in the best interests of the beneficiary, forsaking all other interests.

63 Nor did s. 32 constitute an undertaking on the part of the Crown to act as a fiduciary in settling the titles of the Métis landholders. It confirmed the continuance of different categories of landholdings in existence shortly before or at the creation of the new province (C.A., at paras. 673 and 717), and applied to all landholders (C.A., at para. 717; see also paras. 674 and 677).

[page658]

(4) Conclusion on Fiduciary Duty

64 We conclude that Canada did not owe a fiduciary duty to the Métis in implementing ss. 31 and 32 of the *Manitoba Act*.

C. *Did Canada Fail to Comply With the Honour of the Crown in the Implementation of Sections 31 and 32 of the Manitoba Act?*

(1) The Principle of the Honour of the Crown

65 The appellants argue that Canada breached a duty owed to the Métis based on the honour of the Crown. The phrase "honour of the Crown" refers to the principle that servants of the Crown must conduct themselves with honour when acting on behalf of the sovereign.

66 The honour of the Crown arises "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": *Haida Nation*, at para. 32. In Aboriginal law, the honour of the Crown goes back to the *Royal Proclamation* of 1763, which made reference to "the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection": see *Beckman v. Little Salmon/Carmacks First Nation*, *2010 SCC 53*, *[2010] 3 S.C.R. 103*, at para. 42. This "Protection", though, did not arise from a paternalistic desire to protect the Aboriginal peoples; rather, it was a recognition of their strength. Nor is the honour of the Crown a paternalistic concept. The comments of Brian Slattery with respect to fiduciary duty resonate here:

> The sources of the general fiduciary duty do not lie, then, in a paternalistic concern to protect a "weaker" or "primitive" people, as has sometimes been suggested, but rather in the necessity of persuading native peoples, at a time when they still had considerable military capacities, [page659] that their rights would be better protected by reliance on the Crown than by self-help.

("Understanding Aboriginal Rights" (1987), 66 *Can. Bar Rev.* 727, at p. 753)

The ultimate purpose of the honour of the Crown is the reconciliation of pre-existing Aboriginal societies with the

assertion of Crown sovereignty. As stated in *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550, at para. 24:

> The duty of honour derives from the Crown's assertion of sovereignty in the face of prior Aboriginal occupation. It has been enshrined in s. 35(1) of the *Constitution Act, 1982*, which recognizes and affirms existing Aboriginal rights and titles. Section 35(1) has, as one of its purposes, negotiation of just settlement of Aboriginal claims. In all its dealings with Aboriginal peoples, the Crown must act honourably, in accordance with its historical and future relationship with the Aboriginal peoples in question.

67 The honour of the Crown thus recognizes the impact of the "superimposition of European laws and customs" on pre-existing Aboriginal societies: *R. v. Van der Peet*, [1996] 2 S.C.R. 507, at para. 248, *per* McLachlin J., dissenting. Aboriginal peoples were here first, and they were never conquered (*Haida Nation*, at para. 25); yet, they became subject to a legal system that they did not share. Historical treaties were framed in that unfamiliar legal system, and negotiated and drafted in a foreign language: *R. v. Badger*, [1996] 1 S.C.R. 771, at para. 52; *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85, at pp. 142-43, *per* La Forest J. The honour of the Crown characterizes the "special relationship" that arises out of this colonial practice: *Little Salmon*, at para. 62. As explained by Brian Slattery:

> ... when the Crown claimed sovereignty over Canadian territories and ultimately gained factual control [page660] over them, it did so in the face of pre-existing Aboriginal sovereignty and territorial rights. The tension between these conflicting claims gave rise to a special relationship between the Crown and Aboriginal peoples, which requires the Crown to deal honourably with Aboriginal peoples.

("Aboriginal Rights and the Honour of the Crown" (2005), 29 S.C.L.R. (2d) 433, at p. 436)

(2) When Is the Honour of the Crown Engaged?

68 The honour of the Crown imposes a heavy obligation, and not all interactions between the Crown and Aboriginal people engage it. In the past, it has been found to be engaged in situations involving reconciliation of Aboriginal rights with Crown sovereignty. As stated in *Badger*:

> ... the honour of the Crown is always at stake in its dealing with Indian people. Interpretations of treaties and statutory provisions which have an impact upon treaty or aboriginal rights must be approached in a manner which maintains the integrity of the Crown. [para. 41]

69 This Court has also recognized that the honour of the Crown is engaged by s. 35(1) of the *Constitution Act, 1982*. In *R. v. Sparrow*, [1990] 1 S.C.R. 1075, the Court found that s. 35(1) restrains the legislative power in s. 91(24), in accordance with the "high standard of honourable dealing": p. 1109. In *Haida Nation*, this Court explained that "[i]t is a corollary of s. 35 that the Crown act honourably in defining the rights it guarantees": para. 20. Because of its connection with s. 35, the honour of the Crown has been called a "constitutional principle": *Little Salmon*, at para. 42.

70 The application of these precedents to this case indicates that the honour of the Crown is also engaged by an explicit obligation to an Aboriginal group that is enshrined in the Constitution. The [page661] Constitution is not a mere statute; it is the very document by which the "Crow[n] assert[ed its] sovereignty in the face of prior Aboriginal occupation": *Taku River*, at para. 24. See also *Mitchell v. M.N.R.*, 2001 SCC 33, [2001] 1 S.C.R. 911, at para. 9. It is at the root of the honour of the Crown, and an explicit obligation to an Aboriginal group placed therein engages the honour of the Crown at its core. As stated in *Haida Nation*, "[i]n 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": para. 17 (emphasis added).

71 An analogy may be drawn between such a constitutional obligation and a treaty promise. An "intention to create obligations" and a "certain measure of solemnity" should attach to both: *R. v. Sioui*, [1990] 1 S.C.R. 1025, at p. 1044; *R. v. Sundown*, [1999] 1 S.C.R. 393, at paras. 24-25. Moreover, both types of promises are made for the

overarching purpose of reconciling Aboriginal interests with the Crown's sovereignty. Constitutional obligations may even be arrived at after a course of consultation similar to treaty negotiation.

72 The last element under this rubric is that the obligation must be explicitly owed to an Aboriginal group. The honour of the Crown will not be engaged by a constitutional obligation in which Aboriginal peoples simply have a strong interest. Nor will it be engaged by a constitutional obligation owed to a group partially composed of Aboriginal peoples. Aboriginal peoples are part of Canada, and they do not have special status with respect to constitutional obligations owed to Canadians as a whole. But a constitutional obligation explicitly directed at an Aboriginal group invokes its "special relationship" with the Crown: *Little Salmon*, at para. 62.

[page662]

(3) What Duties Are Imposed by the Honour of the Crown?

73 The honour of the Crown "is not a mere incantation, but rather a core precept that finds its application in concrete practices" and "gives rise to different duties in different circumstances": *Haida Nation*, at paras. 16 and 18. It is not a cause of action itself; rather, it speaks to *how* obligations that attract it must be fulfilled. Thus far, the honour of the Crown has been applied in at least four situations:

(1) The honour of the Crown gives rise to a fiduciary duty when the Crown assumes discretionary control over a specific Aboriginal interest (*Wewaykum*, at paras. 79 and 81; *Haida Nation*, at para. 18);

(2) The honour of the Crown informs the purposive interpretation of s. 35 of the *Constitution Act, 1982*, and gives rise to a duty to consult when the Crown contemplates an action that will affect a claimed but as of yet unproven Aboriginal interest (*Haida Nation*, at para. 25);

(3) The honour of the Crown governs treaty-making and implementation (*Province of Ontario v. Dominion of Canada* (1895), 25 S.C.R. 434, at p. 512, *per* Gwynne J., dissenting; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388, at para. 51), leading to requirements such as honourable negotiation and the avoidance of the appearance of sharp dealing (*Badger*, at para. 41); and

(4) The honour of the Crown requires the Crown to act in a way that accomplishes the intended purposes of treaty and statutory grants to Aboriginal peoples (*R. v. Marshall*, [1999] 3 S.C.R. 456, at para. 43, referring to *The Case of The Churchwardens of St. Saviour in Southwark* (1613), 10 Co. Rep. 66b, 77 E.R. 1025, [page663] and *Roger Earl of Rutland's Case* (1608), 8 Co. Rep. 55a, 77 E.R. 555; *Mikisew Cree First Nation*, at para. 51; *Badger*, at para. 47).

74 Thus, the duty that flows from the honour of the Crown varies with the situation in which it is engaged. What constitutes honourable conduct will vary with the circumstances.

75 By application of the precedents and principles governing this honourable conduct, we find that when the issue is the implementation of a constitutional obligation to an Aboriginal people, the honour of the Crown requires that the Crown: (1) takes a broad purposive approach to the interpretation of the promise; and (2) acts diligently to fulfill it.

76 The first branch, purposive interpretation of the obligation, has long been recognized as flowing from the honour of the Crown. In the constitutional context, this Court has recognized that the honour of the Crown demands that s. 35(1) be interpreted in a generous manner, consistent with its intended purpose. Thus, in *Haida Nation*, it was held that, unless the recognition and affirmation of Aboriginal rights in s. 35 of the *Constitution Act, 1982* extended to yet unproven rights to land, s. 35 could not fulfill its purpose of honourable reconciliation: para. 27. The Court wrote, at para. 33: "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." A purposive approach to interpretation

informed by the honour of the Crown applies no less to treaty obligations. For example, in *Marshall*, Binnie J. rejected a proposed treaty interpretation on the grounds that it was not "consistent with the honour and integrity of the Crown... . The trade arrangement must be interpreted in a manner which gives meaning and substance to the promises made by the Crown": para. 52.

[page664]

77 This jurisprudence illustrates that an honourable interpretation of an obligation cannot be a legalistic one that divorces the words from their purpose. Thus, the honour of the Crown demands that constitutional obligations to Aboriginal peoples be given a broad, purposive interpretation.

78 Second, the honour of the Crown requires it to act diligently in pursuit of its solemn obligations and the honourable reconciliation of Crown and Aboriginal interests.

79 This duty has arisen largely in the treaty context, where the Crown's honour is pledged to diligently carrying out its promises: *Mikisew Cree First Nation*, at para. 51; *Little Salmon*, at para. 12; see also *Haida Nation*, at para. 19. In its most basic iteration, the law assumes that the Crown always intends to fulfill its solemn promises, including constitutional obligations: *Badger*; *Haida Nation*, at para. 20. At a minimum, sharp dealing is not permitted: *Badger*. Or, as this Court put it in *Mikisew Cree First Nation*, "the honour of the Crown [is] pledged to the fulfilment of its obligations to the Indians": para. 51. But the duty goes further: if the honour of the Crown is pledged to the fulfillment of its obligations, it follows then that the honour of the Crown requires the Crown to endeavour to ensure its obligations are fulfilled. Thus, in review proceedings under the *James Bay and Northern Québec Agreement*, the participants are expected to "carry out their work with due diligence": *Quebec (Attorney General) v. Moses*, 2010 SCC 17, [2010] 1 S.C.R. 557, at para. 23. As stated by Binnie J. in *Little Salmon*, at para. 12: "It is up to the parties, when treaty issues arise, to act diligently to advance their respective interests. Good government requires that decisions be taken in a timely way." This duty applies whether the obligation arises in a treaty, as in the precedents outlined above, or in the Constitution, as here.

[page665]

80 To fulfill this duty, Crown servants must seek to perform the obligation in a way that pursues the purpose behind the promise. The Aboriginal group must not be left "with an empty shell of a treaty promise": *Marshall*, at para. 52.

81 It is a narrow and circumscribed duty, which is engaged by the extraordinary facts before us. This duty, recognized in many authorities, is not a novel addition to the law.

82 Not every mistake or negligent act in implementing a constitutional obligation to an Aboriginal people brings dishonour to the Crown. Implementation, in the way of human affairs, may be imperfect. However, a persistent pattern of errors and indifference that substantially frustrates the purposes of a solemn promise may amount to a betrayal of the Crown's duty to act honourably in fulfilling its promise. Nor does the honour of the Crown constitute a guarantee that the purposes of the promise will be achieved, as circumstances and events may prevent fulfillment, despite the Crown's diligent efforts.

83 The question is simply this: Viewing the Crown's conduct as a whole in the context of the case, did the Crown act with diligence to pursue the fulfillment of the purposes of the obligation?

(4) The Argument That Failure to Act Diligently in Implementing Section 31 Should Not Be Considered by This Court

84 Our colleague Rothstein J. asserts that the parties did not argue that lack of diligent implementation of s. 31 was inconsistent with the honour of the Crown, and that we should not therefore consider this possibility.

[page666]

85 We agree with our colleague that new developments in the law must be approached with caution where they have not been canvassed by the parties to the litigation. However, in our view this concern does not arise here.

86 The honour of the Crown was at the heart of this litigation from the beginning. Before the courts below and in this Court, the Métis argued that the conduct of the government in implementing s. 31 of the *Manitoba Act* breached the duty that arose from the honour of the Crown. They were supported in this contention by a number of interveners. In oral argument, the intervener the Attorney General for Saskatchewan stated that the honour of the Crown calls for "a broad, liberal, and generous interpretation", and acts as "an interpretive guide post to the public law duties ... with respect to the implementation of Section 31": transcript, at p. 67. The intervener Métis Nation of Alberta argued that s. 31 is an unfulfilled promise here, which the honour of the Crown demands be fulfilled by reconciliation through negotiation. The intervener the Métis Nation of Ontario argued that s. 31 "could not be honoured by a process that ultimately defeated the purpose of the provision": transcript, at p. 28.

87 These submissions went beyond the argument that the honour of the Crown gave rise to a fiduciary duty, raising the broader issue of whether the government's conduct generally comported with the honour of the Crown. Canada understood this: it argued in its factum that while the Crown intends to fulfill its promises, the honour of the Crown in this case does not give rise to substantive obligations to do so.

88 In short, all parties understood that the issue of what duties the honour of the Crown might raise, [page667] apart from a fiduciary duty, was on the table, and all parties presented submissions on it.

89 It is true that the Métis and the interveners supporting them did not put the argument in precisely the terms of the reasons. While they argued that the government's conduct in implementing s. 31 did not comport with the honour of the Crown, they did not express this alleged failure in terms of failure to comply with a duty of diligent implementation. However, this was implicit in their argument, given that the failure to diligently implement s. 31 lay at the heart of their grievance.

90 For these reasons, we conclude that it is not inappropriate to consider and resolve the question of what duties the honour of the Crown gave rise to in connection with s. 31 of the *Manitoba Act*, not just as they impact on the argument that the government owed a fiduciary duty to the Métis, but more broadly.

(5) Did the Solemn Promise in Section 31 of the *Manitoba Act* Engage the Honour of the Crown?

91 As outlined above, the honour of the Crown is engaged by constitutional obligations to Aboriginal groups. Section 31 of the *Manitoba Act* is just such a constitutional obligation. Section 31 conferred land rights on yet-to-be-identified individuals - the Métis children. Yet the record leaves no doubt that it was a promise made to the Métis people collectively, in recognition of their distinct community. The honour of the Crown is thus engaged here.

92 To understand the nature of s. 31 as a solemn obligation, it may be helpful to consider its [page668] treaty-like history and character. Section 31 sets out solemn promises - promises which are no less fundamental than treaty promises. Section 31, like a treaty, was adopted with "the intention to create obligations ... and a certain measure of solemnity": *Sioui*, at p. 1044; *Sundown*. It was intended to create legal obligations of the highest order: no greater solemnity than inclusion in the Constitution of Canada can be conceived. Section 31 was conceived in the context of negotiations to create the new province of Manitoba. And all this was done to the end of reconciling the Métis Aboriginal interest with the Crown's claim to sovereignty. As the trial judge held:

> ... the evidence establishes that this [s. 31] grant, to be given on an individual basis for the benefit of the families, albeit given to the children, was given for the purpose of recognizing the role of the Métis in the Settlement both past and to the then present, for the purpose of attempting to ensure the harmonious entry

> of the territory into Confederation, mindful of both Britain's condition as to treatment of the settlers and the uncertain state of affairs then existing in the Settlement, and for the purpose of giving the children of the Métis and their families on a onetime basis an advantage in the life of the new province over expected immigrants. [Emphasis added; para. 544.]

93 Section 31, though, is not a treaty. The trial judge correctly described s. 31 as a constitutional provision crafted for the purpose of resolving Aboriginal concerns and permitting the creation of the province of Manitoba. When the *Manitoba Act* was passed, the Métis dominated the Red River provisional government, and controlled a significant military force. Canada had good reason to take the steps necessary to secure peace between the Métis and the settlers. Justice MacInnes wrote:

> Canada, to the knowledge of Macdonald and Cartier, was in a difficult position having to complete the steps necessary for the entry of Rupert's Land into Canada. An insurrection had occurred at Red River such that, in the view of both Canada and Britain, a void in the lawful governance of the territory existed. Canada, as a result [page669] of McDougall's conduct on December 1, 1869, had in a practical sense claimed the territory for Canada, but the legal transfer of the territory from Britain had not yet occurred. Accordingly, Canada had no lawful authority to govern the area. Furthermore, there was neither the practical ability nor the will for Canada or the Imperial Government to enforce authority and in that sense, the purpose of the discussions or negotiations between the Red River delegates and Macdonald and Cartier was to bring about in a peaceful way the entry of the territory into Canada, thereby giving Canada the opportunity to peacefully take over the territory and its governance and be able to move forward with its goal of nation building. [para. 649]

94 Section 31 is a constitutional obligation to an Aboriginal group. In accordance with the principles outlined above, the honour of the Crown is engaged by s. 31 and gives rise to a duty of diligent, purposive fulfillment.

(6) Did Section 32 of the *Manitoba Act* Engage the Honour of the Crown?

95 We agree with the Court of Appeal that the honour of the Crown was not engaged by s. 32 of the *Manitoba Act.* Unlike s. 31, it was not a promise made specifically to an Aboriginal group, but rather a benefit made generally available to all settlers, Métis and non-Métis alike. The honour of the Crown is not engaged whenever an Aboriginal person accesses a benefit.

(7) Did the Crown Act Honourably in Implementing Section 31 of the *Manitoba Act*?

96 The trial judge indicated that, although they did not act in bad faith, the government servants may have been negligent in administering the s. 31 grant. He held that the implementation of the obligation was within the Crown's discretion and that it had a discretion to act negligently: "Mistakes, even negligence, on the part of those responsible for implementation of the grant are not sufficient to successfully attack Canada's exercise of discretion [page670] in its implementation of the grant" (para. 943 (emphasis added)). The Court of Appeal took a similar view: see para. 656.

97 Based on the arguments before them and the applicable precedents, the trial judge and the Court of Appeal did not focus on what we take as the central issue in the case: whether the government's implementation of s. 31 comported with the duty of the Crown to diligently pursue implementation of the provision in a way that would achieve its objectives. The question is whether the Crown's conduct, viewed as a whole and in context, met this standard. We conclude that it did not.

98 The broad purpose of s. 31 of the *Manitoba Act* was to reconcile the Métis community with the sovereignty of the Crown and to permit the creation of the province of Manitoba. This reconciliation was to be accomplished by a more concrete measure - the prompt and equitable transfer of the allotted public lands to the Métis children.

99 The prompt and equitable implementation of s. 31 was fundamental to the project of reconciliation and the entry of Manitoba into Canada. As the trial judge found, s. 31 was designed to give the Métis a head start in the race for land and a place in the new province. This required that the grants be made while a head start was still possible. Everyone concerned understood that a wave of settlement from Europe and Canada to the east would soon sweep over the province. Acknowledging the need for timely implementation, Minister Cartier sent a letter to the meeting of the Manitoba Legislature charged with determining whether to accept the *Manitoba Act*, assuring the Métis that the s. 31 grants would "be of a nature to meet the wishes of the half-breed residents" and that the division of land would be done "in the most effectual and equitable manner".

[page671]

100 The Métis allege Canada failed to fulfill its duties to the Métis people in relation to the children's grant in four ways: (1) inexcusably delaying distribution of the s. 31 lands; (2) distributing lands via random selection rather than ensuring family members received contiguous parcels; (3) failing to ensure s. 31 grant recipients were not taken advantage of by land speculators; and (4) giving some eligible Métis children $240 worth of scrip redeemable at the Land Titles Office instead of a direct grant of land. We will consider each in turn.

(a) *Delay*

101 Contrary to the expectations of the parties, it took over 10 years to make the allotments of land to Métis children promised by s. 31. Indeed, the final settlement, in the form not of land but of scrip, did not occur until 1885. This delay substantially defeated a purpose of s. 31.

102 A central purpose of the s. 31 grant, as found by MacInnes J., was to give "families of the Métis through their children a head start in the new country in anticipation of the probable and expected influx of immigrants": para. 655. Time was then plainly of the essence, if the goal of giving the Métis children a real advantage, relative to an impending influx of settlers from the east, was to be achieved.

103 The government understood this. Prime Minister Macdonald, on May 2, 1870, just before addressing Parliament, wrote that the land was

> to be distributed as soon as practicable amongst the different heads of half breed families according to the number of children of both sexes then existing in each [page672] family under such legislative enactments, which may be found advisable to secure the transmission and holding of the said lands amongst the half breed families. - To extinguish Indian claims - ... [Emphasis added.]

And Minister Cartier, as we know, confirmed that the "guarantee" would be effected "in the most effectual and equitable manner".

104 Yet that was not what happened. As discussed earlier in these reasons, implementation was delayed by many government actions and inactions, including: (1) starting off with the wrong class of beneficiaries, contrary to the wording of s. 31 and objections in the House of Commons; (2) taking three years to rectify this error; (3) commissioning a report in 1875 that erroneously lowered the number of eligible recipients and required yet a third allotment; (4) completing implementation only in 1885 by giving scrip to eligible Métis denied land because of mistakes in the previous three iterations of the allotment process; (5) long delays in issuing patents; and (6) unexplained periods of inaction. In the meantime, settlers were pouring in and the Manitoba Legislature was passing various acts dealing in different and contradictory ways with how Métis could sell their yet-to-be-realized interests in land.

105 The delay was noted by all concerned. The Legislative Council and Assembly of Manitoba complained of the delay on February 8, 1872, noting that new settlers had been allowed to take up land in the area. In early 1875, a

number of Métis parishes sent petitions to Ottawa complaining of the delay, saying it was having a "damaging effect upon the prosperity of the Province": C.A., at para. 123. The provincial government also in that year made a request to the Governor General that the process be expedited. In 1883, the Deputy Minister of the Interior, A. M. Burgess, said this: "I am every day grieved and heartily sick when I [page673] think of the disgraceful delay ... .": A.R., vol. XXI, at pp. 123-24; see also C.A., at para. 160.

106 This brings us to whether the delay was inconsistent with the duty imposed by the honour of the Crown to act diligently to fulfill the purpose of the s. 31 obligation. The Court of Appeal did not consider this question. But like the trial judge, it concluded that inattention and carelessness were likely factors:

> With respect to those known events that contributed to the delay (prominent among them the cancellation of the first two allotments, the slow pace of the allotment process in the third and final round, the erroneous inclusion of adults as beneficiaries for the s. 31 grants, and the long delays in the issuance of patents), mistakes were made and it is difficult to avoid the inference that inattention or carelessness may have been a contributing factor. [para. 656]

107 As discussed above, a negligent act does not in itself establish failure to implement an obligation in the manner demanded by the honour of the Crown. On the other hand, a persistent pattern of inattention may do so if it frustrates the purpose of the constitutional obligation, particularly if it is not satisfactorily explained.

108 The record and findings of the courts below suggest a persistent pattern of inattention. The government was warned of the initial error of including all Métis, yet took three years to cancel the first faulty allotment and start a second. An inexplicable delay lies between the first and second allotments, from 1873 to 1875. The government had changed, to be sure. But as the Court of Appeal found, there is no explanation in the record as to "why it took the new government over a year to address the continuing delays in moving ahead with the allotments": para. 126. The Crown's obligations cannot be suspended simply because there is a change in government. The second allotment, when [page674] it finally took place, was aborted in 1876 because of a report that underestimated eligible recipients. But there is no satisfactory explanation why a third and final allotment was not completed until 1880. The explanation offered is simply that those in charge did not have adequate time to devote to the task because of other government priorities, and they did not wish to delegate the task because information about the grants might fall into the hands of speculators.

109 We take no issue with the finding of the trial judge that, with one exception, there was no bad faith or misconduct on the part of the Crown employees: paras. 1208-9. However, diligence requires more than simply the absence of bad faith. The trial judge noted that the children's grants "were not implemented or administered without error or dissatisfaction": para. 1207. Viewing the matter through the lens of fiduciary duty, the trial judge found this did not rise to a level of concern. We take a different view. The findings of the trial judge indicate consistent inattention and a consequent lack of diligence.

110 We conclude that, viewing the conduct of the Crown in its entirety and in the context of the situation, including the need for prompt implementation, the Crown acted with persistent inattention and failed to act diligently to achieve the purposes of the s. 31 grant. Canada's argument that, in some cases, the delay secured better prices for Métis who sold is undermined by evidence that many Métis sold potential interests for too little, and, in any event, it does not absolve the Crown of failure to act as its honour required. The delay in completing the s. 31 distribution was inconsistent with the behaviour demanded by the honour of the Crown.

[page675]

(b) *Sales to Speculators*

111 The Métis argue that Canada breached its duty to the children eligible for s. 31 grants by failing to protect them

from land speculators. They say that Canada should not have permitted sales before the allotments were granted to the children or before the recipients attained the age of majority.

112 Canada responds that the Crown was not obliged to impose any restraint on alienation, and indeed would have been criticized had it done so. It says that the Métis already had a history of private landholding, including buying and selling property. They say that the desire of many Métis to sell was not the result of any breach of duty by the Crown, but rather simply reflected that the amount of land granted far exceeded Métis needs, and many Métis did not desire to settle down in Manitoba.

113 The trial judge held that restricting the alienability of Métis land would have been seen as patronizing and been met with disfavour amongst the Métis. The Court of Appeal agreed, and added that, "practically speaking, next to nothing could have been done to prevent sales of and speculation in s. 31 lands in the absence of an absolute prohibition against sales of any kind": para. 631. It added that some Métis received more land than they needed, and many were leaving the settlement to follow the buffalo hunt, making the ability to sell their interests valuable.

114 We see no basis to interfere with the finding that many eligible Métis were determined to sell their lots or the conclusion that a prohibition on sales would have been unacceptable. This said, we note that the 10-year delay in implementation of the land grants increased sales to speculators. Persons concerned at the time urged that information about [page676] the location of each child's individual allotment be made public as early as possible to give potential claimants a sense of ownership and avert speculative sell-offs. This did not happen: evidence of Dr. Thomas Flanagan, A.R., vol. XXVI, at p. 53. Dr. Flanagan concluded "[t]he Metis were already selling their claims to participate in the grant, and being able to sell the right to a particular piece of land rather than a mere right to participate in a lottery would indeed have enhanced the prices they received": p. 54. Until the Métis acquired their s. 31 grants, they provided no benefit to the children, and a cash offer from a speculator would appear attractive. Moreover, as time passed, the possibility grew that the land was becoming less valuable, as the Métis could not effectively protect any timber or other resources that might exist on the plots they might someday receive from exploitation by others.

115 In 1873, the Manitoba government, aware of the improvident sales that were occurring, moved to curb speculation by passing *The Half-Breed Land Grant Protection Act*, S.M. 1873, c. 44, which permitted vendors to repudiate sales. The preamble to that legislation recognized that "very many persons entitled to participate in the said grant in evident ignorance of the value of their individual shares have agreed severally to sell their right to the same to speculators, receiving therefor only a trifling consideration". However, with *An Act to amend the Act passed in the 37th year of Her Majesty's reign, entitled "The Half-Breed Land Grant Protection Act"*, S.M. 1877, c. 5 ("*The Half-Breed Land Grant Amendment Act, 1877*"), Manitoba changed course, so that a Métis child who made a bad bargain was stuck with it. *An Act to enable certain children of Half-breed heads of families to convey their land*, S.M. 1878, c. 20 ("*The Half-Breed Land Grant Act, 1878*"), followed. It allowed Métis children between 18 and 21 years of age to sell their s. 31 entitlement with parental [page677] consent, so long as they appeared in front of one judge or two justices of the peace.

116 Dr. Flanagan found that 11 percent of the sample examined sold their lands prior to learning the location of their grant, and received "markedly lower prices" as a result: "Metis Family Study", A.R., vol. XXVII, at p. 53. The Court of Appeal concluded that the price received by Métis who sold after allotment was about twice that received by those who sold before allotment: para. 168.

117 The honour of the Crown did not demand that the grant lands be made inalienable. However, the facts on the ground, known to all, made it all the more important to complete the allotment without delay and, in the interim, to advise Métis of what holdings they would receive. By 1874, in their recommendations as to how the allotment process should be carried out, both Codd and Lieutenant Governor Alexander Morris implicitly recognized that delay was encouraging sales at lower prices; nevertheless, allotment would not be complete for six more years. Until allotments were known and completed, delay inconsistent with the honour of the Crown was perpetuating a situation where children were receiving artificially diminished value for their land grants.

(c) *Scrip*

118 Due to Codd's underestimation of the number of eligible children, 993 Métis were left out of the 1.4 million-acre allotment in the end. Instead, they received scrip redeemable for land at a land title office. Scrip could also be sold for cash on the open market, where it was worth about half its face value: C.A., at para. 168.

[page678]

119 The Métis argue that Canada breached its duty to the children who received scrip because s. 31 demanded that land, not scrip, be distributed; and because scrip was not distributed until 1885, when at going land prices, Métis who received scrip could not acquire the 240 acres granted to other children.

120 We do not accept the Métis' first argument that delivery of scrip instead of land constituted a breach of s. 31 of the *Manitoba Act*. As long as the 1.4 million acres was set aside and distributed with reasonable equity, the scheme of the *Manitoba Act* was not offended. It was unavoidable that the land would be distributed based on an estimate of the number of eligible Métis that would be inaccurate to some degree. The issuance of scrip was a reasonable mechanism to provide the benefit to which the excluded children were entitled.

121 The Métis' second argument is that the value of scrip issued was deficient. The government decided to grant to each left-out child $240 worth of scrip, based on a rate of $1 per acre. While the Order in Council price for land was $1 an acre in 1879, by 1885, when the scrip was delivered, most categories of land were priced at $2 or $2.50 an acre at the land title office: A.R., vol. XXIV, at p. 8. The children who received scrip thus obtained a grant equivalent to between 96 and 120 acres, significantly less than the 240 acres provided to those who took part in the initial distribution. The delay resulted in the excluded children receiving less land than the others. This was a departure from the s. 31 promise that the land would be divided in a roughly equal fashion amongst the eligible children.

122 The most serious complaint regarding scrip is that Canada took too long to issue it. The process was marred by the delay and mismanagement that typified the overall implementation of the s. 31 grants. Canada recognized in 1884 that a significant number of eligible children would not receive the [page679] land to which they were entitled, yet it did nothing to provide a remedy to the excluded beneficiaries for almost a year. The trial judge observed:

> By memorandum to the Minister of the Interior dated May 1884, Deputy Minister A.M. Burgess wrote that there were about 500 claimants whose applications had been approved but whose claims were unsatisfied because the land had been "exhausted". He was unable to explain the error, but recommended that scrip be issued to the children.
>
> For whatever reason action was postponed until April 1885 when Burgess submitted another report in which he explained how this shortage occurred. Burgess recommended as equitable that the issue of scrip to each half-breed child who has since proved his or her claim should be for $240.00, the same to be accepted as in full satisfaction of such claim. The $240.00 was based upon 240 acres (being the size of the individual grant) at the rate of $1.00 per acre. [paras. 255-56]

123 We conclude that the delayed issuance of scrip redeemable for significantly less land than was provided to the other recipients further demonstrates the persistent pattern of inattention inconsistent with the honour of the Crown that typified the s. 31 grants.

(d) *Random Allotment*

124 The Métis assert that the s. 31 lands should have been allotted so that the children's lots were contiguous to, or in the vicinity of, their parents' lots. At a minimum, they say siblings' lands should have been clustered together. They say that this was necessary to facilitate actual settlement, rather than merely sale, of the s. 31 lands, so as to establish a Métis homeland.

[page680]

125 Canada responds that it would not have been possible to settle all the Métis children on lots contiguous to their parents. Many families had a large number of children, and each child was entitled to a 240-acre lot. They argue that in the circumstances, a random allotment was reasonable.

126 The trial judge found there was no agreement to distribute the land in family blocks. He observed that while the French Métis generally wanted grants contiguous to where they were residing and were not overly concerned with the value of the land, the English Métis were interested in selecting the most valuable allotments available even if they were not adjacent to their family lots. He also observed that the lottery was not random throughout the province: each parish received an allotment of land in its area and then distributed land within that allotment randomly to the individual Métis children living in the parish. He concluded that it was difficult to conceive how the land could have been administered other than by random lottery without creating unfairness and divisiveness within each parish. Further, because of the size of the grants, it would be hard to give a family a series of 240-acre contiguous parcels without interfering with neighbouring families' ability to receive the same. Moreover, a random lottery gave each child within the parish an equal chance at receiving the best parcel available. Finally, there was little, if any, complaint about the random selection from those present at the time. The Court of Appeal agreed, noting that Lieutenant Governor Archibald attempted to accommodate Métis wishes for the placement of a parish's allotments.

127 Given the finding at trial that the grant was intended to benefit the individual children, not establish a Métis land base, we accept that random selection within each parish was an acceptable way to distribute the land consistent with the purpose of the s. 31 obligation. This said, the delay in [page681] distributing land, and the consequential sales prior to patent, may well have made it more difficult for Métis to trade grants amongst themselves to achieve contiguous parcels.

