PAPE SALTER TEILLET LLP BARRISTERS AND SOLICITORS

September 19, 2018

VIA RESS AND COURIER

Ontario Energy Board
2300 Yonge Street, 27th Floor
Toronto, ON M4P 1E4

Attention: Kirsten Walli, Board Secretary

Re: Upper Canada Transmission Inc. ("NextBridge Infrastructure") and Hydro One Networks Inc.
East-West Tie Line Project and Lake Superior Link Project Combined Hearing
EB-2017-0182/EB-2017-0194/EB-2017-0364
Métis Nation of Ontario Written Submissions and Authorities on NextBridge Infrastructure's Development Costs

We are counsel to the Métis Nation of Ontario ("MNO"), an intervenor in the above-noted proceeding.

In accordance with Procedural Order No. 3 issued August 31, 2018, enclosed please find MNO's Written Submissions and Authorities on NextBridge Infrastructure's development costs in the above-noted proceeding.

Yours sincerely,

Megan Strachan
Pape Salter Teillet LLP

EB-2017-0182
EB-2017-0194
EB-2017-0364

ONTARIO ENERGY BOARD

Upper Canada Transmission Inc. (on behalf of NextBridge Infrastructure)
Application for leave to construct an electricity
transmission line between Thunder Bay and Wawa, Ontario

-and-

Hydro One Networks Inc.
Application to upgrade existing transmission station facilities
in the Districts of Thunder Bay and Algoma, Ontario

-and-

Hydro One Networks Inc.
Application for leave to construct an electricity transmission line
between Thunder Bay and Wawa, Ontario

MÉTIS NATION OF ONTARIO
WRITTEN SUBMISSIONS AND AUTHORITIES
ON NEXTBRIDGE'S DEVELOPMENT COSTS

September 19, 2018

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PART 1: OVERVIEW

1. The Ontario Energy Board ("OEB") has requested written arguments pertaining to the prudence of Upper Canada Transmission Inc.'s ("NextBridge") development costs for the East-West Tie Project ("EWT"). NextBridge was designated by the OEB to undertake the development work for the EWT on August 7, 2013.[1]

2. The OEB and others asked NextBridge several questions regarding the development costs for the EWT associated with First Nations and Métis economic participation and consultation. In addition to requesting greater details on the costs and outcomes of consultation activities,[2] NextBridge was questioned about why costs to support First Nations and Métis economic participation were necessarily incurred during the development phase of the EWT.[3] Specifically, NextBridge received an interrogatory asking whether leave to construct could be granted "prior to incurring material First Nations and Métis [economic] participation costs."[4] The Métis Nation of Ontario ("MNO") agrees with NextBridge's response that leave to construct **cannot** be

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[1] OEB Phase 2 Decision and Order, EB-2011-0140, issued on August 7, 2013 ("OEB Phase 2 Decision").

[2] Information Requests on NextBridge's consultation costs included HONI Interrogatory #13, #14 from the Written Interrogatories of Hydro One Networks Inc., to NextBridge arising from NextBridge's Undertaking Responses on Development Cots filed on July 23, 2018, EB-2017-0182/0194/0364, filed August 14, 2018, at 7–8; Board Staff Interrogatory #3, #4 in OEB Staff Interrogatories, EB-2017-0182/0194/0364, filed August 14, 2018, at 2–3.

[3] CCC Supplementary Interrogatory 2(e), EB-2017-0182/0194/0364, filed August 14, 2018; OEB Member Duff questioning during July 5, 2018, hearing, Transcript of Proceeding ("Tr Pr") at 221, July 5, 2018.

[4] CCC Supplementary Interrogatory 2(e), EB-2017-0182/0194/0364, filed August 14, 2018.

granted without NextBridge—or any other proponent seeking to build a new transmission project in Ontario—incurring material costs in pursuit and implementation of First Nations and Métis economic participation.

3. The MNO has been engaged in economic participation discussions and undertaking consultation activities with NextBridge since late 2013. The MNO submits that **both** Aboriginal consultation **and** economic participation discussions must take place—and therefore require a proponent to incur costs—during the development phase for the following reasons:

a) The law requires Aboriginal consultation during the planning (i.e., development) stage of a project, specifically because:

   i) the duty to consult and accommodate must be fulfilled prior to project approval;

   ii) NextBridge was obligated to carry out procedural aspects of consultation;

   iii) fulfilling the duty to consult and accommodate requires relationship-building:

      (A) Relationships take time and efforts to build; and

      (B) Relationships cannot be turned on and off.

b) Economic participation discussions are required during the development stage:

   i) to fulfill the duty to consult and accommodate;

   ii) to implement Ontario law and policy;

   iii) because it was a requirement for designation by the OEB, carrying the necessary implication that the designated transmitter would undertake this work during the development of the EWT; and

   iv) because the OEB cannot approve a leave to construct application that does not further Ontario policies regarding First Nations and Métis economic participation in new transmission projects.

PART 2: SUBMISSIONS

A. The Law Requires Aboriginal Consultation During the Planning Stage of a Project

4. The MNO notes that these submissions do not address: the scope of the duty to consult and accommodate that is owed to impacted Métis communities represented by the MNO; the rights and claims of these communities; the adequacy of consultation with these communities; or, how the OEB must take these matters into account when making its determination on leave to construct. The MNO will make detailed arguments on these issues, amongst other things, in its final written submissions.

5. For the purposes of commenting on the prudence of NextBridge's development costs, the MNO's submissions on Aboriginal consultation are limited to the legal requirement to engage in consultation and accommodation during the planning stage of a project (i.e., the development phase). While the ultimate responsibility to fulfill the duty lies with the Crown,[5] NextBridge is obligated to carry out procedural aspects of consultation, including building a relationship with the MNO, and incur whatever costs are necessary to do so.

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5 *Clyde River* (*Hamlet*) *v Petroleum Geo-Services Inc*, 2017 SCC 40, [2017] SCJ No 40 at para 30 [*Clyde River* cited to QL] [Authorities, Tab 1].

(i) The Duty to Consult and Accommodate Must be Fulfilled Prior to Project Approval

6. The duty to consult and accommodate Aboriginal rights and claims is well established as a "constitutional imperative."[6] No development can proceed unless and until the duty has been discharged:

> …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 challenged, it should be quashed on judicial review…adequate Crown consultation **before project approval** is always preferable to after-the-fact judicial remonstration.[7]

7. The law is clear that consultation must occur early in the decision-making process, that is, prior to leave to construct being granted. Once leave to construct is granted, there is a "clear momentum to allow a project," which is precisely what the courts have cautioned against:

> **The duty of consultation, if it is to be meaningful, cannot be postponed to the last and final point in a series of decisions.** Once important preliminary decisions have been made and relied upon by the proponent and others, there is clear momentum to allow a project.[8]

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6 *Clyde River*, *supra* note 5 at para 24 [Authorities, Tab 1].

7 *Clyde River*, *supra* note 5 at para 24 (emphasis added) [Authorities, Tab 1].

8 *Squamish Indian Band v British Columbia* (*Minister of Sustainable Resource Management*), 2004 BCSC 1320, [2004] BCJ No 2143 at para 74 (QL) [Authorities, Tab 8]. Also see *Sambaa K'e Dene Band v Duncan*, 2012 FC 204, [2012] FCJ No 216 at para 165 (QL) (emphasis added) [Authorities, Tab 7].

(ii) NextBridge Is Obligated to Carry Out Procedural Aspects of Consultation

8. It is common practice for the Crown to delegate procedural aspects of the duty to project proponents.[9] The Crown has done so in this case. On November 4, 2013, the Ministry of Energy and NextBridge executed a Memorandum of Understanding ("MOU") which provided that "NextBridge is responsible for carrying out procedural aspects of consultation that are delegated to it by the Crown."[10] Under the MOU, NextBridge was delegated extensive responsibilities:

> a) Preparing and executing a Consultation Plan for the Project that sets out how Nextbridge will fulfill its responsibilities under this MOU;
>
> b) Sharing with the Ministry, for its review, its Consultation Plan for the Project;
>
> c) Providing Aboriginal Communities with timely notice of the Project for the purposes of considering possible impacts on their Section 35 Rights;
>
> d) Providing Aboriginal Communities with information about the Project and the role that NextBridge will play in Crown consultation on the Project;
>
> e) Following up on the notice and provision of information in paragraphs (c) and (d) immediately above if NextBridge has not received a timely response or acknowledgment from an Aboriginal community;
>
> f) Explaining to Aboriginal Communities the regulatory and approval processes that apply to the Project;
>
> g) **Taking all reasonable steps to foster positive relationships with Aboriginal communities;**

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9 *Haida Nation v British Columbia* (*Minister of Forests*), 2004 SCC 73, [2004] SCJ No 70 at para 53 [*Haida* cited to QL] [Authorities, Tab 3].

10 Memorandum of Understanding between the Ontario Ministry of Energy and NextBridge, dated November 4, 2013, s 2.2 (b), Monthly Report, Schedule E, EB-2011-0140, filed November 21, 2013 (the "MOU").

h) **Offering Aboriginal Communities reasonable assistance, including financial assistance where appropriate and as determined by NextBridge, to participate in consultation on the Project**;

i) **Meeting with, and receiving and considering correspondence or other written materials from Aboriginal Communities in order to identify any concerns they may have regarding the potential impact of the Project on their Section 35 Rights;**

j) **Where appropriate, discussing with Aboriginal Communities accommodation, including mitigation, of potential adverse effects of the Project on their Section 35 Rights;**

k) Where appropriate, developing and proposing appropriate accommodation measures, in consultation with the Crown;

l) Recording all activities undertaken to fulfill any Duty in relation to the Project;

m) Filing documents, attending regulatory hearings, presenting records and other appropriate evidence of activities undertaken by the Crown and NextBridge to fulfil any Duty in relation to the Project, and making written and oral submissions, as appropriate, regarding the fulfilment of any Duty; and

n) All ancillary activities associated with fulfilling the responsibilities of NextBridge under this MOU.[11]

9. Multiple MNO Community Councils were listed as "Aboriginal Communities" with whom NextBridge needed to consult under the MOU.[12] It was therefore incumbent on NextBridge to begin its consultations with the MNO as soon as possible, and it did so. NextBridge's consultation record indicates that it began consultation with the MNO in December

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11 MOU, *supra* note 10, s 4.1 (emphasis added).

12 MOU, *supra* note 10, List of Communities. The MNO's final written submissions will address the error made by the Crown in identifying individual MNO Community Councils (rather than the Métis community as a whole, which is regional in nature) as the entity to be consulted with.

of 2013, just a few weeks after the execution of the MOU with Canada, and several months after receiving designation from the OEB.[13]

10. The Métis communities impacted by the EWT that the MNO represents are owed deep consultation. 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."[14] Further details on the impacted Métis communities and their rights and claims will be addressed in the MNO's final written submissions.[15] For the purposes of these submissions on NextBridge's development costs, it is sufficient to point out that the wide range of responsibilities delegated to NextBridge in the MOU are reflective of a deep duty to consult.[16]

11. The OEB heard evidence from NextBridge that the information provided by the MNO through consultations, including through two traditional land use reports, was used "in

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13 Tr Pr at 125:15–19, May 7, 2018.

14 *Clyde River, supra* note 5 at para 43 [Authorities, Tab 1].

15 These were also addressed in the MNO's oral submissions on NextBridge's Motion to Dismiss the LSL Leave to Construct Application, which forms part of the record of the Combined Hearing.

16 The caselaw has stated that, when deeper consultation is required, Aboriginal communities are "entitled to more than the minimum receipt of notice, disclosure of information, and ensuing discussion." *Taku River Tlingit First Nation v British Columbia*, 2004 SCC 74, [2004] SCJ No 69 at para 32 (QL) [Authorities, Tab 9].

[Nextbridge's] project planning."[17] This included "the identification, mitigation and/or avoidance of potential adverse effects that may arise from project routing, construction and operations."[18] NextBridge confirmed that, without consultation with the MNO, it would have been impossible to engage in these planning activities and the development of mitigation strategies for impacts to Métis communities and their rights, interests, and claims.[19] In other words, it would have been impossible for NextBridge to fulfill its responsibilities as delegated to it under the MOU, impacting the Crown's ability to discharge the duty to consult and accommodate.[20]

(iii) Fulfilling the Duty to Consult and Accommodate Requires Relationship Building

12. The MOU requires NextBridge to "[take] all reasonable steps to foster positive relationships with Aboriginal communities."[21] This is consistent with the Supreme Court of Canada's repeated direction that "consultation is concerned with an ethic of ongoing relationships,"[22] or, put another way, with "fostering reconciliation by promoting an ongoing

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17 Tr Pr at 129, May 7, 2018.

18 NextBridge Response to OEB Staff IR 41, EB-2017-0182/0194/0364, filed January 25, 2018, at 10.

19 Tr Pr at 130:1–6, May 7, 2018.

20 Such as s. 4.1j) of the MOU, *supra* note 10.

21 MOU, *supra* note 10, s 4.1 g).

22 *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] SCJ No 43 at para 38 [*Carrier Sekani* cited to QL] [Authorities, Tab 6].

relationship."[23] MNO President Margaret Froh, in her evidence before the OEB,[24] echoed the Supreme Court of Canada's words, stating that consultation with the MNO is based on "establishing that relationship of trust."[25]

13. It is foolhardy and naïve to believe that a respectful "relationship of trust" can be built **after** a project is approved. Such a fundamentally flawed approach dooms a project, no matter how large or important. The Enbridge Northern Gateway Pipeline and TransMountain Pipeline projects are cautionary tales. In these cases, a mutually respectful, two-way relationship was not nurtured prior to project approval. The approvals for these projects were challenged by Aboriginal communities and were quashed.[26] If that unfortunate scenario occurred here, it would result in great expense to the ratepayer and would delay a project that the province has identified

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23 *Clyde River, supra* note 5 at para 47 [Authorities, Tab 1].

