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
INTERVENOR WRITTEN SUBMISSIONS AND SUPPORTING DOCUMENTS

October 31, 2018

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PART 1: OVERVIEW

1. The Ontario Energy Board (the "Board") has requested final written arguments regarding the Board's hearing of three applications[1] under section 92 of the *Ontario Energy Board Act, 1998* ("*OEB Act*") (the "Combined Hearing").[2] The Board is tasked with determining whether to grant leave to construct to Upper Canada Transmission Inc. ("NextBridge") for the East-West Tie Project ("EWT") or to Hydro One Networks Inc. ("Hydro One") for the Lake Superior Link Project ("LSL").

2. In choosing which application will receive leave to construct approval—the EWT or the LSL—this Board cannot overlook the imperatives of section 35 of the *Constitution Act*, *1982* nor the requirements of Ontario energy policy. This Board cannot overlook the reliance that First Nations and Métis communities have placed on its designation process and decisions related to the EWT. This Board cannot overlook the deficiencies, gaps, and uncertainty in Hydro One's LSL application regarding Métis consultation, accommodation, and economic participation, and cannot fail to weigh those against the robust Métis consultation record and successful economic participation negotiations of NextBridge with the MNO.

3. The MNO and NextBridge have engaged in almost five years of consultations and negotiations. These consultations and negotiations were based on previous Board directions and

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[1] OEB File Nos. EB-2017-0182/EB-2017-0194/EB-2017-0364.

[2] OEB Procedural Order No 1, EB-2017-0182/EB-2017-0194/EB-2017-0364, issued August 13, 2018, online (PDF): http://www.rds.oeb.ca/HPECMWebDrawer/Record/616403/File/document.

decisions, court decisions, and successive Ontario Long-Term Energy Policies ("LTEPs"). The MNO and NextBridge have reached an Economic Participation Agreement that both parties believe advances this Board's directions and implements Ontario policy (the "MNO-NextBridge Agreement"). Through the MNO-NextBridge Agreement, and consistent with its implementation, the MNO has provided its support for the EWT, which the MNO expects will factor into the overall determination of whether the Crown's duty to consult and accommodate Métis communities has been met. This is contrasted against Hydro One's pre-determination of impacts on Métis rights, its lack of confirmed Métis (or First Nations) economic participation in the LSL, and the preliminary stage of its consultation efforts.

4. This Board—as an agent of the Crown charged with making a final decision that will impact Métis rights, interests, and claims—must act in accordance with the honour of Crown. This Board has a part to play in reconciliation, which is the "fundamental objective of the modern law of aboriginal and treaty rights."[3] Turning a blind eye to the issues of Métis consultation, accommodation, and economic participation—all of which have been squarely raised to this Board from the beginning of the designation process in 2011—is not honourable. Rejecting years of process and previous decisions—and the commitments made to First Nations and Métis communities through that process—is not honourable. Choosing a proponent—Hydro

[3] *Mikisew Cree First Nation v Canada* (*Minister of Canadian Heritage*), 2005 SCC 69 at para 1 [*Mikisew 2005*] [Tab 25].

One—who has put forward a flawed approach that is inconsistent with this Board's previous directions and Ontario policy is not honourable. Nor will it advance reconciliation.

PART 2: SEVEN YEARS OF PROCESS: THE EWT

5. In 2011, the Ministry of Energy sent a letter to the Board asking it to design a process and select a transmitter to develop the EWT. The Minister's letter was an articulation and re-statement to the Board of existing and applicable Ontario law and policy respecting First Nations and Métis issues in the context of renewable energy project development. This letter clarified that Ontario law and policy require that both First Nations and Métis consultation, flowing from the Crown's constitutional duty, and First Nations and Métis economic participation, flowing from government policy, be considered in the designation process.[4]

6. The EWT designation process was the first opportunity to put into practice the policy commitments in the 2010 LTEP with respect to new transmission in the province. Both First Nations and Métis communities helped inform the 2010 LTEP and its commitments.[5] Both First Nation and Métis communities—whose traditional territories will be traversed by the EWT—wanted to ensure these commitments were meaningfully implemented through the

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4 Letter from Ministry of Energy to Ontario Energy Board requesting a designation process for the EWT, EB-2011-0140, March 29, 2011, Exhibit L.2, online (PDF): http://www.rds.oeb.ca/HPECMWebDrawer/Record/322660/File/document.