(8) Conclusion on the Honour of the Crown

128 The s. 31 obligation made to the Métis is part of our Constitution and engages the honour of the Crown. The honour of the Crown required the Crown to interpret s. 31 in a purposive manner and to diligently pursue fulfillment of the purposes of the obligation. This was not done. The Métis were promised implementation of the s. 31 land grants in "the most effectual and equitable manner". Instead, the implementation was ineffectual and inequitable. This was not a matter of occasional negligence, but of repeated mistakes and inaction that persisted for more than a decade. A government sincerely intent on fulfilling the duty that its honour demanded could and should have done better.

D. *Were the Manitoba Statutes Related to Implementation Unconstitutional?*

129 The Métis seek a declaration that the impugned eight statutes passed by Manitoba were *ultra vires* and therefore unconstitutional or otherwise inoperative by virtue of the doctrine of paramountcy.

130 Between 1877 and 1885, Manitoba passed five statutes that regulated the means by which sales of s. 31 lands could take place by private contract or court order. They dealt with the technical requirements to transfer interests in s. 31 lands. These included: permitting sales by a s. 31 allottee who was over 21 years of age (*The Half-Breed Land Grant Amendment Act, 1877*); allowing sales of grants by Métis between 18 and 21 years of age with parental consent and consent of the child supervised [page682] by a judge or two justices of the peace (*The Half-Breed Land Grant Act, 1878*); and settling issues as to the sufficiency of documentation necessary to pass good title in anticipation of the introduction of the Torrens system (*An Act relating to the Titles of Half-Breed Lands*, S.M. 1885, c. 30). The Manitoba statutes were consolidated in the *Half-Breed Lands Act*, R.S.M. 1891, c. 67, and eventually repealed by *The Statute Law Revision and Statute Law Amendment Act, 1969*, S.M. 1969 (2nd Sess.), c. 34, s. 31.

131 In *Dumont v. Canada (Attorney General)*, *[1990] 1 S.C.R. 279*, a preliminary motion to strike was brought by Canada in respect of this litigation. Wilson J. stated:

> The Court is of the view also that the subject matter of the dispute, inasmuch as it involves the constitutionality of legislation ancillary to the *Manitoba Act, 1870* is justiciable in the courts and that declaratory relief may be granted in the discretion of the court in aid of extra-judicial claims in an appropriate case. [Emphasis added; p. 280.]

This statement is not a ruling or a pre-determination on whether the review of the repealed statutes in this action is moot. The *Dumont* decision recognizes that a declaration *may* be granted - in the discretion of the court - in aid of extra-judicial relief in an appropriate case. The Court simply decided that it was not "plain and obvious" or "beyond doubt" that the case would fail: p. 280.

132 These statutes have long been out of force. They can have no future impact. Their only significance is as part of the historic matrix of the Métis' claims. In short, they are moot. To consider their constitutionality would be a misuse of the Court's time. We therefore need not address this issue.

[page683]

E. *Is the Claim for a Declaration Barred by Limitations?*

133 We have concluded that Canada did not act diligently to fulfill the specific obligation to the Métis contained in s. 31 of the *Manitoba Act*, as required by the honour of the Crown. For the reasons below, we conclude that the law of limitations does not preclude a declaration to this effect.

134 This Court has held that although claims for personal remedies flowing from the striking down of an unconstitutional statute are barred by the running of a limitation period, courts retain the power to rule on the constitutionality of the underlying statute: *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, *2007 SCC 1*, *[2007] 1 S.C.R. 3*; *Ravndahl v. Saskatchewan*, *2009 SCC 7*, *[2009] 1 S.C.R. 181*. The constitutionality of legislation has always been a justiciable question: *Thorson v. Attorney General of Canada*, *[1975] 1 S.C.R. 138*, at p. 151. The "right of the citizenry to *constitutional* behaviour by Parliament" can be vindicated by a declaration that legislation is invalid, or that a public act is *ultra vires*: *Canadian Bar Assn. v. British Columbia*, *2006 BCSC 1342*, *59 B.C.L.R. (4th) 38*, at paras. 23 and 91, citing *Thorson*, at p. 163 (emphasis added). An "issue [that is] constitutional is always justiciable": *Waddell v. Schreyer* *(1981), 126 D.L.R. (3d) 431* (B.C.S.C.), at p. 437, aff'd *(1982), 142 D.L.R. (3d) 177* (B.C.C.A.), leave to appeal refused, [1982] 2 S.C.R. vii (*sub nom. Foothills Pipe Lines (Yukon) Ltd. v. Waddell*).

135 Thus, this Court has found that limitations of actions statutes cannot prevent the courts, as guardians of the Constitution, from issuing declarations on the constitutionality of legislation. By extension, limitations acts cannot prevent the courts from issuing a declaration on the constitutionality of the Crown's conduct.

[page684]

136 In this case, the Métis seek a declaration that a provision of the *Manitoba Act* - given constitutional authority by the *Constitution Act, 1871* - was not implemented in accordance with the honour of the Crown, itself a "constitutional principle": *Little Salmon*, at para. 42.

137 Furthermore, the Métis seek no personal relief and make no claim for damages or for land. Nor do they seek restoration of the title their descendants might have inherited had the Crown acted honourably. Rather, they seek a declaration that a specific obligation set out in the Constitution was not fulfilled in the manner demanded by the Crown's honour. They seek this declaratory relief in order to assist them in extra-judicial negotiations with the

Crown in pursuit of the overarching constitutional goal of reconciliation that is reflected in s. 35 of the *Constitution Act, 1982*.

138 The respondents argue that this claim is statute-barred by virtue of Manitoba's limitations legislation, which, in all its iterations, has contained provisions similar to the current one barring "actions grounded on accident, mistake or other equitable ground of relief" six years after the discovery of the cause of action: *The Limitation of Actions Act*, C.C.S.M. c. L150, s. 2(1)(k). Breach of fiduciary duty is an "equitable ground of relief". We agree, as the Court of Appeal held, that the limitation applies to Aboriginal claims for breach of fiduciary duty with respect to the administration of Aboriginal property: *Wewaykum*, at para. 121, and *Canada (Attorney General) v. Lameman*, *2008 SCC 14*, *[2008] 1 S.C.R. 372*, at para. 13.

139 However, at this point we are not concerned with an action for breach of fiduciary duty, but with a claim for a declaration that the Crown did not [page685] act honourably in implementing the constitutional obligation in s. 31 of the *Manitoba Act*. Limitations acts cannot bar claims of this nature.

140 What is at issue is a constitutional grievance going back almost a century and a half. So long as the issue remains outstanding, the goal of reconciliation and constitutional harmony, recognized in s. 35 of the *Constitution Act, 1982* and underlying s. 31 of the *Manitoba Act*, remains unachieved. The ongoing rift in the national fabric that s. 31 was adopted to cure remains unremedied. The unfinished business of reconciliation of the Métis people with Canadian sovereignty is a matter of national and constitutional import. The courts are the guardians of the Constitution and, as in *Ravndahl* and *Kingstreet*, cannot be barred by mere statutes from issuing a declaration on a fundamental constitutional matter. The principles of legality, constitutionality and the rule of law demand no less: see *Reference re Secession of Quebec*, *[1998] 2 S.C.R. 217*, at para. 72.

141 Furthermore, many of the policy rationales underlying limitations statutes simply do not apply in an Aboriginal context such as this. Contemporary limitations statutes seek to balance protection of the defendant with fairness to the plaintiffs: *Novak v. Bond*, *[1999] 1 S.C.R. 808*, at para. 66, *per* McLachlin J. In the Aboriginal context, reconciliation must weigh heavily in the balance. As noted by Harley Schachter:

> The various rationales for limitations are still clearly relevant, but it is the writer's view that the goal of reconciliation is a far more important consideration and ought to be given more weight in the analysis. Arguments that provincial limitations apply of their own force, or can be incorporated as valid federal law, miss the point when aboriginal and treaty rights are at issue. They ignore the [page686] real analysis that ought to be undertaken, which is one of reconciliation and justification.

("Selected Current Issues in Aboriginal Rights Cases: Evidence, Limitations and Fiduciary Obligations", in *The 2001 Isaac Pitblado Lectures: Practising Law In An Aboriginal Reality* (2001), 203, at pp. 232-33)

Schachter was writing in the context of Aboriginal rights, but the argument applies with equal force here. Leonard I. Rotman goes even farther, pointing out that to allow the Crown to shield its unconstitutional actions with the effects of its own legislation appears fundamentally unjust: "*Wewaykum*: A New Spin on the Crown's Fiduciary Obligations to Aboriginal Peoples?" (2004), *U.B.C. L. Rev.* 219, at pp. 241-42. The point is that despite the legitimate policy rationales in favour of statutory limitations periods, in the Aboriginal context, there are unique rationales that must sometimes prevail.

142 In this case, the claim is not stale - it is largely based on contemporaneous documentary evidence - and no third party legal interests are at stake. As noted by Canada, the evidence provided the trial judge with "an unparalleled opportunity to examine the context surrounding the enactment and implementation of ss. 31 and 32 of the *Manitoba Act*": R.F., at para. 7.

143 Furthermore, the remedy available under this analysis is of a limited nature. A declaration is a narrow remedy. It is available without a cause of action, and courts make declarations whether or not any consequential relief is available. As argued by the intervener the Assembly of First Nations, it is not awarded against the defendant in the

same sense as coercive relief: factum, at para. 29, citing *Cheslatta Carrier Nation v. British Columbia*, 2000 BCCA 539, 193 D.L.R. (4th) 344, at paras. 11-16. In some cases, declaratory relief may be the only way to give effect to the honour of the Crown: Assembly of First Nations' factum, at para. 31. Were the Métis in this action seeking personal remedies, the [page687] reasoning set out here would not be available. However, as acknowledged by Canada, the remedy sought here is clearly not a personal one: R.F., at para. 82. The principle of reconciliation demands that such declarations not be barred.

144 We conclude that the claim in this case is a claim for a declaration of the constitutionality of the Crown's conduct toward the Métis people under s. 31 of the *Manitoba Act*. It follows that *The Limitation of Actions Act* does not apply and the claim is not statute-barred.

F. *Is the Claim for a Declaration Barred by Laches?*

145 The equitable doctrine of laches requires a claimant in equity to prosecute his claim without undue delay. It does not fix a specific limit, but considers the circumstances of each case. In determining whether there has been delay amounting to laches, the main considerations are (1) acquiescence on the claimant's part; and (2) any change of position that has occurred on the defendant's part that arose from reasonable reliance on the claimant's acceptance of the *status quo*: *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6, at pp. 76-80.

146 As La Forest J. put it in *M. (K.)*, at pp. 76-77, citing *Lindsay Petroleum Co. v. Hurd* (1874), L.R. 5 P.C. 221, at pp. 239-40:

> Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy.

[page688]

La Forest J. concluded as follows:

> What is immediately obvious from all of the authorities is that mere delay is insufficient to trigger laches under either of its two branches. Rather, the doctrine considers whether the delay of the plaintiff constitutes acquiescence or results in circumstances that make the prosecution of the action unreasonable. Ultimately, laches must be resolved as a matter of justice as between the parties, as is the case with any equitable doctrine. [Emphasis added; pp. 77-78.]

147 Acquiescence depends on knowledge, capacity and freedom: *Halsbury's Laws of England* (4th ed. 2003), vol. 16(2), at para. 912. In the context of this case - including the historical injustices suffered by the Métis, the imbalance in power that followed Crown sovereignty, and the negative consequences following delays in allocating the land grants - delay by itself cannot be interpreted as some clear act by the claimants which amounts to acquiescence or waiver. As explained below, the first branch of the *Lindsay* test is not met here.

148 The trial judge found that the delay in bringing this action was unexplained, in part because other constitutional litigation was undertaken in the 1890s: paras. 456-57. Two Manitoba statutes were challenged, first in the courts, and then by petition to the Governor General in Council: paras. 431-37. The trial judge inferred that many of the signatories to the petition would have been Métis: para. 435. While we do not contest this factual finding, we do question the legal inference drawn from it by the trial judge. Although many signatories were Métis, the petitioners were, in fact, a broader group, including many signatories and community leaders who were not Métis. For example, as noted by the trial judge, neither Archbishop Taché nor Father Ritchot - leaders in "the French Catholic/Métis community" - were Métis: para. 435. The actions of this large community say little, in law, about the ability of the Métis to seek a declaration based on the honour of the Crown. They do not [page689] establish acquiescence by the Métis community in the existing legal state of affairs.

149 Furthermore, in this rapidly evolving area of the law, it is rather unrealistic to suggest that the Métis sat on their rights before the courts were prepared to recognize those rights. As it is, the Métis commenced this claim before s. 35 was entrenched in the Constitution, and long before the honour of the Crown was elucidated in *Haida Nation*. It is difficult to see how this could constitute acquiescence in equity.

150 Moreover, a court exercising equitable jurisdiction must always consider the conscionability of the behaviour of both parties: see *Pro Swing Inc. v. Elta Golf Inc.*, *2006 SCC 52*, *[2006] 2 S.C.R. 612*, at para. 22. Canada was aware that there would be an influx of settlers and that the Métis needed to get a head start before that transpired, yet it did not work diligently to fulfill its constitutional promise to the Métis, as the honour of Crown required. The Métis did not receive the intended head start, and following the influx of settlers, they found themselves increasingly marginalized, facing discrimination and poverty: see, e.g., trial, at para. 541; C.A., at paras. 95, 244 and 638; A.F., at para. 200. Although bad faith is neither claimed nor needed here, the appellants point to a letter written by Sir John A. Macdonald, which suggests that this marginalization may even have been desired:

> ... it will require a considerable management to keep those wild people quiet. In another year the present residents will be altogether swamped by the influx of strangers who will go in with the idea of becoming industrious and peaceable settlers.

(October 14, 1869, A.R., vol. VII, at p. 65)

[page690]

151 Be that as it may, this marginalization is of evidentiary significance only, as we cannot - and need not - unravel history and determine the precise causes of the marginalization of the Métis community in Manitoba after 1870. All that need be said (and all that is sought in the declaration) is that the central promise the Métis obtained from the Crown in order to prevent their future marginalization - the transfer of lands to the Métis children - was not carried out with diligence, as required by the honour of the Crown.

152 The second consideration relevant to laches is whether there was any change in Canada's position as a result of the delay. The answer is no. This is a case like *M. (K.)*, where La Forest J. observed that it could not be seen how the "plaintiff ... caused the defendant to alter his position in reasonable reliance on the plaintiff's acceptance of the status quo, or otherwise permitted a situation to arise which it would be unjust to disturb": p. 77, quoting R. P. Meagher, W. M. C. Gummow and J. R. F. Lehane, *Equity Doctrines and Remedies* (2nd ed. 1984), at p. 755.

153 This suffices to answer Canada's argument that the Métis claim for a declaration that the Crown failed to act in accordance with the honour of the Crown is barred by laches. We add this, however. It is difficult to see how a court, in its role as guardian of the Constitution, could apply an equitable doctrine to defeat a claim for a declaration that a provision of the Constitution has not been fulfilled as required by the honour of the Crown. We note that, in *Ontario Hydro v. Ontario (Labour Relations Board)*, *[1993] 3 S.C.R. 327*, at p. 357, Lamer C.J. noted that the doctrine of laches does not apply to a constitutional division of powers question. (See also *Attorney General of Manitoba v. Forest*, *[1979] 2 S.C.R. 1032*.) The Constitution is the supreme law of our country, and it demands that courts be empowered to protect its substance and uphold its promises.

[page691]

VII. Disposition

154 The appeal is allowed in part. We conclude that the appellants are entitled to the following declaration:

That the federal Crown failed to implement the land grant provision set out in s. 31 of the *Manitoba Act, 1870* in accordance with the honour of the Crown.

155 The appellants are awarded their costs throughout.

The reasons of Rothstein and Moldaver JJ. were delivered by

ROTHSTEIN J. (dissenting)

I. Introduction

156 In this case, the majority has created a new common law constitutional obligation on the part of the Crown - one that, they say, is unaffected by the common law defence of laches and immune from the legislature's undisputed authority to create limitations periods. They go this far notwithstanding that the courts below did not consider the issue, and that the parties did not argue the issue before this Court. As a result of proceeding in this manner, the majority has fashioned a vague rule that is unconstrained by laches or limitation periods and immune from legislative redress, making the extent and consequences of the Crown's new obligations impossible to predict.

157 While I agree with several of the majority's conclusions, I respectfully disagree with their conclusions on the scope of the duty engaged by the honour of the Crown and the applicability of limitations and laches to this claim.

158 The appellants, herein referred to collectively as the "Métis" made four main claims before this Court. Their primary claim was that [page692] the Crown owed the Métis a fiduciary duty arising from s. 31 of the *Manitoba Act, 1870*, S.C. 1870, c. 3 ("*Manitoba Act*"), and that this duty had been breached. As evidence of the breach of fiduciary duty, the Métis pointed to several factors: the random allocation of the land grants, the delay in allocation of the land, and the allocation of scrip instead of land to some Métis children. These claims make up the bulk of the argument in the Métis' factum.

159 The Métis also raised three other claims in less detail. First, they claimed that provincial statutes were *ultra vires* or inoperative due to the doctrine of paramountcy. Second, they claimed that the Crown did not fulfill its fiduciary duty under, or simply did not properly implement, s. 32 of the *Manitoba Act*. Finally, they claimed a failure to fulfill constitutional obligations, obligations that they state engaged the honour of the Crown. However, they did not elaborate on what duties the honour of the Crown should trigger on these facts.

160 The bulk of these claims were dismissed by the Chief Justice and Justice Karakatsanis and I am in agreement with them on those claims. I agree with their conclusion that there was no fiduciary duty here and therefore the claim for breach of fiduciary duty must fail. I agree that there are no valid claims arising from s. 32 of the *Manitoba Act* and that any claims that might have arisen from the now repealed Manitoba legislation on the land grants are moot, as those acts have long since been out of force. I agree with the majority that the random allocation of land grants was an acceptable means for Canada to implement the s. 31 land grants. Finally, I accept that the Manitoba Metis Federation has standing to bring these claims.

161 However, in my view, after correctly deciding all of these issues and consequently dismissing the vast majority of the claims raised on this appeal, my colleagues nonetheless salvage one aspect of the Métis' claims by expanding the scope of the duties that are engaged under the honour of the Crown. These issues were not the [page693] focus of the parties' submissions before this Court or the lower courts. Moreover, the new duty derived from the honour of the Crown that my colleagues have created has the potential to expand Crown liability in unpredictable ways. Finally, I am also of the opinion that any claim based on honour of the Crown was, on the facts of this case, barred by both limitations periods and laches. As a result, I would find for the respondents and dismiss the appeal.

II. Facts

162 While I agree with my colleagues' broad outlines of the facts of this case, I take issue with a number of the specific inferences or conclusions that they draw from the record.

163 As in all appellate reviews, the trial judge's factual findings should not be interfered with absent palpable and overriding error (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 10). While the majority does not do so explicitly, aspects of their review and use of the facts depart from the findings of fact made by the trial judge. However, at no point do they show that the trial judge made any palpable and overriding error in reaching his conclusions. Nor did the Métis claim that the findings I describe below were based on palpable and overriding error.

164 There are two main areas in which the majority reasons have departed from the factual findings of the trial judge, absent a finding of palpable and overriding error: (1) the extent of the delay in distributing the land, and (2) the effect of that delay on the Métis. In my view, the majority's departure from the appropriate standard of appellate review in these areas calls their analysis into question.

A. *Extent and Causes of the Delay*

165 The majority concludes that the record and findings of the courts below suggest a "persistent pattern of inattention". This pattern leads them to find that the duty of diligent fulfillment of solemn promises derived from the honour of the Crown [page694] was breached. In their view, there was a significant delay in implementing the land grants and this delay substantially defeated the purpose of s. 31. I respectfully disagree.

(1) Historical Evidence

166 Historical evidence was presented at trial and the bulk of it was accepted by the trial judge. Based on that evidence and on the reasons of the trial judge, I have summarized the process of how the land grants were distributed below. Though I accept the finding of the trial judge that there was a lengthy delay in the distribution of the land grants, this history reveals a steady and persistent effort to distribute the land grants in the face of significant administrative challenges and an unstable political environment. While a faster process would most certainly have been better, I cannot accept the majority's conclusion that this evidence reveals a pattern of inattention - a finding that is nowhere to be found in the reasons of the trial judge.

(a) *The Census*

167 The first Lieutenant Governor of Manitoba, A. G. Archibald, conducted a census which was completed on December 9, 1870. It would have been impossible to begin the allocation process without a reasonable estimate of how many Métis were owed land.

(b) *The Survey*

168 While the census was in progress, the Lieutenant Governor was also instructed to advise the government on a system for surveying the province. An order in council on April 25, 1871, adopted the survey method that Lieutenant Governor Archibald had proposed. The land needed to be surveyed before it was allocated and the Dominion lands survey was a formidable administrative challenge. The Court of Appeal acknowledged that "the evidence makes it clear that selection of the 1.4 million acres, all of which Canada was obliged [page695] to grant, would have been unworkable in the absence of a survey". The survey of the settlement belt was completed in the years 1871-74.

(c) *Selection of the Townships*

169 Once enough of the survey was complete, the Lieutenant Governor was able to take the next step in the process by selecting which townships would be distributed to the Métis. Lieutenant Governor Archibald received

instructions to begin this process on July 17, 1872. The process of selecting the townships required the Lieutenant Governor to consult with the Métis of each parish to determine which areas should be selected. This consultation process took several months. Such consultation cannot be characterized as persistent inattention to the situation of the Métis.

170 While this process was taking place, there was a change in Lieutenant Governor. On December 31, 1871, Lieutenant Governor Archibald had resigned, realizing that he had lost Prime Minister Macdonald's confidence. He was not replaced, however, until the fall of 1872 when Lieutenant Governor Alexander Morris was sworn in. Archibald continued to serve until Morris took over. These types of changes in government inevitably lead to time being lost. Any such delay cannot, without more, be attributed to inattention.

171 By February 22, 1873, the preparatory work was sufficiently advanced that Lieutenant Governor Morris was able to begin drawing lots for the individual grants of 140 acres. He was able to draw lots at the rate of about 60 per hour.

(d) *Events Giving Rise to the Second Allotment*

172 Early in 1873, concern was expressed about whether it was proper for the heads of Métis families to share in the land grant. As a result, in April 1873, the federal government determined that a stricter interpretation of s. 31 should be adopted. Participation in the land grant was limited to the "children of half-breed heads of families" (trial, at [page696] para. 202). As a result of this change, the number of recipients was significantly reduced, which meant that larger allotments would be required to distribute the entire 1.4 million acres. On August 5, 1873, Lieutenant Governor Morris was instructed to cancel the previous allotments. On August 16, 1873, Morris began the second allotment.

173 This change meant that all of the drawing of the allotments up until that point had to be discarded. However, this was not the result of inattention. Rather, the federal government was taking care to make sure that the land grant was distributed correctly, to the right beneficiaries. The government had originally received advice from Lieutenant Governor Archibald that, in order to achieve the purposes of the land grant, it would be necessary to include the heads of the Métis families. While the Lieutenant Governor's interpretation was not consistent with the text of s. 31, it was an interpretation that was based on an effort to understand the purpose of the text and give meaning to the phrase "towards the extinguishment of the Indian Title to the lands". While the necessity of starting over no doubt resulted in some delay, it was not caused by inattention.

(e) *The Fall of Sir John A. Macdonald's Government*

174 On November 5, 1873, Sir John A. Macdonald's government resigned. On January 22, 1874, an election was held. The opening of Parliament under Prime Minister Alexander Mackenzie was on March 26, 1874. David Laird became Minister of the Interior responsible for Dominion Lands. In the fall of 1874, Minister Laird went to Manitoba to gather information on all phases of the land question. According to Dr. Flanagan, Laird's notebook shows that he considered the appointment of a commission "to enumerate those entitled to land rights under the *Manitoba Act*, including the children's grant under s. 31" (evidence of Dr. Thomas Flanagan, A.R., vol. XXVI, at p. 11).

[page697]

(f) *The Machar/Ryan Commission*

175 An April 26, 1875 order in council established a commission to take applications for patents from those entitled to participate in the land grants under the *Manitoba Act*. By order in council on May 5, 1875, John Machar and Matthew Ryan were appointed commissioners and went to Manitoba in the summer of 1875. By the end of 1875, the commissioners had prepared returns for all parishes. These returns were approved and constituted what was seen as an authoritative list of those entitled to share in the land grant. However, because there was a concern that

this list was not in fact complete, Ryan, having become a magistrate in the North-West Territories, and Donald Codd in the Dominion Lands Office, were authorized to receive further applications by Métis children or heads of families who had not been able to appear before the commission in 1875 because they had emigrated from Manitoba.

(g) *The Patents*

176 On August 31, 1877, the first batch of patents arrived in Winnipeg. After completion of the drawings for a parish, issue of patents usually took one to two years. In the interim, posters were prepared within a few weeks of the approval of the allotment to inform recipients as to the location of their allotments. Most of the patents were issued by 1881, however allotments continued to be approved for some years thereafter. Over 6,000 patents had to be issued under s. 31 of the *Manitoba Act*, on top of over 2,500 under s. 32.

(h) *The Late Applications*

177 In order to get their share of the land grant, the Métis had to file claims with the government. Because of the migration that was already underway, a certain number of these claims were filed late. While the government had anticipated some late claims, the number had been underestimated. As a [page698] result, claims continued to be filed after the 1.4 million acres had already been allocated. On April 20, 1885, an order in council granted the Métis children scrip rather than land, for those children who had submitted late applications.

178 The deadline for filing claims to the $240 scrip for children was May 1, 1886. However, it was not strictly enforced and the late applications continued to trickle in. The government extended the deadline at least four times. In the end, 993 scrips for $240 (worth $238,320) were issued to the Métis children or their heirs.

(2) Evidence of Delay

179 My colleagues point to a number of delays including errors in determining the class of beneficiaries, errors in estimating the number of beneficiaries, long delays in issuing patents and "unexplained periods of inaction". However, these administrative issues must be placed in their proper historical context. At the time, Manitoba was a thinly settled frontier province. There was limited transportation and communications infrastructure and the federal civil service was small. The evidence of Dr. Flanagan was that

> [e]ven with an omniscient, omnicompetent government, it would have taken years to implement the *Manitoba Act*. The objective requirements of carrying out surveys, sorting out claims, and responding to political protests could not be satisfied instantaneously. But, of course, the government of Canada was neither omniscient nor omnicompetent. [p. 171]

Given this context, some "delays" in fulfilling the *Manitoba Act* appear to have been inevitable.

180 The trial judge, at para. 1055, observed that Manitoba was "a fledgling province [that] had just come into existence". Manitoba was far removed from Ottawa, which was the source of the authority for administration of the grant. The trial judge noted, at paras. 155-56, that those involved in [page699] the land grants, including the Lieutenant Governor and the Manitoba legislature, had many challenges to contend with in the establishment of the new province:

> Amongst other things, [the Lieutenant Governor] was to form a government on an interim basis which included selecting and appointing members of his Executive Council, selecting heads of departments of the government, and appointing the members of the Legislative Council. He was to organize electoral divisions, both provincially and federally. He was to undertake a census. He was to provide reports to the Federal Government as to the state of the laws and the system of taxation then existing in the province, and as to the state of the Indian tribes, their numbers, wants and claims, along with any suggestions he might have

> with reference to their protection and to improvement of their condition. He was to report generally on all aspects of the welfare of the province.
>
> Aside from the foregoing, he also received extensive instructions as to the undertakings which he should fulfill as Lieutenant Governor of the North-West Territories.

181 The majority attributes a three-year delay to the erroneous inclusion of the parents of the Métis children. However, much of the time before the cancellation of the first allotment was devoted to a survey that was used for all subsequent allotments. It is inappropriate to characterize this time as a delay. In my view, the delay stemming from the mistake about the beneficiaries amounts to less than a year, since the actual allocation under the first allotment did not begin until February 1873 and the allotment was cancelled on August 5, 1873.

182 My colleagues also point to an "inexplicable delay" from 1873 and 1875. This period included the time after the fall of Sir John A. Macdonald's government in November 1873. In my view, the change in government followed by the decision to proceed by way of a commission accounts for this time period. This Court must recognize the implications of such a change. Even today, changes in government have policy and practical impacts that delay implementation of government programs. Moreover, it does not [page700] constitute inattention to decide to proceed by way of commission in order to determine who was eligible to share in the land grant.

183 My colleagues criticize the failure of government officials to devote adequate time to the distribution of the allotments. However, there was no evidence tendered regarding the size of the civil service in Manitoba or in Ottawa during the 1870s and 1880s. We do not know how many federal or provincial civil servants there were or the extent of the work and functions they were required to perform. We do know that Lieutenant Governor Morris "wanted to move faster but was hampered by the limited time [Dominion Lands Agent] Donald Codd could devote to the enterprise" (Flanagan, at p. 58). Codd was only able to assist in drawing lots two days a week, until Ottawa sent someone to relieve him at the Lands Office. We have no evidence of what other obstacles there may have been impeding this process.

184 There was another changeover in the Lieutenant Governor from Morris to Joseph-Édouard Cauchon in 1877. While there was no doubt time lost as a result of the change itself, drawing of lots was also delayed as Cauchon was concerned about reports of dissatisfaction he had received. Unfortunately, over a hundred years later, the details of those reports are unclear. It is quite possible that they account for the second delay from 1878 to 1880.

185 The trial judge did not make a finding of negligence. There was also no finding of bad faith. Indeed, the trial judge concluded that there was little evidence of complaint at the time the process was being conducted. The trial judge also made no finding that the relevant government officials lacked diligence or acted with a "pattern of inattention".

186 The majority states, at para. 107, that

> a negligent act does not in itself establish failure to implement an obligation in the manner demanded by [page701] the honour of the Crown. On the other hand, a persistent pattern of inattention may do so if it frustrates the purpose of the constitutional obligation, particularly if it is not satisfactorily explained.

187 I agree, as my colleagues state, that a finding of lack of diligence requires a party to show more than just a negligent act. Here, the trial judge did not even find negligence. Despite this, the majority concludes that there was a lack of diligence. In my respectful opinion, that conclusion is inconsistent with the factual findings of the trial judge.

188 There are gaps in the record. My colleagues appear to rely on these gaps to support their view that the government failed to fulfill the obligations set out in s. 31. In my view, the government cannot, at this late date, be called upon to explain specific delays. This is an insurmountable challenge due to the passage of time and the paucity of the historical record.

189 If this land grant obligation had been made today, we would have expected a more expeditious procedure. However, the obligation was not undertaken by the present day federal government. It was undertaken by the government over 130 years ago, at a time when the government and the country were newly formed and struggling to become established. We cannot hold that government to today's standards when considering circumstances that arose under very different conditions. Indeed the need to avoid the application of a modern standard of conduct to historical circumstances has been noted by this Court in the past: *Wewaykum Indian Band v. Canada*, *2002 SCC 79*, *[2002] 4 S.C.R. 245*, at para. 121. To the extent there was delay, on a fair review of the available evidence and findings of the trial judge, it cannot be said to be the result of inattention, much less a persistent pattern of inattention.

B. *Effect of the Delay on the Métis*

190 The majority attributes a number of negative consequences to the length of time that it took for the land grants to be made. In my respectful [page702] view, in so doing they have departed from the factual findings made by the trial judge and drawn inferences that are not supported by the evidence. While the length of time that it took for the land to be distributed may have been frustrating for some of the Métis, it was not the cause of every negative experience that followed for them.

(1) Departure From the Red River Settlement

191 The majority suggests that the marginalization of the Métis and their departure from the Red River Settlement may have been caused by the length of time it took to issue the land grants. This is not supported by the findings of the trial judge or the record. There were other factors at play.

192 The trial judge considered the historical evidence on this point and concluded:

> As the buffalo robe trade was developing strength, agriculture experienced several years of bad crops. From 1844 to 1848, only once, 1845, was the harvest sufficient to feed the Settlement. By the fall of 1848, the Settlement was bordering on starvation. The 1850s brought better crops, but the 1860s were again very poor. The combination of a strong buffalo robe market and very poor crops led to increased abandonment of agriculture by the Métis and some emigration from the Settlement to points west following the buffalo. By 1869, the buffalo were so far west and south of Red River that the buffalo hunt no longer originated in the Settlement. [Emphasis added; para. 50.]

193 Thus, it is clear that emigration from the Red River Settlement began before the s. 31 land grants were contemplated due to the economic forces of declining agriculture and location of the buffalo hunt. The westward retreat of the buffalo herds was a critical factor. The buffalo robe trade was the Métis' primary livelihood and one of the backbones of their economy. This indicates that the Métis' migration was motivated by economic forces, and that the government's actions or inactions were not the sole or even the predominant cause of this phenomenon.

[page703]

194 The majority also attributes to the delay the Métis' inability to trade land to obtain contiguous parcels. With respect, the trial judge concluded that there was no general intention to create a Métis land base and thus, the ability to trade land to obtain contiguous parcels was never one of the objectives of the land grant. The trial judge concluded that only some Métis wanted to obtain contiguous parcels; others preferred to obtain the best land possible. This factual finding is entitled to deference.

195 Finally, my colleagues quote Deputy Minister of the Interior, A. M. Burgess in an effort to suggest that there was general agreement about the existence of the delay and its supposed harmful consequences. Contrary to the majority's suggestions, Burgess's statements cannot be read as a general commentary on the entire land grant process in order to indict the federal government for inattention. Mr. Burgess stated that he was "heartily sick" of the

"disgraceful delay which is taking place in issuing patents" (A.R., vol. XXI, at pp. 123-24 (emphasis added)). The issuing of the patents, and any delay that occurred in that process, represented only one aspect of the administrative challenge posed by the land grants. Mr. Burgess also wrote that he had been working night and day on those patents, hardly evidence of a pattern of inattention.