24 On NextBridge's Motion to Dismiss the LSL Leave to Construct Application.

25 Tr Pr at 9, May 17, 2018.

26 *Tseil-Waututh Nation v Canada*, 2018 FCA 153, [2018] FCJ No 876 at para 558 [*TWN* cited to QL] [Authorities, Tab 10]: "Canada was required to engage in a considered, meaningful two-way dialogue," in other words, to build a relationship of mutual understanding. Canada failed to do so and as a result the consultation process for TransMountain "was an unreasonable consultation process that fell well short of the required mark" (*TWN* at para 762). The approval for the TransMountain pipeline was quashed (*TWN* at para 768). *Gitxaala Nation v Canada*, 2016 FCA 187, [2016] FCJ No 705 at para 279 [*Gitxaala* cited to QL] [Authorities, Tab 2]: "Missing was a real and sustained effort to pursue meaningful two-way dialogue."

as a priority to ensure the reliable and cost-effective supply of electricity to northwestern Ontario.[27]

14. The development of a relationship with an Aboriginal community, and with the MNO specifically, takes time and necessarily involves incurring expenses. This is recognized in the MOU, which **requires** that NextBridge provide financial assistance to Aboriginal communities to carry out consultation and related activities.[28] NextBridge, following the direction of the MOU as well as the Supreme Court of Canada, has done so, investing the necessary time and capacity to build relationships.

(a) Relationships Take Time and Effort to Build

15. The time required to build a respectful and trusting relationship can be significant. In the case of NextBridge and the MNO, regarding the EWT, this took almost 4 and a half years of concerted efforts, including the Extended Development period.[29] NextBridge gave evidence that this time period was critical to building its relationship with the MNO.[30]

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[27] See Order-in-Council 326/2016, approved and ordered March 2, 2016, online: https://www.oeb.ca/oeb/_Documents/Documents/ltr_Ministry_OEB_EW-Tie_Priority_Project_20160310.pdf

[28] MOU, *supra* note 10, s 2.2 h).

[29] NextBridge Argument-in-Chief on Development Costs, EB-2017-0182/0194/0364, filed September 10, 2018, at para 39 ("NextBridge Argument-in-Chief").

[30] Tr Pr at 132, May 7, 2018.

16. In the case of a linear project, such as the EWT, multiple traditional territories are crossed and impacted. This extends the time needed for consultation, and results in higher costs. The recent cases of TransMountain[31] and Northern Gateway[32]—two pipeline projects—demonstrate the unique consultation challenges posed by linear projects. Each potentially impacted Aboriginal community must be separately consulted with, impacts on that community identified and discussed, and their concerns meaningfully addressed.[33] This means that more time, effort, and money for consultation and accommodation is required to grow and nurture many individual relationships. To think that respectful relationships based on "mutual understanding"[34] with multiple Aboriginal communities—each with unique rights, interests, and claims—can be conjured out of the air in a matter of weeks or even months is completely unrealistic, especially for a linear project.

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31 *TWN*, *supra* note 26 [Authorities, Tab 10].

32 *Gitxaala*, *supra* note 26 [Authorities, Tab 2].

33 TWN, *supra* note 26 at para 503 [Authorities, Tab 10]; *Gitxaala*, *supra* note 26 at para 236 [Authorities, Tab 2]: "…where the Crown knows, or ought to know, that its conduct may adversely affect the Aboriginal right or title of more than one First Nation, each First Nation is entitled to consultation based upon the unique facts and circumstances pertinent to it."

34 *Clyde River*, *supra* note 5 at para 49 [Authorities, Tab 1].

(b) Relationships Cannot be Turned On and Off

17. The Oxford Dictionary defines "relationship" as "the state of being connected."[35] Connections are, by their very nature, continuous. A relationship cannot be flicked on and off like a light switch. If a friendship or a marriage is neglected and ignored for months on end, what happens to that relationship? It is common sense that treating any relationship in such a cavalier and callous fashion will lead to its disintegration. The Supreme Court of Canada recognized this when it stated that consultation is about "an ethic of **ongoing** relationships."[36]

18. NextBridge could not have ceased its consultation activities during the Extended Development Period, or at any point of the development process. To do so would sabotage and undermine the relationships it had spent years trying to build.

B. Economic Participation Negotiations Are Required During the Development Phase

19. Economic participation discussions with First Nations and Métis communities must take place during the development phase of EWT—and any other new transmission project in the province—for the following reasons:

a) First Nations and Métis economic participation may be required as part of the fulfillment of the duty to consult and accommodate;

b) First Nations and Métis economic participation is a requirement of Ontario policy;

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35 *English Oxford Living Dictionaries*, *sub verbo* "relationship," online: https://en.oxforddictionaries.com/definition/relationship

36 *Carrier Sekani*, supra note 22 at para 38 (emphasis added).

c) First Nations and Métis economic participation was a requirement for designation by the OEB, carrying the necessary implication that the designated transmitter would undertake this work during the development phase; and

d) The OEB cannot approve a leave to construct application that does not further Ontario policies regarding First Nations and Métis economic participation in new transmission projects.

(i) Economic Participation and the Duty to Consult and Accommodate

20. Where the possibility of accommodation is excluded from the outset, Aboriginal consultation is meaningless.[37] The meaningful discharge of the duty to consult must therefore allow for the possibility of and may also require accommodation:

> When the consultation process suggests amendment of Crown policy, we arrive at the stage of accommodation. **Thus the effect of good faith consultation may be to reveal a duty to accommodate**. Where a strong prima facie case exists for the claim, and the consequences of the government's proposed decision may adversely affect it in a significant way, addressing the Aboriginal concerns may require taking steps to avoid irreparable harm or to minimize the effects of infringement, pending final resolution of the underlying claim.
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> …
>
> 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.[38]

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[37] *Mikisew Cree First Nation v Canada* (*Minister of Canadian Heritage*), 2005 SCC 69, [2005] SCJ No 71 at para 54 [*Mikisew Cree* cited to QL] [Authorities, Tab 4].

[38] *Haida, supra* note 9 at paras 47, 49 (emphasis added) [Authorities, Tab 3].

21. Accommodation can take a variety of forms. The courts have held that categories of appropriate accommodation are not closed and will depend on the unique circumstances of the rights at stake and the project:

> The core of accommodation is the balancing of interests and the reaching of a compromise until such time as claimed rights to property are finally resolved. … This is a developing area of the law and it is too early to be at all categorical about the ambit of appropriate accommodative solutions that have to work not only for [Aboriginal] people but for all of the populace having a broad regard to the public interest.[39]

22. Accommodation can "range in measures [including] economic accommodation, either in recognition of an aboriginal title right (which includes the right to derive economic benefits from the resources in the aboriginal title area), or to compensation for negative impacts on s. 35 rights; economic accommodation may come in many forms, including land grants, revenue sharing, compensation payments, employment opportunities or investment opportunities in a proposed project."[40] Courts have stated that in some instances "financial compensation would be found to be an appropriate measure of accommodation."[41]

23. The OEB was correct to state in its Phase 2 Decision and Order on the EWT that:

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39 *Musqueam Indian Band v British Columbia* (*Minister of Sustainable Resource Management*), 2005 BCCA 128, [2005] BCJ No 444 at para 97 [*Musqueam* cited to QL] [Authorities, Tab 5].

40 Jack Woodward, *Native Law*, Vol 1, (Toronto: Thomson Reuters, 1994) (loose-leaf updated 2017, release 5), ch 5, at 5-112, 5§2281 [Authorities, Tab 12].

41 *Musqueam, supra* note 39 at para 100 [Authorities, Tab 5].

> 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.[42]

24. However, the law is clear that accommodation—if required to fulfill the duty to consult—can include financial or economic arrangements. It is therefore not the case that all economic participation discussions with First Nations and Métis communities would be **solely** in fulfillment of Ontario policy (as discussed further below). Such arrangements can, under certain circumstances, be a part of accommodation discussions that are necessary to fulfill constitutional obligations to First Nations and Métis communities. Because of this close connection, having consultation discussions in the development phase without also having the ability to discuss accommodation measures—which could include financial or economic arrangements—would render consultation "meaningless."[43]

25. Where consultation with First Nations and Métis communities reveals a duty to accommodate, these would need to be discussed, and if necessary, finalized, **prior to project approval** to ensure the discharge of the duty to consult and accommodate.[44]

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42 OEB Phase 2 Decision, *supra* note 1 at 14.

43 *Mikisew Cree*, *supra* note 37 at para 54 [Authorities, Tab 4].

44 See paras 6–7, above.

26. NextBridge acknowledged in its evidence that the duty to consult and economic participation, at the very least, act to inform one another. NextBridge explained in its Argument-in-Chief on development costs that:

> NextBridge was not in a position [at the time of designation] to estimate the costs associated with First Nations and Métis participation **until further engagement had been initiated** and indeed to do so would have been presumptuous to the needs of communities.[45]

27. Evidence given by NextBridge during this proceeding illustrates precisely why cross-pollination between consultation and economic participation discussions is so critical. In the case of the MNO, it resulted in NextBridge's understanding of potential impacts of the EWT on Métis communities represented by the MNO beyond those that were initially identified by the Crown. Ms. Tidmarsh gave evidence that:

> …as we went through our consultation with the MNO and received information from them on the strength of their claims along the line, also at one point during the process the MNO actually ended up with two more communities added to them that were in the project area. Those two extra communities ended up becoming part of our participation discussions as well.[46]

28. As set out above, consultation is about building relationships. So too is economic participation. Without extensive consultation, the relationship with the MNO would not have advanced to the point of reaching an agreement on economic participation.[47] NextBridge

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45 NextBridge Argument-in-Chief, *supra* note 29 para 34c) [emphasis added].

46 Tr Pr at 130:13–19, May 7, 2018.

47 Tr Pr at 133, May 7, 2018.

confirmed this in its evidence given by Ms. Tidmarsh, who stated that: "I don't believe that there could have been a much shorter timeline, considering the ongoing development of the project and the amount of information that was shared between the MNO and NextBridge, especially when it came to getting our details from the general contractor."[48] The four and half year timeline was a **minimum requirement** to successfully do this work, all of which was premised on a strong and respectful relationship between NextBridge and the MNO. It is foolish to think that the same results—the relationship and everything that flows from it—could be accomplished in a shorter timeline, or with substantially less expenses incurred.

(ii) Economic Participation is a Requirement of Ontario Policy

29. There is a clear requirement in Ontario policy that proponents of new transmission projects pursue economic partnerships and arrangements with First Nations and Métis communities. This is found in successive Ontario policies as described briefly below.

30. The 2010 Long-Term Energy Plan ("LTEP") (the plan in place at the time of the designation process for the EWT) stated that:

> Ontario also recognizes that Aboriginal communities have an interest in economic benefits from future transmission projects crossing through their traditional territories…Where a new transmission line crosses the traditional territories of aboriginal communities, Ontario will expect opportunities to be explored…Ontario will encourage transmission companies to enter into

[48] Tr Pr at 132, May 7, 2018.

> partnerships with aboriginal communities, where commercially feasible and where those communities have expressed an interest.[49]

31. Subsequent LTEPs have built on this commitment. The 2013 LTEP stated that:

> 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 obligations, involve potentially affected First Nation and Métis communities, where commercially feasible and where there is an interest**.[50]

32. The current LTEP (2017) does not displace these previous commitments but rather states that it will "continue the direction established in the 2013 LTEP and support First Nations and Métis leadership and capacity in Ontario's evolving energy sector".[51]

33. The 2013 LTEP specifically calls on proponents who are "looking to develop" transmission projects to involve affected First Nations and Métis communities. **There is an express policy requirement to engage in economic participation discussion—as part of**

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[49] Ontario, *Ontario's Long-Term Energy Plan: Building Our Clean Energy Future* (Toronto: Queen's Printer for Ontario, 2010) at 49 ("LTEP 2010"), online: https://www.ontario.ca/document/2010-long-term-energy-plan.

[50] Ontario, *Ontario's Long-Term Energy Plan: Achieving Balance* (Toronto: Queen's Printer for Ontario, 2013) at 69–70 ("LTEP 2013") (emphasis added), online: https://www.ontario.ca/document/2013-long-term-energy-plan.

[51] Ontario, *Ontario's Long-Term Energy Plan: Delivering Fairness and Choice*, (Toronto: Queen's Printer for Ontario, 2017) at 169 ("LTEP 2017"), online: https://www.ontario.ca/document/2017-long-term-energy-plan.

Ontario's socio-economic policy—during the development phase. This is **in addition** to any accommodation discussions that may involve economic or financial components, which would need to be completed prior to project approval to fulfill the duty to consult and accommodate.

(iii) Economic Participation was a Requirement of Designation

34. The fact that First Nations and Métis economic participation was a requirement for designation carries the necessary implication that it would be part of the designated transmitter's development work.

35. The importance of First Nations and Métis economic participation formed a critical part of the designation process from the start. In 2011, the Minister of Energy wrote a letter directing the OEB to design a designation process for the EWT, instructing the OEB to "take 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."[52]

36. The OEB's Phase 1 Decision and Order for the EWT states that **the "primary objective of this proceeding is to select the most qualified transmission company to develop, and bring a leave to construct application for, the [EWT]**."[53] To determine who the "most

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[52] Letter from Minister of Energy to Chair of OEB, EB-2011-0140, EB-2015-0216, March 29, 2011, online: https://www.oeb.ca/industry/policy-initiatives-and-consultations/east-west-tie-line.

[53] OEB Phase 1 Decision and Order, EB-2011-0140, issued on July 12, 2012, at 3 ("OEB Phase 1 Decision") (emphasis added).

qualitied transmission company" was "to develop, and bring a leave to construct application," the OEB included two Aboriginal-specific criteria: "First Nations and Métis consultation" and "First Nation and Métis participation." These formed two of the nine equally weighed criteria used by the OEB to evaluate applications. [54] This meant that about 22%—almost a quarter—of a transmitter's total score in the designation process was related to First Nations and Métis specific criteria.

37. Therefore, in order to be designated, an applicant had to demonstrate the ability to conduct successful consultations with First Nations and Métis Communities **and** propose a "high quality plan" for First Nations and Métis participation, "supported by experience in negotiating such arrangements."[55]

38. The OEB, in its decision to designate NextBridge to develop the EWT, expressly incorporated the 2010 LTEP's requirement to pursue First Nations and Métis economic participation, as set out above.[56] The MNO understood that the OEB, through this incorporation, was requiring NextBridge to pursue economic participation opportunities with First Nations and Métis who were impacted by the project and interested in such participation. The MNO further understood that this was to be pursued during the development phase, as choosing a transmitter to develop the EWT was the "primary purpose" of the designation process. NextBridge

54 OEB Phase 1 Decision, *supra* note 53 at 9.

55 OEB Phase 1 Decision, *supra* note 53 at 9.

56 OEB Phase 2 Decision, *supra* note 1 at 14.

confirmed in its evidence before the OEB that this was its understanding of the OEB's designation decision as well.[57]

39. Moreover, it was clear from NextBridge's application for designation that NextBridge intended to pursue economic participation arrangements—in accordance with Ontario policy—during the development phase. NextBridge's application for designation stated that it would offer negotiated participation in the EWT to affected First Nations and Métis communities, and would finalize these arrangements "prior to submitting its leave to construct application."[58]

40. The OEB, based on that application, designated NextBridge to develop the EWT and bring a leave to construct application. Therefore, NextBridge was designated in part because it had a plan to finalize First Nations and Métis economic participation arrangements **prior** to bringing a leave to construct application. As set out above, this approach is consistent with Ontario law and policy. It would be an absurd result for the costs of negotiating this participation to now be found to be unreasonable. This would be an absurd result because: (a) this is precisely what NextBridge was instructed to do by Ontario policy and the OEB; and (b) this is precisely what NextBridge promised to do in its successful designation application.