(2) Price Obtained for the Land

196 My colleagues conclude that what they say was a 10-year delay in implementation of the land grants increased sales to speculators. They imply that sales to speculators were harmful to Métis interests. While I accept the finding of the trial judge that some sales were made to speculators for improvident prices, not all sales were bad bargains for the Métis.

197 The trial judge also found that there was evidence of sales which occurred at market prices, sales to people who were not speculators and sales [page704] which were not the result of pressure or conduct of speculators. The trial judge held:

> Overall, while there are many examples of what appear to be individuals having been taken advantage of, it is difficult to assess at this late date whether that was so or whether the price obtained was a fair price given the vagaries of what it was that was being sold and the consequent market value of that. [para. 1057]

It appears that some Métis got higher prices and some Métis got lower prices for their land. For the Métis community as a whole, this may have been a "zero sum game". At this stage it would be entirely speculative to conclude that there was adverse impact on the Métis community as a whole as a result of land sales.

198 My colleagues suggest that as time passed, the possibility grew that the land was becoming less valuable. In my view, this conclusion is not supported by the evidence. In fact, 1880 to 1882 were boom years, where the land would have become even more valuable. The Court of Appeal noted that the vast majority of sales took place between 1877 and 1883. It is incongruous for the Métis descendants as a group to come forward ostensibly on behalf of some of their ancestors who may have benefitted from the delay.

(3) Scrip

199 The majority acknowledges that it was unavoidable that the land would be distributed based on an estimate of the number of eligible Métis and that the estimate would be inaccurate to some degree. They also acknowledge that the issuance of scrip was a reasonable mechanism to provide the benefit to which the excluded children were entitled. However, they find that

> the delayed issuance of scrip redeemable for significantly less land than was provided to the other recipients further demonstrates the persistent pattern of inattention ... . [para. 123]

200 I cannot agree that the delayed issuance of scrip demonstrates a persistent pattern of inattention by the government. Rather, the issuance of scrip [page705] was equally if not more consistent with the late filing of applications - over which the government had little control - and the corresponding underestimate in the number of eligible recipients. That is hardly evidence of government inattention.

201 If there had been no delay and the accurate number of Métis children had been known from the outset, each child would have received less land than they actually did because the recipients of scrip would have been included in the original division. In this sense, then, Canada overfulfilled its obligations under the *Manitoba Act* by providing scrip after the 1.4 million acres were exhausted. The issuance of scrip reflected Canada's commitment to meaningful fulfillment of the obligation, not inattention.

C. *Conclusion on the Facts*

202 Manifestly, the trial judge made findings of delay. Nonetheless these findings and the evidence do not reveal a pattern of inattention. They do not reveal a lack of diligence. Nor do they reveal that the purposes of the land grant were frustrated. That alone would nullify any claim the Métis might have based on a breach of duty derived from the honour of the Crown, assuming that any such duty exists a matter to which I now turn.

III. Analysis

A. *Honour of the Crown*

203 In their reasons, my colleagues develop a new duty derived from the honour of the Crown: a duty to diligently fulfill solemn obligations. Earlier cases spoke mostly to the manner in which courts should interpret treaties and statutory provisions and not to the manner in which governments should execute them. While *Haida Nation v. British Columbia (Minister of Forests)*, *2004 SCC 73*, *[2004] 3 S.C.R. 511*, explicitly leaves the door open to finding additional new Crown duties in the [page706] future, this is not an appropriate case to develop such a duty.

204 A duty of diligent fulfillment may well prove to be an appropriate expansion of Crown obligations. However, the duty crafted in the majority reasons is problematic. The threshold test for what constitutes a solemn obligation is unclear. More fundamentally, however, the scope and definition of this new duty created by the majority were not explored by the parties in their submissions in this Court nor were they canvassed in the courts below, making the expansion of the common law in this way inappropriate on appeal to this Court.

(1) Ambiguity as to What Constitutes a Solemn Obligation

205 In order to trigger this new duty of diligent fulfillment, there must first be a "solemn obligation". But no clear framework is provided for when an obligation rises to this "solemn" level such that it triggers the duty of diligent implementation. Furthermore, the majority reasons are unclear as to what types of legal documents will give rise to solemn obligations: Is it only provisions in the Constitution or does it also include treaties? In para. 75, the majority appears to restrict their conclusion on diligence to constitutional obligations to Aboriginal peoples. But, in para. 79, they note that the duty applies whether the obligation arises in a treaty or in the Constitution. This further reflects the inappropriateness of fashioning new common law rights and obligations without the benefit of consideration by the trial judge or Court of Appeal and in particular without the benefit of argument before this Court.

206 This difficulty is manifested in other aspects of the majority reasons. My colleagues accept that s. 31 was a constitutional provision (para. 94). Adopting the narrowest reading of their holding as to what documents trigger solemn obligations - [page707] one limited to constitutional provisions - it would seem such obligations would be triggered here. The majority nonetheless proceeds to consider how s. 31 of the *Manitoba Act* is similar to a treaty (para. 92). It thus appears that s. 31 engages the honour of the Crown, not just because of its constitutional nature, but also because of its treaty-like character.

207 The idea that certain sections of the Constitution should be interpreted differently or should impose higher obligations on the government than other sections because some of these sections can be analogized to treaties is novel to say the least. I reject the notion that when the government undertakes a constitutional obligation, how it must perform that obligation depends on how closely it resembles a treaty.

208 Setting aside the issue of what types of legal documents might contain solemn obligations, there is also uncertainty in the majority's reasons as to which obligations contained in those documents will trigger this duty. My colleagues assert that for the honour of the Crown to be engaged, the obligation must be specifically owed to an Aboriginal group. While I agree that this is clearly a requirement for engaging the honour of the Crown, this alone cannot be sufficient. As the majority notes, in the Aboriginal context, a fiduciary duty can arise as the result of the Crown assuming discretionary control over a *specific Aboriginal interest*. Reducing honour of the Crown to a test about whether or not an obligation is owed simply to an Aboriginal group risks making claims under the honour of

the Crown into "fiduciary duty-light". This new watered down cause of action would permit a claimant who is unable to prove a specific Aboriginal interest to ground a fiduciary duty, to still be able to seek relief so long as the promise was made to an Aboriginal group. Moreover, as the majority acknowledges at para. 108, this new duty can be breached as a result of actions that would not rise to the level required to constitute a breach of fiduciary duty. This new duty, with a broader scope [page708] of application and a lower threshold for breach, is a significant expansion of Crown liability.

(2) Absence of Submissions or Lower Court Decisions on This Issue

209 Even if one were not concerned with the issues identified above, this case was never argued based on this specific duty of diligent fulfillment of solemn obligations arising from the honour of the Crown. The parties made no submissions on a duty of diligent implementation of solemn obligations. The Métis never provided argument as to why the honour of the Crown should be engaged here, what duty it should impose on these facts or how that duty was not fulfilled. As a result, Canada and Manitoba have not had an opportunity to respond on any of these points. This Court does not have the benefit of the necessary opposing perspectives which lie at the heart of our adversarial system.

210 While there is no doubt that the phrase "honour of the Crown" was used in argument before this Court, no submissions of any substance were made as to what duty the honour of the Crown should have engaged on these facts beyond a fiduciary duty, nor were there any submissions on a duty of diligent implementation.

211 During the pleadings phase, honour of the Crown was not mentioned in the Métis' statement of claim and was mentioned only once in passing in their response to particulars (A.R., vol. IV, at p. 110). Before this Court, the Métis referred to honour of the Crown four times in their factum, but never alleged that there was a duty of diligent fulfillment of solemn obligations. Instead, two of the references to the honour of the Crown are contained in their summary of the points in issue and in their [page709] requested order. They also briefly assert that the honour of the Crown required the government to take a liberal approach to interpreting s. 32 and that the honour of the Crown could be used to show one of the elements of a fiduciary obligation under s. 32. They never provided submissions as to what constitutes a solemn obligation nor did they allege specifically that the honour of the Crown required due diligence in the implementation of such solemn obligations. In oral argument before this Court, the only submissions made on honour of the Crown were supplied by the Métis Nation of Alberta and the Attorney General for Saskatchewan. Neither of these interveners, nor the Métis themselves, made submissions about diligence, a new legal test based on patterns of inattention, or solemn obligations.

212 Delineating the boundaries of new legal concepts is prudently done with the benefit of a full record from the courts below and submissions from both parties. Absent these differing perspectives and analysis by the courts below, it is perilous for this Court to embark upon the creation of a new duty under the common law. I believe this concern is manifestly made apparent by the ambiguity in the majority reasons about what legal documents can give rise to solemn obligations.

213 Moreover, it is particularly unsatisfactory to impose a new duty upon a litigant without giving that party an opportunity to make submissions as to the validity or scope of the duty. This inroad on due process is no less concerning when the party to the proceedings is the government. As a result of the majority's reasons, the government's liability to Aboriginal peoples has the potential to be expanded in unforeseen ways. The Crown has not had the opportunity to address what impact this new duty might have on its ability to enter into treaties or make commitments to Aboriginal peoples. It is inappropriate to impose duties on any party, including the government, without giving that party an opportunity to make arguments about the impact that such liability might have. In the case of the government, where the new duty is constitutionally derived and therefore cannot be refined or modified [page710] through ongoing dialogue with Parliament, it is of very serious concern.

214 This Court has always been wary of dramatic changes in the law: see *Watkins v. Olafson*, *[1989] 2 S.C.R. 750*, at p. 760. In that case, this Court concluded that courts are not well placed to know all of the problems with the

current law and more importantly are not able to predict what problems will be associated with the proposed expansion. Courts are not always aware of all of the policy and economic consequences that might flow from the proposed expansion. While this is not a case about the appropriate role for the courts to play relative to the legislature, these same problems are apparent on the facts of this case. Without substantive submissions from the parties, it is difficult for this Court to know how this new duty will operate and what consequences might flow from it. For all these reasons, it is inappropriate to create this new duty as a result of this appeal.

B. *Limitations*

215 Even if one accepts that the honour of the Crown was engaged, that it requires the diligent implementation of s. 31, and that this duty was not fulfilled, any claims arising from such a cause of action have long been barred by statutes of limitations. The majority has attempted to circumvent the application of these limitations periods by characterizing the claim as a fundamental constitutional grievance arising from an "ongoing rift in the national fabric" (para. 140). With respect, there is no legal or principled basis for this exception to validly enacted limitations statutes adopted by the legislature. In my view, these claims must be rejected on the basis that they are time-barred.

(1) Decisions of the Courts Below

216 The present action was commenced on April 15, 1981. The trial judge held that, except for the claims related to the constitutional validity of the Manitoba statutes, there was no question that the [page711] Métis' action was outside the statutorily mandated limitation period and he would have dismissed the action on that basis.

217 The trial judge noted the applicable limitations legislation would have captured these claims. He held that the Métis at the time had knowledge of their rights under s. 31 of the *Manitoba Act* and were engaged in litigation to enforce other rights. From that he inferred that the Métis "chose not to challenge or litigate in respect of s. 31 and s. 32 knowing of the sections, of what those sections were to provide them, and of their rights to litigate" (para. 446). The trial judge concluded that the limitations legislation applied and barred the claims.

218 In the Court of Appeal, Scott C.J.M. noted the trial judge's finding that the Métis knew of their rights and their entitlement to sue more than six years prior to April 15, 1981. The Court of Appeal concluded that the trial judge's factual findings regarding the Métis' knowledge of their rights were entitled to deference. Scott C.J.M. affirmed the trial judge's ruling that the Métis' claim for breach of fiduciary duty with respect to both s. 31 and s. 32 of the Act was statute-barred on the basis that the Métis had not demonstrated that the trial judge misapplied the law or committed palpable and overriding error in arriving at this conclusion.

(2) Limitations Legislation in Manitoba

219 While limitations periods have existed in Manitoba continuously since 1870 by virtue of the application of the laws of England, Manitoba first enacted its own limitations legislation in 1931. *The Limitation of Actions Act, 1931*, S.M. 1931, c. 30, provided for a six-year limitation period for "actions grounded on accident, mistake or other equitable ground of relief" (s. 3(1)(*i*)).

220 There was also a six-year limitation period for any other action not specifically provided for in [page712] that Act or any other act (s. 3(1)(*l*)). *The Limitation of Actions Act, 1931* provided that it applied to "all causes of action whether the same arose before or after the coming into force of this Act" (s. 42). Similar provisions have been contained in every subsequent limitations statute enacted in Manitoba.

221 In my view, the effect of these provisions is that the Métis' claim, whether framed as a breach of fiduciary duty or as breach of some duty derived from honour of the Crown, has been statute-barred since at least 1937.

222 My colleagues are of the view that since this claim is no longer based on breach of fiduciary duty, s. 3(1)(*i*) of

The Limitation of Actions Act, 1931 does not apply to bar these claims. Regardless of how the claims are classified, however, the basket clause of *The Limitation of Actions Act, 1931* contained in s. 3(1)(*l*) would apply to bar the claim since that section is intended to ensure that the six-year limitation period covers any and all causes of action not otherwise provided for by the Act.

223 This claim for a breach of the duty of diligent fulfillment of solemn obligations is a "cause of action" and therefore s. 3(1)(*l*) bars it.

(3) Limitations and Constitutional Claims

224 My colleagues assert that limitations legislation cannot apply to declarations on the constitutionality of Crown conduct. They also state that limitations acts cannot bar claims that the Crown did not act honourably in implementing a constitutional obligation. With respect, these statements are novel. This Court has never recognized a general exception from limitations legislation for constitutionally derived claims. Rather, this Court has consistently held that limitations periods apply to factual claims with constitutional elements.

[page713]

225 The majority notes that limitations periods do not apply to prevent a court from declaring a statute unconstitutional, citing *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, 2007 SCC 1, [2007] 1 S.C.R. 3; *Ravndahl v. Saskatchewan*, 2009 SCC 7, [2009] 1 S.C.R. 181; and *Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138. While I agree, the constitutional validity of statutes is not at issue in this case. Instead, this is a case about factual issues and alleged breaches of obligations which have always been subject to limitations periods, including on the facts of *Ravndahl* and *Kingstreet*.

226 *Kingstreet* and *Ravndahl* make clear that there is an exception to the application of limitations periods where a party seeks a declaration that a statute is constitutionally invalid. Here, my colleagues have concluded that the Métis' claim about unconstitutional statutes is moot. The remaining declaration sought by the Métis has nothing to do with the constitutional validity of a statute.

227 Instead, what the Métis seek in this case is like the personal remedies that the applicants sought in *Kingstreet* and *Ravndahl*. The Métis are asking this Court to rule on a factual dispute about how lands were distributed over 130 years ago. While they are not asking for a monetary remedy, they are asking for their circumstances and the specific facts of the land grants to be assessed. As this Court said in *Ravndahl*:

> Personal claims for constitutional relief are claims brought as an individual *qua* individual for a personal remedy. As will be discussed below, personal claims in this sense must be distinguished from claims which may enure to affected persons generally under an action for a declaration that a law is unconstitutional. [para. 16]

These claims are made by individual Métis and their organized representatives. The claims do not arise from a law which is unconstitutional. Rather, they arise from individual factual circumstances. As [page714] a result, the rule in *Kingstreet* and *Ravndahl* that individual factual claims are barred by limitations periods applies to bar suit in this case.

(4) Policy Rationale for Limitations Periods Applies to These Claims

228 The majority finds that the issue in this case is of such fundamental importance to the reconciliation of the Métis peoples with Canadian sovereignty that invoking a limitations period would be inappropriate. They further conclude that unless this claim is resolved there will be an "ongoing rift in the national fabric".

229 In my view, it is inappropriate to judicially eliminate statutory limitations periods for these claims. Limitations

periods are set by the legislatures and are not discretionary. While limitations periods do not apply to claims that seek to strike down statutes as unconstitutional, as I noted above, this is not such a claim.

230 Limitations statutes are driven by specific policy choices of the legislatures. The exceptions in such statutes are also grounded in policy choices made by legislatures. To create a new judicial exception for those fundamental constitutional claims that arise from rifts in the national fabric is to engage directly in social policy, which is not an appropriate role for the courts.

231 Limitations acts have always been guided by policy. In *M. (K.) v. M. (H.)*, *[1992] 3 S.C.R. 6*, this Court identified three groups of policies underlying limitations statutes: those concerning certainty, evidentiary issues, and diligence.

232 The certainty rationale is connected with the concept of repose: "There comes a time, it is said, when a potential defendant should be secure in his reasonable expectation that he will not be held to account for ancient obligations" (*M. (K.) v. M. (H.)*, at p. 29).

[page715]

233 The evidentiary issues were further expanded upon in *Wewaykum*, at para. 121:

> Witnesses are no longer available, historical documents are lost and difficult to contextualize, and expectations of fair practices change. Evolving standards of conduct and new standards of liability eventually make it unfair to judge actions of the past by the standards of today.

234 Finally, the diligence rationale encourages plaintiffs to not sleep on their rights. An aspect of this concept is the idea that "claims, which are valid, are not usually allowed to remain neglected" (*Riddlesbarger v. Hartford Insurance Co.*, 74 U.S. (7 Wall.) 386 (1868), at p. 390, cited in *United States v. Marion*, 404 U.S. 307 (1971), at p. 322, footnote 14).

235 From these three rationales, limitations law has evolved to include a variety of exceptions which reflect further refinements in the policies that find expression in statutes of limitations. Older limitations acts contained few exceptions but modern statutes recognize certain situations where the strict application of limitations periods would lead to unfairness. For instance, while limitations acts have always included exceptions for minors, exceptions based on capacity have been expanded to recognize claimants with a variety of disabilities. Exceptions have also been created based on the principle of discoverability. However, even as those exceptions have been broadened or added, legislatures have created a counterbalance in the form of ultimate limitations periods which operate to provide final certainty and clarity. None of the legislatively created exceptions, nor their rationales, apply to this case.

(a) *Discoverability*

236 The discoverability principle has its origins in judicial interpretations of when a cause of action "accrues". Discoverability was described [page716] in the English case of *Sparham-Souter v. Town and Country Developments (Essex) Ltd.*, [1976] 1 Q.B. 858 (C.A.), at p. 868, where Lord Denning, M.R. stated:

> ... when building work is badly done and covered up the cause of action does not accrue, and time does not begin to run, until such time as the plaintiff discovers that it has done damage, or ought, with reasonable diligence, to have discovered it.

237 While this judicial discoverability rule was subsequently rejected by the House of Lords, Canadian legislatures moved to amend their limitations acts to take into account the fact that plaintiffs might not always be aware of the facts underlying a claim right away. This evolution was described by this Court in *Kamloops v. Nielsen*, *[1984] 2*

S.C.R. 2, at pp. 40-42, where it was noted that the British Columbia legislature had amended its limitations legislation to give effect to an earlier judicial decision which postponed "the running of time until the acquisition of knowledge or means of knowledge of the facts giving rise to the cause of action".

238 The discoverability principle is grounded in the idea that, even if there is no active concealment on the part of the defendant giving rise to other ways of tolling limitations periods, the facts underlying a cause of action may still not be accessible to the plaintiff for some time. There is a potential injustice that can arise where a claim becomes statute-barred before a plaintiff was aware of its existence (*M. (K.) v. M. (H.)*, at p. 33).

239 The discoverability principle has been applied in a variety of contexts. In *Kamloops*, the claim arose from negligent construction of the foundation of a house, where there was evidence that the defect was not visible until long after the house was completed. In *M. (K.) v. M. (H.)*, discoverability was used to toll the limitation period until such time as the victim of childhood incest was able to discover "the connection between the harm she has suffered and her childhood history" (p. 35). In *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549, [page717] at para. 43, this Court delayed the start of a limitation period under Ontario's no-fault insurance scheme until the plaintiff had knowledge of the extent of injuries that would allow him to make a claim within the scheme.

240 The link in these cases is that the plaintiffs were unaware of the specific damage or were not aware of the link between the damage and the actions of the defendant. Limitations law permits exceptions grounded in lack of knowledge of the facts underlying the claim and the connection between those facts, the actions of the defendant and the harm suffered by the plaintiff.

241 The Métis can make no such claim. They were not unaware of the length of time that it took for the land to be distributed at the time that the distribution was occurring. The trial judge found that representations to the federal government by the Legislative Council and Assembly of Manitoba were made about the length of time the process was taking as early as 1872. At the time, a significant proportion of the Manitoba legislature was Métis. Nor can they claim that they were unaware of the connection between the length of time that the distribution was taking and the actions of the government, since the trial judge found that the federal government responded to this 1872 complaint by reiterating that the selection and allocation of land was within the sole control of Canada. Thus, the exception that the majority has created is not consistent even at the level of public policy with the discoverability exceptions that have been created by legislatures.

242 I would also note that while the history of the discoverability exception indicates that there is room for judicial interpretation in limitations law, that interpretation must be grounded in the actual words of the statute. In this case, the majority has not linked their new exception to any aspect of the text of the Act.

[page718]

(b) *Disability*

243 Tolling limitations periods for minors or those with disabilities is another long-standing exception to the general limitation rules. Section 6 of *The Limitation of Actions Act, 1931* provided that for certain types of claims, a person under a disability had up to two years after the end of that disability to bring an action. These provisions have grown over time. *The Limitation of Actions Act*, C.C.S.M. c. L150, currently in force in Manitoba provides for tolling where a person is a minor or where a person is "in fact incapable of the management of his affairs because of disease or impairment of his physical or mental condition" (s. 7).

244 Incapacity due to disability has also been used as the legislative framework for tolling limitations periods for victims of sexual assault by a trusted person or person in authority. The Ontario *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B, s. 10(2), creates a presumption that the person claiming to have been assaulted was "incapable of commencing the proceeding earlier than it was commenced if at the time of the assault one of the parties to the

assault had an intimate relationship with the person or was someone on whom the person was dependent, whether financially or otherwise". This presumption can be rebutted.

245 A victim who suffered sexual assault at the hands of a person in a position of trust, is said to be incapable of bringing a claim because of a variety of factors including

> the nature of the act (personal violation), the perpetrator's position of power over the victim and the abuse of that position act effectively to silence the victim. Moreover, until recently, many victims of sexual assault were subject to social disapproval based on the perception that they were somehow to blame.

[page719]

(Ontario, Limitations Act Consultation Group, *Recommendations for a New Limitations Act: Report of the Limitations Act Consultation Group* (1991), at p. 20)

246 If the discoverability rule has its origins in incapacity to litigate because of lack of knowledge of particular facts underlying the claim such as the damage or the relationship between the damage and the defendant, the exceptions for disability and minors are grounded in a broader view of incapacity:

> Those under legal disability are presumed not to know their rights and remedies and it would be unfair to expect them to proceed diligently in such matters.

(*Murphy v. Welsh*, *[1993] 2 S.C.R. 1069*, at p. 1080)

247 The Métis were never in a position where they were under a legal disability. As the trial judge found, the Métis were full citizens of Manitoba who wanted to be treated the same as other Canadians. While some sought to entail the s. 31 lands to prevent the children from selling, this view was by no means unanimous. The Métis had always owned land individually and been free to sell it. It is paternalistic to suggest from our modern perspective that the Métis of the 1870s did not know their rights and remedies. This type of paternalism would have been an anathema to the Métis of the time who sought to be treated as equals.

248 The power imbalance that justifies the presumption of incapacity for victims of certain types of sexual assaults is also inapplicable here. Section 31 was enacted *because* of the strength of the Métis community, not because the community was weak or vulnerable or subject to government abuse. While their power in Manitoba declined with the influx of settlers, it is revisionist to suggest that they were in such a weak position in relation to the federal government that the government was able to "silence" them (as described above in para. 245). While many of the recipients of the land grants [page720] were minors, the findings of the trial judge make clear that the children's parents, adults who could have acted on their children's behalf, knew of their rights. The policy that underlies the exception for minors and those with disabilities does not track onto the experience of the Métis.

(c) *Ultimate Limitations Periods*

249 As a counterweight to newer exceptions like discoverability and expanded disability provisions, legislatures have also adopted ultimate limitations periods. The purpose of these ultimate limitations periods is to provide true repose for defendants, even against undiscovered claims. Even if a claim is not discovered, meaning that the basic limitations period has not been engaged, an ultimate limitation period can bar a claim. While basic limitations periods are often in the range of two to six years, ultimate limitations periods are usually 10 to 30 years long.

250 Manitoba has had an ultimate limitations period of 30 years since 1980 (*An Act to Amend The Limitation of Actions Act*, S.M. 1980, c. 28, s. 3). This ultimate limitation period continues in the current act as s. 14(4). Ultimate limitations periods are also in force in many other provinces. The purpose of these ultimate limitations periods was

described by the Manitoba Law Reform Commission in their 2010 report on limitations:

> In order to address the important repose aspect of limitations, there must be some ability to ensure that, after a certain period of time, no action may be brought regardless of the claim's discoverability of late occurring damage.

(*Limitations* (2010), at p. 26)

251 As ultimate limitations periods were introduced, many provincial legislatures chose to effectively exempt certain types of Aboriginal claims from them by grandfathering Aboriginal claims into the former acts, which did not contain ultimate limitations periods. This was done in [page721] Alberta and Ontario, and will soon be done in British Columbia: *Limitations Act*, R.S.A. 2000, c. L-12, s. 13; Ontario *Limitations Act, 2002*, s. 2; *Limitation Act*, S.B.C. 2012, c. 13, s. 2 (not yet in force). In my view, this is evidence that legislatures are alive to the issues posed by Aboriginal claims and limitations periods and the choice of whether or not to exempt such claims from basic and ultimate limitations periods is one that belongs to the legislature.

252 There is a fine balance to be struck between expanded ways to toll limitations periods through discovery and incapacity and a strict ultimate limitations period. It is not the place of the courts to tamper with the selection that each of the legislatures and Parliament have chosen by creating a broad general exception for claims that courts find to be fundamental or serious. The type of exception proposed by my colleagues is antithetical to the careful policy development that characterizes this area of the law. The courts are ill-suited for doing this type of work which must be grounded in a clear understanding of how each aspect of the limitations regime works together to produce a fair result.

253 If Parliament or provincial legislatures wanted to exclude factual claims with a constitutional component from limitations periods, then they could do so by statute. As they have not chosen to make an exception for the type of declaration that the Métis seek in this case, it is inappropriate for this Court to do so.

(d) *Role of Reconciliation*

254 My colleagues suggest that the above rationales have little role to play in an Aboriginal context, where the goal of reconciliation must [page722] be given priority. In so doing, the majority's reasons call into question this Court's decisions in *Wewaykum*, at para. 121, and more recently in *Canada (Attorney General) v. Lameman*, *2008 SCC 14*, *[2008] 1 S.C.R. 372*. In *Lameman*, this Court specifically stated that policy rationales that support limitations periods "appl[y] as much to Aboriginal claims as to other claims" (para. 13 (emphasis added)). Without doing so explicitly, it appears that the majority has departed from the legal certainty created by *Wewaykum* and *Lameman*, in favour of an approach where "reconciliation" must be given priority.

255 Moreover, the legal framework of this claim is very different from a claim based on an Aboriginal right. Aboriginal rights are protected from extinguishment under s. 35 of the *Constitution Act, 1982*. Aboriginal rights, therefore, constitute ongoing legal entitlements. By contrast, the claims in this case concern a constitutional obligation that was fulfilled over 100 years ago.

(5) Manitoba Legislation Does Not Exempt Declarations From Limitation Periods

256 My colleagues assert that limitations periods should not apply to claims for failure to diligently fulfill solemn obligations arising from the Constitution where the only remedy sought is a declaration. Respectfully, this is a choice to be made by the legislature. In Manitoba, limitations legislation has never contained an exception for declarations. This Court is not empowered to create one.

257 In some other provinces the legislation governing limitations periods provides for specific exceptions where the

only remedy sought is a declaration without any consequential relief: Alberta *Limitations Act*, s. 1(i)(i); Ontario *Limitations Act, 2002*, s. 16(1)(a); British Columbia *Limitation Act*, s. 2(1)(d) (not yet in force).

[page723]

258 These exceptions are contained within the finely tailored legislative schemes as described above. In those provinces where recent amendments have provided for declaratory judgments to be exempt from limitations periods, the limitations legislation also contains provisions that restrict the retroactive application of those exemptions. For example, in Ontario, if a claim was not started before the exemption was enacted and the limitation period under the former act had elapsed, the creation of the new exemption from limitation periods for declaratory judgments would not revive those previously barred claims, even if the only remedy sought was a declaration: Ontario *Limitations Act, 2002*, s. 24. Thus, even where the legislature has seen fit to exempt declarations from limitation periods, it has not done so retroactively.

259 This is unsurprising since changes to limitations periods are rarely made retroactively, because to do so would prejudice those who relied upon those limitations periods in organizing their affairs. Retroactive changes to limitations law mean that potential defendants who were under the impression that claims against them were time-barred would be again exposed to the threat of litigation. In contrast, when a limitations period is changed prospectively, potential defendants were never in a position to rely on a limitation period and would always be on notice as to the possibility of litigation. In effect, if limitations periods were changed retroactively, the certainty rationale would be significantly compromised by depriving defendants of the benefit of limitations protection that they had relied upon up until the change in the law.

260 The issue of whether to exempt declaratory judgments from limitations periods is one that has been canvassed recently in Manitoba. In 2010, the Manitoba Law Reform Commission recommended that an exception be created for declaratory judgments, but this recommendation has not been implemented. In making that recommendation, the Manitoba Law Reform Commission recognized that, while declaratory judgments do not compel [page724] the Crown to act in a particular way, there is still a risk that an exception for declaratory remedies might "undermin[e] the principles that support the establishment of limitations" (*Limitations*, at p. 33). This is because obtaining a declaration can be the first step in obtaining an additional remedy, one that would otherwise be barred by a limitation period.

261 The Manitoba Law Reform Commission noted that this risk was particularly acute in the case of declarations made in respect of the Crown, since there is authority to support the proposition that the Crown does not generally ignore a court declaration (p. 32). While the Crown response to a declaration is not always satisfactory to everyone, the possibility that the declaration will lead to some additional extra-judicial remedy is real. This means that while a declaratory order without consequential relief might appear to have little impact on the certainty created by limitations periods, the result for litigants is not necessarily as benign. There is a risk that a declaratory judgment will lead to additional remedies, even when not ordered by the courts.

262 In my view, that risk is fully realized in this case. As my colleagues note, the Métis do not seek a declaration as an end in itself. Rather, they plan to use the declaration to obtain redress in extra-judicial negotiations with the Crown. This result undermines the certainty rationale for limitation periods by exposing the Crown to an obligation long after the limitation period expired. By exempting the declaration sought by the Métis from limitation periods, the majority has inappropriately stepped into the shoes of the Manitoba legislature.

(6) Effect of Exempting These Claims From Limitations Periods

263 The majority has removed these claims by the Métis from the ordinary limitations regime by arguing that these claims are fundamental [page725] and that a failure to address them perpetuates an "ongoing rift in the national fabric". With respect, the determination that a particular historical injustice amounts to a rift in the national fabric is a political or sociological question. It is not a legally cognizable reason to exempt a claim from the application of

limitations periods. Moreover, it leaves the courts in the position of having to assess whether any claim made is sufficiently fundamental to permit them to address it on its merits despite its staleness.

264 Over the course of Canadian history, there have been instances where the Canadian government has acted in ways that we would now consider inappropriate, offensive or even appalling. The policy choice of how to handle these historical circumstances depends on a variety of factors and is therefore one that is best left to Parliament or the government, which have in recent years acted in a variety of ways, including apologies and compensation schemes, to make amends for certain historical wrongs.

265 The reasons of the majority would now have the courts take on a role in respect of these political and social controversies. Where the parties ask for a declaration only and link it to some constitutional principle, the courts will now be empowered to decide those cases no matter how long ago the actions and facts that gave rise to the claim occurred. In my view, this has the potential to open the court system to a whole host of historical social policy claims. While the resolution of historical injustice is clearly an admirable goal, the creation of a judicial exemption from limitations periods for such claims is not an appropriate solution.

266 This exception creates the possibility of indeterminate liability for the Crown, since claims under this new duty will apparently be possible forever. Courts have always been wary of the possibility of indeterminate liability. In *Ultramares Corp. v. Touche*, 174 N.E. 441 (N.Y. 1931), at p. 444, Cardozo C.J. expressed concern about the creation of "liability in an indeterminate amount for an indeterminate time to an indeterminate class". This [page726] concern was recognized, albeit more with respect to indeterminate amounts and classes, by this Court in *Design Services Ltd. v. Canada*, *2008 SCC 22*, *[2008] 1 S.C.R. 737*, at paras. 59-66. In my view, as this exception from limitations periods creates liability for an indeterminate time, it is not an appropriate step for this Court to take.

267 The exemption proposed by my colleagues is not aligned with any of the principles that underlie the limitations scheme. It is instead an exception that is virtually limitless in scope, relying, as it does, on a social policy appeal to restore our national fabric rather than accepted legal principles. It cannot be characterized as the type of incremental change that supports the development and evolution of the common law and it is therefore not an appropriate change for the courts to make.

(7) The Crown Is Entitled to the Benefit of Limitations Periods

268 Limitations periods apply to the government as they do to all other litigants. At common law, limitations periods could be used by the Crown to defend against actions, but could not be used by defendants pursued by the Crown (P. W. Hogg, P. J. Monahan and W. K. Wright, *Liability of the Crown* (4th ed. 2011), at pp. 98-99). This is no longer the case as the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, s. 32, specifically provides that provincial limitations periods apply to claims by and against the Crown:

> **32.** Except as otherwise provided in this Act or in any other Act of Parliament, the laws relating to prescription and the limitation of actions in force in a province between subject and subject apply to any proceedings by or against the Crown in respect of any cause of action arising in that province, and proceedings by or against the Crown in respect of a cause of action arising otherwise than in a province shall be taken within six years after the cause of action arose.

[page727]

The effect of this section is that the provincial limitations legislation in Manitoba applies to the federal Crown. Moreover, even absent this Act, the common law provided that it was possible for the Crown to rely on a limitations period to defend against claims (Hogg, Monahan and Wright, at p. 99).

269 The application of limitations periods to claims against the Crown is clear from the cases generally and also

specifically in the area of Aboriginal claims. For example, in both *Wewaykum* and *Lameman*, this Court applied a limitations period to bar an Aboriginal claim against the government.

270 Application of limitations periods to the Crown benefits the legal system by creating certainty and predictability. It also serves to protect society at large by ensuring that claims against the Crown are made in a timely fashion so that the Crown is able to defend itself adequately.

271 The relevance of limitations periods to claims against the Crown can clearly be seen on the facts of this case. My colleagues rely on "unexplained periods of inaction" and "inexplicable delay" to support their assertion that there is a pattern of indifference. In my view, it cannot reasonably be ruled out that, had this claim been brought in a timely fashion, the Crown might have been able to explain the length of time that it took to allocate the land to the satisfaction of a court. The Crown can no longer bring evidence from the people involved and the historical record is full of gaps. This case is the quintessential example of the need for limitations periods.

C. *Laches*

272 In addition to being barred by the limitation period, these claims are subject to laches. Laches is an equitable doctrine that requires a claimant in equity to prosecute his or her claim without undue delay. In Canada, there are two recognized branches to the doctrine of laches: delays that result from [page728] acquiescence or delays that result in circumstances that make prosecution of the action unreasonable (*M. (K.) v. M. (H.)*, at pp. 76-77, citing *Lindsay Petroleum Co. v. Hurd* (1874), L.R. 5 P.C. 221, at pp. 239-40).

273 The majority finds that the Métis cannot have acquiesced because of their marginalized position in society and the government's role in bringing about that marginalization. They further find that the government did not alter its position in reasonable reliance on the *status quo*, nor would disturbing the current situation give rise to an injustice. Finally, they conclude that given the constitutional aspect of the Métis' claim, it would be inappropriate in any event to apply the doctrine of laches.

274 Respectfully, I cannot agree. The Métis have knowingly delayed their claim by over a hundred years and in so doing have acquiesced to the circumstances and invited the government to rely on that, rendering the prosecution of this action unreasonable. As a result, their claim cannot succeed because it is barred by both branches of the doctrine of laches.

(1) Decisions of the Courts Below

275 The trial judge held that the doctrine of laches acted as a defence to all of the Métis claims. He found that those entitled to benefits under ss. 31 and 32 of the *Manitoba Act* were, at the material time, aware of their rights under the Act and of their right to sue if they so wished. The trial judge held that there was "grossly unreasonable delay" in bringing this action in respect of those rights and the breaches that the Métis now claimed (para. 454). The majority have identified no palpable and overriding error with this conclusion.

276 There is some irony in the majority in this Court crafting its approach around the government's delay and at the same time excusing the Métis' delay in bringing their action for over 100 years.

[page729]

277 The trial judge observed that there was no evidence to explain the delay in making the claim. The only explanations offered came from counsel for the Métis and none of them provided "a justifiable explanation at law for those entitled under s. 31 and s. 32, whether individually or collectively, to have sat on their rights as they did until 1981" (para. 457). Nor, in the trial judge's view, did this delay in the exercise of their rights square with the evidence of Métis individuals and the larger community pursuing legal remedies throughout the 1890s for other claims arising from the *Manitoba Act*. The trial judge held that this amounted to acquiescence in law. Both Canada and Manitoba

were prejudiced by the claim not being advanced in a timely fashion due to the incomplete nature of the evidence that was available at trial.

278 The Court of Appeal concluded that laches "may be applied to claims seeking declaratory relief whether declaratory judgments are viewed as equitable in nature or *sui generis*" (para. 342). The Court of Appeal then considered whether laches can operate to bar constitutional claims. It concluded that, while laches cannot be applied to claims based on the division of powers, the claims advanced by the Métis were not of that type. The Court of Appeal decided that it was unnecessary to determine whether laches could be applied to the types of constitutional claims advanced by the Métis because it determined that those claims were moot.

(2) Acquiescence

279 My colleagues suggest, at para. 149, that no one can acquiesce where the law has changed, since it is "unrealistic" to expect someone to have enforced their claim before the courts were prepared to recognize those rights. With respect, this conclusion is at odds with the common law approach to changes in the law. While there is no doubt that the law on Crown duties to Aboriginal people has evolved since the 1870s, defences of general application, including laches, have always applied to claimants despite such changes in the [page730] law (*In re Spectrum Plus Ltd. (in liquidation)*, 2005 UKHL 41, [2005] 2 A.C. 680, at para. 26). The applicability of general defences like limitations periods to evolving areas of the law was also recognized by this Court in *Canada (Attorney General) v. Hislop*, 2007 SCC 10, [2007] 1 S.C.R. 429, at para. 101. My colleagues' approach to acquiescence is a significant change in the law of laches in Canada with potentially significant repercussions.

280 Turning to the specific requirements for the application of acquiescence, I agree with my colleagues that it depends on knowledge, capacity and freedom (*Halsbury's Laws of England* (4th ed. 2003), vol. 16(2), at para. 912). In my view, all three were present on the facts of this case.

281 Justice La Forest, in *M. (K.) v. M. (H.)*, described the required level of knowledge to apply laches:

> ... an important aspect of the concept is the plaintiff's knowledge of her rights. It is not enough that the plaintiff knows of the facts that support a claim in equity; she must also know that the facts give rise to that claim: *Re Howlett*, [1949] Ch. 767. However, this Court has held that knowledge of one's claim is to be measured by an objective standard; see *Taylor v. Wallbridge* (1879), 2 S.C.R. 616, at p. 670. In other words, the question is whether it is reasonable for a plaintiff to be ignorant of her legal rights given her knowledge of the underlying facts relevant to a possible legal claim. [Emphasis deleted; pp. 78-79.]

282 Given the trial judge's findings, the Métis had this required knowledge in the 1870s. This conclusion amounts to a finding of fact and cannot be set aside absent palpable and overriding error. The majority has not identified any such error.

[page731]

283 Instead of confronting this conclusion on knowledge, my colleagues conclude that the Métis could not acquiesce for three reasons: (1) historical injustices suffered by the Métis; (2) the imbalance in power that followed Crown sovereignty; and (3) the negative consequences following delays in allocating the land grants. I cannot agree with these conclusions.

(a) *Historical Injustices*

284 The main historical injustice discussed by the majority is the very issue of this case: delay in making the land grants. They conclude that the Métis did not receive the benefit that was intended by the land grants, and they imply that this was a cause of the Métis' subsequent marginalization. They suggest that, because laches is an equitable construct, the conscionability of both parties must be considered. While this is no doubt true, they then rely on the

facts of the claim to conclude that equity does not permit the government to benefit from a laches defence. Effectively, they conclude that the very wrong that it is alleged the government committed resulted in a level of unconscionability that means they cannot access the defence of laches. With respect, this cannot be so. Laches is always invoked as a defence by a party alleged to have, in some way, wronged the plaintiff. If assessing conscionability is reduced to determining if the plaintiff has proven his or her allegations against the defendant, the defence of laches is rendered illusory.

(b) *Imbalance in Power Following Crown Sovereignty*

285 The evidence is not such that any imbalance in power between the Métis and the government was enough to undermine the knowledge, capacity and freedom of the Métis to the extent required to prevent a finding of acquiescence.

[page732]

286 At the start of the relevant time period, the Métis were a political and military force to be reckoned with. The majority notes, at para. 23 that "[t]he Métis were the dominant demographic group in the Settlement, comprising around 85 percent of the population, and held leadership positions in business, church and government." They also note that

> [w]hen the *Manitoba Act* was passed, the Métis dominated the Red River provisional government, and controlled a significant military force. Canada had good reason to take the steps necessary to secure peace between the Métis and the settlers. [para. 93]

287 Furthermore, while the power and influence of the Métis declined in the following years, there is no evidence that the Métis reached a point where the imbalance in power was so great that they lost the knowledge, capacity or freedom required to acquiesce. Indeed, throughout the 1890s, applications were brought to the courts regarding disputes over individual allotments governed by s. 31. The Attorney General of Manitoba cites three examples of such litigation: *Barber v. Proudfoot*, [1890-91] 1 W.L.T.R. 144 (Man. Q.B. *en banc*) (a Métis individual sought to have a sale set aside), *Hardy v. Desjarlais* (1892), 8 Man. R. 550 (Q.B.) (the deed of sale was executed prior to the court order approving it, the money was not paid into court until the land was sold at a higher price), and *Robinson v. Sutherland* (1893), 9 Man. R. 199 (Q.B.) (a Métis minor alleged that her father forced her to sell her land contrary to the wishes of her husband). This litigation demonstrates that individual Métis had knowledge of their rights under s. 31 during this time period and had knowledge that they could apply to court in order to enforce their rights.

288 While the power of the Métis had declined by the 1890s, there is no evidence that this prevented them from organizing in such a way as to avail themselves of the courts when they felt their rights were being threatened. Throughout the 1890s [page733] Métis individuals were involved in a series of cases related to the "Manitoba Schools Question".

289 Catholic members of the Métis community collectively appealed to the courts regarding legislation involving denominational schools and twice pursued these issues all the way to the Judicial Committee of the Privy Council (*City of Winnipeg v. Barrett*, [1892] A.C. 445; and *Brophy v. Attorney-General of Manitoba*, [1895] A.C. 202). As these cases were not successful, Archbishop Taché organized a petition, which contained 4,267 signatures, that was submitted to the Governor General. This led to a reference to this Court and a subsequent appeal to the Privy Council.

290 From this evidence the trial judge inferred "that many of the 4,267 signatories [to the petition] would have been Métis" and that it was "clear that those members of the community including their leadership certainly were alive to [their] rights ... and of the remedies they had in the event of an occurrence which they considered to be a breach" (para. 435). My colleagues reject the second inference drawn by the trial judge, again without identifying any palpable and overriding error, stating that the actions of a larger community do not provide evidence of the Métis' ability to seek a declaration based on the honour of the Crown (para. 148). I cannot accept that conclusion. In my

view, the evidence demonstrates that, when the rights of the Métis under the *Manitoba Act* were infringed by government action, the Métis were well aware of and able to access the courts for remedies.

291 The trial judge did not conclude that Archbishop Taché and Father Ritchot were Métis; he merely noted that they were leaders of a group that included some Métis and that group had accessed the courts to enforce rights contained in the *Manitoba Act*. This conclusion did not demonstrate any palpable and overriding error. It was reasonable for the trial judge to infer that by signing the petition and being aware of the litigation on denominational schools individual Métis had the [page734] knowledge required under the test described by La Forest J. in *M. (K.) v. M. (H.)*. Both the cases of individual claims under the Manitoba legislation and the cases about the denominational schools show that members of the Métis community had the capacity and freedom to pursue litigation when they saw their rights being affected. In respect of any delay in making land grants, they chose not to do anything until 100 years later. As a result, the Métis acquiesced and laches should be imputed against them.

(c) *Negative Consequences Created by Delays in Allocating the Land Grants*

292 The reasons of the majority suggest that the fact that there was delay in distributing the land is sufficient to lead to the conclusion that the Métis were rendered so vulnerable as to be unable to acquiesce. In my view, this conclusion is untenable as a matter of law. It suggests that no party that suffered injury could ever acquiesce and thus renders the first part of the laches test meaningless. While laches requires consideration of whether the plaintiff had the capacity to bring a claim, this has never been extended to except from laches all who are vulnerable. Laches is imputed against vulnerable people just as limitations periods are applied against them. These doctrines cannot fulfill their purposes if they are not universally applicable.

293 Moreover, I do not accept the implication that the marginalization of the Métis was caused by delays in the distribution of the land grants. As noted above, the Métis community was under pressure for a number of reasons during the 1870s and 1880s. To suggest, as my colleagues do, that delays in the land grants caused the vulnerability of the Métis is to make an inference that was not made by the trial judge and is not supported by the record.

294 In my view, the trial judge was correct in finding that the Métis had acquiesced and that laches could be imputed against them on that basis.

[page735]

(3) Circumstances That Make the Prosecution Unreasonable

295 Though my conclusion on acquiescence would be sufficient to result in imputing laches against the Métis, I am also of the view that the Métis' delay resulted in circumstances that make the prosecution of their claim unreasonable.

296 The majority finds that the delay did not result in circumstances that make prosecution of the claim unreasonable since they do not find that the government reasonably relied on the Métis' acceptance of the *status quo*. I cannot agree. The delay in commencing this suit was some 100 years. This delay has resulted in an incomplete evidentiary record. The unexplained delays that my colleagues refer to as evidence for the Crown acting dishonourably may well have been accounted for had the claim been brought promptly. The effect of this extraordinary delay on the evidentiary record, in a case dependent on establishing the actions of Crown officials over 100 years ago, constitutes circumstances that would make the prosecution unreasonable.

297 Moreover, we cannot know whether, if the claims had been brought at the time, the government might have been able to reallocate resources to allow the grants to be made faster or to take other steps to satisfy the Métis community. It cannot be said that the government did not alter or refrain from altering its position in reliance on the

failure of the Métis to bring a claim in a timely manner.

(4) Laches Applies to Equitable Claims Against the Crown

298 The doctrine of laches can be used by all parties, including the Crown, to defend against equitable claims that have not been brought in a sufficiently timely manner. In *Wewaykum*, this Court considered the application of laches to an Aboriginal claim against the Crown and concluded [page736] that laches could act to bar a claim for breach of fiduciary duty. The delay at issue in that case was at least 45 years. The Court in *Wewaykum*, at para. 110, stated that

> [t]he doctrine of laches is applicable to bar the claims of an Indian band in appropriate circumstances: *L'Hirondelle v. The King* (1916), 16 Ex. C.R. 193; *Ontario (Attorney General) v. Bear Island Foundation* (1984), 49 O.R. (2d) 353 (H.C.), at p. 447 (aff'd on other grounds (1989), 68 O.R. (2d) 394 (C.A.), aff'd [1991] 2 S.C.R. 570); *Chippewas of Sarnia Band v. Canada (Attorney General)* (2000), 51 O.R. (3d) 641 (C.A.). There are also dicta in two decisions of this Court considering, without rejecting, arguments that laches may bar claims to aboriginal title: *Smith v. The Queen*, [1983] 1 S.C.R. 554, at p. 570; *Guerin*, *supra*, at p. 390.

299 As discussed above in relation to limitations periods, the application of the defence of laches to the Crown is beneficial for the legal system and society generally. The rationales that justify the application of laches for private litigants apply equally to the Crown.

(5) Laches Applies to Claims Under Honour of the Crown

300 The majority concludes that claims for a declaration that a provision of the Constitution was not fulfilled as required by the honour of the Crown ought never to be subject to laches. This is a broad and sweeping declaration, especially considering the conclusion of this Court in *Wewaykum* that breaches of the fiduciary duty could be subject to laches. A fiduciary duty is one duty derived from the honour of the Crown. It is fundamentally inconsistent to permit certain claims (e.g. those based on "solemn obligations" contained in Constitutional documents) derived from the honour of the Crown to escape the imputation of laches while other claims (e.g. those based on the more well-established and narrowly defined fiduciary obligation) are not given such a wide berth. Moreover, this holding will encourage litigants to reframe claims in order to bring themselves within the scope of this new, more [page737] generous exception to the doctrine of laches, which - particularly in light of the ambiguities associated with the new duty - creates uncertainty in the law.

301 My colleagues rely on the holding in *Ontario Hydro v. Ontario (Labour Relations Board)*, [1993] 3 S.C.R. 327, to support their position. In my view, reference to that case is inapposite. Division of powers claims, such as the one considered in *Ontario Hydro*, are based on ongoing legal boundaries between federal and provincial jurisdiction. This claim based on the honour of the Crown is grounded in factual circumstances that occurred over 100 years ago. Just as *Kingstreet* and *Ravndahl* distinguish claims based on factual circumstances from those based on ongoing statutory issues in the context of limitations statutes, so too should this case be distinguished from *Ontario Hydro*.

(6) Conclusion on Laches

302 In my view, both branches of laches are satisfied. The Crown is entitled to the benefit of this equitable defence generally and specifically in relation to claims arising from the honour of the Crown in implementing constitutional provisions. As La Forest J. stated in *M. (K.) v. M. (H.)*, at p. 78, "[u]ltimately, laches must be resolved as a matter of justice as between the parties". Both the Métis and the government are entitled to justice. As a matter of justice, laches applies and precludes granting the equitable remedy sought here.

IV. Conclusion

303 I would dismiss the appeal with costs.

[page738]

Appeal allowed in part with costs throughout, ROTHSTEIN *and* MOLDAVER JJ. *dissenting.*

Solicitors:

Solicitors for the appellants: Rosenbloom Aldridge Bartley & Rosling, Vancouver.

Solicitor for the respondent the Attorney General of Canada: Attorney General of Canada, Saskatoon.

Solicitor for the respondent the Attorney General of Manitoba: Attorney General of Manitoba, Winnipeg.

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

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

Solicitor for the intervener the Métis National Council: Métis National Council, Ottawa.

Solicitors for the intervener the Métis Nation of Alberta: JTM Law, Toronto.

Solicitors for the intervener the Métis Nation of Ontario: Pape Salter Teillet, Vancouver.

Solicitors for the intervener the Treaty One First Nations: Rath & Company, Priddis, Alberta.

Solicitors for the intervener the Assembly of First Nations: Arvay Finlay, Vancouver; Nahwegahbow, Corbiere, Rama, Ontario.

Tab 16

Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), [2005] 3 S.C.R. 388

Supreme Court Reports

Supreme Court of Canada

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

Heard: March 14, 2005;

Judgment: November 24, 2005.

File No.: 30246.

[2005] 3 S.C.R. 388 | *[2005] 3 R.C.S. 388* | *[2005] S.C.J. No. 71* | *[2005] A.C.S. no 71* | *2005 SCC 69*

Mikisew Cree First Nation, appellant; v. Sheila Copps, Minister of Canadian Heritage, and Thebacha Road Society, respondents, and Attorney General for Saskatchewan, Attorney General of Alberta, Big Island Lake Cree Nation, Lesser Slave Lake Indian Regional Council, Treaty 8 First Nations of Alberta, Treaty 8 Tribal Association, Blueberry River First Nations and Assembly of First Nations, interveners.

(70 paras.)

Appeal From:

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Case Summary

Catchwords:

Indians — Treaty rights — Crown's duty to consult — Crown exercising its treaty right and "taking up" surrendered lands to build winter road to meet regional transportation needs — Proposed road reducing territory over which Mikisew Cree First Nation would be entitled to exercise its treaty rights to hunt, fish and trap — Whether Crown had duty to consult Mikisew — If so, whether Crown discharged its duty — Treaty No. 8.

Catchwords:

Crown — Honour of Crown — Duty to consult and accommodate Aboriginal peoples

Catchwords:

Appeal — Role of intervener — New argument.

Summary:

Under Treaty 8, made in 1899, the First Nations who lived in the area surrendered to the Crown 840,000 square kilometres of what is now northern Alberta, northeastern British Columbia, northwestern Saskatchewan and the

southern portion of the Northwest Territories, an area whose size dwarfs France, exceeds Manitoba, Saskatchewan and Alberta and approaches the size of British Columbia. In exchange for this surrender, the First Nations were promised reserves and some other benefits including, most importantly to them, the rights to hunt, trap and fish throughout the land surrendered to the Crown except "such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes".

The Mikisew Reserve is located within Treaty 8 in what is now Wood Buffalo National Park. In 2000, the federal government approved a winter road, which was to run through the Mikisew's reserve, without consulting them. After the Mikisew protested, the road alignment was modified (but without consultation) to track around the boundary of the reserve. The total area of the road corridor is approximately 23 square kilometres. The Mikisew's objection to the road goes beyond the direct impact of closure to hunting and trapping of the area covered by the winter road and included the injurious affection it would have on their traditional lifestyle which was central to their culture. The Federal Court, Trial Division set aside the Minister's approval based on breach of the Crown's fiduciary duty to consult with the Mikisew adequately and granted an interlocutory injuction against constructing the winter road. The court held that the standard public notices and open houses which were given were not sufficient and that the Mikisew were entitled to a distinct consultation process. The Federal Court of Appeal set aside the decision and found, on the basis of an argument put forward by an intervener, that the winter road was properly seen as a "taking up" of surrendered land pursuant to the treaty rather than an infringement of it. This judgment was delivered before the release of this Court's decisions in *Haida Nation* and *Taku River Tlingit First Nation*.

Held: The appeal should be allowed. The duty of consultation, which flows from the honour of the Crown, was breached.

[page390]

The government's approach, rather than advancing the process of reconciliation between the Crown and the Treaty 8 First Nations, undermined it. [para. 4]

When the Crown exercises its Treaty 8 right to "take up" land, its duty to act honourably dictates the content of the process. The question in each case is to determine the degree to which conduct contemplated by the Crown would adversely affect the rights of the aboriginal peoples to hunt, fish and trap so as to trigger the duty to consult. Accordingly, where the court is dealing with a proposed "taking up", it is not correct to move directly to a *Sparrow* justification analysis even if the proposed measure, if implemented, would infringe a First Nation treaty right. The Court must first consider the process and whether it is compatible with the honour of the Crown. [paras. 33-34] [para. 59]

The Crown, while it has a treaty right to "take up" surrendered lands, is nevertheless under the obligation to inform itself on the impact its project will have on the exercise by the Mikisew of their treaty hunting, fishing 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 their concerns. The duty to consult is triggered at a low threshold, but adverse impact is a matter of degree, as is the extent of the content of the Crown's duty. Under Treaty 8, the First Nation treaty rights to hunt, fish and trap are therefore limited not only by geographical limits and specific forms of government regulation, but also by the Crown's right to take up lands under the treaty, subject to its duty to consult and, if appropriate, to accommodate the concerns of the First Nation affected. [paras. 55-56]

Here, the duty to consult is triggered. The impacts of the proposed road were clear, established, and demonstrably adverse to the continued exercise of the Mikisew hunting and trapping rights over the lands in question. Contrary to the Crown's argument, the duty to consult was not discharged in 1899 by the pre-treaty negotiations. [paras. 54-55]

However, given that the Crown is proposing to build a fairly minor winter road on surrendered lands where the Mikisew treaty rights are expressly subject to the [page391] "taking up" limitation, the content of the Crown's duty of consultation in this case lies at the lower end of the spectrum. The Crown is required to provide notice to the Mikisew and to engage directly with them. This engagement should include the provision of information about the project, addressing what the Crown knew to be the Mikisew's interests and what the Crown anticipated might be

the potential adverse impact on those interests. The Crown must also solicit and listen carefully to the Mikisew's concerns, and attempt to minimize adverse impacts on its treaty rights. [para. 64]

The Crown did not discharge its obligations when it unilaterally declared the road re-alignment would be shifted from the reserve itself to a track along its boundary. It failed to demonstrate an intention of substantially addressing aboriginal concerns through a meaningful process of consultation. [paras. 64-67]

The Attorney General of Alberta did not overstep the proper role of an intervener when he raised before the Federal Court of Appeal a fresh argument on the central issue of whether the Minister's approval of the winter road infringed Treaty 8. It is always open to an intervener to put forward any legal argument in support of what it submits is the correct legal conclusion on an issue properly before the court provided that in doing so its legal argument does not require additional facts not proven in evidence at trial, or raise an argument that is otherwise unfair to one of the parties. [para. 40]

Cases Cited

Considered: *R. v. Badger*, [1996] 1 S.C.R. 771; *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550, 2004 SCC 74; **distinguished:***R. v. Sparrow*, [1990] 1 S.C.R. 1075; **referred to:** *R. v. Sioui*, [1990] 1 S.C.R. 1025; *R. v. Marshall*, [1999] 3 S.C.R. 456; *R. v. Marshall*, [2005] 2. S.C.R. 220, 2005 SCC 43; *Halfway River First Nation v. British Columbia (Ministry of Forests)* (1999), 178 D.L.R. (4th) 666, 1999 BCCA 470; *R. v. Morgentaler*, [1993] 1 S.C.R. 462; *Lamb v. Kincaid* (1907), 38 S.C.R. 516; *Athey v. Leonati*, [1996] 3 S.C.R. 458; *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, [2002] 1 S.C.R. 678, 2002 SCC 19; *Province of Ontario v. Dominion of [page392] Canada* (1895), 25 S.C.R. 434; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245, 2002 SCC 79; *McInerney v. MacDonald*, [1992] 2 S.C.R. 138; *R. v. Smith*, [1935] 2 W.W.R. 433.

Statutes and Regulations Cited

Constitution Act, 1982, s. 35.

Natural Resources Transfer Agreement, 1930 (Alberta) (Schedule of *Constitution Act, 1930*, R.S.C. 1985, App. II, No. 26), para. 10.

Wood Buffalo National Park Game Regulations, SOR/78-830, s. 36(5).

Treaties and Proclamations

Royal Proclamation (1763), R.S.C. 1985, App. II, No. 1.

Treaty No. 8 (1899).

Authors Cited

Mair, Charles. *Through the Mackenzie Basin: A Narrative of the Athabasca and Peace River Treaty Expedition of 1899*. Toronto: William Briggs, 1908.

Report of Commissioners for Treaty No. 8, in *Treaty No. 8 made June 21, 1899 and Adhesions, Reports, etc.*, reprinted from 1899 edition. Ottawa: Queen's Printer, 1966.

History and Disposition:

APPEAL from a judgment of the Federal Court of Appeal (Rothstein, Sexton and Sharlow JJ.A.), *[2004] 3 F.C.R. 436*, *(2004), 236 D.L.R. (4th) 648*, *317 N.R. 258*, *[2004] 2 C.N.L.R. 74*, *[2004] F.C.J. No. 277* (QL), *2004 FCA 66*, reversing a judgment of Hansen J. *(2001), 214 F.T.R. 48*, *[2002] 1 C.N.L.R. 169*, *[2001] F.C.J. No. 1877* (QL), *2001 FCT 1426*. Appeal allowed.

Counsel

Jeffrey R. W. Rath and Allisun Taylor Rana, for the appellant.

Cheryl J. Tobias and Mark R. Kindrachuk, Q.C., for the respondent Sheila Copps, Minister of Canadian Heritage.

No one appeared for the respondent the Thebacha Road Society.

P. Mitch McAdam, for the intervener the Attorney General for Saskatchewan.

Robert J. Normey and Angela J. Brown, for the intervener the Attorney General of Alberta.

[page393]

James D. Jodouin and Gary L. Bainbridge, for the intervener the Big Island Lake Cree Nation.

C. Allan Donovan and Bram Rogachevsky, for the intervener the Lesser Slave Lake Indian Regional Council.

Robert C. Freedman and Dominique Nouvet, for the intervener the Treaty 8 First Nations of Alberta.

E. Jack Woodward and Jay Nelson, for the intervener the Treaty 8 Tribal Association.

Thomas R. Berger, Q.C., and Gary A. Nelson, for the intervener the Blueberry River First Nations.

Jack R. London, Q.C., and Bryan P. Schwartz, for the intervener the Assembly of First Nations.

The judgment of the Court was delivered by

BINNIE J.

1 The fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions. The management of these relationships takes place in the shadow of a long history of grievances and misunderstanding. The multitude of smaller grievances created by the indifference of some government officials to aboriginal people's concerns, and

the lack of respect inherent in that indifference has been as destructive of the process of reconciliation as some of the larger and more explosive controversies. And so it is in this case.

2 Treaty 8 is one of the most important of the post-Confederation treaties. Made in 1899, the First Nations who lived in the area surrendered to the Crown 840,000 square kilometres of what is now northern Alberta, northeastern British Columbia, northwestern Saskatchewan and the southern portion of the Northwest Territories. Some idea of the size of this surrender is given by the fact that it dwarfs France (543,998 square kilometres), [page394] exceeds the size of Manitoba (650,087 square kilometres), Saskatchewan (651,900 square kilometres) and Alberta (661,185 square kilometres) and approaches the size of British Columbia (948,596 square kilometres). In exchange for this surrender, the First Nations were promised reserves and some other benefits including, most importantly to them, the following rights of hunting, trapping, and fishing:

> And Her Majesty the Queen hereby agrees with the said Indians that they shall have right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as before described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes. [Emphasis added.]
>
> (*Report of Commissioners for Treaty No. 8* (1899), at p. 12)

3 In fact, for various reasons (including lack of interest on the part of First Nations), sufficient land was not set aside for reserves for the Mikisew Cree First Nation (the "Mikisew") until the 1986 Treaty Land Entitlement Agreement, 87 years after Treaty 8 was made. Less than 15 years later, the federal government approved a 118-kilometre winter road that, as originally conceived, ran through the new Mikisew First Nation Reserve at Peace Point. The government did not think it necessary to engage in consultation directly with the Mikisew before making this decision. After the Mikisew protested, the winter road alignment was changed to track the boundary of the Peace Point reserve instead of running through it, again without consultation with the Mikisew. The modified road alignment traversed the traplines of approximately 14 Mikisew families who reside in the area near the proposed road, and others who may trap in that area although they do not live there, and the hunting grounds of as many as 100 Mikisew people whose hunt (mainly of moose), the Mikisew say, would be adversely affected. The fact the proposed winter road directly affects only about 14 Mikisew trappers and perhaps 100 hunters may not seem [page395] very dramatic (unless you happen to be one of the trappers or hunters in question) but, in the context of a remote northern community of relatively few families, it is significant. Beyond that, however, the principle of consultation in advance of interference with existing treaty rights is a matter of broad general importance to the relations between aboriginal and non-aboriginal peoples. It goes to the heart of the relationship and concerns not only the Mikisew but other First Nations and non-aboriginal governments as well.

4 In this case, the relationship was not properly managed. Adequate consultation in advance of the Minister's approval did not take place. The government's approach did not advance the process of reconciliation but undermined it. The duty of consultation which flows from the honour of the Crown, and its obligation to respect the existing treaty rights of aboriginal peoples (now entrenched in s. 35 of the *Constitution Act, 1982*), was breached. The Mikisew appeal should be allowed, the Minister's approval quashed, and the matter returned to the Minister for further consultation and consideration.

I. Facts

5 About 5 percent of the territory surrendered under Treaty 8 was set aside in 1922 as Wood Buffalo National Park. The Park was created principally to protect the last remaining herds of wood bison (or buffalo) in northern Canada and covers 44,807 square kilometres of land straddling the boundary between northern Alberta and southerly parts of the Northwest Territories. It is designated a UNESCO World Heritage Site. The Park itself is larger than Switzerland.

[page396]

6 At present, it contains the largest free-roaming, self-regulating bison herd in the world, the last remaining natural nesting area for the endangered whooping crane, and vast undisturbed natural boreal forests. More to the point, it has been inhabited by First Nation peoples for more than over 8,000 years, some of whom still earn a subsistence living by hunting, fishing and commercial trapping within the Park boundaries. The Park includes the traditional lands of the Mikisew. As a result of the Treaty Land Entitlement Agreement, the Peace Point Reserve was formally excluded from the Park in 1988 but of course is surrounded by it.

7 The members of the Mikisew Cree First Nation are descendants of the Crees of Fort Chipewyan who signed Treaty 8 on June 21, 1899. It is common ground that its members are entitled to the benefits of Treaty 8.

A. *The Winter Road Project*

8 The proponent of the winter road is the respondent Thebacha Road Society, whose members include the Town of Fort Smith (located in the Northwest Territories on the northeastern boundary of Wood Buffalo National Park, where the Park headquarters is located), the Fort Smith Métis Council, the Salt River First Nation, and Little Red River Cree First Nation. The advantage of the winter road for these people is that it would provide direct winter access among a number of isolated northern communities and to the Alberta highway system to the south. The trial judge accepted that the government's objective was to meet "regional transportation needs": *(2001), 214 F.T.R. 48*, *2001 FCT 1426*, at para. 115.

B. *The Consultation Process*

9 According to the trial judge, most of the communications relied on by the Minister to demonstrate appropriate consultation were instances of the Mikisew's being provided with standard information about the proposed road in the same form and substance as the communications being distributed to the general public of interested [page397] stakeholders. Thus Parks Canada acting for the Minister, provided the Mikisew with the Terms of Reference for the environmental assessment on January 19, 2000. The Mikisew were advised that open house sessions would take place over the summer of 2000. The Minister says that the first formal response from the Mikisew did not come until October 10, 2000, some two months after the deadline she had imposed for "public" comment. Chief Poitras stated that the Mikisew did not formally participate in the open houses, because "... an open house is not a forum for us to be consulted adequately".

10 Apparently, Parks Canada left the proponent Thebacha Road Society out of the information loop as well. At the end of January 2001, it advised Chief Poitras that it had just been informed that the Mikisew did not support the road. Up to that point, Thebacha had been led to believe that the Mikisew had no objection to the road's going through the reserve. Chief Poitras wrote a further letter to the Minister on January 29, 2001 and received a standard-form response letter from the Minister's office stating that the correspondence "will be given every consideration".

11 Eventually, after several more miscommunications, Parks Canada wrote Chief Poitras on April 30, 2001, stating in part: "I apologize to you and your people for the way in which the consultation process unfolded concerning the proposed winter road and any resulting negative public perception of the [Mikisew Cree First Nation]". At that point, in fact, the decision to approve the road with a modified alignment had already been taken.

12 On May 25, 2001, the Minister announced on the Parks Canada website that the Thebacha Road Society was authorized to build a winter road 10 metres wide with posted speed limits ranging from 10 to 40 kilometres per hour. The approval was said to be in accordance with "Parks Canada plans and policy" and "other federal laws and regulations". [page398] No reference was made to any obligations to the Mikisew.