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57 Tr Pr at 123–134, May 7, 2018.

58 OEB Phase 2 Decision, *supra* note 1 at 17–18.

(iv) The OEB Cannot Approve a Leave to Construct Application that Does not Further Ontario Policies Related to First Nations and Métis Economic Participation

41. Any proponent seeking to construct a new transmission project in Ontario must seek the economic participation of potentially affected First Nations and Métis communities, if there is an interest and if commercially feasible. This is required to implement the Ontario policies set out above. This includes NextBridge. It applies equally to Hydro One's advancement of its Lake Superior Link leave to construct application.[59]

42. The OEB is charged with making decisions that are consistent with Ontario policy. This is a requirement of its enabling legislation. The *Ontario Energy Board Act* sets out a general requirement to "promote the use and generation of electricity from renewable energy in a manner consistent with the policies of the Government of Ontario…."[60] More specifically, when considering a leave to construct application, the OEB is directed by the *OEB Act* to determine whether the project is in the public interest "in a manner consistent with the policies of the Government of Ontario."[61]

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59 The lack of First Nations and Métis economic participation in the LSL, and the role it should be play in the OEB's evaluation of that application will be dealt with in greater detail in the MNO's final written submission.

60 *Ontario Energy Board Act*, *1998*, SO 1998, c 15 Sched B, s 1(1)5 [*OEB Act*] [Authorities, Tab 11].

61 *OEB Act*, *supra* note 60, s 96(2)2 [Authorities, Tab 11]. The full section states: "Where applicable and in a manner consistent with the policies of the Government of Ontario, the promotion of the use of renewable energy sources."

43. On this basis, a leave to construct application for the EWT cannot be granted without First Nations and Métis economic participation already in place, or, at the very least, having been pursued in good faith and in accordance with Ontario policy. Approving any leave to construct application for a new transmission project, in the absence of evidence of this, would be inconsistent with Ontario policy. It would therefore also be inconsistent with the statutory objectives of the OEB and its statutory mandate.

PART 3: CONCLUSION

44. The law is clear that Aboriginal consultation and accommodation—which may require consideration of economic arrangements—must occur during the planning phase of any project, including the EWT. The law, Ontario policy, and the OEB's own designation process and associated decisions make equally clear that First Nations and Métis economic participation must be pursued during the development phase of the EWT.

45. NextBridge could not have waited until obtaining leave to construct to conduct consultations or engage in economic participation discussions. If this was NextBridge's plan, the OEB would be unable to grant it leave to construct. Moreover, it is highly unlikely that NextBridge would have been awarded the designation in the first place because its application

would not have met the OEB's designation criteria.[62] As a result, NextBridge's consultation and economic participation costs were necessarily incurred during the development phase.

46. All of which is respectfully submitted this 19th day of September 2018.

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[62] As explained above, First Nations and Métis-specific criteria formed 22% of the applicants' scores in the designation process.

LIST OF AUTHORITIES

TAB	ITEM
1.	*Clyde River* (*Hamlet*) *v Petroleum Geo-Services Inc*, 2017 SCC 40, [2017] SCJ No 40
2.	*Gitxaala Nation v Canada*, 2016 FCA 187, [2016] FCJ No 705 (excerpts)
3.	*Haida Nation v British Columbia* (*Minister of Forests*), 2004 SCC 73, [2004] SCJ No 70 (excerpts)
4.	*Mikisew Cree First Nation v Canada* (*Minister of Canadian Heritage*), 2005 SCC 69, [2005] SCJ No 71 (excerpts)
5.	*Musqueam Indian Band v British Columbia* (*Minister of Sustainable Resource Management*), 2005 BCCA 128, [2005] BCJ No 444 (excerpts)
6.	*Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] SCJ No 43 (excerpts)
7.	*Sambaa K'e Dene Band v Duncan*, 2012 FC 204, [2012] FCJ No 216 (excerpts)
8.	*Squamish Indian Band v British Columbia* (*Minister of Sustainable Resource Management*), 2004 BCSC 1320, [2004] BCJ No 2143 (excerpts)
9.	*Taku River Tlingit First Nation v British Columbia*, 2004 SCC 74, [2004] SCJ No 69 (excerpts)
10.	*Tseil-Waututh Nation v Canada*, 2018 FCA 153, [2018] FCJ No 876 (excerpts)
11.	*Ontario Energy Board Act, 1998*, SO 1998, c 15 Sched B (excerpts)
12.	Jack Woodward, *Native Law*, Vol 1, (Toronto: Thomson Reuters, 1994) (loose-leaf updated 2017, release 5) (excerpts)

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.

Statutes and Regulations Cited

Canada Oil and Gas Operations Act, R.S.C. 1985, c. O-7, ss. 2.1, 3, 5(1)(a), 5(1)(b), 5(4), 5(5), 5.002 [ad. 2015, c. 4, s. 7], 5.2(2), 5.31, 5.32, 5.331 [*idem*, s. 13], 5.36.

Canadian Environmental Assessment Act, S.C. 1992, c. 37.

Canadian Environmental Assessment Act, 2012, S.C. 2012, c. 19, s. 52.

Constitution Act, 1982, s. 35.

National Energy Board Act, R.S.C. 1985, c. N-7, s. 12(2), 16.3, 24.

National Energy Board Act, S.C. 1959, c. 46.

Treaties and Agreements

Nunavut Land Claims Agreement (1993).

Authors Cited

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Hogg, Peter W., Patrick J. Monahan and Wade K. Wright. *Liability of the Crown*, 4th ed. Toronto: Carswell, 2011.

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

Newman, Dwight G. *The Duty to Consult: New Relationships with Aboriginal Peoples*. Saskatoon: Purich Publishing, 2009.

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

Nader R. Hasan, *Justin Safayeni* and *Pam Hrick*, for the appellants.

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.

Dominique Nouvet, *Marie Belleau* and *Sonya Morgan*, for the intervener Nunavut Tunngavik Incorporated.

Written submissions only by *David Schulze* and *Nicholas Dodd*, for the intervener the Makivik Corporation.

Marie-France Major and *Thomas Slade*, for the intervener the Nunavut Wildlife Management Board.

Kate Darling, *Lorraine Land*, *Matt McPherson* and *Krista Nerland*, for the intervener the Inuvialuit Regional Corporation.

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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.

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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.

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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).

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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:

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> 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).

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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)

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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.

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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

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Federal Courts Reports

Federal Court of Appeal

Dawson, Stratas and Ryer JJ.A.

Heard: Vancouver, October 1-2, 5-8, 2015;

Judgment: Ottawa, June 23, 2016.

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448-14, A-514-14, A-517-14, A-520-14, A-522-14

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Gitxaala Nation, Gitga'at First Nation, Haisla Nation, The Council of the Haida Nation and Peter Lantin suing on his own behalf and on behalf of all citizens of the Haida Nation, Kitasoo Xai'xais Band Council on behalf of all members of the Kitasoo Xai'xais Nation and Heiltsuk Tribal Council on behalf of all members of the Heiltsuk Nation, Martin Louie, on his own behalf, and on behalf of Nadleh Whut'en and on behalf of the Nadleh Whut'en Band, Fred Sam, on his own behalf, on behalf of all Nak'azdli Whut'en, and on behalf of the Nak'azdli Band, Unifor, ForestEthics Advocacy Association, Living Oceans Society, Raincoast Conservation Foundation, Federation of British Columbia Naturalists carrying on business as BC Nature (Applicants and Appellants) v. Her Majesty the Queen, Attorney General of Canada, Minister of the Environment, Northern Gateway Pipelines Inc., Northern Gateway Pipelines Limited Partnership and National Energy Board (Respondents) and The Attorney General of British Columbia, Amnesty International and The Canadian Association of Petroleum Producers (Interveners)

(364 paras.)

Case Summary

Catchwords:

Aboriginal Peoples — Duty to consult — Judicial review applications of Order in Council P.C. 2014-809 requiring National Energy Board (Board) to issue two Certificates of Public Convenience and Necessity (Certificates), on certain conditions, concerning Northern Gateway Project (Project) - [page419] Project, proposed by Northern Gateway Pipelines Inc., Northern Gateway Pipelines Limited Partnership (Northern Gateway), consisting of two pipelines transporting oil, condensate, related facilities — Also before Court five applications for judicial review of Report issued by review panel known as Joint Review Panel acting under Canadian Environmental Assessment Act, 2012 (CEAA, 2012), s. 52, National Energy Board Act (NEBA); four appeals against Certificates issued by Board — All proceedings consolidated — Order in Council decision legally under review — Project significantly affecting several First Nations parties to proceedings — Project referred to review panel (Joint Review Panel) to be conducted jointly under NEBA, Canadian Environment Assessment Act (CEAA) — Joint Review Panel finding that Project in public interest, recommending issue of applied-for certificates subject to conditions — Following release of Joint Review Panel's Report, process of consultation with Aboriginal groups entering Phase IV of consultation framework — When issuing Order in Council, Governor in Council agreeing with Joint Review Panel's findings, recommendations, environmental conclusions contained in Report — Whether Canada fulfilling duty to consult with Aboriginal peoples — Per Dawson and Stratas JJ.A.: Governor in Council's decision

reasonable under administrative law principles — However, while NEBA, s. 54 not referring to duty to consult, in 2012, when Parliament enacting s. 54 in current form, duty to consult well-established — Very express language required to oust duty to consult — In executing Phase IV of consultation framework, Canada failing to make reasonable efforts to inform, consult — Canada's execution of Phase IV consultation process unacceptably flawed; falling well short of mark — Execution thereof failing to maintain honour of Crown — As to timelines of consultation process, while Governor in Council subject to deadline for decision under NEBA, s. 54(3), subsection allowing Governor in Council by order to extend deadline — No evidence in present case that Canada giving any thought to asking Governor in Council extension of deadline — Also, information put before Governor in Council not accurately portraying concerns of affected First Nations — Lack of meaningful dialogue taking place in Phase IV another concern — Based on totality of evidence examined, Canada failing in Phase IV to engage, dialogue, grapple with concerns expressed thereto in good faith by all applicant/appellant First Nations — As to adequacy of Canada's reasons herein, Canada obliged at law under duty to consult, under NEBA, s. 54 to give reasons for decision directing Board to issue Certificates — Given circumstances in case, importance of claimed rights to Aboriginal groups, significance of potential infringement thereof, deep consultation required herein with written explanations to show Aboriginal groups' concerns considered, to reveal impact concerns having on Governor in Council's decision — Applications for judicial review of Order in Council P.C. 2014-809 allowed; appeals against Certificates allowed; applications for judicial review of Joint Review Panel Report dismissed — Per Ryer J.A. (dissenting): Order in Council [page420] should not be set aside on basis that Crown's execution of Phase IV consultations inadequate to meet duty to consult — In context of overall Project-approval process, execution of Phase IV consultations adequate — Alleged imperfections stated by majority insufficient to demonstrate that Crown's consultations inadequate — Also, no error in Governor in Council's reasons warranting Court's intervention.

Catchwords:

Administrative Law — Judicial Review — Standard of Review — Judicial review of Order in Council P.C. 2014-809 requiring National Energy Board (Board) to issue two Certificates of Public Convenience and Necessity, on certain conditions, concerning Northern Gateway Project — What standard of review applying to Governor in Council's decision — Standard of review of Governor in Council's decision reasonableness since decision at issue constituting discretionary decision founded on widest considerations of policy, public interest.

Catchwords:

Practice — Preliminary Determination of Question of Law — Consolidated proceedings brought before Court involving Northern Gateway Project in which Order in Council P.C. 2014-809 requiring National Energy Board (Board) to issue two Certificates of Public Convenience and Necessity (Certificates) — Included in consolidated proceedings five applications for judicial review of Report issued by Joint Review Panel acting under Canadian Environmental Assessment Act, 2012 (CEAA, 2012), s. 52, National Energy Board Act (NEBA); four appeals from Certificates issued by National Energy Board — Joint Review Panel finding that [page421] Project in public interest — When issuing Order in Council, Governor in Council agreeing with Joint Review Panel's findings, recommendations, environmental conclusions contained in Report — Whether applications for judicial review against Joint Review Panel Report lying; whether appeals against Board's Certificates valid — Applications for judicial review brought against Report of Joint Review Panel not lying — No decisions about legal or practical interest made — Any deficiency in Report to be considered only by Governor in Council, not Court — Therefore, applications for judicial review dismissed — As for appeals against Certificates issued by Board, primary attack must be against Governor in Council's Order in Council since Order in Council prompting automatic issuance of Board's Certificates — Since Order in Council should be quashed, Certificates issued thereunder must also be quashed.

Summary:

These were nine applications for judicial review of Order in Council P.C. 2014-809. That Order required the National Energy Board (Board) to issue two Certificates of Public Convenience and Necessity (Certificates), on certain conditions, concerning the Northern Gateway Project (Project). That Project, proposed by Northern Gateway Pipelines Inc. and Northern Gateway Pipelines Limited Partnership (Northern Gateway), consists of two pipelines transporting oil and condensate and related facilities. Also before the Court were five applications for judicial review of a Report issued by a review panel known as the Joint Review Panel acting under section 52 of the *Canadian Environmental Assessment Act, 2012* (CEAA, 2012), and the *National Energy Board Act* (NEBA). The Governor in Council considered the Joint Review Panel's Report when making its Order in Council. As well, four appeals of the Certificates issued by the National Energy Board were before the Court. All of these proceedings were consolidated. While three administrative acts -- the Order in Council, the Report and the Certificates -- were all subject to challenge, the Order in Council was the decision legally under review and the focus of the Court's analysis.