13 The Minister now says the Mikisew ought not to be heard to complain about the process of consultation because they declined to participate in the public process that took place. Consultation is a two-way street, she

says. It was up to the Mikisew to take advantage of what was on offer. They failed to do so. In the Minister's view, she did her duty.

14 The proposed winter road is wide enough to allow two vehicles to pass. Pursuant to s. 36(5) of the *Wood Buffalo National Park Game Regulations*, SOR/78-830, creation of the road would trigger a 200-metre wide corridor within which the use of firearms would be prohibited. The total area of this corridor would be approximately 23 square kilometres.

15 The Mikisew objection goes beyond the direct impact of closure of the area covered by the winter road to hunting and trapping. The surrounding area would be, the trial judge found, injuriously affected. Maintaining a traditional lifestyle, which the Mikisew say is central to their culture, depends on keeping the land around the Peace Point reserve in its natural condition and this, they contend, is essential to allow them to pass their culture and skills on to the next generation of Mikisew. The detrimental impact of the road on hunting and trapping, they argue, may simply prove to be one more incentive for their young people to abandon a traditional lifestyle and turn to other modes of living in the south.

16 The Mikisew applied to the Federal Court to set aside the Minister's approval based on their view of the Crown's fiduciary duty, claiming that the Minister owes "a fiduciary and constitutional duty to adequately consult with Mikisew Cree First Nation with regard to the construction of the road" (trial judge, at para. 26).

[page399]

17 An interlocutory injunction against construction of the winter road was issued by the Federal Court, Trial Division on August 27, 2001.

II. Relevant Enactments

18 *Constitution Act, 1982*

> **35.** (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

III. Judicial History

A. *Federal Court, Trial Division* (*(2001), 214 F.T.R. 48*, *2001 FCT 1426*)

19 Hansen J. held that the lands included in Wood Buffalo National Park were not "taken up" by the Crown within the meaning of Treaty 8 because the use of the lands as a national park did not constitute a "visible use" incompatible with the existing rights to hunt and trap (*R. v. Badger*, *[1996] 1 S.C.R. 771*; *R. v. Sioui*, *[1990] 1 S.C.R. 1025*). The proposed winter road and its 200-metre "[no] firearm" corridor would adversely impact the Mikisew's treaty rights. These rights received constitutional protection in 1982, and any infringements must be justified in accordance with the test in *R. v. Sparrow*, *[1990] 1 S.C.R. 1075*. In Hansen J.'s view, the Minister's decision to approve the road infringed the Mikisew's Treaty 8 rights and could not be justified under the *Sparrow* test.

20 In particular, the trial judge held that the standard public notices and open houses which were given were not sufficient. The Mikisew were entitled to a distinct consultation process. She stated at paras. 170-71:

> The applicant complains that the mitigation measures attached to the Minister's decision were not developed in consultation with Mikisew and were not designed to minimize impacts on Mikisew's rights. I [page400] agree. Even the realignment, apparently adopted in response to Mikisew's objections, was not developed in consultation with Mikisew. The evidence does not establish that any consideration was given to whether the new route would minimize impacts on Mikisew's treaty rights. The evidence of Chief George Poitras highlighted an air of secrecy surrounding the realignment, a process that should have included a transparent consideration of Mikisew's concerns.

> Parks Canada admitted it did not consult with Mikisew about the route for the realignment, nor did it consider the impacts of the realignment on Mikisew trappers' rights.

21 Accordingly, the trial judge allowed the application for judicial review and quashed the Minister's approval.

B. *Federal Court of Appeal* ([2004] 3 F.C.R. 436, 2004 FCA 66)

22 Rothstein J.A., with whom Sexton J.A. agreed, allowed the appeal and restored the Minister's approval. He did so on the basis of an argument brought forward by the Attorney General of Alberta as an intervener on the appeal. The argument was that Treaty 8 expressly contemplated the "taking up" of surrendered lands for various purposes, including roads. The winter road was more properly seen as a "taking up" pursuant to the Treaty rather than an infringement of it. As Rothstein J.A. held:

> Where a limitation expressly provided for by a treaty applies, there is no infringement of the treaty and thus no infringement of section 35. This is to be contrasted with the case where the limitations provided by the treaty do not apply but the government nevertheless seeks to limit the treaty right. In such a case, the *Sparrow* test must be satisfied in order for the infringement to be constitutionally permissible. [para. 21]

Rothstein J.A. also held that there was no obligation on the Minister to consult with the Mikisew about the road, although to do so would be "good practice" (para. 24). (This opinion was delivered before the release of this Court's decisions in *Haida Nation v. British Columbia (Minister of Forests)*, [page401] [2004] 3 S.C.R. 511, 2004 SCC 73, and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550, 2004 SCC 74.)

23 Sharlow J.A., in dissenting reasons, agreed with the trial judge that the winter road approval was itself a *prima facie* infringement of the Treaty 8 rights and that the infringement had not been justified under the *Sparrow* test. The Crown's obligation as a fiduciary must be considered. The failure of the Minister's staff at Parks Canada to engage in meaningful consultation was fatal to the Crown's attempt at justification. She wrote:

> In this case, there is no evidence of any good faith effort on the part of the Minister to understand or address the concerns of Mikisew Cree First Nation about the possible effect of the road on the exercise of their Treaty 8 hunting and trapping rights. It is significant, in my view, that Mikisew Cree First Nation was not even told about the realignment of the road corridor to avoid the Peace Point Reserve until after it had been determined that the realignment was possible and reasonable, in terms of environmental impact, and after the road was approved. That invites the inference that the responsible Crown officials believed that as long as the winter road did not cross the Peace Point Reserve, any further objections of the Mikisew Cree First Nation could be disregarded. Far from meaningful consultation, that indicates a complete disregard for the concerns of Mikisew Cree First Nation about the breach of their Treaty 8 rights. [para. 152]

Sharlow J.A. would have dismissed the appeal.

IV. Analysis

24 The post-Confederation numbered treaties were designed to open up the Canadian west and northwest to settlement and development. Treaty 8 itself recites that "the said Indians have been notified and informed by Her Majesty's said Commission that it is Her desire to open for settlement, immigration, trade, travel, mining, lumbering and such other [page402] purposes as to Her Majesty may seem meet". This stated purpose is reflected in a corresponding limitation on the Treaty 8 hunting, fishing and trapping rights to exclude such "tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes". The "other purposes" would be at least as broad as the purposes listed in the recital, mentioned above, including "travel".

25 There was thus from the outset an uneasy tension between the First Nations' essential demand that they

continue to be as free to live off the land after the treaty as before and the Crown's expectation of increasing numbers of non-aboriginal people moving into the surrendered territory. It was seen from the beginning as an ongoing relationship that would be difficult to manage, as the Commissioners acknowledged at an early Treaty 8 negotiation at Lesser Slave Lake in June 1899:

> The white man is bound to come in and open up the country, and we come before him to explain the relations that must exist between you, and thus prevent any trouble.
>
> (C. Mair, *Through the Mackenzie Basin: A Narrative of the Athabasca and Peace River Treaty Expedition of 1899*, at p. 61)

As Cory J. explained in *Badger*, at para. 57, "[t]he Indians understood that land would be taken up for homesteads, farming, prospecting and mining and that they would not be able to hunt in these areas or to shoot at the settlers' farm animals or buildings".

26 The hunting, fishing and trapping rights were not solely for the benefit of First Nations people. It was in the Crown's interest to keep the aboriginal people living off the land, as the Commissioners themselves acknowledged in their Report on Treaty 8 dated September 22, 1899:

[page403]

> We pointed out that the Government could not undertake to maintain Indians in idleness; that the same means of earning a livelihood would continue after the treaty as existed before it, and that the Indians would be expected to make use of them. [p. 5]

27 Thus none of the parties in 1899 expected that Treaty 8 constituted a finished land use blueprint. Treaty 8 signalled the advancing dawn of a period of transition. The key, as the Commissioners pointed out, was to "explain the relations" that would govern future interaction "and thus prevent any trouble" (Mair, at p. 61).

A. *Interpretation of the Treaty*

28 The interpretation of the treaty "must be realistic and reflect the intention[s] of both parties, not just that of the [First Nation]" (*Sioui*, at p. 1069). As a majority of the Court stated in *R. v. Marshall*, [1999] 3 S.C.R. 456, at para. 14:

> The Indian parties did not, for all practical purposes, have the opportunity to create their own written record of the negotiations. Certain assumptions are therefore made about the Crown's approach to treaty making (honourable) which the Court acts upon in its approach to treaty interpretation (flexible) as to the existence of a treaty ... the completeness of any written record ... and the interpretation of treaty terms once found to exist. The bottom line is the Court's obligation is to "choose from among the various possible interpretations of the *common* intention [at the time the treaty was made] the one which best reconciles" the [First Nation] interests and those of the Crown. [Emphasis in original; citations omitted.]

See also *R. v. Marshall*, [2005] 2 S.C.R. 220, 2005 SCC 43, *per* McLachlin C.J. at paras. 22-24, and *per* LeBel J. at para. 115.

29 The Minister is therefore correct to insist that the clause governing hunting, fishing and trapping cannot be isolated from the treaty as a whole, but must be read in the context of its underlying purpose, as intended by both the Crown and the First [page404] Nations peoples. Within that framework, as Cory J. pointed out in *Badger*,

> the words in the treaty must not be interpreted in their strict technical sense nor subjected to rigid modern rules of construction. Rather, they must be interpreted in the sense that they would naturally have been understood by the Indians at the time of the signing. [para. 52]

30 In the case of Treaty 8, it was contemplated by all parties that "from time to time" portions of the surrendered land would be "taken up" and transferred from the inventory of lands over which the First Nations had treaty rights to hunt, fish and trap, and placed in the inventory of lands where they did not. Treaty 8 lands lie to the north of Canada and are largely unsuitable for agriculture. The Commissioners who negotiated Treaty 8 could therefore express confidence to the First Nations that, as previously mentioned, "the same means of earning a livelihood would continue after the treaty as existed before it" (p. 5).

31 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.

32 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 [page405] 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.

B. *The Process of Treaty Implementation*

33 Both the historical context and the inevitable tensions underlying implementation of Treaty 8 demand a *process* by which lands may be transferred from the one category (where the First Nations retain rights to hunt, fish and trap) to the other category (where they do not). The content of the process is dictated by the duty of the Crown to act honourably. Although *Haida Nation* was not a treaty case, McLachlin C.J. pointed out, at paras. 19 and 35:

> 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 [page406] 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".
>
> ...
>
> 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.

34 In the case of a treaty the Crown, as a party, will always have notice of its contents. The question in each case will therefore be to determine the degree to which conduct contemplated by the Crown would adversely affect those rights so as to trigger the duty to consult. *Haida Nation* and *Taku River* set a low threshold. The flexibility lies not in the trigger ("might adversely affect it") but in the variable content of the duty once triggered. At the low end, "the

only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice" (*Haida Nation*, at para. 43). The Mikisew say that even the low end content was not satisfied in this case.

C. *The Mikisew Legal Submission*

35 The appellant, the Mikisew, essentially reminded the Court of what was said in *Haida Nation* and *Taku River*. This case, the Mikisew say, is stronger. In those cases, unlike here, the aboriginal interest to the lands was asserted but not yet proven. In this case, the aboriginal interests are protected by Treaty 8. They are established legal facts. As [page407] in *Haida Nation*, the trial judge found the aboriginal interest was threatened by the proposed development. If a duty to consult was found to exist in *Haida Nation* and *Taku River*, then, *a fortiori*, the Mikisew argue, it must arise here and the majority judgment of the Federal Court of Appeal was quite wrong to characterise consultation between governments and aboriginal peoples as nothing more than a "good practice" (para. 24).

D. *The Minister's Response*

36 The respondent Minister seeks to distinguish *Haida Nation* and *Taku River*. Her counsel advances three broad propositions in support of the Minister's approval of the proposed winter road.

1. In "taking up" the 23 square kilometres for the winter road, the Crown was doing no more than Treaty 8 entitled it to do. The Crown as well as First Nations have rights under Treaty 8. The exercise by the Crown of *its* Treaty right to "take up" land is not an infringement of the Treaty but the performance of it.
2. The Crown went through extensive consultations with First Nations in 1899 at the time Treaty 8 was negotiated. Whatever duty of accommodation was owed to First Nations was discharged at that time. The terms of the Treaty do not contemplate further consultations whenever a "taking up" occurs.
3. In the event further consultation was required, the process followed by the Minister through Parks Canada in this case was sufficient.

37 For the reasons that follow, I believe that each of these propositions must be rejected.

[page408]

(1) <u>In "taking up" Land for the Winter Road the Crown Was Doing No More Than It Was Entitled To Do Under the Treaty</u>

38 The majority judgment in the Federal Court of Appeal held that "[w]ith the exceptions of cases where the Crown has taken up land in bad faith or has taken up so much land that no meaningful right to hunt remains, taking up land for a purpose express or necessarily implied in the treaty itself cannot be considered an infringement of the treaty right to hunt" (para. 19).

39 The "Crown rights" argument was initially put forward in the Federal Court of Appeal by the Attorney General of Alberta as an intervener. The respondent Minister advised the Federal Court of Appeal that, while she did not dispute the argument, "[she] was simply not relying on it" (para. 3). As a preliminary objection, the Mikisew say that an intervener is not permitted "to widen or add to the points in issue": *R. v. Morgentaler*, *[1993] 1 S.C.R. 462*, at p. 463. Therefore it was not open to the Federal Court of Appeal (or this Court) to decide the case on this basis.

(a) *Preliminary Objection: Did the Attorney General of Alberta Overstep the Proper Role of an Intervener?*

40 This branch of the Mikisew argument is, with respect, misconceived. In their application for judicial review, the Mikisew argued that the Minister's approval of the winter road infringed Treaty 8. The infringement issue has been central to the proceedings. It is always open to an intervener to put forward any legal argument in support of what it submits is the correct legal conclusion on an issue properly before the Court, provided that in doing so its legal argument does not require additional facts, not proven in evidence at trial or raise an argument that is otherwise unfair to one of the parties. An intervener is in no worse a position than a party who belatedly discovers some legal [page409] argument that it ought to have raised earlier in the proceedings but did not, as in *Lamb v. Kincaid* *(1907), 38 S.C.R. 516*, where Duff J. stated, at p. 539:

> A court of appeal, I think, should not give effect to such a point taken for the first time in appeal, unless it be clear that, had the question been raised at the proper time, no further light could have been thrown upon it.

See also *Athey v. Leonati*, *[1996] 3 S.C.R. 458*, at paras. 51-52.

41 Even granting that the Mikisew can fairly say the Attorney General of Alberta frames the non-infringement argument differently than was done by the federal Minister at trial, the Mikisew have still not identified any prejudice. Had the argument been similarly formulated at trial, how could "further light" have been thrown on it by additional evidence? The historical record was fully explored at trial. At this point the issue is one of the rules of treaty interpretation, not evidence. It thus comes within the rule stated in *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, *[2002] 1 S.C.R. 678*, *2002 SCC 19*, that "[t]he Court is free to consider a new issue of law on the appeal where it is able to do so without procedural prejudice to the opposing party and where the refusal to do so would risk an injustice" (para. 33). Here the Attorney General of Alberta took the factual record as he found it. The issue of treaty infringement has always been central to the case. Alberta's legal argument is not one that should have taken the Mikisew by surprise. In these circumstances it would be intolerable if the courts were precluded from giving effect to a correct legal analysis just because it came later rather than sooner and from an intervener rather than a party. To close our eyes to the argument would be to "risk an injustice".

[page410]

(b) *The Content of Treaty 8*

42 The "hunting, trapping and fishing clause" of Treaty 8 was extensively reviewed by this Court in *Badger*. In that case Cory J. pointed out that "even by the terms of Treaty No. 8, the Indians' right to hunt for food was circumscribed by both geographical limitations and by specific forms of government regulation" (para. 37). The members of the First Nations, he continued, "would have understood that land had been 'required or taken up' when it was being put to a [visible] use which was incompatible with the exercise of the right to hunt" (para. 53).

> [T]he oral promises made by the Crown's representatives and the Indians' own oral history indicate that it was understood that land would be taken up and occupied in a way which precluded hunting when it was put to a visible use that was incompatible with hunting. Turning to the case law, it is clear that the courts have also accepted this interpretation and have concluded that whether or not land has been taken up or occupied is a question of fact that must be resolved on a case-by-case basis. [para. 58]

43 While *Badger* noted the "geographic limitation" to hunting, fishing and trapping rights, it did not (as it did not need to) discuss the process by which "from time to time" land would be "taken up" and thereby excluded from the exercise of those rights. The actual holding in *Badger* was that the Alberta licensing regime sought to be imposed on all aboriginal hunters within the Alberta portion of Treaty 8 lands infringed Treaty 8, even though the treaty right was expressly made subject to "regulations as may from time to time be made by the government". The Alberta licensing scheme denied to "holders of treaty rights as modified by the [*Natural Resources Transfer Agreement, 1930*] the very means of exercising those rights" (para. 94). It was thus an attempted exercise of regulatory power that went beyond what was reasonably within the contemplation of the parties to the treaty in 1899. (I note

parenthetically that the *Natural Resources Transfer Agreement*, 1930 is not at issue in this case as the Mikisew reserve is vested in Her [page411] Majesty in Right of Canada. Paragraph 10 of the Agreement provides that after-created reserves "shall thereafter be administered by Canada in the same way in all respects as if they had never passed to the Province under the provisions hereof".)

44 The Federal Court of Appeal purported to follow *Badger* in holding that the hunting, fishing and trapping rights would be infringed only "where the Crown has taken up land in bad faith or has taken up so much land that no meaningful right to hunt remains" (para. 18). With respect, I cannot agree with this implied rejection of the Mikisew procedural rights. At this stage the winter road is no more than a contemplated change of use. The proposed use would, if carried into execution, reduce the territory over which the Mikisew would be entitled to exercise their Treaty 8 rights. Apart from everything else, there would be no hunting at all within the 200-metre road corridor. More broadly, as found by the trial judge, the road would injuriously affect the exercise of these rights in the surrounding bush. As the Parks Canada witness, Josie Weninger, acknowledged in cross-examination:

> Q: But roads, in effect, change the pattern of moose and other wildlife within the Park and that's been what Parks Canada observed in the past with regards to other roads, correct?
>
> A: It is documented that roads do impact. I would be foolish if I said they didn't.

The Draft Environmental Assessment Report acknowledged the road could potentially result in a diminution in quantity of the Mikisew harvest of wildlife, as fewer furbearers (including fisher, muskrat, marten, wolverine and lynx) will be caught in their traps. Second, in qualitative terms, the more lucrative or rare species of furbearers may decline in population. Other potential impacts [page412] include fragmentation of wildlife habitat, disruption of migration patterns, loss of vegetation, increased poaching because of easier motor vehicle access to the area and increased wildlife mortality due to motor vehicle collisions. While *Haida Nation* was decided after the release of the Federal Court of Appeal reasons in this case, it is apparent that the proposed road will adversely affect the existing Mikisew hunting and trapping rights, and therefore that the "trigger" to the duty to consult identified in *Haida Nation* is satisfied.

45 The Minister seeks to extend the *dictum* of Rothstein J.A. by asserting, at para. 96 of her factum, that the test ought to be "whether, after the taking up, it still remains reasonably practicable, within the Province as a whole, for the Indians to hunt, fish and trap for food [to] the extent that they choose to do so" (emphasis added). This cannot be correct. It suggests that a prohibition on hunting at Peace Point would be acceptable so long as decent hunting was still available in the Treaty 8 area north of Jasper, about 800 kilometres distant across the province, equivalent to a commute between Toronto and Quebec City (809 kilometres) or Edmonton and Regina (785 kilometres). One might as plausibly invite the truffle diggers of southern France to try their luck in the Austrian Alps, about the same distance as the journey across Alberta deemed by the Minister to be an acceptable fulfilment of the promises of Treaty 8.

46 The Attorney General of Alberta tries a slightly different argument, at para. 49 of his factum, adding a *de minimus* element to the treaty-wide approach:

> In this case the amount of land to be taken up to construct the winter road is 23 square kilometres out of 44,807 square kilometres of Wood Buffalo National [page413] Park and out of 840,000 square kilometres encompassed by Treaty No. 8. As Rothstein J.A. found, this is not a case where a meaningful right to hunt no longer remains.

47 The arguments of the federal and Alberta Crowns simply ignore the significance and practicalities of a First

Nation's traditional territory. Alberta's 23 square kilometre argument flies in the face of the injurious affection of surrounding lands as found by the trial judge. More significantly for aboriginal people, as for non-aboriginal people, location is important. Twenty-three square kilometres alone is serious if it includes the claimants' hunting ground or trapline. While the Mikisew may have rights under Treaty 8 to hunt, fish and trap throughout the Treaty 8 area, it makes no sense from a practical point of view to tell the Mikisew hunters and trappers that, while their own hunting territory and traplines would now be compromised, they are entitled to invade the traditional territories of other First Nations distant from their home turf (a suggestion that would have been all the more impractical in 1899). The Chipewyan negotiators in 1899 were intensely practical people, as the Treaty 8 Commissioners noted in their report (at p. 5):

> The Chipewyans confined themselves to asking questions and making brief arguments. They appeared to be more adept at cross-examination than at speech-making, and the Chief at Fort Chipewyan displayed considerable keenness of intellect and much practical sense in pressing the claims of his band.

Badger recorded that a large element of the Treaty 8 negotiations were the assurances of *continuity* in traditional patterns of economic activity. Continuity respects traditional patterns of activity and occupation. The Crown promised that the Indians' rights to hunt, fish and trap would continue "after the treaty as existed before it" (p. 5). This promise is not honoured by dispatching the Mikisew to territories far from their traditional hunting grounds and traplines.

[page414]

48 What Rothstein J.A. actually said at para. 18 is as follows:

> With the exceptions of cases where the Crown has taken up land in bad faith or has taken up so much land that no meaningful right to hunt remains, taking up land for a purpose express or necessarily implied in the treaty itself cannot be considered an infringement of the treaty right to hunt. [Emphasis added.]

The "meaningful right to hunt" is not ascertained on a treaty-wide basis (all 840,000 square kilometres of it) but in relation to the territories over which a First Nation traditionally hunted, fished and trapped, and continues to do so today. If the time comes that in the case of a particular Treaty 8 First Nation "no meaningful right to hunt" remains over *its* traditional territories, the significance of the oral promise that "the same means of earning a livelihood would continue after the treaty as existed before it" would clearly be in question, and a potential action for treaty infringement, including the demand for a *Sparrow* justification, would be a legitimate First Nation response.

(c) *Unilateral Crown Action*

49 There is in the Minister's argument a strong advocacy of unilateral Crown action (a sort of "this is surrendered land and we can do with it what we like" approach) which not only ignores the mutual promises of the treaty, both written and oral, but also is the antithesis of reconciliation and mutual respect. It is all the more extraordinary given the Minister's acknowledgment at para. 41 of her factum that "[i]n many if not all cases the government will not be able to appreciate the effect a proposed taking up will have on the Indians' exercise of hunting, fishing and trapping rights without consultation".

50 The Attorney General of Alberta denies that a duty of consultation can be an implied term of Treaty 8. He argues:

[page415]

> Given that a consultation obligation would mean that the Crown would be required to engage in meaningful consultations with any and all affected Indians, being nomadic individuals scattered across a vast expanse

> of land, every time it wished to utilize an individual plot of land or change the use of the plot, such a requirement would not be within the range of possibilities of the common intention of the parties.

The parties *did* in fact contemplate a difficult period of transition and sought to soften its impact as much as possible, and any administrative inconvenience incidental to managing the process was rejected as a defence in *Haida Nation* and *Taku River*. There is no need to repeat here what was said in those cases about the overarching objective of reconciliation rather than confrontation.

(d) *Honour of the Crown*

51 The duty to consult is grounded in the honour of the Crown, and it is not necessary for present purposes to invoke fiduciary duties. The honour of the Crown is itself a fundamental concept governing treaty interpretation and application that was referred to by Gwynne J. of this Court *as a treaty obligation* as far back as 1895, four years before Treaty 8 was concluded: *Province of Ontario v. Dominion of Canada* *(1895), 25 S.C.R. 434*, at pp. 511-12 *per* Gwynne J. (dissenting). While he was in the minority in his view that the treaty obligation to pay Indian annuities imposed a trust on provincial lands, nothing was said by the majority in that case to doubt that the honour of the Crown was pledged to the fulfilment of its obligations to the Indians. This had been the Crown's policy as far back as the *Royal Proclamation* of 1763, and is manifest in the promises recorded in the report of the Commissioners. The honour of the Crown exists as a source of obligation independently of treaties as well, of course. In *Sparrow, Delgamuukw v. British Columbia* *[1997] 3 S.C.R. 1010*, *Haida Nation* and *Taku River*, the "honour of the Crown" was invoked as a central principle in resolving aboriginal claims to consultation despite the absence of any treaty.

[page416]

52 It is not as though the Treaty 8 First Nations did not pay dearly for their entitlement to honourable conduct on the part of the Crown; surrender of the aboriginal interest in an area larger than France is a hefty purchase price.

(2) Did the Extensive Consultations with First Nations Undertaken in 1899 at the Time Treaty 8 Was Negotiated Discharge the Crown's Duty of Consultation and Accommodation?

53 The Crown's second broad answer to the Mikisew claim is that whatever had to be done was done in 1899. The Minister contends:

> While the government should consider the impact on the treaty right, there is no duty to accommodate in this context. The treaty itself constitutes the accommodation of the aboriginal interest; taking up lands, as defined above, leaves intact the essential ability of the Indians to continue to hunt, fish and trap. As long as that promise is honoured, the treaty is not breached and no separate duty to accommodate arises. [Emphasis added.]

54 This is not correct. Consultation that excludes from the outset any form of accommodation would be meaningless. The contemplated process is not simply one of giving the Mikisew an opportunity to blow off steam before the Minister proceeds to do what she intended to do all along. Treaty making is an important stage in the long process of reconciliation, but it is only a stage. What occurred at Fort Chipewyan in 1899 was not the complete discharge of the duty arising from the honour of the Crown, but a rededication of it.

55 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 [page417] 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.

56 In summary, the 1899 negotiations were the first step in a long journey that is unlikely to end any time soon. Viewed in light of the facts of this case, we should qualify *Badger*'s identification of two inherent limitations on Indian hunting, fishing and trapping rights under Treaty 8 (geographical limits and specific forms of government regulation) by a third, namely the Crown's right to take up lands under the treaty, which itself is subject to its duty to consult and, if appropriate, accommodate First Nations' interests before reducing the area over which their members may continue to pursue their hunting, trapping and fishing rights. Such a third qualification (not at issue in *Badger*) is fully justified by the history of the negotiations leading to Treaty 8, as well as by the honour of the Crown as previously discussed.

57 As stated at the outset, the honour of the Crown infuses every treaty and the performance of every treaty obligation. Treaty 8 therefore gives rise to Mikisew procedural rights (e.g. consultation) as well as substantive rights (e.g. hunting, fishing and trapping rights). Were the Crown to have barrelled ahead with implementation of the winter road without adequate consultation, it would have been in [page418] violation of its *procedural* obligations, quite apart from whether or not the Mikisew could have established that the winter road breached the Crown's *substantive* treaty obligations as well.

58 *Sparrow* holds not only that rights protected by s. 35 of the *Constitution Act, 1982* are not absolute, but also that their breach may be justified by the Crown in certain defined circumstances. The Mikisew rights under Treaty 8 are protected by s. 35. The Crown does not seek to justify in *Sparrow*-terms shortcomings in its consultation in this case. The question that remains, therefore, is whether what the Crown did here complied with its obligation to consult honourably with the Mikisew First Nation.

(3) Was the Process Followed by the Minister Through Parks Canada in this Case Sufficient?

59 Where, as here, the Court is dealing with a *proposed* "taking up" it is not correct (even if it is concluded that the proposed measure *if implemented* would infringe the treaty hunting and trapping rights) to move directly to a *Sparrow* analysis. The Court must first consider the *process* by which the "taking up" is planned to go ahead, and whether that process is compatible with the honour of the Crown. If not, the First Nation may be entitled to succeed in setting aside the Minister's order on the process ground whether or not the facts of the case would otherwise support a finding of infringement of the hunting, fishing and trapping rights.

60 I should state at the outset that the winter road proposed by the Minister was a permissible purpose for "taking up" lands under Treaty 8. It is obvious that the listed purposes of "settlement, mining, lumbering" and "trading" all require suitable transportation. The treaty does not spell out permissible "other purposes" but the term should not be read restrictively: *R. v. Smith*, *[1935] 2 W.W.R. 433*, [page419] (Sask. C.A.), at pp. 440-41. In any event, as noted earlier, the opening recital of Treaty 8 refers to "travel".

61 The question is whether the Minister and her staff pursued the permitted purpose of regional transportation needs in accordance with the Crown's duty to consult. The answer turns on the particulars of that duty shaped by the circumstances here. In *Delgamuukw*, the Court considered the duty to consult and accommodate in the context of an infringement of aboriginal title (at para. 168):

> 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. [Emphasis added.]

62 In *Haida Nation*, the Court pursued the kinds of duties that may arise in pre-proof claim situations, and McLachlin C.J. used the concept of a spectrum to frame her analysis (at paras. 43-45):

> 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 [page420] 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. ... [Emphasis added.]

63 The determination of the content of the duty to consult will, as *Haida* suggests, be governed by the context. One variable will be the specificity of the promises made. Where, for example, a treaty calls for certain supplies, or Crown payment of treaty monies, or a modern land claims settlement imposes specific obligations on aboriginal peoples with respect to identified resources, the role of consultation may be quite limited. If the respective obligations are clear the parties should get on with performance. Another contextual factor will be the seriousness of the impact on the aboriginal people of the Crown's proposed course of action. The more serious the impact the more important will be the role of consultation. Another factor in a non-treaty case, as *Haida* points out, will be the strength of the aboriginal claim. The history of dealings between the Crown and a particular First Nation may also be significant. Here, the most important contextual factor is that Treaty 8 provides a framework within which to manage the continuing changes in land use already foreseen in 1899 and expected, even now, to continue well into the future. In that context, consultation is key to achievement of the [page421] overall objective of the modern law of treaty and aboriginal rights, namely reconciliation.

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

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

[page422]

65 It is true, as the Minister argues, that there is some reciprocal onus on the Mikisew to carry their end of the consultation, to make their concerns known, to respond to the government's attempt to meet their concerns and suggestions, and to try to reach some mutually satisfactory solution. In this case, however, consultation never reached that stage. It never got off the ground.

66 Had the consultation process gone ahead, it would not have given the Mikisew a veto over the alignment of the road. As emphasized in *Haida Nation*, consultation will not always lead to accommodation, and accommodation may or may not result in an agreement. There could, however, be changes in the road alignment or construction that would go a long way towards satisfying the Mikisew objections. We do not know, and the Minister cannot know in the absence of consultation, what such changes might be.

67 The trial judge's findings of fact make it clear that the Crown failed to demonstrate an "'intention of substantially addressing [Aboriginal] concerns' ... through a meaningful process of consultation" (*Haida Nation*, at para. 42). On the contrary, the trial judge held that

> [i]n the present case, at the very least, this [duty to consult] would have entailed a response to Mikisew's October 10, 2000 letter, and a meeting with them to ensure that their concerns were addressed early in the planning stages of the project. At the meetings that were finally held between Parks Canada and Mikisew, a decision had essentially been made, therefore, the meeting could not have been conducted with the genuine intention of allowing Mikisew's concerns to be integrated with the proposal. [para. 154]

The trial judge also wrote:

> ... it is not consistent with the honour of the Crown, in its capacity as fiduciary, for it to fail to consult with a [page423] First Nation prior to making a decision that infringes on constitutionally protected treaty rights. [para. 157]

68 I agree, as did Sharlow J.A., dissenting in the Federal Court of Appeal. She declared that the mitigation measures were adopted through a process that was "fundamentally flawed" (para. 153).

69 In the result I would allow the appeal, quash the Minister's approval order, and remit the winter road project to the Minister to be dealt with in accordance with these reasons.

70 Costs are sought by the Mikisew on a solicitor and client basis but there are no exceptional circumstances to justify such an award. The appeal is therefore allowed and the decision of the Court of Appeal is set aside, all with costs against the respondent Minister in this Court and in the Federal Court of Appeal on a party and party basis. The costs in the Trial Division remain as ordered by the trial judge.

Solicitors

Solicitors for the appellant: Rath & Co., Priddis, Alberta.

Solicitor for the respondent Sheila Copps, Minister of Canadian Heritage: Attorney General of Canada, Edmonton.

Solicitors for the respondent the Thebacha Road Society: Ackroyd Piasta Roth & Day, Edmonton.

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

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

Solicitors for the intervener the Big Island Lake Cree Nation: Woloshyn & Co., Saskatoon.

[page424]

Solicitors for the intervener the Lesser Slave Lake Indian Regional Council: Donovan & Co., Vancouver.

Solicitors for the intervener the Treaty 8 First Nations of Alberta: Cook Roberts, Victoria.

Solicitors for the intervener the Treaty 8 Tribal Association: Woodward & Co., Victoria.

Solicitors for the intervener the Blueberry River First Nations: Thomas R. Berger, Vancouver.

Solicitors for the intervener the Assembly of First Nations: Pitblado, Winnipeg.

Tab 17

R. v. Powley, [2003] 2 S.C.R. 207

Supreme Court Reports

Supreme Court of Canada

Present: McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel and Deschamps JJ.

Heard: March 17, 2003;

Judgment: September 19, 2003.

File No.: 28533.