The Northern Gateway Project consists of two 1 178 kilometre pipelines and associated facilities. One pipeline is intended to transport oil from Bruderheim, Alberta to Kitimat, British Columbia where the oil would be loaded onto tankers for delivery to export markets. The other pipeline would carry condensate removed from tankers at Kitimat to Bruderheim for distribution to Alberta markets. The associated facilities include both tank and marine terminals in Kitimat consisting of a number of oil storage tanks, condensate storage tanks, [page422] tanker berths and a utility berth. The Project significantly affects a number of the First Nations who were parties to the proceedings. Other parties before the Court claimed a strong interest in the Project. The challenges associated with the approval process for the Project were immense.

In 2005, Northern Gateway Pipeline submitted a preliminary information package to the National Energy Board and the Canadian Environmental Assessment Agency. In 2006, the Project was referred to a review panel to be conducted jointly under the NEBA and the *Canadian Environment Assessment Act* (CEAA). The review panel was known as the Joint Review Panel because it had two tasks. First, it had to prepare a report under section 52 of the NEBA for the consideration of the Governor in Council. Second, it was to conduct an environmental assessment of the Project and provide recommendations to the Governor in Council under section 30 of the CEAA. In 2010, Northern Gateway filed an application requesting, *inter alia*, certificates from the Board for the Project. The Joint Review Panel's hearings began in 2012. During that period, there were some legislative changes to the CEAA, which became the *Canadian Environmental Assessment Act, 2012* and amendments were made to the NEBA. The joint review process for the Project was continued under these amended provisions.

In December 2013, the Joint Review Panel issued a two-volume Report. It found that the Project was in the public interest and recommended that the applied-for certificates be issued subject to 209 conditions. As well, it recommended that the Governor in Council conclude in particular that potential adverse environmental effects from the Project alone were not likely to be significant. Following the release of the Report, the process of consultation with Aboriginal groups entered Phase IV of the consultation framework whereby Northern Gateway engaged with over 80 different Aboriginal groups across various regions of Alberta and British Columbia.

In 2014, the Governor in Council issued the Order in Council at issue. Balancing all the competing considerations before it, the Governor in Council accepted the Joint Review Panel's finding that the Project, if constructed and operated in full compliance with certain conditions, would be required by the present and future public convenience and necessity. It [page423] accepted the Panel's recommendation and reached the same environmental conclusions as those outlined in the Report. Exercising its power under section 54 of the NEBA, the Governor in Council directed the Board to issue Certificates of Public Convenience and Necessity to Northern Gateway for the Project in accordance with the terms and conditions set out in the Joint Review Panel's Report. Later, the Board issued two Certificates to Northern Gateway: one for the oil pipeline and associated facilities and another for the condensate pipeline and associated facilities.

The consolidated proceedings taken together sought an order quashing the administrative decisions in this case because, under administrative law principles, they are unreasonable or incorrect. They also sought an order quashing the Order in Council and the Certificates because Canada did not fulfill its duty to consult with Aboriginal peoples concerning the project.

The main issues were whether the applications for judicial review of the Report of the Joint Review Panel could lie; whether the appeals against the Board's Certificates were valid; what was the standard of review of the Governor in Council's decision; and whether Canada fulfilled its duty to consult with Aboriginal peoples.

Held (Ryer J.A. dissenting), the applications for judicial review of Order in Council P.C. 2014-809 should be allowed; the appeals against the Certificates should be allowed; the applications for judicial review of the Joint Review Panel Report should be dismissed.

Per Dawson and Stratas JJ.A.: Several parties brought applications for judicial review against the Report of the Joint Review Panel. Within this legislative scheme, those applications for judicial review did not lie. No decisions about legal or practical interests had been made. Under this legislative scheme, any deficiency in the Report of the Joint Review Panel was to be considered only by the Governor in Council, not the Court. Therefore, these applications for judicial review should be dismissed.

As for the notices of appeal against the Certificates issued by the Board, under this legislative regime, the primary attack must be against the Governor in Council's Order in Council since it prompts the automatic issuance of the Certificates. If the Governor in Council's Order in Council falls, then the [page424] Certificates issued by the Board automatically fall as a consequence. Since the Order in Council should be quashed, the Certificates issued as a result of the Order in Council must also be quashed.

The Governor in Council's decision -- the Order in Council - - was the product of its consideration of recommendations made thereto in the Report. The decision was not simply a consideration of an environmental assessment. The recommendations made to the Governor in Council covered much more than matters disclosed by the environmental assessment -- matters of a polycentric and diffuse kind. In conducting its assessment, the Governor in Council had to balance a broad variety of matters most of which were more properly within the realm of the executive. By vesting decision-making in the Governor in Council, Parliament implicated the decision-making of Cabinet, a body of diverse policy perspectives representing all constituencies within government. And by defining broadly what can go into the report upon which it is to make its decision, Parliament must be taken to have intended that the decision in issue here be made on the broadest possible basis. The standard of review for decisions such as this (discretionary decisions founded upon the widest considerations of policy and public interest) is reasonableness.

The Governor in Council's decision was reasonable under administrative law principles. The Governor in Council was entitled to assess the sufficiency of the information and recommendations it had received, balance all the considerations - - economic, cultural, environmental and otherwise -- and come to the conclusion it did. However, the analysis did not end there. While section 54 of the NEBA does not refer to the duty to consult, in 2012, when Parliament enacted section 54 in its current form, the duty to consult was well-established. Very express language would be required to oust the duty to consult. Under the current legislative scheme, the Governor in Council, when considering a project under the NEBA, must consider whether Canada has fulfilled its duty to consult. Further, in order to accommodate Aboriginal concerns as part of its duty to consult, the Governor in Council must necessarily have the power to impose conditions on any certificate it directs the National Energy Board to issue. In determining whether the duty to consult was fulfilled in this case, the standard of whether reasonable efforts to inform and consult were made was applied. In executing Phase IV of its consultation framework, Canada failed to make reasonable efforts to inform and consult and in fact fell well short of the mark.

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The applicant/appellant First Nations alleged a number of flaws in the consultation process that rendered it inadequate. While statements made by the then Minister of Natural Resources were a concern to some First Nation applicants who claimed that this showed bias, the outcome of the Governor in Council's decision was not predetermined. The decision maker in this case was the Governor in Council and the decision whether to approve the Project was politically charged involving an appreciation of many sometimes conflicting considerations of policy and the public interest. The decision was not judicial or quasi-judicial. Statements made by individual members of Cabinet will not establish bias unless the person alleging such bias demonstrates that the statements are the expression of a final opinion on the question at issue. Regarding the argument that the Crown consultation process was unilaterally imposed on the First Nations, as a matter of law, the Crown has

discretion as to how it structures the consultation process and how the duty to consult is met. What is required is a reasonable process, not perfect consultation. The evidence in this case established that from the outset Canada acknowledged its duty of deep consultation with all affected First Nations and there was consultation about Canada's framework for consultation, which was reasonable and not unilaterally imposed. As to funding for participation in the Joint Review Panel and consultation process, the evidence failed to demonstrate that the funding available was so inadequate as to render the consultation process unreasonable. Furthermore, the consultation process was not over-delegated and it was not unreasonable for Canada to integrate the Joint Review Panel process into the Crown consultation process. Canada did not inappropriately delegate its obligation to consult to the Joint Review Panel. The Joint Review Panel process provided affected Aboriginal groups with the opportunity to learn in detail about the nature of the Project and its potential impact on their interests while at the same time affording an opportunity to Aboriginal groups to voice their concerns. Canada also did not fail to assess the strength of the First Nations' claims, an assertion unsupported by the evidence, and was not obliged to share its legal assessment of the strength of claim.

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Additionally, four more concerns expressed by the applicant/appellant First Nations, which were overlapping and interrelated, focussed primarily on Canada's execution of Phase IV of the consultation framework and were dealt with together. Canada's execution of the Phase IV consultation process was unacceptably flawed and fell well short of the mark. Its execution thereof failed to maintain the honour of the Crown. Phase IV was a very important part of the overall consultation framework. The Report of the Joint Review Panel covered only some of the subjects on which consultation was required. Its terms of reference were narrower than the scope of Canada's duty to consult. In addition, there were deficiencies in the Joint Review Panel's process relating to important assessments and determinations. As for the status of the consultation process at the start of Phase IV, this was Canada's first opportunity -- and its last opportunity before the Governor in Council's decision -- to engage in direct consultation and dialogue with affected First Nations on matters of substance, not procedure, concerning the Project.

Regarding Canada's execution of the process of consultation under Phase IV, the argument that the timelines were arbitrarily short and insufficient to provide for meaningful consultation was addressed. While the Governor in Council was subject to a deadline for decision under subsection 54(3) of the NEBA, that subsection allows the Governor in Council, by order, to extend that deadline. The importance and constitutional significance of the duty to consult provides ample reason for the Governor in Council, in appropriate circumstances, to extend the deadline. There was no evidence that Canada gave any thought to asking the Governor in Council to extend the deadline. However, even if Canada did not want to ask the Governor in Council for an extension, a pre-planned, organized process of Phase IV consultation would have allowed Canada to receive in time all relevant views, discuss and consider them, provide any necessary explanations and, if appropriate, make suitable recommendations to the Governor in Council, including any further conditions to be added to any approval of the Project.

A further problem in Phase IV was that, in at least three instances, information was put before the Governor in Council that did not accurately portray the concerns of the affected First Nations. Canada was less than willing to hear the First Nations on this and to consider and, if necessary, correct the information.

Also of significant concern was the lack of meaningful dialogue that took place in Phase IV. Based on the totality of the [page427] evidence examined, Canada failed in Phase IV to engage, dialogue and grapple with the concerns expressed to it in good faith by all of the applicant/appellant First Nations. Missing in particular was any indication of an intention to amend or supplement the conditions imposed by the Joint Review Panel, to correct any errors or omissions in its Report or to provide meaningful feedback in response to the material concerns raised. Following the authorities of the Supreme Court of Canada on the duty to consult, during the Phase IV process, the parties were entitled to much more in the nature of information, consideration and explanation from Canada regarding the specific and legitimate concerns they put to Canada. For discussions during Phase IV to be fruitful and the dialogue to be meaningful, Canada had to share information concerning the strength of the affected First Nations' claims to Aboriginal rights and title but this was never done. It was not consistent with the duty to consult and the obligation of fair dealing for Canada to simply assert that the Project's impact would be mitigated without first discussing the nature and extent of the rights that were to be impacted. While the

consultation process was not a proper forum for the negotiation of title and governance matters, similar to other asserted rights, affected First Nations were entitled to a meaningful dialogue about the strength of their claim. They were entitled to know Canada's information and views concerning the content and strength of their claims so they would know and would be able to discuss with Canada what was in play in the consultations, the subjects on which Canada might have to accommodate and the extent to which Canada might have to accommodate. Canada's failure to be candid on this point was legally unacceptable. Its failure frustrated the sort of genuine dialogue the duty to consult is meant to foster.

Regarding the adequacy of Canada's reasons, in the present case, Canada was obliged at law to give reasons for its decision directing the Board to issue the Certificates. The source of this obligation was two-fold: where a requirement of deep consultation existed, the Crown was obliged to give reasons. Additionally, subsection 54(2) of the NEBA requires that where the Governor in Council orders the Board to issue a certificate, the order "must set out the reasons for making the order." Given the circumstances in this case, the importance of the claimed rights to Aboriginal groups and the significance of the potential infringement of those rights, this was a case where deep consultation required written explanations to show that the Aboriginal groups' concerns were considered and to reveal the impact those concerns had on the Governor in Council's decision. Had the Phase IV consultation process [page428] been adequate, had the reasons given by Canada's officials during the consultation process been adequate and had the Order in Council referred to and adopted, even generically, that process and the reasons given in it, the reasons requirement might have been met but that is not what happened. Here too Canada fell short of the mark.

In conclusion, Canada offered only a brief, hurried and inadequate opportunity in Phase IV -- a critical part of Canada's consultation framework -- to exchange and discuss information and to dialogue. In order to comply with the law, Canada's officials needed to be empowered to dialogue on all subjects of genuine interest to affected First Nations, to exchange information freely and candidly, to provide explanations, and to complete their task to the level of reasonable fulfilment. As a matter of law, the Governor in Council had to receive and consider any new information or new recommendations stemming from the concerns expressed by Aboriginal peoples during the consultation and, if necessary or appropriate, react. In its Order in Council, the Governor in Council decided to acknowledge only the existence of consultations by others during the process but did not say more despite being required to provide reasons under section 54 of the NEBA and under the duty to consult. The Governor in Council had to provide reasons to show that it fulfilled its legal obligation but did not do so. Therefore in Phase IV of the consultation process -- including the execution of the Governor in Council's role at the end of Phase IV -- Canada fell short of the mark. Accordingly, the Order in Council had to be quashed and since the basis for the Board's Certificates was a nullity, the Certificates were also a nullity and had to be quashed. The matter was remitted to the Governor in Council for redetermination.

Per Ryer J.A. (dissenting): The Order in Council should not be set aside on the basis that the Crown's execution of the Phase IV consultations was inadequate to meet its duty to consult. In the context of the overall Project-approval process, the execution of the Phase IV consultations was adequate. The alleged imperfections in the execution of the Phase IV consultations, stipulated in the majority reasons, were insufficient to demonstrate that the Crown's consultations were inadequate. There was also no error in the Governor in Council's reasons that warranted the Court's intervention. In the Project-approval process, the Crown had the obligation to fulfil the duty to consult. Therefore, any obligation to explain why the duty to consult was adequately discharged rested with the Crown, not the Governor in Council. The Crown's reasons for concluding that it had met its duty to consult were readily apparent. In conclusion, the duty to consult was met in the circumstances and the Governor in Council was correct [page429] in so acknowledging and therefore the Order in Council should stand.

Statutes and Regulations Cited

Canada Evidence Act, R.S.C., 1985, c. C-5, s. 39.

231 We begin our analysis on this point by briefly setting forth some of the relevant legal principles that speak to what constitutes a meaningful process of consultation.

232 As explained above, the duty to consult is a procedural duty grounded in the honour of the Crown. The "common thread on the Crown's part must be the intention of substantially addressing [Aboriginal] concerns' as they are raised ... through a meaningful process of consultation": *Haida Nation*, at paragraph 42. 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": *Haida Nation*, at paragraph 45.

233 Meaningful consultation is not intended simply to allow Aboriginal peoples "to blow off steam" before the Crown proceeds to do what it always intended to do. Consultation is meaningless when it excludes from the outset any form of accommodation: *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, *2005 SCC 69*, *[2005] 3 S.C.R. 388* [*Mikisew Cree First Nation*], at paragraph 54.

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234 As the Supreme Court observed in *Haida Nation*, at paragraph 46, meaningful consultation is not just a process of exchanging information. Meaningful consultation "entails testing and being prepared to amend policy proposals in the light of information received, and providing feedback." As submitted by Kitasoo and Heiltsuk, where deep consultation is required, a dialogue must ensue that "leads to a demonstrably serious consideration of accommodation (as manifested by the Crown's consultation-related duty to provide written reasons)" (emphasis added).

235 Further, the Crown is obliged to inform itself of the impact the proposed project will have on an affected First Nation and communicate its findings to the First Nation: *Mikisew Cree First Nation*, at paragraph 55.

236 Two final points are to be made. First, where the Crown knows, or ought to know, that its conduct may adversely affect the Aboriginal right or title of more than one First Nation, each First Nation is entitled to consultation based upon the unique facts and circumstances pertinent to it.

237 Second, where the duty to consult arises in a project like this, the duty to consult must be fulfilled before the Governor in Council gives its approval for the issuance of a certificate by the National Energy Board. This is because the Governor in Council's decision is a high-level strategic decision that sets into motion risks to the applicant/appellant First Nations' Aboriginal rights: *Haida*, at paragraph 76. Further, future consultation, as contemplated by the Joint Review Panel conditions, would not involve the Crown and future decision making lies with the National Energy Board. Canada advised in the consultation process that the National Energy Board does not consult with First Nations at the leave to open stage.

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238 Against this legal framework, we turn to the execution of Phase IV of the consultation process. We begin with a general comment about the importance of consultation at the beginning of Phase IV and the status of the consultation process at that time.

239 Phase IV was a very important part of the overall consultation framework. It began as soon as the Joint Review Panel released its Report. That Report set out specific evaluations on matters of great interest and effect upon Aboriginal peoples, for example matters involving their traditional culture, the environment around them, and, in some cases, their livelihoods. Specific evaluations call for specific responses and due consideration of those responses by Canada. Specific feedback regarding specific matters dealt with in the Report may be more important than earlier opinions offered in the abstract.

240 Further, the Report of the Joint Review Panel covers only some of the subjects on which consultation was

274 Deputy Chief Councillor of the Haisla, Taylor Cross, also gave evidence that Canada's representatives, including Jim Clarke, repeatedly stated that they had to accept the findings of the Joint Review Panel as set out in its Report. This was not so. Phase IV in part was an opportunity to address errors and omissions in the Report on subjects of vital concern to Aboriginal [page531] peoples. The consequence of Canada's position was to severely limit its ability to consult meaningfully on accommodation measures.

275 The Gitxaala encountered the same problems with Canada during Phase IV. It also took the position that approval of the Project was premature and that further studies on matters arising from the Report of the Joint Review Panel were required. The notes of the April 3, 2014 consultation meeting show that Canada was asked "[c]an we get any response, any reasons why the additional work that we're asking for can't be undertaken? Can we talk about what can or can't be undertaken? We invite any discussion."

276 Jim Clarke, for Canada, replied that "I don't want to raise your expectations. Typically we just use the Joint Review Panel as information for the decision. It is not typical to delay the legislative timeframe for decision. It doesn't mean it can't happen it's just not routinely done".

277 During this April 2014 consultation meeting, Canada acknowledged to the Gitxaala that an oil spill could have a catastrophic effect on the Gitxaala's interests. The Gitxaala's representatives went on to observe that the Gitxaala had filed many expert reports in the Joint Review Panel process. The Gitxaala's representatives asked what Canada's views were on a specific report dealing with navigation issues, and how Canada intended to take such report into account. Transport Canada's representative answered, "If we can get more answers we'll try". Answers on this critical issue were never forthcoming.

278 One final example occurred during the March 3, 2014, consultation meeting with the Haisla. The Haisla's [page532] representatives expressed concern at the extent to which paid lobbyists were talking to government officials and affecting the consideration of their concerns and asked for disclosure of lobbying efforts. Mr. Maracle responded that it was "hard for us to get [information] from Ministers, [and it would be] better if you [used] an [access to information request]". If information was available through an access request, it is difficult to see why it would not be provided through the consultation process-particularly in light of the timelines Canada had imposed.

279 Based on our view of the totality of the evidence, we are satisfied that Canada failed in Phase IV to engage, dialogue and grapple with the concerns expressed to it in good faith by all of the applicant/appellant First Nations. Missing was any indication of an intention to amend or supplement the conditions imposed by the Joint Review Panel, to correct any errors or omissions in its Report, or to provide meaningful feedback in response to the material concerns raised. Missing was a real and sustained effort to pursue meaningful two-way dialogue. Missing was someone from Canada's side empowered to do more than take notes, someone able to respond meaningfully at some point.

280 Canada places great reliance on two letters sent to each affected First Nation on June 9, 2014 and July 14, 2014, the former roughly a week before the Governor in Council approved the Project, the other after. In our view, for the following reasons, these letters were insufficient to discharge Canada's obligation to enter into a meaningful dialogue.

281 Aside from the errors found in the June 9, 2014 letter sent to the Kitasoo, the Heiltsuk, the Nadleh and the Nak'azdli, the content of the letters can at best be characterized as summarizing at a high level of generality the nature of some of the concerns expressed by the affected First Nation. Thus, the letter explained that [page533] during Phase IV, officials "noted [their] perspective on the extent which [your] concerns could be mitigated by various measures" without setting out what the Nations suggested mitigation measures were. To the limited extent the June 9, 2014 letter responded to a concern, it did so only in a generic fashion. In substance, no explanation was provided about what, if any, consideration had been given to the suggested mitigation measures.

282 To illustrate, to the extent a First Nation had raised a concern about the consequence of an oil spill, Canada

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.

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[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

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".

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.

[page389]

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.

> 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

Musqueam Indian Band v. British Columbia (Minister of Sustainable Resource Management), [2005] B.C.J. No. 444

British Columbia and Yukon Judgments

British Columbia Court of Appeal

Vancouver, British Columbia

Southin, Hall and Lowry JJ.A.

Heard: September 21 - 23, 2004.

Judgment: March 7, 2005.

Vancouver Registry No. CA031826

[2005] B.C.J. No. 444 | *2005 BCCA 128* | *251 D.L.R. (4th) 717* | *[2005] 6 W.W.R. 429* | *209 B.C.A.C. 219* | *37 B.C.L.R. (4th) 309* | *[2005] 2 C.N.L.R. 212* | *28 R.P.R. (4th) 165* | *137 A.C.W.S. (3d) 664*

Between Musqueam Indian Band, appellant (petitioner), and The Minister of Sustainable Resource Management, Land and Water British Columbia Inc., University of British Columbia and The Attorney General of the Province of British Columbia, respondents (respondents)

(105 paras.)

Case Summary

Aboriginal law — Aboriginal rights — Constitution Act, 1982, s. 35, recognition of existing aboriginal and treaty rights — Meaningful consultation — Lands — Title and ownership — Constitutional law — Canadian Charter of Rights and Freedoms — Aboriginal rights — Civil procedure — Appeals — Powers of appellate court.

Appeal by the Musqueam Indian Band from the dismissal of its petition for judicial review of a decision of the respondent Crown entities authorizing the sale of lands to the respondent University of British Columbia, and for an injunction restraining the sale pending the determination of the Band's claim of aboriginal title to the lands in issue. The respondents entered an interim sale agreement in respect of lands slated for a golf course development. The Band claimed aboriginal title and aboriginal rights in relation to the lands. The Band submitted that the respondents did not undertake their duty to engage in good faith consultation in relation to an accommodation of the Band's asserted aboriginal interests in the lands. The chambers judge dismissed the Band's petition for judicial review of the governmental authorization for the sale on the basis that after the commencement of proceedings, consultations had occurred in a bona fide manner. The judge held that the duty of consultation and accommodation amounted to a duty to formulate a practical interim compromise, and that an offer of economic compensation sufficiently discharged the duty.

HELD: Appeal allowed.

The decision by the chambers judge was rendered prior to the issuance of the Haida and Taku judgments by the Supreme Court of Canada which set forth an analysis of the duty of consultation and accommodation. In the context of these judgments, the consultation undertaken by the respondent Crown entities was flawed because it was left until too late of a stage in the sale process. The Band had established, and the Crown had conceded, a strong claim of aboriginal title to the lands in question. If the land was sold to a third party, there was likely no further opportunity for the Band to prove their connection to the lands. The Band was therefore entitled to a

meaningful consultation process in order that avenues of accommodation could be explored. Accordingly, the authorization of the sale was suspended for two years to provide for proper consultation.

Statutes, Regulations and Rules Cited:

British Columbia Supreme Court Rules, Rules 10, 44, 45, 46.

Canadian Charter of Rights and Freedoms, 1982, s. 24(1).

Constitution Act, 1982, s. 35.

Judicial Review Procedure Act, *R.S.B.C. 1996, c. 241, ss. 1*, 2, 10.

Land Act, *R.S.B.C. 1996, c. 245, ss. 51*, 106(3).

Statutes of 1907, Chapter 45, ss. 1, 2, 3, 6.

University Act, *R.S.B.C. 1996, c. 468*.

University Endowment Land Act, *R.S.B.C. 1996, c. 469, s. 2*(1).

Counsel

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L.J. Mrozinski and P.E. Yearwood: Counsel for the Respondents other than the University

J.P. Taylor, Q.C. and R.W. Sieg: Counsel for the Respondent, University of British Columbia

A.C. Pape, R.B. Salter and B.R. Zoe: Counsel for the Intervenor, First Nations Summit

Reasons for judgment were delivered by Hall J.A. (para. 75). Separate concurring reasons were delivered by Southin J.A. (para. 1). Additional concurring reasons were delivered by Lowry J.A. (para. 103).

SOUTHIN J.A.

1 The issue in this appeal is whether Her Majesty the Queen in right of British Columbia, represented here by the respondents other than the respondent, University of British Columbia, by agreeing to convey certain lands adjacent to but not within the City of Vancouver, known as the University Golf Course, to the University, has breached the duty to consult and accommodate the appellant, and, if so, what remedy should be given for that breach.

2 At the conclusion of the hearing in this Court, the Court said it would not deliver judgment until the Supreme Court of Canada delivered judgment in the cases known as Haida Nation v. British Columbia (Minister of Forests)

disclose information and discuss issues raised in the notice. At the other end of the spectrum, where a strong prima facie case for the claim is established, "deep consultation" aimed at finding a satisfactory interim solution may be required. Such consultation may entail the opportunity for the aboriginal group to make submissions, formally participate in the decision-making process and receive written reasons to show Aboriginal concerns were considered and what impact these concerns had on the decision (at paras. 43-44). According to McLachlin C.J. "[e]very case must be approached individually and flexibly'".

94 In my view, the duty owed to the Musqueam by LWBC in this case tended to the more expansive end of the spectrum. The Crown conceded the Musqueam had a prima facie case for title over the Golf Course Land, and the report of the archaeological firm noted that the Musqueam had the strongest case of the bands in the area. Potential infringement is of significance to the Musqueam in light of their concerns about their land base. If the land is sold to a third party, there will likely be no opportunity for the Musqueam to prove their connection to this land again. The Musqueam were therefore entitled to a meaningful consultation process in order that avenues of accommodation could be explored.

95 In light of my view of the consultation required in this situation, I consider that the consultation process was flawed. If this was only a case where notice was required, the consultation may have been sufficient. However, in the present case, I consider the consultation was left until a too advanced stage in the proposed sale transaction. As McLachlin C.J. observed in Haida, there is ultimately no obligation on parties to agree after due consultation but in my view a decent regard must be had for transparent and informed discussion. Of course, legitimate time constraints may exist in some cases where the luxury of stately progress towards a business decision does not exist, but such urgency was not readily apparent in the present case. These lands have been used as a public golf course for a long time, and the status quo is not about to change having regard to the extant lease arrangements. The Musqueam should have had the benefit of an earlier consultation process as opposed to a series of counter-offers following the decision by LWBC to proceed with the sale.

96 I note that McLachlin C.J. suggested there should be some measure of deference when a court considers the adequacy of the government's efforts to consult with an aboriginal group, and that administrative law principles suggest a standard of reasonableness would be used by the court when the question is not a purely legal question. She also observed that what is required is not perfection, but reasonableness in any consultation process followed by the Crown. However, even providing an appropriate measure of deference, for the reasons set out above, the Province in my view did not adequately consult with the Musqueam regarding the sale of the Golf Course Land.

97 McLachlin C.J. also elaborated in Haida on the accommodation that may be required if the consultation process suggests Crown policy should be amended. The core of accommodation is the balancing of interests and the reaching of a compromise until such time as claimed rights to property are finally resolved. In relatively undeveloped areas of the province, I should think accommodation might take a multiplicity of forms such as a sharing of mineral or timber resources. One could also envisage employment agreements or land transfers and the like. This is a developing area of the law and it is too early to be at all categorical about the ambit of appropriate accommodative solutions that have to work not only for First Nations people but for all of the populace having a broad regard to the public interest.

98 I should think there is a fair probability that some species of economic compensation would be likely found to be appropriate for a claim involving infringement of aboriginal title relating to land of the type of this long-established public golf course located in the built up area of a large metropolis. However, with that said, it is only fair that the consultation process seeking to find proper accommodation should be open, transparent and timely. As I have said, that could not be said to have occurred here because the consultation came too late and was to a degree time constrained because the sale was virtually concluded before any real consultation occurred.

99 The appellant argues that the Province, presumably through LWBC, should have been required to seek to accommodate the appellant by developing land protection measures so that a bank of land could be made available for treaty purposes. I am not at present persuaded that the courts ought to become involved in such considerations.

The treaty process, a process involving not only the Province but as well the federal government, appears to me to be an area discrete from litigation involving questions of aboriginal rights and title. I note that in Taku, the Supreme Court of Canada found that appropriate consultation and accommodation had occurred notwithstanding the position of the First Nation that any accommodation ought to be part of a treaty or a land claim agreement. I would not foreclose the possibility that some arrangements could be made relating to land being set aside to be dealt with in a treaty process as an interim accommodative measure in a controversy like the instant one, but I consider that any such arrangement should be left to a negotiating process between the consulting parties. The courts, required now to attempt to enunciate principles and pass judgment on disputes concerning aboriginal rights and title have sufficient to do without injecting themselves into treaty processes and negotiations.