[2003] 2 S.C.R. 207 | *[2003] 2 R.C.S. 207* | *[2003] S.C.J. No. 43* | *[2003] A.C.S. no 43* | *2003 SCC 43*

Her Majesty The Queen, appellant/respondent on cross-appeal; v. Steve Powley and Roddy Charles Powley, respondents/appellants on cross-appeal, and Attorney General of Canada, Attorney General of Quebec, Attorney General of New Brunswick, Attorney General of Manitoba, Attorney General of British Columbia, Attorney General for Saskatchewan, Attorney General of Alberta, Attorney General of Newfoundland and Labrador, Labrador Métis Nation, a body corporate, Congress of Aboriginal Peoples, Métis National Council ("MNC"), Métis Nation of Ontario ("MNO"), B.C. Fisheries Survival Coalition, Aboriginal Legal Services of Toronto Inc. ("ALST"), Ontario Métis and Aboriginal Association ("OMAA"), Ontario Federation of Anglers and Hunters ("OFAH"), Métis Chief Roy E. J. DeLaRonde, on behalf of the Red Sky Métis Independent Nation, and North Slave Métis Alliance, interveners.

(55 paras.)

Case Summary

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Catchwords:

Constitutional law — Aboriginal rights — Métis — Two members of a Métis community near Sault Ste. [page208] Marie charged with hunting contrary to provincial statute — Whether members of this Métis community have constitutional aboriginal right to hunt for food in environs of Sault Ste. Marie — If so, whether infringement justifiable — Constitution Act, 1982, s. 35 — Game and Fish Act, R.S.O. 1990, c. G.1, ss. 46, 47(1).

Summary:

The respondents, who are members of a Métis community near Sault Ste. Marie, were acquitted of unlawfully hunting a moose without a hunting licence and with knowingly possessing game hunted in contravention of ss. 46 and 47(1) of Ontario's *Game and Fish Act.* The trial judge found that the members of the Métis community in and around Sault Ste. Marie have, under s. 35(1) of the *Constitution Act, 1982*, an aboriginal right to hunt for food that is infringed without justification by the Ontario hunting legislation. The Superior Court of Justice and the Court of Appeal upheld the acquittals.

Held: The appeal and cross-appeal should be dismissed.

The term "Métis" in s. 35 of the *Constitution Act, 1982* does not encompass all individuals with mixed Indian and European heritage; rather, it refers to distinctive peoples who, in addition to their mixed ancestry, developed their

own customs, and recognizable group identity separate from their Indian or Inuit and European forebears. A Métis community is a group of Métis with a distinctive collective identity, living together in the same geographical area and sharing a common way of life. The purpose of s. 35 is to protect practices that were historically important features of these distinctive communities and that persist in the present day as integral elements of their Métis culture. In applying the *Van der Peet* test to determine the Métis' s. 35 entitlements, the pre-contact aspect of the test must be adjusted to take into account the post-contact ethnogenesis and evolution of the Métis. A pre-control test establishing when Europeans achieved political and legal control in an area and focusing on the period after a particular Métis community arose and before it came under the control of European laws and customs is necessary to accommodate this history.

[page209]

Aboriginal rights are communal, grounded in the existence of a historic and present community, and exercisable by virtue of an individual's ancestrally based membership in the present community. The aboriginal right claimed in this case is the right to hunt for food in the environs of Sault Ste. Marie. To support a site-specific aboriginal rights claim, an identifiable Métis community with some degree of continuity and stability must be established through evidence of shared customs, traditions, and collective identity, as well as demographic evidence. The trial judge's findings of a historic Métis community and of a contemporary Métis community in and around Sault Ste. Marie are supported by the record and must be upheld.

The verification of a claimant's membership in the relevant contemporary community is crucial, since individuals are only entitled to exercise Métis aboriginal rights by virtue of their ancestral connection to and current membership in a Métis community. Self-identification, ancestral connection, and community acceptance are factors which define Métis identity for the purpose of claiming Métis rights under s. 35. Absent formal identification, courts will have to ascertain Métis identity on a case-by-case basis taking into account the value of community self-definition, the need for the process of identification to be objectively verifiable and the purpose of the constitutional guarantee. Here, the trial judge correctly found that the respondents are members of the Métis community that arose and still exists in and around Sault Ste. Marie. Residency on a reserve for a period of time by the respondents' ancestors did not, in the circumstances of this case, negate their Métis identity. An individual decision by a Métis person's ancestors to take treaty benefits does not necessarily extinguish that person's claim to Métis rights, absent collective adhesion by the Métis community to the treaty.

The view that Métis rights must find their origin in the pre-contact practices of their aboriginal ancestors must be rejected. This view in effect would deny to Métis their full status as distinctive rights-bearing peoples whose own integral practices are entitled to constitutional protection under s. 35(1). The historical record fully supports the trial judge's finding that the period just prior to 1850 is the appropriate date for finding effective European control in the Sault Ste. Marie area. The evidence also [page210] supports his finding that hunting for food was integral to the Métis way of life at Sault Ste. Marie in the period just prior to 1850. This practice has been continuous to the present.

Ontario's lack of recognition of any Métis right to hunt for food and the application of the challenged provisions infringes the Métis aboriginal right and conservation concerns did not justify the infringement. Even if the moose population in that part of Ontario were under threat, the Métis would still be entitled to a priority allocation to satisfy their subsistence needs. Further, the difficulty of identifying members of the Métis community should not be exaggerated so as to defeat constitutional rights. In the immediate future, the hunting rights of the Métis should track those of the Ojibway in terms of restrictions for conservation purposes and priority allocations. In the longer term, a combination of negotiation and judicial settlement will more clearly define the contours of the Métis right to hunt.

While the Court of Appeal had jurisdiction to issue a stay of its decision, which has now expired, no compelling reason existed for issuing an additional stay.

Cases Cited

Applied: R. v. Van der Peet, *[1996] 2 S.C.R. 507*; referred to: R. v. Sparrow, *[1990] 1 S.C.R. 1075*; Reference re Manitoba Language Rights, *[1985] 1 S.C.R. 721*.

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Game and Fish Act, R.S.O. 1990, c. G.1, ss. 46, 47(1).

Authors Cited

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Ray, Arthur J. "An Economic History of the Robinson Treaties Area Before 1860", March 17, 1998.

History and Disposition:

APPEAL and CROSS-APPEAL from a judgment of the Ontario Court of Appeal *(2001), 53 O.R. (3d) 35*, *196 D.L.R. (4th) 221*, *141 O.A.C. 121*, *152 C.C.C. (3d) 97*, *[2001] 2 C.N.L.R. 291*, *40 C.R. (5th) 221*, *80 C.R.R. (2d) 1*, *[2001] O.J. No. 607* (QL), affirming a decision of the Superior Court of Justice *(2000), 47 O.R. (3d) 30*, *[2000] 1 C.N.L.R. 233*, upholding a judgment of the Ontario Court (Provincial Division), *[1999] 1 C.N.L.R. 153*, *58 C.R.R. (2d) 149*, *[1998] O.J. No. 5310* (QL). Appeal and cross-appeal dismissed.

Counsel

Lori R. Sterling and Peter Lemmond, for the appellant/respondent on cross-appeal.

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Ivan G. Whitehall, Q.C., Michael H. Morris and Barbara Ritzen, for the intervener the Attorney General of Canada.

René Morin, for the intervener the Attorney General of Quebec.

Gabriel Bourgeois, Q.C., and Pierre Castonguay, for the intervener the Attorney General of New Brunswick.

Deborah L. Carlson and Holly D. Penner, for the intervener the Attorney General of Manitoba.

Darlene A. Leavitt, for the intervener the Attorney General of British Columbia.

Written submissions only by P. Mitch McAdam, for the intervener the Attorney General for Saskatchewan.

[page212]

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Donald H. Burrage, Q.C., for the intervener the Attorney General of Newfoundland and Labrador.

D. Bruce Clarke, for the intervener the Labrador Métis Nation.

Joseph Eliot Magnet, for the intervener the Congress of Aboriginal Peoples.

Clem Chartier and Jason Madden, for the interveners the Métis National Council and the Métis Nation of Ontario.

Written submissions only by J. Keith Lowes, for the intervener the B.C. Fisheries Survival Coalition.

Written submissions only by Brian Eyolfson, for the intervener the Aboriginal Legal Services of Toronto Inc.

Robert MacRae, for the intervener the Ontario Métis and Aboriginal Association.

Written submissions only by Timothy S. B. Danson, for the intervener the Ontario Federation of Anglers and Hunters.

Alan Pratt and Carla M. McGrath, for the intervener the Métis Chief Roy E. J. DeLaRonde, on behalf of the Red Sky Métis Independent Nation.

Written submissions only by Janet L. Hutchison and Stuart C. B. Gilby, for the intervener the North Slave Métis Alliance.

The following is the judgment delivered by

THE COURT

I. Introduction

1 This case raises the issue of whether members of the Métis community in and around Sault Ste. Marie enjoy a constitutionally protected right to hunt for food under s. 35 of the *Constitution Act, 1982*. We conclude that they do.

[page213]

2 On the morning of October 22, 1993, Steve Powley and his son, Roddy, set out hunting. They headed north from their residence in Sault Ste. Marie, and at about 9 a.m., they shot and killed a bull moose near Old Goulais Bay Road.

3 Moose hunting in Ontario is subject to strict regulation. The Ministry of Natural Resources ("MNR") issues Outdoor Cards and validation stickers authorizing the bearer to harvest calf moose during open season. People wishing to harvest adult moose must enter a lottery to obtain a validation tag authorizing them to hunt either a bull or a cow in a particular area, as specified on the tag. The number of tags issued for a given season depends on the calculations of MNR biologists, who estimate the current adult moose population and the replacement rate for animals removed from the population. The validation tag requirement and seasonal restrictions are not enforced against Status Indians, and the MNR does not record Status Indians' annual harvest. (See *MNR Interim Enforcement Policy on Aboriginal Right to Hunt and Fish for Food* (1991).)

4 After shooting the bull moose near Old Goulais Bay Road, Steve and Roddy Powley transported it to their residence in Sault Ste. Marie. Neither of them had a valid Outdoor Card, a valid hunting licence to hunt moose, or a validation tag issued by the MNR. In lieu of these documents, Steve Powley affixed a handwritten tag to the ear of the moose. The tag indicated the date, time, and location of the kill, as required by the hunting regulations. It stated that the animal was to provide meat for the winter. Steve Powley signed the tag, and wrote his Ontario Métis and Aboriginal Association membership number on it.

5 Later that day, two conservation officers arrived at the Powleys' residence. The Powleys told the officers they had shot the moose. One week later, the Powleys were charged with unlawfully hunting moose and knowingly possessing game hunted [page214] in contravention of the *Game and Fish Act*, R.S.O. 1990, c. G-1. They both entered pleas of not guilty.

6 The facts are not in dispute. The Powleys freely admit that they shot, killed, and took possession of a bull moose without a hunting licence. However, they argue that, as Métis, they have an aboriginal right to hunt for food in the Sault Ste. Marie area that cannot be infringed by the Ontario government without proper justification. Because the Ontario government denies the existence of any special Métis right to hunt for food, the Powleys argue that subjecting them to the moose hunting provisions of the *Game and Fish Act* violates their rights under s. 35(1) of the *Constitution Act, 1982*, and cannot be justified.

7 The trial court, Superior Court, and Court of Appeal agreed with the Powleys. They found that the members of the Métis community in and around Sault Ste. Marie have an aboriginal right to hunt for food that is infringed without justification by the Ontario hunting regulations. Steve and Roddy Powley were therefore acquitted of unlawfully hunting and possessing the bull moose. Ontario appeals from these acquittals.

8 The question before us is whether ss. 46 and 47(1) of the *Game and Fish Act*, which prohibit hunting moose without a licence, unconstitutionally infringe the respondents' aboriginal right to hunt for food, as recognized in s. 35(1) of the *Constitution Act, 1982*.

II. Analysis

9 Section 35 of the *Constitution Act, 1982* provides:

> **35.** (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> [page215]
>
> (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

10 The term "Métis" in s. 35 does not encompass all individuals with mixed Indian and European heritage; rather, it refers to distinctive peoples who, in addition to their mixed ancestry, developed their own customs, way of life, and recognizable group identity separate from their Indian or Inuit and European forebears. Métis communities evolved and flourished prior to the entrenchment of European control, when the influence of European settlers and political institutions became pre-eminent. The Royal Commission on Aboriginal Peoples describes this evolution as follows:

> Intermarriage between First Nations and Inuit women and European fur traders and fishermen produced children, but the birth of new Aboriginal cultures took longer. At first, the children of mixed unions were brought up in the traditions of their mothers or (less often) their fathers. Gradually, however, distinct Métis cultures emerged, combining European and First Nations or Inuit heritages in unique ways. Economics played a major role in this process. The special qualities and skills of the Métis population made them indispensable members of Aboriginal/non-Aboriginal economic partnerships, and that association contributed to the shaping of their cultures... . As interpreters, diplomats, guides, couriers, freighters, traders and suppliers, the early Métis people contributed massively to European penetration of North America.
>
> The French referred to the fur trade Métis as *coureurs de bois* (forest runners) and *bois brulés* (burnt-wood people) in recognition of their wilderness occupations and their dark complexions. The Labrador Métis (whose culture had early roots) were originally called "livyers" or "settlers", those who remained in the fishing settlements year-round rather than returning periodically to Europe or Newfoundland. The Cree people expressed the Métis character in the term *Otepayemsuak*, meaning the "independent ones".
>
> (*Report of the Royal Commission on Aboriginal Peoples: Perspectives and Realities*, vol. 4, at pp. 199-200 ("*RCAP Report*"))

[page216]

The Métis developed separate and distinct identities, not reducible to the mere fact of their mixed ancestry: "What distinguishes Métis people from everyone else is that they associate themselves with a culture that is distinctly Métis" (*RCAP Report*, vol. 4, at p. 202).

11 The Métis of Canada share the common experience of having forged a new culture and a distinctive group identity from their Indian or Inuit and European roots. This enables us to speak in general terms of "the Métis". However, particularly given the vast territory of what is now Canada, we should not be surprised to find that different groups of Métis exhibit their own distinctive traits and traditions. This diversity among groups of Métis may enable us to speak of Métis "peoples", a possibility left open by the language of s. 35(2), which speaks of the "Indian, Inuit and Métis peoples of Canada".

12 We would not purport to enumerate the various Métis peoples that may exist. Because the Métis are explicitly included in s. 35, it is only necessary for our purposes to verify that the claimants belong to an identifiable Métis community with a sufficient degree of continuity and stability to support a site-specific aboriginal right. A Métis community can be defined as a group of Métis with a distinctive collective identity, living together in the same geographic area and sharing a common way of life. The respondents here claim membership in the Métis community centred in and around Sault Ste. Marie. It is not necessary for us to decide, and we did not receive submissions on, whether this community is also a Métis "people", or whether it forms part of a larger Métis people that extends over a wider area such as the Upper Great Lakes.

13 Our evaluation of the respondents' claim takes place against this historical and cultural backdrop. The overarching interpretive principle for our legal analysis is a purposive reading of s. 35. The inclusion of the Métis in s. 35 is based on a commitment [page217] to recognizing the Métis and enhancing their survival as distinctive communities. The purpose and the promise of s. 35 is to protect practices that were historically important features of these distinctive communities and that persist in the present day as integral elements of their Métis culture.

14 For the reasons elaborated below, we uphold the basic elements of the *Van der Peet* test (*R. v. Van der Peet*, *[1996] 2 S.C.R. 507*) and apply these to the respondents' claim. However, we modify certain elements of the pre-contact test to reflect the distinctive history and post-contact ethnogenesis of the Métis, and the resulting differences between Indian claims and Métis claims.

A. *The Van der Peet Test*

15 The core question in *Van der Peet* was: "How should the aboriginal rights recognized and affirmed by s. 35(1) of the *Constitution Act, 1982* be defined?" (para. 15, *per* Lamer C.J.). Lamer C.J. wrote for the majority, at para. 31:

> [W]hat s. 35(1) does is provide the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose; the aboriginal rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.

16 The emphasis on prior occupation as the primary justification for the special protection accorded aboriginal rights led the majority in *Van der Peet* to endorse a pre-contact test for identifying which customs, practices or traditions were integral to a particular aboriginal culture, and therefore entitled to constitutional protection. However, the majority recognized that the pre-contact test might prove inadequate to capture the range of Métis customs, [page218] practices or traditions that are entitled to protection, since Métis cultures by definition post-date European contact. For this reason, Lamer C.J. explicitly reserved the question of how to define Métis aboriginal rights for another day. He wrote at para. 67:

> [T]he history of the Métis, and the reasons underlying their inclusion in the protection given by s. 35, are quite distinct from those of other aboriginal peoples in Canada. As such, the manner in which the aboriginal rights of other aboriginal peoples are defined is not necessarily determinative of the manner in which the aboriginal rights of the Métis are defined. At the time when this Court is presented with a Métis claim under s. 35 it will then, with the benefit of the arguments of counsel, a factual context and a specific Métis claim, be able to explore the question of the purposes underlying s. 35's protection of the aboriginal rights of Métis people, and answer the question of the kinds of claims which fall within s. 35(1)'s scope when the claimants are Métis. The fact that, for other aboriginal peoples, the protection granted by s. 35 goes to the practices, customs and traditions of aboriginal peoples prior to contact, is not necessarily relevant to the answer which will be given to that question.

17 As indicated above, the inclusion of the Métis in s. 35 is not traceable to their pre-contact occupation of Canadian territory. The purpose of s. 35 as it relates to the Métis is therefore different from that which relates to the Indians or the Inuit. The constitutionally significant feature of the Métis is their special status as peoples that emerged between first contact and the effective imposition of European control. The inclusion of the Métis in s. 35 represents Canada's commitment to recognize and value the distinctive Métis cultures, which grew up in areas not yet open to colonization, and which the framers of the *Constitution Act, 1982* recognized can only survive if the Métis are protected along with other aboriginal communities.

[page219]

18 With this in mind, we proceed to the issue of the correct test to determine the entitlements of the Métis under s. 35 of the *Constitution Act, 1982*. The appropriate test must then be applied to the findings of fact of the trial judge. We accept *Van der Peet* as the template for this discussion. However, we modify the pre-contact focus of the *Van der Peet* test when the claimants are Métis to account for the important differences between Indian and Métis claims. Section 35 requires that we recognize and protect those customs and traditions that were historically important features of Métis communities prior to the time of effective European control, and that persist in the

present day. This modification is required to account for the unique post-contact emergence of Métis communities, and the post-contact foundation of their aboriginal rights.

(1) Characterization of the Right

19 The first step is to characterize the right being claimed: *Van der Peet, supra*, at para. 76. Aboriginal hunting rights, including Métis rights, are contextual and site-specific. The respondents shot a bull moose near Old Goulais Bay Road, in the environs of Sault Ste. Marie, within the traditional hunting grounds of that Métis community. They made a point of documenting that the moose was intended to provide meat for the winter. The trial judge determined that they were hunting for food, and there is no reason to overturn this finding. The right being claimed can therefore be characterized as the right to hunt for food in the environs of Sault Ste. Marie.

20 We agree with the trial judge that the periodic scarcity of moose does not in itself undermine the respondents' claim. The relevant right is not to hunt moose but to hunt for food in the designated territory.

[page220]

(2) Identification of the Historic Rights-Bearing Community

21 The trial judge found that a distinctive Métis community emerged in the Upper Great Lakes region in the mid-17th century, and peaked around 1850. We find no reviewable error in the trial judge's findings on this matter, which were confirmed by the Court of Appeal. The record indicates the following: In the mid-17th century, the Jesuits established a mission at Sainte-Marie-du-Sault, in an area characterized by heavy competition among fur traders. In 1750, the French established a fixed trading post on the south bank of the Saint Mary's River. The Sault Ste. Marie post attracted settlement by Métis -- the children of unions between European traders and Indian women, and their descendants (A. J. Ray, "An Economic History of the Robinson Treaties Area Before 1860" (1998) ("Ray Report"), at p. 17). According to Dr. Ray, by the early 19th century, "[t]he settlement at Sault Ste. Marie was one of the oldest and most important [Métis settlements] in the upper lakes area" (Ray Report, at p. 47). The Hudson Bay Company operated the Sault Ste. Marie's post primarily as a depot from 1821 onwards (Ray Report, at p. 51). Although Dr. Ray characterized the Company's records for this post as "scanty" (Ray Report, at p. 51), he was able to piece together a portrait of the community from existing records, including the 1824-25 and 1827-28 post journals of HBC Chief Factor Bethune, and the 1846 report of a government surveyor, Alexander Vidal (Ray Report, at pp. 52-53).

22 Dr. Ray's report indicates that the individuals named in the post journals "were overwhelmingly Métis", and that Vidal's report "provide[s] a crude indication of the rate of growth of the community and highlights the continuing dominance of Métis in it" (Ray Report, at p. 53). Dr. Victor P. Lytwyn characterized the Vidal report and accompanying map as "clear evidence of a distinct and cohesive Métis community at Sault Ste. Marie" (V. P. Lytwyn, [page221] "Historical Report on the Métis Community at Sault Ste. Marie" (1998) ("Lytwyn Report"), at p. 2) while Dr. Ray elaborated: "By the time of Vidal's visit to the Sault Ste. Marie area, the people of mixed ancestry living there had developed a distinctive sense of identity and Indians and Whites recognized them as being a separate people" (Ray Report, at p. 56).

23 In addition to demographic evidence, proof of shared customs, traditions, and a collective identity is required to demonstrate the existence of a Métis community that can support a claim to site-specific aboriginal rights. We recognize that different groups of Métis have often lacked political structures and have experienced shifts in their members' self-identification. However, the existence of an identifiable Métis community must be demonstrated with some degree of continuity and stability in order to support a site-specific aboriginal rights claim. Here, we find no basis for overturning the trial judge's finding of a historic Métis community at Sault Ste. Marie. This finding is supported by the record and must be upheld.

(3) Identification of the Contemporary Rights-Bearing Community

24 Aboriginal rights are communal rights: They must be grounded in the existence of a historic and present community, and they may only be exercised by virtue of an individual's ancestrally based membership in the present community. The trial judge found that a Métis community has persisted in and around Sault Ste. Marie despite its decrease in visibility after the signing of the Robinson-Huron Treaty in 1850. While we take note of the trial judge's determination that the Sault Ste. Marie Métis community was to a large extent an "invisible entity" (*[1999] 1 C.N.L.R. 153*, at para. 80) from the [page222] mid-19th century to the 1970s, we do not take this to mean that the community ceased to exist or disappeared entirely.

25 Dr. Lytwyn describes the continued existence of a Métis community in and around Sault Ste. Marie despite the displacement of many of the community's members in the aftermath of the 1850 treaties:

> [T]he Métis continued to live in the Sault Ste. Marie region. Some drifted into the Indian Reserves which had been set apart by the 1850 Treaty. Others lived in areas outside of the town, or in back concessions. The Métis continued to live in much the same manner as they had in the past -- fishing, hunting, trapping and harvesting other resources for their livelihood.
>
> (Lytwyn Report, at p. 31 (emphasis added); see also J. Morrison, "The Robinson Treaties of 1850: A Case Study", at p. 201.)

26 The advent of European control over this area thus interfered with, but did not eliminate, the Sault Ste. Marie Métis community and its traditional practices, as evidenced by census data from the 1860s through the 1890s. Dr. Lytwyn concluded from this census data that "[a]lthough the Métis lost much of their traditional land base at Sault Ste. Marie, they continued to live in the region and gain their livelihood from the resources of the land and waters" (Lytwyn Report, at p. 32). He also noted a tendency for underreporting and lack of information about the Métis during this period because of their "removal to the peripheries of the town", and "their own disinclination to be identified as Métis" in the wake of the Riel rebellions and the turning of Ontario public opinion against Métis rights through government actions and the media (Lytwyn Report, at p. 33).

27 We conclude that the evidence supports the trial judge's finding that the community's lack of visibility [page223] was explained and does not negate the existence of the contemporary community. There was never a lapse; the Métis community went underground, so to speak, but it continued. Moreover, as indicated below, the "continuity" requirement puts the focus on the continuing practices of members of the community, rather than more generally on the community itself, as indicated below.

28 The trial judge's finding of a contemporary Métis community in and around Sault Ste. Marie is supported by the evidence and must be upheld.

(4) Verification of the Claimant's Membership in the Relevant Contemporary Community

29 While determining membership in the Métis community might not be as simple as verifying membership in, for example, an Indian band, this does not detract from the status of Métis people as full-fledged rights-bearers. As Métis communities continue to organize themselves more formally and to assert their constitutional rights, it is imperative that membership requirements become more standardized so that legitimate rights-holders can be identified. In the meantime, courts faced with Métis claims will have to ascertain Métis identity on a case-by-case basis. The inquiry must take into account both the value of community self-definition, and the need for the process of identification to be objectively verifiable. In addition, the criteria for Métis identity under s. 35 must reflect the purpose of this constitutional guarantee: to recognize and affirm the rights of the Métis held by virtue of their direct relationship to this country's original inhabitants and by virtue of the continuity between their customs and traditions and those of their Métis predecessors. This is not an insurmountable task.

30 We emphasize that we have not been asked, and we do not purport, to set down a comprehensive definition of who is Métis for the purpose of asserting a claim under s. 35. We therefore limit [page224] ourselves to indicating

the important components of a future definition, while affirming that the creation of appropriate membership tests before disputes arise is an urgent priority. As a general matter, we would endorse the guidelines proposed by Vaillancourt Prov. J. and O'Neill J. in the courts below. In particular, we would look to three broad factors as indicia of Métis identity for the purpose of claiming Métis rights under s. 35: self-identification, ancestral connection, and community acceptance.

31 First, the claimant must self-identify as a member of a Métis community. This self-identification should not be of recent vintage: While an individual's self-identification need not be static or monolithic, claims that are made belatedly in order to benefit from a s. 35 right will not satisfy the self-identification requirement.

32 Second, the claimant must present evidence of an ancestral connection to a historic Métis community. This objective requirement ensures that beneficiaries of s. 35 rights have a real link to the historic community whose practices ground the right being claimed. We would not require a minimum "blood quantum", but we would require some proof that the claimant's ancestors belonged to the historic Métis community by birth, adoption, or other means. Like the trial judge, we would abstain from further defining this requirement in the absence of more extensive argument by the parties in a case where this issue is determinative. In this case, the Powleys' Métis ancestry is not disputed.

33 Third, the claimant must demonstrate that he or she is accepted by the modern community whose continuity with the historic community provides the legal foundation for the right being claimed. Membership in a Métis political organization may be relevant to the question of community acceptance, but it is not sufficient in the absence of a [page225] contextual understanding of the membership requirements of the organization and its role in the Métis community. The core of community acceptance is past and ongoing participation in a shared culture, in the customs and traditions that constitute a Métis community's identity and distinguish it from other groups. This is what the community membership criterion is all about. Other indicia of community acceptance might include evidence of participation in community activities and testimony from other members about the claimant's connection to the community and its culture. The range of acceptable forms of evidence does not attenuate the need for an objective demonstration of a solid bond of past and present mutual identification and recognition of common belonging between the claimant and other members of the rights-bearing community.

34 It is important to remember that, no matter how a contemporary community defines membership, only those members with a demonstrable ancestral connection to the historic community can claim a s. 35 right. Verifying membership is crucial, since individuals are only entitled to exercise Métis aboriginal rights by virtue of their ancestral connection to and current membership in a Métis community.

35 In this case, there is no reason to overturn the trial judge's finding that the Powleys are members of the Métis community that arose and still exists in and around Sault Ste. Marie. We agree with the Court of Appeal that, in the circumstances of this case, the fact that the Powleys' ancestors lived on an Indian reserve for a period of time does not negate the Powleys' Métis identity. As the Court of Appeal indicated, "E.B. Borron, commissioned in 1891 by the province to report on annuity payments to the Métis, was of the view that Métis who had taken treaty benefits remained Métis and he recommended that they be removed from the treaty annuity lists" (*(2001), 53 O.R. (3d) 35*, at para. 139, *per* Sharpe J.A.). We emphasize that the individual decision by a Métis person's ancestors to take treaty [page226] benefits does not necessarily extinguish that person's claim to Métis rights. It will depend, in part, on whether there was a collective adhesion by the Métis community to the treaty. Based on the record, it was open to the trial judge to conclude that the rights of the Powleys' ancestors did not merge into those of the Indian band.

(5) Identification of the Relevant Time Frame

36 As indicated above, the pre-contact aspect of the *Van der Peet* test requires adjustment in order to take account of the post-contact ethnogenesis of the Métis and the purpose of s. 35 in protecting the historically important customs and traditions of these distinctive peoples. While the fact of prior occupation grounds aboriginal rights claims for the Inuit and the Indians, the recognition of Métis rights in s. 35 is not reducible to the Métis' Indian

ancestry. The unique status of the Métis as an Aboriginal people with post-contact origins requires an adaptation of the pre-contact approach to meet the distinctive historical circumstances surrounding the evolution of Métis communities.

37 The pre-contact test in *Van der Peet* is based on the constitutional affirmation that aboriginal communities are entitled to continue those practices, customs and traditions that are integral to their distinctive existence or relationship to the land. By analogy, the test for Métis practices should focus on identifying those practices, customs and traditions that are integral to the Métis community's distinctive existence and relationship to the land. This unique history can most appropriately be accommodated by a post-contact but pre-control test that identifies the time when Europeans effectively established political and [page227] legal control in a particular area. The focus should be on the period after a particular Métis community arose and before it came under the effective control of European laws and customs. This pre-control test enables us to identify those practices, customs and traditions that predate the imposition of European laws and customs on the Métis.

38 We reject the appellant's argument that Métis rights must find their origin in the pre-contact practices of the Métis' aboriginal ancestors. This theory in effect would deny to Métis their full status as distinctive rights-bearing peoples whose own integral practices are entitled to constitutional protection under s. 35(1). The right claimed here was a practice of both the Ojibway and the Métis. However, as long as the practice grounding the right is distinctive and integral to the pre-control Métis community, it will satisfy this prong of the test. This result flows from the constitutional imperative that we recognize and affirm the aboriginal rights of the Métis, who appeared after the time of first contact.

39 The pre-control test requires us to review the trial judge's findings on the imposition of European control in the Sault Ste. Marie area. Although Europeans were clearly present in the Upper Great Lakes area from the early days of exploration, they actually discouraged settlement of this region. J. Peterson explains:

> With the exception of Detroit, Kaskaskia and Cahokia, the French colonial administration established no farming communities in the Great Lakes region. After 1763, only partly in response to the regionwide resistance [page228] movement known as Pontiac's Rebellion, the British likewise discouraged settlement west of Lake Ontario. Desire to keep the peace and to monopolize the profits of the Great Lakes Indian trade were the overriding considerations favouring this policy. To have simultaneously encouraged an influx of white farmers would have upset both the diplomatic alliance with the native inhabitants inherited from the French and the ratio between humans and animals on the ground, straining the fur-bearing capacities of the region.
>
> (J. Peterson, "Many roads to Red River: Métis genesis in the Great Lakes region, 1680-1815", in *The New Peoples: Being and Becoming Métis in North America* (1985), 37, at p. 40)

This policy changed in the mid-19th century, as British economic needs and plans evolved. The British sent William B. Robinson to negotiate treaties with the Indian tribes in the regions of Lake Huron and Lake Superior. One of his objectives as Treaty Commissioner was to obtain land in order to allow mining, timber and other development, including the development of a town at Sault Ste. Marie (Lytwyn Report, *supra*, at p. 29).

40 The historical record indicates that the Sault Ste. Marie Métis community thrived largely unaffected by European laws and customs until colonial policy shifted from one of discouraging settlement to one of negotiating treaties and encouraging settlement in the mid-19th century. The trial judge found, and the parties agreed in their pleadings before the lower courts, that "effective control [of the Upper Great Lakes area] passed from the Aboriginal peoples of the area (Ojibway and Metis) to European control" in the period between 1815 and 1850 (para. 90). The record fully supports the finding that the period just prior to 1850 is the appropriate date for finding effective control in this geographic area, which the Crown agreed was the critical date in its pleadings below.

[page229]

(6) Determination of Whether the Practice is Integral to the Claimants' Distinctive Culture

41 The practice of subsistence hunting and fishing was a constant in the Métis community, even though the availability of particular species might have waxed and waned. The evidence indicates that subsistence hunting was an important aspect of Métis life and a defining feature of their special relationship to the land (Peterson, *supra*, at p. 41; Lytwyn Report, *supra*, at p. 6). A major part of subsistence was the practice at issue here, hunting for food.

42 Peterson describes the Great Lakes Métis communities as follows at p. 41:

> These people were neither adjunct relative-members of tribal villages nor the standard bearers of European civilization in the wilderness. Increasingly, they stood apart or, more precisely, in between. By the end of the last struggle for empire in 1815, their towns, which were visually, ethnically and culturally distinct from neighbouring Indian villages and "white towns" along the eastern seaboard, stretched from Detroit and Michilimackinac at the east to the Red River at the northwest.
>
> ...
>
> ... [R]esidents [of these trading communities] ... drew upon a local subsistence base rather than on European imports ... . [S]uch towns grew as a result of and were increasingly dominated by the offspring of Canadian trade employees and Indian women who, having reached their majority, were intermarrying among themselves and rearing successive generations of métis. In both instances, these communities did not represent an extension of French, and later British colonial culture, but were rather "adaptation[s] to the Upper Great Lakes environment." [Emphasis added.]