100 While I have observed that having regard to the nature and location of these lands, this may well be a situation where financial compensation could be found to be an appropriate measure of accommodation, I would not wish to limit the parties from engaging in the broadest consideration of appropriate arrangements. I would note that this is not the only tract of land in the Lower Mainland that is Provincial property or property over which the Province has a measure of dominion. Having regard to the wish of the appellant to obtain in the future an enhanced land base and as well its desire to pursue a land settlement related to the treaty process it is engaged in, the parties should be afforded a wide field for consideration of appropriate accommodative solutions. To remedy what I view as the general deficiency in the original consultation process and to provide a full opportunity for meaningful discussion between the parties, I believe an order should be made that will be as efficacious as presently possible. As I noted, we are dealing here with an area of law, aboriginal title, which Lamer C.J. referred to as not particularly developed. Courts will seek to fashion fair and appropriate remedies for individual cases conscious that as yet we do not have much guidance by way of precedent but, as in other fields, the common law will simply have to develop to meet new circumstances.

101 In order to afford LWBC and the appellant proper opportunity for consultation with a view to reaching some modus vivendi on appropriate accommodation, I would order the suspension of the operation of the Order in Council authorizing the sale for two years. That time frame should provide ample opportunity for the parties to seek to reach some agreement. I would direct that at the expiration of such period any party to the negotiations should be at liberty to bring on appropriate proceedings in the Supreme Court of British Columbia to address any issues that may be felt to require decision by the court. Based on what was said by the Supreme Court of Canada in Haida, UBC has no role to play in the process of consultation or accommodation between the Province and the appellant. I would therefore allow the appeal of the appellant concerning the respondent representatives of the Province of British Columbia in the terms I have indicated and I would dismiss the appeal of the appellant concerning the respondent UBC. I am in agreement with the disposition of costs proposed by Madam Justice Southin.

102 Before closing I should perhaps observe, out of an abundance of caution, that UBC has previously agreed to hold the lands subject to future directions of a court of competent jurisdiction. If agreement eludes the negotiating parties, it is clearly possible that some order could be made affecting title to the lands and UBC could be called upon to honour its undertaking. Of course, because these lands are under a long term lease to a golf course operator, I would not expect any alteration in the status quo over the near term.

HALL J.A.

The following is the judgment of

LOWRY J.A.

103 I have had the opportunity of reading in draft the judgments of Madam Justice Southin and Mr. Justice Hall. I agree that the appeal of the order dismissing the petition against the Crown (but not University of British Columbia) should be allowed for the reasons given by Mr. Justice Hall. Shortly put, I agree that the consultation on which the parties ultimately embarked was not conducted sufficiently free of unnecessary time constraints to afford a

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.

Statutes and Regulations Cited

(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)).

Sambaa K'e Dene Band v. Duncan, [2012] F.C.J. No. 216

Federal Court Judgments

Federal Court

Calgary, Alberta

Mactavish J.

Heard: November 22, 2011.

Judgment: February 10, 2012.

Docket T-1946-10

[2012] F.C.J. No. 216 | *[2012] A.C.F. no 216* | *2012 FC 204* | *405 F.T.R. 182* | *[2012] 2 C.N.L.R. 369*

Between Sambaa K'e Dene Band and Nahanni Butte Dene Band, Applicants, and John Duncan, Minister of Indian Affairs and Northern Development, Government of the Northwest Territories, and Acho Dene Koe First Nation, Respondents

(213 paras.)

Counsel

John R. Lojek, for the Applicants.

Andrew Fox, Donna Keats, for the Respondent (the Minister of Indian Affairs and Northern Development).

Karen Lajoie, for the Respondent (the Government of the Northwest Territories).

REASONS FOR JUDGMENT AND JUDGMENT

MACTAVISH J.

1 The Sambaa K'e Dene Band ["SKDB"], the Nahanni Butte Dene Band ["NBDB"] and the Acho Dene Koe First Nation ["ADKFN"] have overlapping claims to land in the south-western corner of the Northwest Territories ["NWT"].

2 The SKDB and NBDB seek judicial review of a decision of the Minister of Indian Affairs and Northern Development ["Canada" or "the Minister"] postponing consultations with them until such time as an agreement in principle is reached with the ADKFN in relation to the ongoing comprehensive land claims negotiations between Canada and the ADKFN. The SKDB and the NBDB have also named the Government of the Northwest Territories ["GNWT"] and the ADKFN as respondents in this application.

3 The SKDB and NBDB say that by delaying consultation with them until after an agreement in principle is entered into between Canada and the ADKFN, Canada has failed to comply with its legal and constitutional duty to consult with and properly accommodate the SKDB and the NBDB

4 For the reasons that follow, I have concluded that Canada had a duty to consult with the SKDB and the NBDB in

agreement in principle phase is at the low end of the spectrum, and should be limited to notice, disclosure or discussion: *Haida Nation*, above at para. 43; *Mikisew*, above at para. 64.

159 I would start my analysis by observing that what *Haida Nation* actually says is required at the lower end of the consultation spectrum "may be to give notice, disclose information, *and discuss any issues raised in response to the notice*": at para. 43 [my emphasis].

160 Citing T. Isaac and A. Knox, "The Crown's Duty to Consult Aboriginal People" *(2003), 41 Alta. L. Rev. 49* at 61, the Court goes on in *Haida Nation* to observe that "'consultation' in its least technical definition *is talking together for mutual understanding*"': at para. 43 [my emphasis].

161 Similarly, in Mikisew, where the Crown's duty to consult was found to lie at the lower end of the spectrum, it was nevertheless required to "engage directly" with the Mikisew. This "engagement" required the Crown 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": above at para. 64.

162 Canada concedes that it has not, as yet, had *any* direct discussions with the SKDB and NBDB with respect to their concerns, notwithstanding the two First Nations' repeated requests for consultation. As will be explained later in these reasons, I am satisfied that Canada has not satisfied the duty on it to consult with the SKDB and NBDB, even if that duty were only at the lower end of the spectrum.

163 Moreover, and in any event, I am satisfied that the particular facts of this case are such that Canada has a present obligation to consult somewhat more deeply with the SKDB and NBDB.

164 I would start by noting that the duty to consult extends to strategic, higher level decisions that may have an impact on Aboriginal claims and rights, even if that impact on the disputed lands or resources may not be immediate: *Rio Tinto*, above at para. 44.

165 If it is to be meaningful, consultation cannot be postponed until the last and final point in a series of decisions. Once important preliminary decisions have been made there may well be "a clear momentum" to move forward with a particular course of action: see *Squamish Indian Band v. British Columbia (Minister of Sustainable Resource Management),* *2004 BCSC 1320*, *34 B.C.L.R. (4th) 280* at para. 75. Such a momentum may develop even if the preliminary decisions are not legally binding on the parties.

166 Indeed, the case law shows that the non-binding nature of preliminary decisions does not necessarily mean that there can be no duty to consult. For example, in *Dene Tha' First Nation v. Canada (Minister of Environment)*, *2006 FC 1354*, *303 F.T.R. 106*, negotiations leading to a non-binding Cooperation Plan nonetheless triggered a duty to consult that fell at the high end of the consultation spectrum.

167 Justice Phelan described the Cooperation Plan as "a complex agreement for a specified course of action, a road map, which intended to *do* something. It intended to set up the blue print from which all ensuing regulatory and environmental review processes would flow. It is an essential feature of the construction of [the project in issue]": *Dene Tha' First Nation*, above at para. 100. Justice Phelan further noted that "the Cooperation Plan, although not written in mandatory language, functioned as a blueprint for the entire project": above at para. 107.

168 Justice Phelan concluded that the Cooperation Plan was "a form of 'strategic planning'": at para. 108. By itself it conferred no rights, but it set up the means by which a whole process would be managed and was a process through which the rights of the Aboriginal peoples would be affected. As a consequence, Justice Phelan was satisfied that the Cooperation Plan established a process by which the rights of the Dene Tha' would be affected: above at para. 108.

169 I recognize that for the duty to consult to be engaged, there must be an appreciable adverse effect on the First Nations' ability to exercise their Aboriginal or Treaty rights, and that merely speculative impacts will not suffice. I

Squamish Indian Band v. British Columbia (Minister of Sustainable Resource Management), [2004] B.C.J. No. 2143

British Columbia and Yukon Judgments

British Columbia Supreme Court

Vancouver, British Columbia

Koenigsberg J.

Oral judgment: September 27, 2004.

Released: October 19, 2004.

Vancouver Registry No. L032971

[2004] B.C.J. No. 2143 | *2004 BCSC 1320* | *34 B.C.L.R. (4th) 280* | *[2005] 1 C.N.L.R. 347*

Between The Squamish Nation, by the Chiefs and Council of the Squamish Indian Band, on their own behalf and on behalf of the members of the Squamish Indian Band, petitioners, and The Minister of Sustainable Resource Management, on behalf of Her Majesty the Queen in right of the Province of British Columbia; Land and Water British Columbia Inc. and The Environmental Assessment Office and Garibaldi at Squamish Inc., respondents

(102 paras.)

Case Summary

Aboriginal law — Aboriginal rights — Constitution Act, 1982, s. 35, recognition of existing aboriginal and treaty rights — Meaningful consultation — Lands — Title and ownership — Constitutional law — Canadian constitution — Aboriginal rights.

Petition by the Squamish Nation for a declaration that four decisions made by the respondent Crown agencies were made in breach of the Crown's fiduciary and constitutional duties to consult and seek accommodation before granting rights to third parties which may affect the exercise of aboriginal rights. The Squamish Nation claimed aboriginal title over lands that were the subject of a proposed ski resort and golf course development. The Squamish Nation also claimed aboriginal rights to use the area for cultural and sacred practices, and for hunting, fishing, trapping, recreational and other traditional uses. A legislative policy set out the development process involving a series of agreements between the applicable Crown agency and the developer. Each agreement created binding obligations on the Crown and increased the likelihood of the ultimate approval of a project. The interim agreement between the relevant Crown agency and the first developer envisioned a 12,000 bed resort using 6,260 acres of land and granted the developer a licence to enter the land in order to carry out the agreement. It also required the developer to undertake an environmental review. The interim agreement and the licence were silent with respect to consultation of the Squamish Nation. However, in the course of the environmental review, the Crown's Environmental Assessment Office invited the Squamish Nation to comment on the project. The Squamish Nation responded and requested funding to participate in the process to identity and address any related issues. Shortly thereafter, the first developer lost its financing and the interim agreement expired before the approval process advanced further. Its rights were assigned to a second developer, which pursuant to a modification agreement and a change of control decision was awarded rights by the Crown to develop a ski area master plan without going through the pre-requisite procedural requirements set out in the legislative policy. The second developer's plan doubled the proposed area of the resort. The Squamish Nation was not consulted with respect to the Crown's decision or the expanded proposal. The Squamish Nation wrote the applicable Crown agency to request documents and received a response that consultation was not a

necessary condition to issuing a ski area master plan. All interested parties met, at which time the Squamish Nation voiced its objection to the expanded proposal. The expanded proposal was initially rejected by the Crown agency, however, the decision was reversed one week later and the Squamish Nation brought its petition before the court. A proposal setting out further steps was subsequently issued by the Crown agency to the developer without consulting the Squamish Nation.

HELD: Petition allowed and declaration granted.

The duty to consult in this case arose at the earliest stage of the decision-making by the Crown in an approval process which would possibly result in the infringement of claimed aboriginal rights. The need for consultation to take place at the earliest opportunity arose, before the developer, who sought land rights from the government, invested such time and money that it accrued legally enforceable rights against the Crown. The duty to meaningfully consult in this case arose in relation to the earliest decisions because the applicable Crown agencies knew, from discussions with the Squamish Nation in relation to the proposal of the first developer, that significant rights were asserted by the Squamish Nation which could result in the need for significant accommodation and jeopardized the viability of the proposed resort. At no time could it be said that the Crown was unaware of the legitimate need to meaningfully consult with the Squamish Nation. Thus, there was a breach of the Crown's fiduciary duty in its failure to consult the Squamish Nation. The appropriate remedy, in addition to the declaration sought, was that in relation to all of the decisions having been made without consultation, consultation must take place, with fair consideration of the issues, as if those decisions had not already been made.

Statutes, Regulations and Rules Cited:

Environmental Assessment Act, *SBC 2002, c. 43, s. 51*.

Land Act, *R.S.B.C. 1996, c. 245, s. 36*.

Counsel

Counsel for Petitioners: G.J. McDade, Q.C. and James P. Tate

Counsel for Respondents: P.J. Pearlman, Q.C.

Counsel for Garibaldi at Squamish Inc.: C.D. Johnston

Counsel for GAR 96: H. Shapray, Q.C.

KOENIGSBERG J. (orally)

Corrected and Amended

Oral Reasons for Judgment

LAW

71 [70] A useful discussion of the development of the caselaw in the area of the duty of consultation, is found in Gitxsan and Other First Nations v. British Columbia (Minister of Forests) *(2002), 10 B.C.L.R. (4th) 126*, 2002, BCSC 1701. The duty of consultation has been considered in a number of Court of Appeal and Supreme Court of Canada decisions. In summary that duty arises from the fiduciary duty of the Crown to recognize, affirm and protect aboriginal rights however they arise. Crown title is burdened by aboriginal title and rights - and thus there my be two conflicting rights whenever the Crown seeks to grant rights to parties over land claimed as subject to aboriginal rights. The duty to consult and accommodate then arises from those potentially conflicting rights and becomes the means of reconciling those rights. Whether aboriginal title and rights are potentially infringed must be assessed in light of the potential of a Crown granted right in question being inconsistent with the exercise of aboriginal rights including title if such rights should be proven to exist in the area in question.

72 [71] In Delgamuukw v. British Columbia, *[1997] 3 S.C.R. 1010*, (1997), at 1112 at para. 168, Chief Justice Lamer made clear the duty to consult and its general scope:

> Moreover, the other aspects of aboriginal title suggest that the fiduciary duty may be articulated in a manner different than the idea of priority. This point becomes clear from a comparison between aboriginal title and the aboriginal right to fish for food in Sparrow, *[1990] 1 S.C.R. 1075*. First, 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 to determining whether the infringement of aboriginal title is justified, in the same way that the Crown's failure to consult an aboriginal group with respect to the terms by which reserve land is leaded may breach its fiduciary duty at common law: Guerin, *[1984] 2 S.C.R. 335*. [emphasis added]
>
> 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.