43 Dr. Ray emphasized in his report that a key feature of Métis communities was that "their members earned a substantial part of their livelihood off of [page230] the land" (Ray Report, *supra*, at p. 56 (emphasis deleted)). Dr. Lytwyn concurred: "The Métis of Sault Ste. Marie lived off the resources of the land. They obtained their livelihood from hunting, fishing, gathering and cultivating" (Lytwyn Report, at p. 2). He reported that "[w]hile Métis fishing was prominent in the written accounts, hunting was also an important part of their livelihood", and that "[a] traditional winter hunting area for the Sault Métis was the Goulais Bay area" (Lytwyn Report, at pp. 4-5). He elaborated at p. 6:

> In the mid-19th century, the Métis way of life incorporated many resource harvesting activities. These activities, especially hunting and trapping, were done within traditional territories located within the hinterland of Sault Ste. Marie. The Métis engaged in these activities for generations and, on the eve of the 1850 treaties, hunting, fishing, trapping and gathering were integral activities to the Métis community at Sault Ste. Marie.

44 This evidence supports the trial judge's finding that hunting for food was integral to the Métis way of life at Sault Ste. Marie in the period just prior to 1850.

(7) Establishment of Continuity Between the Historic Practice and the Contemporary Right Asserted

45 Although s. 35 protects "existing" rights, it is more than a mere codification of the common law. Section 35 reflects a new promise: a constitutional commitment to protecting practices that were historically important features of particular aboriginal communities. A certain margin of flexibility might be required to ensure that aboriginal practices can evolve and develop over time, but it is not necessary to define or to rely on that margin in this case. Hunting for food was an important feature of the Sault Ste. Marie Métis community, and the practice has been continuous to the present. Steve and Roddy Powley claim a Métis aboriginal right to hunt for food. The right claimed by the Powleys [page231] falls squarely within the bounds of the historical practice grounding the right.

(8) Determination of Whether or Not the Right Was Extinguished

46 The doctrine of extinguishment applies equally to Métis and to First Nations claims. There is no evidence of extinguishment here, as determined by the trial judge. The Crown's argument for extinguishment is based largely on the Robinson-Huron Treaty of 1850, from which the Métis as a group were explicitly excluded.

(9) If There Is a Right, Determination of Whether There Is an Infringement

47 Ontario currently does not recognize any Métis right to hunt for food, or any "special access rights to natural resources" for the Métis whatsoever (appellant's record, at p. 1029). This lack of recognition, and the consequent application of the challenged provisions to the Powleys, infringe their aboriginal right to hunt for food as a continuation of the protected historical practices of the Sault Ste. Marie Métis community.

(10) Determination of Whether the Infringement Is Justified

48 The main justification advanced by the appellant is that of conservation. Although conservation is clearly a very important concern, we agree with the trial judge that the record here does not support this justification. If the moose population in this part of Ontario were under threat, and there was no evidence that it is, the Métis would still be entitled to a priority allocation to satisfy their subsistence needs in accordance with the criteria set out in *R. v. Sparrow*, [1990] 1 S.C.R. 1075. While preventative measures might be required for conservation purposes in the future, we have not been presented with evidence to support such measures here. The Ontario authorities can make out a case for [page232] regulation of the aboriginal right to hunt moose for food if and when the need arises. On the available evidence and given the current licensing system, Ontario's blanket denial of any Métis right to hunt for food cannot be justified.

49 The appellant advances a subsidiary argument for justification based on the alleged difficulty of identifying who is Métis. As discussed, the Métis identity of a particular claimant should be determined on proof of self-identification, ancestral connection, and community acceptance. The development of a more systematic method of identifying Métis rights-holders for the purpose of enforcing hunting regulations is an urgent priority. That said, the difficulty of identifying members of the Métis community must not be exaggerated as a basis for defeating their rights under the Constitution of Canada.

50 While our finding of a Métis right to hunt for food is not species-specific, the evidence on justification related primarily to the Ontario moose population. The justification of other hunting regulations will require adducing evidence relating to the particular species affected. In the immediate future, the hunting rights of the Métis should track those of the Ojibway in terms of restrictions for conservation purposes and priority allocations where threatened species may be involved. In the longer term, a combination of negotiation and judicial settlement will more clearly define the contours of the Métis right to hunt, a right that we recognize as part of the special aboriginal relationship to the land.

B. *The Request for a Stay*

51 With respect to the cross-appeal, we affirm that the Court of Appeal had jurisdiction to issue a stay of its decision in these circumstances. This power should continue to be used only in exceptional [page233] situations in which a court of general jurisdiction deems that giving immediate effect to an order will undermine the very purpose of that order or otherwise threaten the rule of law: *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721. We note that the Powleys' acquittal would have remained valid notwithstanding the stay. It was, however, within the Court of Appeal's discretion to suspend the application of its ruling to other members of the Métis community in order to foster cooperative solutions and ensure that the resource in question was not depleted in the interim, thereby negating the value of the right.

52 The initial stay expired on February 23, 2002, and more than a year has passed since that time. The Court of Appeal's decision has been the law of Ontario in the interim, and chaos does not appear to have ensued. We see

no compelling reason to issue an additional stay. We also note that it is particularly important to have a clear justification for a stay where the effect of that stay would be to suspend the recognition of a right that provides a defence to a criminal charge, as it would here.

III. Conclusion

53 Members of the Métis community in and around Sault Ste. Marie have an aboriginal right to hunt for food under s. 35(1). This is determined by their fulfillment of the requirements set out in *Van der Peet*, modified to fit the distinctive purpose of s. 35 in protecting the Métis.

54 The appeal is dismissed with costs to the respondents. The cross-appeal is dismissed.

55 The constitutional question is answered as follows:

> Are ss. 46 and 47(1) of the *Game and Fish Act*, R.S.O. 1990, c. G.1, as they read on October 22, 1993, of no force or effect with respect to the respondents, being [page234] Métis, in the circumstances of this case, by reason of their aboriginal rights under s. 35 of the *Constitution Act, 1982*?
>
> Answer: Yes.

APPENDIX

Relevant Constitutional and Statutory Provisions

> *Game and Fish Act*, R.S.O. 1990, c. G.1, ss. 46 and 47(1)
>
> **46.** No person shall knowingly possess any game hunted in contravention of this Act or the regulations.
>
> **47.** (1) Except under the authority of a licence and during such times and on such terms and conditions and in such parts of Ontario as are prescribed in the regulations, no person shall hunt black bear, polar bear, caribou, deer, elk or moose.
>
> *Constitution Act, 1982*
>
> **35.** (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

Solicitors

Solicitor for the appellant/respondent on cross-appeal: Ministry of the Attorney General of Ontario, Toronto.

Solicitors for the respondents/appellants on cross-appeal: Pape & Salter, Toronto.

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[page235]

Solicitor for the intervener the Attorney General of Manitoba: Attorney General of Manitoba, Winnipeg.

Solicitor for the intervener the Attorney General of British Columbia: Attorney General of British Columbia, Victoria.

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Solicitors for the intervener the Labrador Métis Nation: Burchell Green Hayman Parish, Halifax.

Solicitor for the intervener the Congress of Aboriginal Peoples: Joseph Eliot Magnet, Ottawa.

Solicitor for the interveners the Métis National Council and Métis Nation of Ontario: Métis National Council, Ottawa.

Solicitor for the intervener the B.C. Fisheries Survival Coalition: J. Keith Lowes, Vancouver.

Solicitor for the intervener the Aboriginal Legal Services of Toronto Inc.: Aboriginal Legal Services of Toronto Inc., Toronto.

Solicitor for the intervener the Ontario Métis and Aboriginal Association: Robert MacRae, Sault Ste. Marie.

Solicitors for the intervener the Ontario Federation of Anglers and Hunters: Danson, Recht & Voudouris, Toronto.

Solicitor for the intervener the Métis Chief Roy E. J. DeLaRonde, on behalf of the Red Sky Métis Independent Nation: Alan Pratt, Dunrobin, Ontario.

Solicitors for the intervener the North Slave Métis Alliance: Chamberlain Hutchison, Edmonton; Burchell Green Hayman Parish, Halifax.

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Tab 18

Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council, [2010] 2 S.C.R. 650

Supreme Court Reports

Supreme Court of Canada

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

Heard: May 21, 2010;

Judgment: October 28, 2010.

File No.: 33132.

[2010] 2 S.C.R. 650 | *[2010] 2 R.C.S. 650* | *[2010] S.C.J. No. 43* | *[2010] A.C.S. no 43* | *2010 SCC 43*

Rio Tinto Alcan Inc. and British Columbia Hydro and Power Authority, Appellants; v. Carrier Sekani Tribal Council, Respondent, and Attorney General of Canada, Attorney General of Ontario, Attorney General of British Columbia, Attorney General of Alberta, British Columbia Utilities Commission, Mikisew Cree First Nation, Moosomin First Nation, Nunavut Tunngavik Inc., Nlaka'pamux Nation Tribal Council, Okanagan Nation Alliance, Upper Nicola Indian Band, Lakes Division of the Secwepemc Nation, Assembly of First Nations, Standing Buffalo Dakota First Nation, First Nations Summit, Duncan's First Nation, Horse Lake First Nation, Independent Power Producers Association of British Columbia, Enbridge Pipelines Inc. and TransCanada Keystone Pipeline GP Ltd., Interveners.

(95 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Case Summary

Catchwords:

Constitutional law — Honour of the Crown — Aboriginal peoples — Aboriginal rights — Right to consultation — British Columbia authorized project altering timing and flow of water in area claimed by First Nations [page651] without consulting affected First Nations — Thereafter, provincial hydro and power authority sought British Columbia Utilities Commission's approval of agreement to purchase power generated by project from private producer — Duty to consult arises when Crown knows of potential Aboriginal claim or right and contemplates conduct that may adversely affect it — Whether Commission reasonably declined to consider adequacy of consultation in context of assessing whether agreement is in public interest — Whether duty to consult arose — What constitutes "adverse effect" — Constitution Act, 1982, s. 35 — Utilities Commission Act, R.S.B.C. 1996, c. 473, s. 71.

Administrative law — Boards and tribunals — Jurisdiction — British Columbia authorized project altering timing and flow of water in area claimed by First Nations without consulting affected First Nations — Thereafter, provincial hydro and power authority sought British Columbia Utilities Commission's approval of agreement to purchase power generated by project from private producer — Commission empowered to decide questions of law and to determine whether agreement is in public interest — Whether Commission had jurisdiction to discharge Crown's constitutional obligation to consult — Whether Commission had jurisdiction to consider adequacy of consultation — If so, whether it was required to consider adequacy of consultation in determining whether agreement is in public interest — Constitution Act, 1982, s. 35 — Utilities Commission Act, R.S.B.C. 1996, c. 473, s. 71.

Summary:

In the 1950s, the government of British Columbia authorized the building of a dam and reservoir which altered the amount and timing of water flows in the Nechako River. The First Nations claim the Nechako Valley as their ancestral homeland, and the right to fish in the Nechako River, but, pursuant to the practice at the time, they were not consulted about the dam project.

Since 1961, excess power generated by the dam has been sold by Alcan to BC Hydro under Energy Purchase Agreements ("EPAs") which commit Alcan to supplying and BC Hydro to purchasing excess electricity. The government of British Columbia sought the [page652] Commission's approval of the 2007 EPA. The First Nations asserted that the 2007 EPA should be subject to consultation under s. 35 of the *Constitution Act, 1982*.

The Commission accepted that it had the power to consider the adequacy of consultation with Aboriginal groups, but found that the consultation issue could not arise because the 2007 EPA would not adversely affect any Aboriginal interest. The British Columbia Court of Appeal reversed the Commission's orders and remitted the case to the Commission for evidence and argument on whether a duty to consult the First Nations exists and, if so, whether it had been met. Alcan and BC Hydro appealed.

Held: The appeal should be allowed and the decision of the British Columbia Utilities Commission approving the 2007 EPA should be confirmed.

The Commission did not act unreasonably in approving the 2007 EPA. Governments have a duty to consult with Aboriginal groups when making decisions which may adversely impact lands and resources to which Aboriginal peoples lay claim. The duty to consult is grounded in the honour of the Crown and is a corollary of the Crown's obligation to achieve the just settlement of Aboriginal claims through the treaty process. While the treaty claims process is ongoing, there is an implied duty to consult with Aboriginal claimants on matters that may adversely affect their treaty and Aboriginal rights, and to accommodate those interests in the spirit of reconciliation. The duty has both a legal and a constitutional character, and is prospective, fastening on rights yet to be proven. The nature of the duty and the remedy for its breach vary with the situation.

The duty to consult 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. This test can be broken down into three elements. First, the Crown must have real or constructive knowledge of a potential Aboriginal claim or right. While the existence of a potential claim is essential, proof that the claim will succeed is not. Second, there must be Crown conduct or a Crown decision. In accordance with the generous, purposive approach that must be brought to the duty to consult, the required decision or conduct is not confined to government exercise of statutory powers or to decisions or conduct which have an immediate impact [page653] on lands and resources. The duty to consult extends to "strategic, higher level decisions" that may have an impact on Aboriginal claims and rights. Third, there must be a possibility that the Crown conduct may affect the Aboriginal claim or right. The claimant must show a causal relationship between the proposed government conduct or decision and a potential for adverse impacts on pending Aboriginal claims or rights. Past wrongs, speculative impacts, and adverse effects on a First Nation's future negotiating position will not suffice. Moreover, the duty to consult is confined to the adverse impacts flowing from the current government conduct or decision, not to larger adverse impacts of the project of which it is a part. Where the resource has long since been altered and the present government conduct or decision does not have any further impact on the resource, the issue is not consultation, but negotiation about compensation.

Tribunals are confined to the powers conferred on them by their constituent legislation, and the role of particular tribunals in relation to consultation depends on the duties and powers the legislature has conferred on them. The legislature may choose to delegate the duty to consult to a tribunal, and it may empower the tribunal to determine whether adequate consultation has taken place.

The power to engage in consultation itself, as distinct from the jurisdiction to determine whether a duty to consult exists, cannot be inferred from the mere power to consider questions of law. Consultation itself is not a question of law; it is a distinct, often complex, constitutional process and, in certain circumstances, a right involving facts, law, policy, and compromise. The tribunal seeking to engage in consultation must be expressly or impliedly

empowered to do so and its enabling statute must give it the necessary remedial powers.

The duty to consult is a constitutional duty invoking the honour of the Crown. It must be met. If the tribunal structure set up by the legislature is incapable of dealing with a decision's potential adverse impacts on Aboriginal interests, then the Aboriginal peoples affected must seek appropriate remedies in the courts. These remedies have proven time-consuming and expensive, are often ineffective, and serve the interest of no one.

[page654]

In this case, the Commission had the power to consider whether adequate consultation had taken place. The *Utilities Commission Act* empowered it to decide questions of law in the course of determining whether an EPA is in the public interest, which implied a power to decide constitutional issues properly before it. At the time, it also required the Commission to consider "any other factor that the commission considers relevant to the public interest", including the adequacy of consultation. This conclusion is not altered by the *Administrative Tribunals Act*, which provides that a tribunal does not have jurisdiction over any "constitutional question", since the application for reconsideration does not fall within the narrow statutory definition of that term.

The Legislature did not delegate the Crown's duty to consult to the Commission. The Commission's power to consider questions of law and matters relevant to the public interest does not empower it to engage in consultation because consultation is a distinct constitutional process, not a question of law.

The Commission correctly accepted that it had the power to consider the adequacy of consultation with Aboriginal groups, and reasonably concluded that the consultation issue could not arise because the 2007 EPA would not adversely affect any Aboriginal interest. In this case, the Crown had knowledge of a potential Aboriginal claim or right and BC Hydro's proposal to enter into an agreement to purchase electricity from Alcan is clearly proposed Crown conduct. However, the 2007 EPA would have neither physical impacts on the Nechako River or the fishery nor organizational, policy or managerial impacts that might adversely affect the claims or rights of the First Nations. The failure to consult on the initial project was an underlying infringement, and was not sufficient to trigger a duty to consult. Charged with the duty to act in accordance with the honour of Crown, BC Hydro's representatives will nevertheless be required to take into account and consult as necessary with affected Aboriginal groups insofar as any decisions taken in the future have the potential to adversely affect them.

Cases Cited

Followed: *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511; **referred to:** *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [page655] [2004] 3 S.C.R. 550; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388; *Huu-Ay-Aht First Nation v. British Columbia (Minister of Forests)*, 2005 BCSC 697, [2005] 3 C.N.L.R. 74; *Wii'litswx v. British Columbia (Minister of Forests)*, 2008 BCSC 1139, [2008] 4 C.N.L.R. 315; *Klahoose First Nation v. Sunshine Coast Forest District (District Manager)*, 2008 BCSC 1642, [2009] 1 C.N.L.R. 110; *Dene Tha' First Nation v. Canada (Minister of Environment)*, 2006 FC 1354, [2007] 1 C.N.L.R. 1, aff'd 2008 FCA 20, 35 C.E.L.R. (3d) 1; *An Inquiry into British Columbia's Electricity Transmission Infrastructure & Capacity Needs for the Next 30 Years, Re*, 2009 CarswellBC 3637; *R. v. Lefthand*, 2007 ABCA 206, 77 Alta. L.R. (4) 203; *R. v. Douglas*, 2007 BCCA 265, 278 D.L.R. (4) 653; *R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339; *Paul v. British Columbia (Forest Appeals Commission)*, 2003 SCC 55, [2003] 2 S.C.R. 585; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190.

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History and Disposition:

APPEAL from a judgment of the British Columbia Court of Appeal (Donald, Huddart and Bauman JJ.A.), *2009 BCCA 67*, 89 B.C.L.R. (4) 298, *266 B.C.A.C. 228*, 449 W.A.C. 228, *[2009] 2 C.N.L.R. 58*, *[2009] 4 W.W.R. 381*, 76 R.P.R. (4) 159, *[2009] B.C.J. No. 259* (QL), *2009 CarswellBC 340*, allowing an appeal from a decision of the British Columbia Utilities Commission, 2008 CarswellBC 1232, and remitting the consultation issue to the Commission. Appeal allowed; decision [page656] of the British Columbia Utilities Commission approving 2007 EPA confirmed.

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Richard Spaulding, for the intervener Nunavut Tunngavik Inc.

Written submissions only by *Timothy Howard* and *Bruce Stadfeld*, for the interveners the Nlaka'pamux Nation Tribal Council, the Okanagan Nation Alliance and the Upper Nicola Indian Band.

Robert J. M. Janes, for the intervener the Lakes Division of the Secwepemc Nation.

[page657]

Peter W. Hutchins and *David Kalmakoff*, for the intervener the Assembly of First Nations.

Written submissions only by *Mervin C. Phillips*, for the intervener the Standing Buffalo Dakota First Nation.

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Roy W. Millen, for the intervener the Independent Power Producers Association of British Columbia.

Written submissions only by *Harry C. G. Underwood*, for the intervener Enbridge Pipelines Inc.

Written submissions only by *C. Kemm Yates*, *Q.C.*, for the intervener the TransCanada Keystone Pipeline GP Ltd.

The judgment of the Court was delivered by

McLACHLIN C.J.

1 In the 1950s, the government of British Columbia authorized the building of the Kenney Dam in Northwest British Columbia for the production of hydro power for the smelting of aluminum. The dam and reservoir altered the water flows to the Nechako River, which the Carrier Sekani Tribal Council ("CSTC") First Nations have since time immemorial used for fishing and sustenance. This was done without consulting with the CSTC First Nations. Now, the government of British Columbia seeks approval of a contract for the sale of excess power from the dam to British Columbia Hydro and Power Authority ("BC Hydro"), a Crown corporation. The question is whether the British Columbia Utilities Commission (the "Commission") is required to consider the issue of consultation with the CSTC First Nations in determining whether the sale is in the public interest.

[page658]

2 In *Haida Nation v. British Columbia (Minister of Forests)*, *2004 SCC 73*, *[2004] 3 S.C.R. 511*, this Court affirmed that governments have a duty to consult with Aboriginal groups when making decisions which may adversely impact lands and resources to which Aboriginal peoples lay claim. In the intervening years, government-Aboriginal consultation has become an important part of the resource development process in British Columbia especially; much of the land and resources there are subject to land claims negotiations. This case raises the issues of what triggers a duty to consult, and the place of government tribunals in consultation and the review of consultation. I

would allow the appeal, while affirming the duty of BC Hydro to consult the CSTC First Nations on future developments that may adversely affect their claims and rights.

I. Background

A. *The Facts*

3 In the 1950s, Alcan (now Rio Tinto Alcan) dammed the Nechako River in northwestern British Columbia for the purposes of power development in connection with aluminum production. The project was one of huge magnitude. It diverted water from the Nechako River into the Nechako Reservoir, where a powerhouse was installed for the production of electricity. After passing through the turbines of the powerhouse, the water flowed to the Kemano River and on to the Pacific Ocean to the west. The dam affected the amount and timing of water flows into the Nechako River to the east, impacting fisheries on lands now claimed by the CSTC First Nations. Alcan effected these water diversions under Final Water Licence No. 102324 which gives Alcan use of the water on a permanent basis.

4 Alcan, the Province of British Columbia, and Canada entered into a Settlement Agreement in [page659] 1987 on the release of waters in order to protect fish stocks. Canada was involved because fisheries, whether seacoast-based or inland, fall within federal jurisdiction under s. 91(12) of the *Constitution Act, 1867*. The 1987 agreement directs the release of additional flows in July and August to protect migrating salmon. In addition, a protocol has been entered into between the Haisla Nation and Alcan which regulates water flows to protect eulachon spawning grounds.

5 The electricity generated by the project has been used over the years primarily for aluminum smelting. Since 1961, however, Alcan has sold its excess power to BC Hydro, a Crown Corporation, for use in the local area and later for transmission to neighbouring communities. The Energy Purchase Agreement ("EPA") entered into in 2007, which is the subject of this appeal is the latest in a series of power sales from Alcan to BC Hydro. It commits Alcan to supplying and BC Hydro to purchasing excess electricity from the Kemano site until 2034. The 2007 EPA establishes a Joint Operating Committee to advise the parties on the administration of the EPA and the operation of the reservoir.

6 The CSTC First Nations claim the Nechako Valley as their ancestral homeland, and the right to fish in the Nechako River. As was the practice at the time, they were not consulted about the diversion of the river effected by the 1950s dam project. They assert, however, that the 2007 EPA for the power generated by the project should be subject to consultation. This, they say, is their constitutional right under s. 35 of the *Constitution Act, 1982*, as defined in *Haida Nation*.

B. *The Commission Proceedings*

7 The 2007 EPA was subject to review before the Commission. It was charged with determining whether the sale of electricity was in the public interest under s. 71 of the *Utilities Commission Act*, [page660] R.S.B.C. 1996, c. 473. The Commission had the power to declare a contract for the sale of electricity unenforceable if it found that it was not in the public interest having regard to the quantity of energy to be supplied, the availability of supplies, the price and availability of any other form of energy, the price of the energy supplied to a public utility company, and "any other factor that the commission considers relevant to the public interest".

8 The Commission began its work by holding two procedural conferences to determine, among other things, the "scope" of its hearing. "Scoping" is the process by which the Commission determines what "information it considers necessary to determine whether the contract is in the public interest" pursuant to s. 71(1)(b) of the *Utilities Commission Act*. The question of the role of First Nations in the proceedings arose at this stage. The CSTC was not party to the proceedings but the Haisla Nation was. The Haisla people submitted that the Province and BC Hydro "ha[d] failed to act on their legal obligation" to them, but refrained from asking the Commission "to assess the

adequacy [of consultation] and accommodation afforded ... on the 2007 EPA": *Re: British Columbia Hydro & Power Authority Filing of Electricity Purchase Agreement with Alcan Inc. as an Energy Supply Contract Pursuant to Section 71*, British Columbia Utilities Commission, October 10, 2007 (the "Scoping Order"), unreported. The Commission's Scoping Order therefore addressed the consultation issue as follows:

> Evidence relevant to First Nations consultation may be relevant for the same purpose that the Commission often considers evidence of consultation with other stakeholders. Generally, insufficient evidence of consultation, including with First Nations is not determinative of matters before the Commission.

9 On October 29, 2007, the CSTC requested late intervener status on the issue of consultation on the basis that the Commission's decision [page661] might negatively impact Aboriginal rights and title which were the subject of its ongoing land claims. At the opening of the oral hearing on November 19, 2007, the CSTC applied for reconsideration of the Scoping Order and, in written submissions of November 20, 2007, it asked the Commission to include in the hearing's scope the issues of whether the duty to consult had been met, whether the proposed power sale under the 2007 EPA could constitute an infringement of Aboriginal rights and title in and of itself, and the related issue of the environmental impact of the 2007 EPA on the rights of the CSTC First Nations.

10 The Commission established a two-stage process to consider the CSTC's application for reconsideration of the Scoping Order: an initial screening phase to determine whether there was a reasonable evidentiary basis for reconsideration, and a second phase to receive arguments on whether the rescoping application should be granted. At the first stage, the CSTC filed evidence, called witnesses and cross-examined the witnesses of BC Hydro and Alcan. The Commission confined the proceedings to the question of whether the 2007 EPA would adversely affect potential CSTC First Nations' interests by causing changes in water flows into the Nechako River or changes in water levels of the Nechako Reservoir.

11 On November 29, 2007, the Commission issued a preliminary decision on the Phase I process called "Impacts on Water Flows". It concluded that the "responsibility for operation of the Nechako Reservoir remains with Alcan under the 2007 EPA", and that the EPA would not affect water levels in the Nechako River stating, "the 2007 EPA sets the priority of generation produced but does not set the priority for water". With or without the 2007 EPA, "Alcan operates the Nechako Reservoir to optimize power generation".

12 As to fisheries, the Commission stated that "the priority of releases from the Nechako Reservoir [under the 1987 Settlement Agreement] [page662] is first to fish flows and second to power service". While the timing of water releases from the Nechako Reservoir for power generation purposes may change as a result of the 2007 EPA, that change "will have no impact on the releases into the Nechako river system". This is because water releases for power generation flow not into the Nechako River system to the east, with which the CSTC First Nations are concerned, but into the Kemano River to the west. Nor, the Commission found, would the 2007 EPA bring about a change in control over water flows and water levels, or alter the management structure of the reservoir.

13 The Commission then embarked on Phase II of the rescoping hearing and invited the parties to make written submissions on the reconsideration application - specifically, on whether it would be a jurisdictional error not to revise the Scoping Order to encompass consultation issues on these facts. The parties did so.

14 On December 17, 2007, the Commission dismissed the CSTC's application for reconsideration of the scoping order on grounds that the 2007 EPA would not introduce new adverse effects to the interests of the First Nations: *Re British Columbia Hydro & Power Authority*, 2008 CarswellBC 1232 (B.C.U.C.) (the "Reconsideration Decision"). For the purposes of the motion, the Commission assumed the historic infringement of Aboriginal rights, Aboriginal title, and a failure by the government to consult. Referring to *Haida Nation*, it concluded that "more than just an underlying infringement" was required. The CSTC had to demonstrate that the 2007 EPA would "adversely affect" the Aboriginal interests of its member First Nations. Applying this test to its findings of fact, it stated that "a section 71 review does not approve, transfer or change control of licenses or authorization and therefore where there are no new physical impacts acceptance of a section 71 filing [without consultation] would not be a jurisdictional error". The Commission therefore concluded that its decision on the 2007 EPA would have no adverse effects on the

CSTC First Nations' interests. The duty to consult was therefore not triggered, and no jurisdictional [page663] error was committed in failing to include consultation with the First Nations in the Scoping Order beyond the general consultation extended to all stakeholders.

15 The Commission went on to conclude that the 2007 EPA was in the public interest and should be accepted. It stated:

> In the circumstances of this review, evidence regarding consultation with respect to the historical, continuing infringement can reasonably be expected to be of no assistance for the same reasons there is no jurisdictional error, that is, the limited scope of the section 71 review, and there are no new physical impacts.

16 In essence, the Commission took the view that the 2007 EPA would have no physical impact on the existing water levels in the Nechako River and hence it would not change the current management of its fishery. The Commission further found that its decision would not involve any transfer or change in the project's licences or operations. Consequently, the Commission concluded that its decision would have no adverse impact on the pending claims or rights of the CSTC First Nations such that there was no need to rescope the hearing to permit further argument on the duty to consult.

C. *The Judgment of the Court of Appeal, 2009 BCCA 67, 89 B.C.L.R. (4th) 298 (Donald, Huddart and Bauman JJ.A.)*

17 The CSTC appealed the Reconsideration Decision and the approval of the 2007 EPA to the British Columbia Court of Appeal. The Court, *per* Donald J.A., reversed the Commission's orders and remitted the case back to the Commission for "evidence and argument on whether a duty to consult and, if necessary, accommodate the [CSTC First Nations] exists and, if so, whether the duty has been met in respect of the filing of the 2007 EPA" (para. 69).

[page664]

18 The Court of Appeal found that the Commission had jurisdiction to consider the issue of consultation. The Commission had the power to decide questions of law, and hence constitutional issues relating to the duty to consult.

19 The Court of Appeal went on to hold that the Commission acted prematurely by rejecting the application for reconsideration. Donald J.A., writing for the Court, stated:

> ... the Commission wrongly decided something as a preliminary matter which properly belonged in a hearing of the merits. The logic flaw was in predicting that consultation could have produced no useful outcome. Put another way, the Commission required a demonstration that the [CSTC] would win the point as a precondition for a hearing into the very same point.
>
> I do not say that the Commission would be bound to find a duty to consult here. The fault in the Commission's decision is in not entertaining the issue of consultation within the scope of a full hearing when the circumstances demanded an inquiry. [paras. 61-62]

20 The Court of Appeal held that the honour of the Crown obliged the Commission to decide the consultation issue, and that "the tribunal with the power to approve the plan must accept the responsibility to assess the adequacy of consultation" (para. 53). Unlike the Commission, the Court of Appeal did not consider whether the 2007 EPA was capable of having an adverse impact on a pending claim or right of the CSTC First Nations. The Court of Appeal did not criticize the Commission's adverse impacts finding. Rather, it appears to have concluded that despite these findings, the Commission was obliged to consider whether consultation could be "useful". In finding that the Commission should have considered the consultation issue, the Court of Appeal appears to have taken a broader view than did the Commission as to when a duty to consult may arise.

21 The Court of Appeal suggested that a failure to consider consultation risked the approval of a contract in breach of the Crown's constitutional [page665] duty. Donald J.A. asked, "How can a contract formed by a Crown agent in breach of a constitutional duty be in the public interest? The existence of such a duty and the allegation of the breach must form part and parcel of the public interest inquiry" (para. 42).

22 Alcan and BC Hydro appeal to this Court. They argue that the Court of Appeal took too wide a view of the Crown's duty to consult and of the role of tribunals in deciding consultation issues. In view of the Commission's task under its constituent statute and the evidence before it, Alcan and BC Hydro submit that the Commission correctly concluded that it had no duty to consider the consultation issue raised by the CSTC, since, however much participation was accorded, there was no possibility of finding a duty to consult with respect to the 2007 EPA.

23 The CSTC argues that the Court of Appeal correctly held that the Commission erred in refusing to rescope its proceeding to allow submissions on the consultation issue. It does not pursue earlier procedural arguments in this Court.

II. The Legislative Framework

A. *Legislation Regarding the Public Interest Determination*

24 The 2007 EPA was subject to review before the Commission under the authority of s. 71 of the *Utilities Commission Act* to determine whether it was in the public interest. Prior to May 2008, this determination was to be based on the quantity of energy to be supplied; the availability of supplies; the price and availability of any other form of energy; the price of the energy supplied to a public utility company; and "any other factor that the commission considers relevant to the public interest": [page666] *Utilities Commission Act*, s. 71(2)(a) to (e). Effective May 2008, these considerations were expanded to include "the government's energy objectives" and its long-term resource plans: s. 71(2.1)(a) and (b). The public interest clause, however, was narrowed to considerations of the interests of potential British Columbia public utility customers: s. 71(2.1)(d).

B. *Legislation on the Commission's Remedial Powers*

25 Based on the above considerations, the Commission may issue an order approving the proposed contract under s. 71(2.4) of the *Utilities Commission Act* if it is found to be in the public interest. If it is not found to be in the public interest, the Commission can issue an order declaring the contract unenforceable, either wholly or in part, or "make any other order it considers advisable in the circumstances": s. 71(2) and (3).

C. *Legislation on the Commission's Jurisdiction and Appeals*

26 Section 79 of the *Utilities Commission Act* states that all findings of fact made by the Commission within its jurisdiction are "binding and conclusive". This is supplemented by s. 105 which grants the Commission "exclusive jurisdiction in all cases and for all matters in which jurisdiction is conferred on it by this or any other Act". An appeal, however, lies from a decision or order of the Commission to the Court of Appeal with leave: s. 101(1).

27 Together, ss. 79 and 105 of the *Utilities Commission Act* constitute a "privative clause" as defined in s. 1 of the British Columbia *Administrative Tribunals Act*, S.B.C. 2004, c. 45. Under s. 58 of the *Administrative Tribunals Act*, this privative clause attracts a "patently unreasonable" standard of judicial review to "a finding of fact or law or [page667] an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause"; a standard of correctness is to be applied in the review of "all [other] matters".

28 The jurisdiction of the commission is also arguably affected by s. 44(1) of the *Administrative Tribunals Act* which applies to the Commission by virtue of s. 2(4) of the *Utilities Commission Act*. Section 44(1) of the *Administrative Tribunals Act* states that "[t]he tribunal does not have jurisdiction over constitutional questions". A "constitutional question" is defined in s. 1 of the *Administrative Tribunals Act* by s. 8 of the *Constitutional Question Act*, R.S.B.C.

1996, c. 68. Section 8(2) says:

> **8...** .
>
> (2) If in a cause, matter or other proceeding
>
> (a) the constitutional validity or constitutional applicability of any law is challenged, or
>
> (b) an application is made for a constitutional remedy,
>
> the law must not be held to be invalid or inapplicable and the remedy must not be granted until after notice of the challenge or application has been served on the Attorney General of Canada and the Attorney General of British Columbia in accordance with this section.