73 [72] In Haida Nation v. British Columbia (Minister of Forests) *(2002), 99 B.C.L.R. (3d) 209*, (Haida No. 1) at para. 55 Lambert J.A., after quoting from Delgamuukw and considering the duty to consult concluded that the obligation to consult and accommodate is a free standing enforceable legal and equitable duty.

74 [73] The duty to consult is triggered whenever there is the potential for impact of third party interests on claimed aboriginal lands. In this case - there can be no issue about how or why that duty arises at the earliest stages. The Crown knew of the aboriginal claims and knew before it reinstated the Interim Agreement and approved the Change of Control that the Squamish Nation had defined and confirmed interests in the area and a concern about the negative impact on their interests (which were then and still are the subject of treaty negotiations) of any commercial development specifically including a ski hill development. Mikisew Cree Nation v. Canada (Minister of Canadian Heritage), *[2002] 1 C.N.L.R. 169* at 211-213 - a recent decision of the Federal Court Trial Division discusses the importance of consultation at early stages of planning.

75 [74] The duty of consultation, if it is to be meaningful, cannot be postponed to the last and final point in a series of decisions, Once important preliminary decisions have been made and relied upon by the proponent and others,

Taku River Tlingit First Nation v. British Columbia (Project Assessment Director), [2004] 3 S.C.R. 550

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.: 29146.

[page551]

[2004] 3 S.C.R. 550 | *[2004] 3 R.C.S. 550* | *[2004] S.C.J. No. 69* | *[2004] A.C.S. no 69* | *2004 SCC 74*

Norm Ringstad, in his capacity as the Project Assessment Director of the Tulsequah Chief Mine Project, Sheila Wynn, in her capacity as the Executive Director, Environmental Assessment Office, the Minister of Environment, Lands and Parks, and the Minister of Energy and Mines and Minister Responsible for Northern Development, appellants; v. Taku River Tlingit First Nation and Melvin Jack, on behalf of himself and all other members of the Taku River Tlingit First Nation, Redfern Resources Ltd., and Redcorp Ventures Ltd. formerly known as Redfern Resources Ltd., respondents, and Attorney General of Canada, Attorney General of Quebec, Attorney General of Alberta, Business Council of British Columbia, British Columbia and Yukon Chamber of Mines, British Columbia Chamber of Commerce, British Columbia Wildlife Federation, Council of Forest Industries, Mining Association of British Columbia, Aggregate Producers Association of British Columbia, Doig River First Nation, First Nations Summit, and Union of British Columbia Indian Chiefs, interveners.

(47 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 — If so, whether consultation and accommodation engaged in by Province prior to issuing project approval certificate was adequate to satisfy honour of Crown.

Summary:

Since 1994, a mining company has sought permission from the British Columbia government to re-open an old mine. The Taku River Tlingit First Nation ("TRTFN"), which participated in the environmental assessment process engaged in by the Province under the *Environmental Assessment Act*, objected to the company's plan to build a road through a portion of the TRTFN's traditional territory. The Province granted the project approval certificate in 1998. The TRTFN brought a petition to quash the decision on grounds based on administrative law and on its Aboriginal rights and title. The chambers judge concluded that the decision makers had not been

sufficiently careful during the final months of the assessment process to ensure that they had effectively addressed the substance of the TRTFN's concerns. She set aside the decision and directed a reconsideration. The majority of the Court of Appeal upheld the decision, finding that the Province had failed to meet its duty to consult with and accommodate the TRTFN.

Held: The appeal should be allowed.

The Crown's duty to consult and accommodate Aboriginal peoples, even prior to proof of asserted Aboriginal rights and title, is grounded in the principle of the honour of the Crown, which derives from the Crown's assertion of sovereignty in the face of prior Aboriginal occupation. The Crown's honour cannot be interpreted [page552] narrowly or technically, but must be given full effect in order to promote the process of reconciliation mandated by s. 35(1) of the *Constitution Act, 1982*. The duty to consult varies with the circumstances. It arises when a Crown actor has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it. This in turn may lead to a duty to accommodate Aboriginal concerns. Responsiveness is a key requirement of both consultation and accommodation. The scope of the duty to consult is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed.

The Crown's obligation to consult the TRTFN was engaged in this case. The Province was aware of the TRTFN's title and rights claims and knew that the decision to reopen the mine had the potential to adversely affect the substance of the TRTFN's claims. The TRTFN's claim is relatively strong, supported by a *prima facie* case, as attested to by its inclusion in the Province's treaty negotiation process. While the proposed road is to occupy only a small portion of the territory over which the TRTFN asserts title, the potential for negative derivative impacts on the TRTFN's claims is high. On the spectrum of consultation required by the honour of the Crown, the TRTFN was entitled to more than minimum consultation under the circumstances, and to a level of responsiveness to its concerns that can be characterized as accommodation. It is impossible, however, to provide a prospective checklist of the level of consultation required.

In this case, the process engaged in by the Province under the *Environmental Assessment Act* fulfilled the requirements of its duty to consult and accommodate. The TRTFN was part of the Project Committee, participating fully in the environmental review process. Its views were put before the decision makers, and the final project approval contained measures designed to address both its immediate and its long-term concerns. The Province was not under a duty to reach agreement with the TRTFN, and its failure to do so did not breach the obligations of good faith that it owed the TRTFN. Finally, it is expected that, throughout the permitting, approval and licensing process, as well as in the [page553] development of a land use strategy, the Crown will continue to fulfill its honourable duty to consult and, if appropriate, accommodate the TRTFN.

Cases Cited

Applied: Haida Nation v. British Columbia (Minister of Forests), *[2004] 3 S.C.R. 511*, *2004 SCC 73*; referred to: 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*; Delgamuukw v. British Columbia, *[1997] 3 S.C.R. 1010*.

Statutes and Regulations Cited

Constitution Act, 1982, s. 35(1).

Environmental Assessment Act, *R.S.B.C. 1996, c. 119* [rep. 2002, c. 43, s. 58], ss. 2, 7, 9, 10, 14 to 18, 19(1), 21, 22, 23, 29, 30(1).

B. *What Was the Scope and Extent of the Province's Duty to Consult and Accommodate the TRTFN?*

29 The scope of the duty to consult is "proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed" (*Haida, supra*, at para. 39). It will vary with the circumstances, but always requires meaningful, good faith consultation and willingness on the part of the Crown to make changes based on information that emerges during the process.

30 There is sufficient evidence to conclude that the TRTFN have *prima facie* Aboriginal rights and title over at least some of the area that they claim. Their land claim underwent an extensive validation process in order to be accepted into the federal land claims policy in 1984. The Department of Indian Affairs hired a researcher to report on the claim, and her report was reviewed at several stages before the Minister validated the claim based on the TRTFN's traditional use and occupancy of the land and resources in question. In order to participate in treaty negotiations under the B.C. Treaty Commission, the TRTFN were required to file a statement of intent setting out their asserted territory and the basis for their claim. An Aboriginal group need not be accepted into the treaty process for the Crown's duty to consult to apply to them. Nonetheless, the TRTFN's claim was accepted for negotiation on the basis of a preliminary decision as to its validity. In contrast to the *Haida* case, the courts below did [page567] not engage in a detailed preliminary assessment of the various aspects of the TRTFN's claims, which are broad in scope. However, acceptance of its title claim for negotiation establishes a *prima facie* case in support of its Aboriginal rights and title.

31 The potentially adverse effect of the Ministers' decision on the TRTFN's claims appears to be relatively serious. The chambers judge found that all of the experts who prepared reports for the review recognized the TRTFN's reliance on its system of land use to support its domestic economy and its social and cultural life (para. 70). The proposed access road was only 160 km long, a geographically small intrusion on the 32,000-km2 area claimed by the TRTFN. However, experts reported that the proposed road would pass through an area critical to the TRTFN's domestic economy: see, for example, Dewhirst Report (R.R., vol. I, at pp. 175, 187, 190 and 200) and Staples Addendum Report (A.R., vol. IV, at pp. 595-600, 604-5 and 629). The TRTFN was also concerned that the road could act as a magnet for future development. The proposed road could therefore have an impact on the TRTFN's continued ability to exercise its Aboriginal rights and alter the landscape to which it laid claim.

32 In summary, the TRTFN's claim is relatively strong, supported by a *prima facie* case, as attested to by its acceptance into the treaty negotiation process. The proposed road is to occupy only a small portion of the territory over which the TRTFN asserts title; however, the potential for negative derivative impacts on the TRTFN's claims is high. On the spectrum of consultation required by the honour of the Crown, the TRTFN was entitled to more than the minimum receipt of notice, disclosure of information, and ensuing discussion. While it is [page568] impossible to provide a prospective checklist of the level of consultation required, it is apparent that the TRTFN was entitled to something significantly deeper than minimum consultation under the circumstances, and to a level of responsiveness to its concerns that can be characterized as accommodation.

C. *Did the Crown Fulfill its Duty to Consult and Accommodate the TRTFN?*

33 The process of granting project approval to Redfern took three and a half years, and was conducted largely under the *Environmental Assessment Act*. As discussed above, the Act sets out a process of information gathering and consultation. The Act requires that Aboriginal peoples whose traditional territory includes the site of a reviewable project be invited to participate on a project committee.

34 The question is whether this duty was fulfilled in this case. A useful framework of events up to August 1st, 2000 is provided by Southin J.A. at para. 28 of her dissent in this case at the Court of Appeal. Members of the TRTFN were invited to participate in the Project Committee to coordinate review of the project proposal in November 1994 and were given the original two-volume submission for review and comment: Southin J.A., at para. 39. They participated fully as Project Committee members, with the exception of a period of time from February to August of

Tsleil-Waututh Nation v. Canada (Attorney General), [2018] F.C.J. No. 876

Federal Court Judgments

Federal Court of Appeal

Vancouver, British Columbia

E.R. Dawson, Y. de Montigny and J.M. Woods J.A.

Heard: October 2-5, 10, 12-13, 2017.

Judgment: August 30, 2018.

Dockets: A-78-17, A-217-16, A-218-16,

A-223-16, A-224-16, A-225-16,

A-232-16, A-68-17, A-74-17, A-75-17,

A-76-17, A-77-17, A-84-17, A-86-17

[2018] F.C.J. No. 876 | *[2018] A.C.F. no 876* | *2018 FCA 153*

Between Tsleil-Waututh Nation, City of Vancouver, City of Burnaby, The Squamish Nation (also known as the Squamish Indian Band), Xàlek/Sekyú Siyam, Chief Ian Campbell on his own behalf and on behalf of all members of the Squamish Nation, Coldwater Indian Band, Chief Lee Spahan in his capacity as Chief of the Coldwater Band on behalf of all members of the Coldwater Band, Aitchelitz, Skowkale, Shxwh :y Village, Soowahlie, Squiala First Nation, Tzeachten, Yakweakwioose, Skwah, Chief David Jimmie on his own behalf and on behalf of all members of the Ts'Elxwéyeqw Tribe, Upper Nicola Band, Chief Ron Ignace and Chief Fred Seymour on their own behalf and on behalf of all other members of the Stk'Emlupsemc te Secwepemc of the Secwepemc Nation, Raincoast Conservation Foundation and Living Oceans Society, Applicants, and Attorney General of Canada, National Energy Board and Trans Mountain Pipeline ULC, Respondents, and Attorney General of Alberta and Attorney General of British Columbia, Interveners

(776 paras.)

Counsel

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Crystal Reeves, Elin Sigurdson, for the Applicant, Upper Nicola Band.

Jana McLean, Joelle Walker, for the Applicants, Aitchelitz, Skowkale, Shxwh :y Village, Soowahlie, Squiala First Nation, Tzeachten, Yakweakwioose, Skwah, Chief David Jimmie on his own behalf and on behalf of all members of the Ts'Elxwéyeqw Tribe.

495 Good faith consultation may reveal a duty to accommodate. Where there is a strong *prima facie* case establishing the claim and the consequence of proposed conduct may adversely affect the claim in a significant way, the honour of the Crown may require steps to avoid irreparable harm or to minimize the effects of infringement (*Haida Nation*, paragraph 47).

496 Good faith is required on both sides in the consultative process: "The common thread on the Crown's part must be 'the intention of substantially addressing [Aboriginal] concerns' as they are raised [...] through a meaningful process of consultation" (*Haida Nation*, paragraph 42). 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" (*Haida Nation*, paragraph 45).

497 At the same time, Indigenous claimants must not frustrate the Crown's reasonable good faith attempts, nor should they take unreasonable positions to thwart the government from making decisions or acting in cases where, despite meaningful consultation, agreement is not reached (*Haida Nation*, paragraph 42).

498 In the present case, much turns on what constitutes a meaningful process of consultation.

499 Meaningful consultation is not intended simply to allow Indigenous peoples "to blow off steam" before the Crown proceeds to do what it always intended to do. Consultation is meaningless when it excludes from the outset any form of accommodation (*Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, *2005 SCC 69*, *[2005] 3 S.C.R. 388*, paragraph 54).

500 The duty is not fulfilled by simply providing a process for exchanging and discussing information. There must be a substantive dimension to the duty. Consultation is talking together for mutual understanding (*Clyde River*, paragraph 49).

501 As the Supreme Court observed in *Haida Nation* at paragraph 46, meaningful consultation is not just a process of exchanging information. Meaningful consultation "entails testing and being prepared to amend policy proposals in the light of information received, and providing feedback." Where deep consultation is required, a dialogue must ensue that leads to a demonstrably serious consideration of accommodation. This serious consideration may be demonstrated in the Crown's consultation-related duty to provide written reasons for the Crown's decision.

502 Where, as in this case, the Crown must balance multiple interests, a safeguard requiring the Crown to explain in written reasons the impacts of Indigenous concerns on decision-making becomes more important. In the absence of this safeguard, other issues may overshadow or displace the issue of impacts on Indigenous rights (*Gitxaala*, paragraph 315).

503 Further, the Crown is obliged to inform itself of the impact the proposed project will have on an affected First Nation, and, if appropriate in the circumstances, communicate its findings to the First Nation and attempt to substantially address the concerns of the First Nation (*Mikisew Cree First Nation*, paragraph 55).