A "constitutional remedy" is defined as "a remedy under section 24(1) of the *Canadian Charter of Rights and Freedoms* other than a remedy consisting of the exclusion of evidence or consequential on such exclusion": *Constitutional Question Act*, s. 8(1).

D. *Section 35 of the Constitution Act, 1982*

29 Section 35 of the *Constitution Act, 1982* reads:

[page668]

> **35.** (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.
>
> (3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.
>
> (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

III. The Issues

30 The main issues that must be resolved are: (1) whether the Commission had jurisdiction to consider consultation; and (2) if so, whether the Commission's refusal to rescope the inquiry to consider consultation should be set aside. In order to resolve these issues, it is necessary to consider when a duty to consult arises and the role of tribunals in relation to the duty to consult. These reasons will therefore consider:

1. When a duty to consult arises;
2. The role of tribunals in consultation;
3. The Commission's jurisdiction to consider consultation;
4. The Commission's Reconsideration Decision;
5. The Commission's conclusion that approval of the 2007 EPA was in the public interest.

IV. Analysis

A. *When Does the Duty to Consult Arise?*

31 The Court in *Haida Nation* answered this question as follows: the duty to consult arises "when [page669] 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" (para. 35). This test can be broken down into three elements:

(1) the Crown's knowledge, actual or constructive, of a potential Aboriginal claim or right; (2) contemplated Crown conduct; and (3) the potential that the contemplated conduct may adversely affect an Aboriginal claim or right. I will discuss each of these elements in greater detail. First, some general comments on the source and nature of the duty to consult are in order.

32 The duty to consult is grounded in the honour of the Crown. It is a corollary of the Crown's obligation to achieve the just settlement of Aboriginal claims through the treaty process. While the treaty claims process is ongoing, there is an implied duty to consult with the Aboriginal claimants on matters that may adversely affect their treaty and Aboriginal rights, and to accommodate those interests in the spirit of reconciliation: *Haida Nation*, at para. 20. As stated in *Haida Nation*, at para. 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.

33 The duty to consult described in *Haida Nation* derives from the need to protect Aboriginal interests while land and resource claims are ongoing or when the proposed action may impinge on an Aboriginal right. Absent this duty, Aboriginal groups seeking to protect their interests pending a [page670] final settlement would need to commence litigation and seek interlocutory injunctions to halt the threatening activity. These remedies have proven time-consuming, expensive, and are often ineffective. Moreover, with a few exceptions, many Aboriginal groups have limited success in obtaining injunctions to halt development or activities on the land in order to protect contested Aboriginal or treaty rights.

34 Grounded in the honour of the Crown, the duty has both a legal and a constitutional character: *R. v. Kapp*, *2008 SCC 41*, *[2008] 2 S.C.R. 483*, at para. 6. The duty seeks to provide protection to Aboriginal and treaty rights while furthering the goals of reconciliation between Aboriginal peoples and the Crown. Rather than pitting Aboriginal peoples against the Crown in the litigation process, the duty recognizes that both must work together to reconcile their interests. It also accommodates the reality that often Aboriginal peoples are involved in exploiting the resource. Shutting down development by court injunction may serve the interest of no one. The honour of the Crown is therefore best reflected by a requirement for consultation with a view to reconciliation.

35 *Haida Nation* sets the framework for dialogue prior to the final resolution of claims by requiring the Crown to take contested or established Aboriginal rights into account *before* making a decision that may have an adverse impact on them: J. Woodward, *Native Law*, vol. 1 (loose-leaf), at p. 5-35. The duty is *prospective*, fastening on rights yet to be proven.

36 The nature of the duty varies with the situation. The richness of the required consultation increases with the strength of the *prima facie* Aboriginal claim and the seriousness of the impact on the underlying Aboriginal or treaty right: *Haida Nation*, at paras. 43-45, and *Taku River Tlingit First Nation v. British Columbia (Project Assessment [page671] Director)*, *2004 SCC 74*, *[2004] 3 S.C.R. 550*, at para. 32.

37 The remedy for a breach of the duty to consult also varies with the situation. The Crown's failure to consult can lead to a number of remedies ranging from injunctive relief against the threatening activity altogether, to damages, to an order to carry out the consultation prior to proceeding further with the proposed government conduct: *Haida Nation*, at paras. 13-14.

38 The duty to consult embodies what Brian Slattery has described as a "generative" constitutional order which sees "section 35 as serving a dynamic and not simply static function" ("Aboriginal Rights and the Honour of the Crown" *(2005), 29 S.C.L.R. (2d) 433*, at p. 440). This dynamicism was articulated in *Haida Nation* as follows, at

para. 32:

> ... 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*.

As the post-*Haida Nation* case law confirms, consultation is "[c]oncerned with an ethic of ongoing relationships" and seeks to further an ongoing process of reconciliation by articulating a preference for remedies "that promote ongoing negotiations": D. G. Newman, *The Duty to Consult: New Relationships with Aboriginal Peoples* (2009), at p. 21.

39 Against this background, I now turn to the three elements that give rise to a duty to consult.

(1) Knowledge by the Crown of a Potential Claim or Right

40 To trigger the duty to consult, the Crown must have real or constructive knowledge of a [page672] claim to the resource or land to which it attaches: *Haida Nation*, at para. 35. The threshold, informed by the need to maintain the honour of the Crown, is not high. Actual knowledge arises when a claim has been filed in court or advanced in the context of negotiations, or when a treaty right may be impacted: *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388, para. 34. Constructive knowledge arises when lands are known or reasonably suspected to have been traditionally occupied by an Aboriginal community or an impact on rights may reasonably be anticipated. While the existence of a potential claim is essential, proof that the claim will succeed is not. What is required is a credible claim. Tenuous claims, for which a strong *prima facie* case is absent, may attract a mere duty of notice. As stated in *Haida Nation*, at para. 37:

> 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.

41 The claim or right must be one which actually exists and stands to be affected by the proposed government action. This flows from the fact that the purpose of consultation is to protect unproven or established rights from irreversible harm as the settlement negotiations proceed: Newman, at p. 30, citing *Haida Nation*, at paras. 27 and 33.

(2) Crown Conduct or Decision

42 Second, for a duty to consult to arise, there must be Crown conduct or a Crown decision that [page673] engages a potential Aboriginal right. What is required is conduct that may adversely impact on the claim or right in question.

43 This raises the question of what government action engages the duty to consult. It has been held that such action is not confined to government exercise of statutory powers: *Huu-Ay-Aht First Nation v. British Columbia (Minister of Forests)*, 2005 BCSC 697, [2005] 3 C.N.L.R. 74, at paras. 94 and 104; *Wii'litswx v. British Columbia (Minister of Forests)*, 2008 BCSC 1139, [2008] 4 C.N.L.R. 315, at paras. 11-15. This accords with the generous, purposive approach that must be brought to the duty to consult.

44 Further, government action is not confined to decisions or conduct which have an immediate impact on lands and resources. A potential for adverse impact suffices. Thus, the duty to consult extends to "strategic, higher level decisions" that may have an impact on Aboriginal claims and rights (Woodward, at p. 5-41 (emphasis omitted)).

Examples include the transfer of tree licences which would have permitted the cutting of old-growth forest (*Haida Nation*); the approval of a multi-year forest management plan for a large geographic area (*Klahoose First Nation v. Sunshine Coast Forest District (District Manager)*, *2008 BCSC 1642*, *[2009] 1 C.N.L.R. 110*); the establishment of a review process for a major gas pipeline (*Dene Tha' First Nation v. Canada (Minister of Environment)*, *2006 FC 1354*, *[2007] 1 C.N.L.R. 1*, aff'd *2008 FCA 20*, *35 C.E.L.R. (3d) 1*); and the conduct of a comprehensive inquiry to determine a province's infrastructure and capacity needs for electricity transmission (*An Inquiry into British Columbia's Electricity Transmission Infrastructure & Capacity Needs for the Next 30 Years, Re*, 2009 CarswellBC 3637 (B.C.U.C.)). We leave for another day the question of whether government conduct includes legislative action: see *R. v. Lefthand*, *2007 ABCA 206*, *77 Alta. L.R. (4th) 203*, at paras. 37-40.

[page674]

(3) Adverse Effect of the Proposed Crown Conduct on an Aboriginal Claim or Right

45 The third element of a duty to consult is the possibility that the Crown conduct may affect the Aboriginal claim or right. The claimant must show a causal relationship between the proposed government conduct or decision and a potential for adverse impacts on pending Aboriginal claims or rights. Past wrongs, including previous breaches of the duty to consult, do not suffice.

46 Again, a generous, purposive approach to this element is in order, given that the doctrine's purpose, as stated by Newman, is "to recognize that actions affecting unproven Aboriginal title or rights or treaty rights can have irreversible effects that are not in keeping with the honour of the Crown" (p. 30, citing *Haida Nation*, at paras. 27 and 33). Mere speculative impacts, however, will not suffice. As stated in *R. v. Douglas*, *2007 BCCA 265*, *278 D.L.R. (4th) 653*, at para. 44, there must an "appreciable adverse effect on the First Nations' ability to exercise their aboriginal right". The adverse effect must be on the future exercise of the right itself; an adverse effect on a First Nation's future negotiating position does not suffice.

47 Adverse impacts extend to any effect that may prejudice a pending Aboriginal claim or right. Often the adverse effects are physical in nature. However, as discussed in connection with what constitutes Crown conduct, high-level management decisions or structural changes to the resource's management may also adversely affect Aboriginal claims or rights even if these decisions have no "immediate impact on lands and resources": Woodward, at p. 5-41. This is because such structural changes to the resources management may set the stage for further decisions that will have a *direct* adverse impact on land and resources. For example, [page675] a contract that transfers power over a resource from the Crown to a private party may remove or reduce the Crown's power to ensure that the resource is developed in a way that respects Aboriginal interests in accordance with the honour of the Crown. The Aboriginal people would thus effectively lose or find diminished their constitutional right to have their interests considered in development decisions. This is an adverse impact: see *Haida Nation*, at paras. 72-73.

48 An underlying or continuing breach, while remediable in other ways, is not an adverse impact for the purposes of determining whether a particular government decision gives rise to a duty to consult. The duty to consult is designed to prevent damage to Aboriginal claims and rights while claim negotiations are underway: *Haida Nation*, at para. 33. The duty arises when the Crown has *knowledge*, real or constructive, of the potential or actual existence of the Aboriginal right or title "and contemplates conduct that might adversely affect it": *Haida Nation*, at para. 35 (emphasis added). This test was confirmed by the Court in *Mikisew Cree* in the context of treaty rights, at paras. 33-34.

49 The question is whether there is a claim or right that potentially may be adversely impacted by the *current* government conduct or decision in question. Prior and continuing breaches, including prior failures to consult, will only trigger a duty to consult if the present decision has the potential of causing a novel adverse impact on a present claim or existing right. This is not to say that there is no remedy for past and continuing breaches, including previous failures to consult. As noted in *Haida Nation*, a breach of the duty to consult may be remedied in various

ways, including the awarding of damages. To trigger a fresh duty of consultation - the matter which is here at issue - a contemplated [page676] Crown action must put current claims and rights in jeopardy.

50 Nor does the definition of what constitutes an adverse effect extend to adverse impacts on the negotiating position of an Aboriginal group. The duty to consult, grounded in the need to protect Aboriginal rights and to preserve the future use of the resources claimed by Aboriginal peoples while balancing countervailing Crown interests, no doubt may have the ulterior effect of delaying ongoing development. The duty may thus serve not only as a tool to settle interim resource issues but also, and incidentally, as a tool to achieve longer term compensatory goals. Thus conceived, the duty to consult may be seen as a necessary element in the overall scheme of satisfying the Crown's constitutional duties to Canada's First Nations. However, cut off from its roots in the need to preserve Aboriginal interests, its purpose would be reduced to giving one side in the negotiation process an advantage over the other.

(4) An Alternative Theory of Consultation

51 As we have seen, the duty to consult arises when: (1) the Crown has knowledge, actual or constructive, of potential aboriginal claims or rights; (2) the Crown proposes conduct or a decision; and (3) that conduct or decision may have an adverse impact on the Aboriginal claims or rights. This requires demonstration of a causal connection between the proposed Crown conduct and a potential adverse impact on an Aboriginal claim or right.

52 The respondent's submissions are based on a broader view of the duty to consult. It argues that even if the 2007 EPA will have no impact on the Nechako River water levels, the Nechako fisheries [page677] or the management of the contested resource, the duty to consult may be triggered because the 2007 EPA is part of a larger hydro-electric project which continues to impact its rights. The effect of this proposition is that if the Crown proposes an action, however limited, that relates to a project that impacts Aboriginal claims or rights, a fresh duty to consult arises. The current government action or decision, however inconsequential, becomes the hook that secures and reels in the constitutional duty to consult on the entire resource.

53 I cannot accept this view of the duty to consult. *Haida Nation* negates such a broad approach. It grounded the duty to consult in the need to preserve Aboriginal rights and claims pending resolution. It confines the duty to consult to adverse impacts flowing from the specific Crown proposal at issue - not to larger adverse impacts of the project of which it is a part. The subject of the consultation is the impact on the claimed rights of the *current* decision under consideration.

54 The argument for a broader duty to consult invokes the logic of the fruit of the poisoned tree - an evidentiary doctrine that holds that past wrongs preclude the Crown from subsequently benefiting from them. Thus, it is suggested that the failure to consult with the CSTC First Nations on the initial dam and water diversion project prevents any further development of that resource without consulting on the entirety of the resource and its management. Yet, as *Haida Nation* pointed out, the failure to consult gives rise to a variety of remedies, including damages. An order compelling consultation is only appropriate where the proposed Crown conduct, immediate or prospective, may adversely impact on established or claimed rights. Absent this, other remedies may be more appropriate.

[page678]

B. *The Role of Tribunals in Consultation*

55 The duty on a tribunal to consider consultation and the scope of that inquiry depends on the mandate conferred by the legislation that creates the tribunal. Tribunals are confined to the powers conferred on them by their constituent legislation: *R. v. Conway*, *2010 SCC 22*, *[2010] 1 S.C.R. 765*. It follows that the role of particular tribunals in relation to consultation depends on the duties and powers the legislature has conferred on it.

56 The legislature may choose to delegate to a tribunal the Crown's duty to consult. As noted in *Haida Nation*, it is open to governments to set up regulatory schemes to address the procedural requirements of consultation at different stages of the decision-making process with respect to a resource.

57 Alternatively, the legislature may choose to confine a tribunal's power to determinations of whether adequate consultation has taken place, as a condition of its statutory decision-making process. In this case, the tribunal is not itself engaged in the consultation. Rather, it is reviewing whether the Crown has discharged its duty to consult with a given First Nation about potential adverse impacts on their Aboriginal interest relevant to the decision at hand.

58 Tribunals considering resource issues touching on Aboriginal interests may have neither of these duties, one of these duties, or both depending on what responsibilities the legislature has conferred on them. Both the powers of the tribunal to consider questions of law and the remedial powers granted it by the legislature are relevant considerations in determining the contours of that tribunal's jurisdiction: *Conway*. As such, they are also relevant to determining whether a particular tribunal has a duty to consult, a duty to consider consultation, or no duty at all.

59 The decisions below and the arguments before us at times appear to merge the different [page679] duties of consultation and its review. In particular, it is suggested that every tribunal with jurisdiction to consider questions of law has a constitutional duty to consider whether adequate consultation has taken place and, if not, to itself fulfill the requirement regardless of whether its constituent statute so provides. The reasoning seems to be that this power flows automatically from the power of the tribunal to consider legal and hence constitutional questions. Lack of consultation amounts to a constitutional vice that vitiates the tribunal's jurisdiction and, in the case before us, makes it inconsistent with the public interest. In order to perform its duty, it must rectify the vice by itself engaging in the missing consultation.

60 This argument cannot be accepted, in my view. A tribunal has only those powers that are expressly or implicitly conferred on it by statute. In order for a tribunal to have the power to enter into interim resource consultations with a First Nation, pending the final settlement of claims, the tribunal must be expressly or impliedly authorized to do so. The power to engage in consultation itself, as distinct from the jurisdiction to determine whether a duty to consult exists, cannot be inferred from the mere power to consider questions of law. Consultation itself is not a question of law; it is a distinct and often complex constitutional process and, in certain circumstances, a right involving facts, law, policy, and compromise. The tribunal seeking to engage in consultation itself must therefore possess remedial powers necessary to do what it is asked to do in connection with the consultation. The remedial powers of a tribunal will depend on that tribunal's enabling statute, and will require discerning the legislative intent: *Conway*, at para. 82.

61 A tribunal that has the power to consider the adequacy of consultation, but does not itself have the power to enter into consultations, should provide whatever relief it considers appropriate in the circumstances, in accordance with the remedial powers expressly or impliedly conferred upon it by [page680] statute. The goal is to protect Aboriginal rights and interests and to promote the reconciliation of interests called for in *Haida Nation*.

62 The fact that administrative tribunals are confined to the powers conferred on them by the legislature, and must confine their analysis and orders to the ambit of the questions before them on a particular application, admittedly raises the concern that governments may effectively avoid their duty to consult by limiting a tribunal's statutory mandate. The fear is that if a tribunal is denied the power to consider consultation issues, or if the power to rule on consultation is split between tribunals so as to prevent any one from effectively dealing with consultation arising from particular government actions, the government might effectively be able to avoid its duty to consult.

63 As the B.C. Court of Appeal rightly found, the duty to consult with Aboriginal groups, triggered when government decisions have the potential to adversely affect Aboriginal interests, is a constitutional duty invoking the honour of the Crown. It must be met. If the tribunal structure set up by the legislature is incapable of dealing with a decision's potential adverse impacts on Aboriginal interests, then the Aboriginal peoples affected must seek appropriate remedies in the courts: *Haida Nation*, at para. 51.

64 Before leaving the role of tribunals in relation to consultation, it may be useful to review the standard of review that courts should apply in addressing the decisions of tribunals. The starting point is *Haida Nation*, at para. 61:

> 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... . 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 [page681] 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 ....

65 It is therefore clear that some deference is appropriate on matters of mixed fact and law, invoking the standard of reasonableness. This, of course, does not displace the need to take express legislative intention into account in determining the appropriate standard of review on particular issues: *Canada (Citizenship and Immigration) v. Khosa*, *2009 SCC 12*, *[2009] 1 S.C.R. 339*. It follows that it is necessary in this case to consider the provisions of the *Administrative Tribunals Act* and the *Utilities Commission Act* in determining the appropriate standard of review, as will be discussed more fully below.

C. *The Commission's Jurisdiction to Consider Consultation*

66 Having considered the law governing when a duty to consult arises and the role of tribunals in relation to the duty to consult, I return to the questions at issue on appeal.

67 The first question is whether consideration of the duty to consult was within the mandate of the Commission. This being an issue of jurisdiction, the standard of review at common law is correctness. The relevant statutes, discussed earlier, do not displace that standard. I therefore agree with the Court of Appeal that the Commission did not err in concluding that it had the power to consider the issue of consultation.

68 As discussed above, issues of consultation between the Crown and Aboriginal groups arise from s. 35 of the *Constitution Act, 1982*. They therefore have a constitutional dimension. The question is whether the Commission possessed the power to [page682] consider such an issue. As discussed, above, tribunals are confined to the powers conferred on them by the legislature: *Conway*. We must therefore ask whether the *Utilities Commission Act* conferred on the Commission the power to consider the issue of consultation, grounded as it is in the Constitution.

69 It is common ground that the *Utilities Commission Act* empowers the Commission to decide questions of law in the course of determining whether the 2007 EPA is in the public interest. The power to decide questions of law implies a power to decide constitutional issues that are properly before it, absent a clear demonstration that the legislature intended to exclude such jurisdiction from the tribunal's power (*Conway*, at para. 81; *Paul v. British Columbia (Forest Appeals Commission)*, *2003 SCC 55*, *[2003] 2 S.C.R. 585*, at para. 39). "[S]pecialized tribunals with both the expertise and authority to decide questions of law are in the best position to hear and decide constitutional questions related to their statutory mandates": *Conway*, at para. 6.

70 Beyond its general power to consider questions of law, the factors the Commission is required to consider under s. 71 of the *Utilities Commission Act*, while focused mainly on economic issues, are broad enough to include the issue of Crown consultation with Aboriginal groups. At the time, s. 71(2)(e) required the Commission to consider "any other factor that the commission considers relevant to the public interest". The constitutional dimension of the duty to consult gives rise to a special public interest, surpassing the dominantly economic focus of the consultation under the *Utilities Commission Act*. As Donald J.A. asked, "How can a contract formed by a Crown agent in breach of a constitutional duty be in the public interest?" (para. 42).

71 This conclusion is not altered by the *Administrative Tribunals Act*, which provides that a tribunal does not have jurisdiction over [page683] constitutional matters. Section 2(4) of the *Utilities Commission Act* makes certain sections of the *Administrative Tribunals Act* applicable to the Commission. This includes s. 44(1) which provides that "[t]he tribunal does not have jurisdiction over constitutional questions." However, "constitutional question" is defined narrowly in s. 1 of the *Administrative Tribunals Act* as "any question that requires notice to be given under section 8 of the *Constitutional Question Act*". Notice is required only for challenges to the constitutional validity or constitutional applicability of any law, or are application for a constitutional remedy.

72 The application to the Commission by the CSTC for a rescoping order to address consultation issues does not fall within this definition. It is not a challenge to the constitutional validity or applicability of a law, nor a claim for a constitutional remedy under s. 24 of the *Charter* or s. 52 of the *Constitution Act, 1982*. In broad terms, consultation under s. 35 of the *Constitution Act, 1982* is a constitutional question: *Paul*, para. 38. However, the provisions of the *Administrative Tribunals Act* and the *Constitutional Question Act* do not indicate a clear intention on the part of the legislature to exclude from the Commission's jurisdiction the duty to consider whether the Crown has discharged its duty to consult with holders of relevant Aboriginal interests. It follows that, in applying the test articulated in *Paul* and *Conway*, the Commission has the constitutional jurisdiction to consider the adequacy of Crown consultation in relation to matters properly before it.

73 For these reasons, I conclude that the Commission had the power to consider whether adequate consultation with concerned Aboriginal peoples had taken place.

74 While the *Utilities Commission Act* conferred on the Commission the power to consider whether adequate consultation had taken place, [page684] its language did not extend to empowering the Commission to engage in consultations in order to discharge the Crown's constitutional obligation to consult. As discussed above, legislatures may delegate the Crown's duty to consult to tribunals. However, the Legislature did not do so in the case of the Commission. Consultation itself is not a question of law, but a distinct constitutional process requiring powers to effect compromise and do whatever is necessary to achieve reconciliation of divergent Crown and Aboriginal interests. The Commission's power to consider questions of law and matters relevant to the public interest does not empower it to itself engage in consultation with Aboriginal groups.

75 As the Court of Appeal rightly found, the duty to consult with Aboriginal groups, triggered when government decisions have the potential to adversely affect Aboriginal interests, is a constitutional duty invoking the honour of the Crown. It must be met. If the tribunal structure set up by the Legislature is incapable of dealing with a decision's potential adverse impacts on Aboriginal interests, then the Aboriginal peoples affected must seek appropriate remedies in the courts: *Haida Nation*, at para. 51.

D. *The Commission's Reconsideration Decision*

76 The Commission correctly accepted that it had the power to consider the adequacy of consultation with Aboriginal groups. The reason it decided it would not consider this issue was not for want of power, but because it concluded that the consultation issue could not arise, given its finding that the 2007 EPA would not adversely affect any Aboriginal interest.

77 As reviewed earlier in these reasons, the Commission held a hearing into the issue of whether the main hearing should be rescoped to permit exploration of the consultation issue. The evidence at this hearing was directed to the issue [page685] of whether approval of the 2007 EPA would have any adverse impact on the interests of the CSTC First Nations. The Commission considered both the impact of the 2007 EPA on river levels (physical impact) and on the management and control of the resource. The Commission concluded that the 2007 EPA would not have any adverse physical impact on the Nechako River and its fishery. It also concluded that the 2007 EPA did not "transfer or change control of licenses or authorization", negating adverse impacts from management or control changes. The Commission held that an underlying infringement (i.e. failure to consult on the initial project) was not sufficient

to trigger a duty to consult. It therefore dismissed the application for reconsideration and declined to rescope the hearing to include consultation issues.

78 The determination that rescoping was not required because the 2007 EPA could not affect Aboriginal interests is a mixed question of fact and law. As directed by *Haida Nation*, the standard of review applicable to this type of decision is normally reasonableness (understood in the sense that any conclusion resting on incorrect legal principles of law would not be reasonable). However, the provisions of the relevant statutes, discussed earlier, must be considered. The *Utilities Commission Act* provides that the Commission's findings of fact are "binding and conclusive", attracting a patently unreasonable standard under the *Administrative Tribunals Act.* Questions of law must be correctly decided. The question before us is a question of mixed fact and law. It falls between the legislated standards and thus attracts the common law standard of "reasonableness" as set out in *Haida Nation* and *Dunsmuir v. New Brunswick*, *2008 SCC 9*, *[2008] 1 S.C.R. 190*.

79 A duty to consult arises, as set out above, when there is: (a) knowledge, actual or constructive, by the Crown of a potential Aboriginal claim or right, (b) contemplated Crown conduct, and (c) the potential that the contemplated conduct may [page686] adversely affect the Aboriginal claim or right. If, in applying the test set out in *Haida Nation*, it is arguable that a duty to consult could arise, the Commission would have been wrong to dismiss the rescoping order.

80 The first element of the duty to consult - Crown knowledge of a potential Aboriginal claim or right - need not detain us. The CSTC First Nations' claims were well-known to the Crown; indeed, it was lodged in the Province's formal claims resolution process.

81 Nor need the second element - proposed Crown conduct or decision - detain us. BC Hydro's proposal to enter into an agreement to purchase electricity from Alcan is clearly proposed Crown conduct. BC Hydro is a Crown corporation. It acts in place of the Crown. No one seriously argues that the 2007 EPA does not represent a proposed action of the Province of British Columbia.

82 The third element - adverse impact on an Aboriginal claim or right caused by the Crown conduct - presents greater difficulty. The Commission, referring to *Haida Nation*, took the view that to meet the adverse impact requirement, "more than just an underlying infringement" was required. In other words, it must be shown that the 2007 EPA could "adversely affect" a current Aboriginal interest. The Court of Appeal rejected, or must be taken to have rejected, the Commission's view of the matter.

83 In my view, the Commission was correct in concluding that an underlying infringement in and of itself would not constitute an adverse impact giving rise to a duty to consult. As discussed above, the constitutional foundation of consultation articulated in *Haida Nation* is the potential for adverse impacts on Aboriginal interests of state-authorized [page687] developments. Consultation centres on how the resource is to be developed in a way that prevents irreversible harm to existing Aboriginal interests. Both parties must meet in good faith, in a balanced manner that reflects the honour of the Crown, to discuss development with a view to accommodation of the conflicting interests. Such a conversation is impossible where the resource has long since been altered and the present government conduct or decision does not have any further impact on the resource. The issue then is not consultation about the further development of the resource, but negotiation about compensation for its alteration without having properly consulted in the past. The Commission applied the correct legal test.

84 It was argued that the Crown breached the rights of the CSTC when it allowed the Kenney Dam and electricity production powerhouse with their attendant impacts on the Nechako River to be built in the 1950s and that this breach is ongoing and shows no sign of ceasing in the foreseeable future. But the issue before the Commission was whether a fresh duty to consult could arise *with respect to the Crown decision before the Commission*. The question was whether the *2007 EPA* could *adversely* impact the claim or rights advanced by the CSTC First Nations in the ongoing claims process. The issue of ongoing and continuing breach was not before the Commission, given its limited mandate, and is therefore not before this Court.

85 What then is the potential impact of the 2007 EPA on the claims of the CSTC First Nations? The Commission held there could be none. The question is whether this conclusion was reasonable based on the evidence before the Commission on the rescoping inquiry.

86 The Commission considered two types of potential impacts. The first type of impact was the [page688] physical impact of the 2007 EPA on the Nechako River and thus on the fishery. The Commission conducted a detailed review of the evidence on the impact the 2007 EPA could have on the river's water levels and concluded it would have none. This was because the levels of water on the river were entirely governed by the water licence and the 1987 agreement between the Province, Canada, and Alcan. The Commission rejected the argument that not approving the 2007 EPA could potentially raise water levels in the Nechako River, to the benefit of the fishery, on the basis of uncontradicted evidence that if Alcan could not sell its excess electricity to BC Hydro it would sell it elsewhere. The Commission concluded that with or without the 2007 EPA, "Alcan operates the Nechako Reservoir to optimize power generation". Finally, the Commission concluded that changes in the timing of water releases for power generation have no effect on water levels in the Nechako River because water releases for power generation flow into the Kemano River to the west, rather than the Nechako River to the east.

87 The Commission also considered whether the 2007 EPA might bring about organizational, policy, or managerial changes that might adversely affect the claims or rights of the CSTC First Nations. As discussed above, a duty to consult may arise not only with respect to specific physical impacts, but with respect to high-level managerial or policy decisions that may potentially affect the future exploitation of a resource to the detriment of Aboriginal claimants. It noted that a "section 71 review does not approve, transfer or change control of licenses or authorization". Approval of the 2007 EPA would not effect management changes, ruling out any attendant adverse impact. This, plus the absence of physical impact, led the Commission to conclude that the 2007 EPA had no potential to adversely impact on Aboriginal interests.

[page689]

88 It is necessary, however, to delve further. The 2007 EPA calls for the creation of a Joint Operating Committee, with representatives of Alcan and BC Hydro (s. 4.13). The duties of the committee are to provide advice to the parties regarding the administration of the 2007 EPA and to perform other functions that may be specified or that the parties may direct (s. 4.14). The 2007 EPA also provides that the parties will jointly develop, maintain, and update a reservoir operating model based on Alcan's existing operating model and "using input data acceptable to both Parties, acting reasonably" (s. 4.17).

89 The question is whether these clauses amount to an authorization of organizational changes that have the potential to adversely impact on Aboriginal interests. Clearly the Commission did not think so. But our task is to examine that conclusion and ask whether this view of the Commission was reasonable, bearing in mind the generous approach that should be taken to the duty to consult, grounded in the honour of the Crown.

90 Assuming that the creation of the Joint Operating Committee and the ongoing reservoir operation plan can be viewed as organizational changes effected by the 2007 EPA, the question is whether they have the potential to adversely impact the claims or rights of the CSTC First Nations. In cases where adverse impact giving rise to a duty to consult has been found as a consequence of organizational or power-structure changes, it has generally been on the basis that the operational decision at stake may affect the Crown's future ability to deal honourably with Aboriginal interests. Thus, in *Haida Nation*, the Crown proposed to enter into a long-term timber sale contract with Weyerhaeuser. By entering into the contract, the Crown would have reduced its power to control logging of trees, some of them old growth forest, and hence its ability to exercise decision making over the forest consistent with the honour of the Crown. The resource would have been harvested without the consultation discharge that the honour of the Crown required. The Haida people would have been robbed of their [page690] constitutional entitlement. A more telling adverse impact on Aboriginal interests is difficult to conceive.

91 By contrast, in this case, the Crown remains present on the Joint Operating Committee and as a participant in

the reservoir operating model. Charged with the duty to act in accordance with the honour of Crown, BC Hydro's representatives would be required to take into account and consult as necessary with affected Aboriginal groups insofar as any decisions taken in the future have the potential to adversely affect them. The CSTC First Nations' right to Crown consultation on any decisions that would adversely affect their claims or rights would be maintained. I add that the honour of the Crown would require BC Hydro to give the CSTC First Nations notice of any decisions under the 2007 EPA that have the potential to adversely affect their claims or rights.

92 This ongoing right to consultation on future changes capable of adversely impacting Aboriginal rights does not undermine the validity of the Commission's decision on the narrow issue before it: whether approval of the 2007 EPA could have an adverse impact on claims or rights of the CSTC First Nations. The Commission correctly answered that question in the negative. The uncontradicted evidence established that Alcan would continue to produce electricity at the same rates *regardless of whether the 2007 EPA is approved or not*, and that Alcan will sell its power elsewhere if BC Hydro does not buy it, as is their entitlement under Final Water Licence No. 102324 and the 1987 Agreement on waterflows. Moreover, although the Commission did not advert to it, BC Hydro, as a participant on the Joint Operating Committee and the resevoir management team, must in the future consult with the CSTC First Nations on any decisions that may adversely impact their claims or rights. On this evidence, it was not unreasonable for the Commission to conclude that the 2007 EPA will not adversely affect the claims and rights [page691] currently under negotiation of the CSTC First Nations.

93 I conclude that the Commission took a correct view of the law on the duty to consult and hence on the question before it on the application for reconsideration. It correctly identified the main issue before it as whether the 2007 EPA had the potential to adversely affect the claims and rights of the CSTC First Nations. It then examined the evidence on this question. It looked at the organizational implications of the 2007 EPA and at the physical changes it might bring about. It concluded that these did not have the potential to adversely impact the claims or rights of the CSTC First Nations. It has not been established that the Commission acted unreasonably in arriving at these conclusions.

E. *The Commission's Decision That Approval of the 2007 EPA Was in the Public Interest*

94 The attack on the Commission's decision to approve the 2007 EPA was confined to the Commission's failure to consider the issue of adequate consultation over the affected interests of the CSTC First Nations. The conclusion that the Commission did not err in rejecting the application to consider this matter removes this objection. It follows that the argument that the Commission acted unreasonably in approving the 2007 EPA fails.

V. Disposition

95 I would allow the appeal and confirm the decision of the British Columbia Utilities Commission approving the 2007 EPA. Each party will bear their costs.

Appeal allowed; British Columbia Utilities Commission's approval of 2007 Energy Purchase Agreement confirmed.

[page692]

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[page693]

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