504 Consultation must focus on rights. In *Clyde River*, the Board had concluded that significant environmental effects to marine mammals were not likely and effects on traditional resource use could be addressed through mitigation measures. The Supreme Court held that the Board's inquiry was misdirected for the purpose of consultation. The Board was required to focus on the Inuit's treaty rights; the "consultative inquiry is not properly into environmental effects *per se*. Rather, it inquires into the impact on the *right*" (emphasis in original) (*Clyde River*, paragraph 45). Mitigation measures must provide a reasonable assurance that constitutionally protected rights were considered as rights in themselves--not just as an afterthought to the assessment of environmental concerns (*Clyde River*, paragraph 51).

505 When consulting on a project's potential impacts the Crown must consider existing limitations on Indigenous

v. In order to ensure that the Governor in Council received accurate information, two drafts of the Crown Consultation Report were distributed for comment and Indigenous groups were invited to provide their own submissions to the Governor in Council.

vi. The consultation was based on the unique facts and circumstances applicable to each Indigenous group. The Crown Consultation Report contained a detailed appendix for each potentially affected Indigenous group that dealt with: background information; a preliminary strength of claim assessment; a summary of the group's involvement in the Board and Crown Consultation process; a summary of the group's interests and concerns; accommodation proposals; the group's response to the Board's report; the potential impacts of the Project on the group's Indigenous interests; and the Crown's conclusions.

552 I acknowledge significant improvements in the consultation process. To illustrate, in *Gitxaala* this Court noted, among other matters, that:

* requests for extensions of time were ignored (reasons, paragraphs 247 and 250);
* inaccurate information was put before the Governor in Council (reasons, paragraphs 255-262);
* requests for information went unanswered (reasons, paragraphs 272, 275-278);
* Canada did not disclose its assessment of the strength of the Indigenous parties' claim to rights or title or its assessment of the Project's impacts (reasons, paragraphs 288-309); and,
* Canada acknowledged that the consultation on some issues fell well short of the mark (reasons, paragraph 254).

553 Without doubt, the consultation process for this project was generally well-organized, less rushed (except in the final stage of Phase III) and there is no reasonable complaint that information within Canada's possession was withheld or that requests for information went unanswered.

554 Ministers of the Crown were available and engaged in respectful conversations and correspondence with representatives of a number of the Indigenous applicants.

555 Additional participant funding was offered to each of the applicants to support participation in discussions with the Crown consultation team following the release of the Board's report and recommendations. The British Columbia Environmental Assessment Office also offered consultation funding.

556 The Crown Consultation Report provided detailed information about Canada's approach to consultation, Indigenous applicants' concerns and Canada's conclusions. An individualized appendix was prepared for each Indigenous group (as described above at paragraph 551(vi)).

557 However, for the reasons developed below, Canada's execution of Phase III of the consultation process was unacceptably flawed and fell short of the standard prescribed by the jurisprudence of the Supreme Court. As such, the consultation process fell short of the required mark for reasonable consultation.

558 To summarize my reasons for this conclusion, Canada was required to do more than receive and understand the concerns of the Indigenous applicants. Canada was required to engage in a considered, meaningful two-way dialogue. Canada's ability to do so was constrained by the manner in which its representatives on the Crown consultation team implemented their mandate. For the most part, Canada's representatives limited their mandate to listening to and recording the concerns of the Indigenous applicants and then transmitting those concerns to the decision-makers.

559 On the whole, the record does not disclose responsive, considered and meaningful dialogue coming back from Canada in response to the concerns expressed by the Indigenous applicants. While there are some examples of

758 Canada acknowledged it owed a duty of deep consultation to each Indigenous applicant. More was required of Canada.

759 The inadequacies of the consultation process flowed from the limited execution of the mandate of the Crown consultation team. Missing was someone representing Canada who could engage interactively. Someone with the confidence of Cabinet who could discuss, at least in principle, required accommodation measures, possible flaws in the Board's process, findings and recommendations and how those flaws could be addressed.

760 The inadequacies of the consultation process also flowed from Canada's unwillingness to meaningfully discuss and consider possible flaws in the Board's findings and recommendations and its erroneous view that it could not supplement or impose additional conditions on Trans Mountain.

761 These three systemic limitations were then exacerbated by Canada's late disclosure of its assessment that the Project did not have a high level of impact on the exercise of the applicants' "Aboriginal Interests" and its related failure to provide more time to respond so that all Indigenous groups could contribute detailed comments on the second draft of the Crown Consultation Report.

762 Canada is not to be held to a standard of perfection in fulfilling its duty to consult. However, the flaws discussed above thwarted meaningful, two-way dialogue. The result was an unreasonable consultation process that fell well short of the required mark.

763 The Project is large and presented genuine challenges to Canada's effort to fulfil its duty to consult. The evaluation of Canada's fulfillment of its duty must take this into account. However, in largest part the concerns of the Indigenous applicants were quite specific and focussed and thus quite easy to discuss, grapple with and respond to. Had Canada's representatives met with each of the Indigenous applicants immediately following the release of the Board's report, and had Canada's representatives executed a mandate to engage and dialogue meaningfully, Canada could well have fulfilled the duty to consult by the mandated December 19, 2016 deadline.

E. Remedy

764 In these reasons I have concluded that the Board failed to comply with its statutory obligation to scope and assess the Project so as to provide the Governor in Council with a "report" that permitted the Governor in Council to make its decision whether to approve the Project. The Board unjustifiably excluded Project-related shipping from the Project's definition.

765 This exclusion of Project-related shipping from the Project's definition permitted the Board to conclude that section 79 of the *Species at Risk Act* did not apply to its consideration of the effects of Project-related shipping. Having concluded that section 79 did not apply, the Board was then able to conclude that, notwithstanding its conclusion that the operation of Project-related vessels is likely to result in significant adverse effects to the Southern resident killer whale, the Project was not likely to cause significant adverse environmental effects.

766 This finding--that the Project was not likely to cause significant adverse environmental effects--was central to its report. The unjustified failure to assess the effects of Project-related shipping under the *Canadian Environmental Assessment Act, 2012* and the resulting flawed conclusion about the environmental effects of the Project was critical to the decision of the Governor in Council. With such a flawed report before it, the Governor in Council could not legally make the kind of assessment of the Project's environmental effects and the public interest that the legislation requires.

767 I have also concluded that Canada did not fulfil its duty to consult with and, if necessary, accommodate the Indigenous applicants.

768 It follows that Order in Council P.C. 2016-1069 should be quashed, rendering the certificate of public convenience and necessity approving the construction and operation of the Project a nullity. The issue of Project approval should be remitted to the Governor in Council for prompt redetermination.

769 In that redetermination the Governor in Council must refer the Board's recommendations and its terms and conditions back to the Board, or its successor, for reconsideration. Pursuant to section 53 of the *National Energy Board Act*, the Governor in Council may direct the Board to conduct that reconsideration taking into account any factor specified by the Governor in Council. As well, the Governor in Council may specify a time limit within which the Board shall complete its reconsideration.

770 Specifically, the Board ought to reconsider on a principled basis whether Project-related shipping is incidental to the Project, the application of section 79 of the *Species at Risk Act* to Project-related shipping, the Board's environmental assessment of the Project in the light of the Project's definition, the Board's recommendation under subsection 29(1) of the *Canadian Environmental Assessment Act, 2012* and any other matter the Governor in Council should consider appropriate.

771 Further, Canada must re-do its Phase III consultation. Only after that consultation is completed and any accommodation made can the Project be put before the Governor in Council for approval.

772 As mentioned above, the concerns of the Indigenous applicants, communicated to Canada, are specific and focussed. This means that the dialogue Canada must engage in can also be specific and focussed. This may serve to make the corrected consultation process brief and efficient while ensuring it is meaningful. The end result may be a short delay, but, through possible accommodation the corrected consultation may further the objective of reconciliation with Indigenous peoples.

F. Proposed Disposition

773 For these reasons I would dismiss the applications for judicial review of the Board's report in Court Dockets A-232-16, A-225-16, A-224-16, A-217-16, A-223-16 and A-218-16.

774 I would allow the applications for judicial review of the Order in Council P.C. 2016-1069 in Court Dockets A-78-17, A-75-17, A-77-17, A-76-17, A-86-17, A-74-17, A-68-17 and A-84-17, quash the Order in Council and remit the matter to the Governor in Council for prompt redetermination.

775 The issue of costs is reserved. If the parties are unable to agree on costs they may make submissions in writing, such submissions not to exceed five pages.

776 Counsel are thanked for the assistance they have provided to the Court.

E.R. DAWSON J.A.
Y. de MONTIGNY J.A.:— I agree.
J.M. WOODS J.A.:— I agree.

* * * * *

APPENDIX

National Energy Board Act*, *R.S.C. 1985, c. N-7

52 (1) If the Board is of the opinion that an application for a certificate in respect of a pipeline is complete, it shall prepare and submit to the Minister, and make public, a report setting out

Français

Ontario Energy Board Act, 1998

S.O. 1998, CHAPTER 15
Schedule B

Consolidation Period: From August 15, 2018 to the e-Laws currency date.

Last amendment: 2018, c. 10, Sched. 1, s. 10.

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; 2018, c. 10, Sched. 1, s. 10.

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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

93 REPEALED: 2003, c. 3, s. 65.

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

2003, c. 3, s. 65 - 01/08/2003

Route map

94 An applicant for an order granting leave under this Part shall file with the application a map showing the general location of the proposed work and the municipalities, highways, railways, utility lines and navigable waters through, under, over, upon or across which the proposed work is to pass. 1998, c. 15, Sched. B, s. 94.

Exemption, s. 90 or 92

95 The Board may, if in its opinion special circumstances of a particular case so require, exempt any person from the requirements of section 90 or 92 without a hearing. 1998, c. 15, Sched. B, s. 95.

Order allowing work to be carried out

96 (1) If, after considering an application under section 90, 91 or 92 the Board is of the opinion that the construction, expansion or reinforcement of the proposed work is in the public interest, it shall make an order granting leave to carry out the work. 1998, c. 15, Sched. B, s. 96.

Applications under s. 92

(2) In an application under section 92, the Board shall only consider the following when, under subsection (1), it considers whether the construction, expansion or reinforcement of the electricity transmission line or electricity distribution line, or the making of the interconnection, is in the public interest:

1. The interests of consumers with respect to prices and the reliability and quality of electricity service.
2. Where applicable and in a manner consistent with the policies of the Government of Ontario, the promotion of the use of renewable energy sources. 2009, c. 12, Sched. D, s. 16.

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

2003, c. 3, s. 66 - 01/08/2003

2009, c. 12, Sched. D, s. 16 - 09/09/2009

Lieutenant Governor in Council, order re electricity transmission line

96.1 (1) The Lieutenant Governor in Council may make an order declaring that the construction, expansion or reinforcement of an electricity transmission line specified in the order is needed as a priority project. 2015, c. 29, s. 16.

Effect of order

(2) When it considers an application under section 92 in respect of the construction, expansion or reinforcement of an electricity transmission line specified in an order under subsection (1), the Board shall accept that the construction, expansion or reinforcement is needed when forming its opinion under section 96. 2015, c. 29, s. 16.

Obligations must be followed

(3) Nothing in this section relieves a person from the obligation to obtain leave of the Board for the construction, expansion or reinforcement of an electricity transmission line specified in an order under subsection (1). 2015, c. 29, s. 16.

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

2015, c. 29, s. 16 - 04/03/2016

Condition, land-owner's agreements

97 In an application under section 90, 91 or 92, leave to construct shall not be granted until the applicant satisfies the Board that it has offered or will offer to each owner of land affected by the approved route or location an agreement in a form approved by the Board. 1998, c. 15, Sched. B, s. 97.

No leave if covered by licence

97.1 (1) In an application under section 92, leave shall not be granted to a person if a licence issued under Part V that is held by another person includes an obligation to develop, construct, expand or reinforce the line, or make the interconnection, that is the subject of the application. 2016, c. 10, Sched. 2, s. 16.

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- Funding for a traditional practices program that helps support traditional land use activities.[260.3]
- Economic accommodation, either in recognition of an aboriginal title right (which includes the right to derive economic benefits from the resources in the aboriginal title area), or to compensate for negative impacts on s. 35 rights; economic accommodation may come in many forms, including land grants, revenue sharing, compensation payments, employment opportunities in a proposed project or investment opportunities in proposed project.
- Environmental monitoring to assess the ongoing impacts of a project and ensure that its impacts do not exceed any pre-agreed environmental thresholds.[260.4]
- A right on the part of the aboriginal group to play a role in decision-making that will affect its traditional territory, such as an opportunity to co-manage a park with government, to co-manage a project or part of a project, or to have a seat on a land use committee.

By no means is the above list meant to be exhaustive. Indeed, it is suggested here that the Crown and aboriginal groups should be creative in trying to reach mutually acceptable settlements.

5§2281 The role of broader social interests and the need to compromise. The Supreme Court of Canada stated in *Haida* that in formulating a reasonable accommodation proposal, the Crown must take into consideration "other societal interests".[260.5] In considering accommodation options, the Crown may take into account how those accommodations would affect other interests and public policy objectives, because "[compromise is inherent to the reconciliation process."[260.6] The duty to consult does not provide Indigenous groups with a "veto" over final Crown decisions; rather, proper accommodation stresses the need to balance competing societal interests with Aboriginal and treaty rights.[260.7]

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specifying any specific accommodation outcome: 2011 BCCA 247, 2011 CarswellBC 1238 (B.C. C.A.) at para. 167 (per C.J. Finch).

260.3 *Suing v. Canada (Attorney General)*, 2012 FC 297, 2012 CarswellNat 635 (F.C.) at para. 113.

260.4 See, for example, *Suing v. Canada (Attorney General)*, 2012 FC 297, 2012 CarswellNat 635 (F.C.) at paras. 62-63 and 113.

260.5 *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, 2004 CarswellBC 2656, [2005] 1 C.N.L.R. 72 (S.C.C.) at para. 50 [interveners included Squamish Indian Band, Lax-kw'alaams Indian Band, Haisla Nation, Dene Tha' First Nation]; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, 2004 CarswellBC [2005] 1 C.N.L.R. 366 (S.C.C.) at para. 2 [interveners included the Doig River First Nation]; affirmed in *Suing v. Canada (Attorney General)*, 2012 FC 297, 2012 CarswellNat 635 (F.C.) at para. 120.

260.6 *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, 2004 CarswellBC 2654, [2005] 1 C.N.L.R. 366 (S.C.C.) at para. 2 [interveners included the Doig River First Nation].