5 Ontario, *Ontario's Long Term Energy Plan: Building Our Clean Energy Future* (Toronto: Queen's Printer for Ontario, 2010) at 10, online (PDF): https://files.ontario.ca/books/final_mei_ltep_en_acc.pdf ("LTEP 2010").

designation. Moreover, as the first transmission designation process of its kind in the province, it was precedent-setting for future designations. The MNO therefore participated as an intervenor in the Board's Phase 1 and Phase 2 hearings.[6]

7. At its core, the Board's designation process was about selecting a private sector transmitter with the "best" plan to develop the EWT based on criteria established by the Board. Consistent with Ontario's constitutional obligations owing to Aboriginal peoples and its distinct socio-economic policies, the "best" plan needed to address First Nation and Métis consultation and participation. This was reflected in the Board's use of a specific criterion related to First Nations and Métis economic participation, and another criterion related to First Nations and Métis consultation.[7] These formed two of the nine equally weighted criteria the Board applied to choose a transmitter. In other words, First Nations and Métis-specific criteria formed almost a quarter of each transmitter's final score in the designation process.[8]

8. Upper Canada Transmission Inc., known as "NextBridge," was designated by the Board to develop the EWT; it had the best plan.[9] NextBridge was designated in part based on its

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6 East-West Tie Line, EB-2011-0140/EB-2015-0216, launched August 22, 2011.

7 Phase 1 Decision and Order, EB-2011-0140, issued on July 12, 2012, at 3, online (PDF): http://www.rds.oeb.ca/HPECMWebDrawer/Record/353291/File/document ("OEB Phase 1 Decision").

8 OEB Phase 1 Decision, *supra* note 7 at 3.

9 OEB Phase 2 Decision and Order, EB-2011-0140, issued on August 7, 2013, online (PDF): http://www.ontarioenergyboard.ca/oeb/_Documents/EB-2011-0140/Dec_Order_Phase2_East-WestTie_20130807.pdf ("OEB Phase 2 Decision").

"ability to conduct successful First Nation and Métis consultations."[10] NextBridge received the top score in this category.

9. Regarding First Nations and Métis economic participation, the Board's designation decision (the "Phase 2 Decision") stated that "the more that an application demonstrably provided opportunities for participation and was committed to that participation, the higher the Board ranked the proponent."[11] The Board expressly incorporated Ontario's 2010 LTEP into its Phase 2 Decision.[12]

10. The MNO and NextBridge both understood from the Board's Phase 2 Decision that the Board was requiring NextBridge, as the designated transmitter, to pursue economic participation opportunities with First Nations and Métis communities impacted by the EWT. On this basis—in reliance on the Board's process, decisions, and Ontario LTEPs—NextBridge and the MNO have engaged in consultations and negotiations since late 2013.[13] Through these almost five years of consultation and negotiation, NextBridge and the MNO have built a mutually respectful

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10 OEB Phase 2 Decision, *supra* note 9 at 38.

11 OEB Phase 2 Decision, *supra* note 9 at 15.

12 OEB Phase 2 Decision, *supra* note 9 at 14–15.

13 Hearing Transcript ("Hr Tr"), EB-2017-0182 at 123:22–124:8 and 125:15–19, May 7, 2018, online (Word): http://www.rds.oeb.ca/HPECMWebDrawer/Record/607888/File/document [Tab 7].

relationship, which culminated in the execution of the MNO-NextBridge Agreement in June 2018.[14]

PART 3: THE RIGHTS, CLAIMS AND INTERESTS OF THE NORTHERN LAKE SUPERIOR AND SAULT STE. MARIE MÉTIS COMMUNITIES

11. The MNO was created in 1993 to represent Ontario Métis and their communities. It has governance structures at the local, regional, and provincial levels. These structures work together to advance the collective rights and interests of MNO citizens and communities.[15] The two rights-bearing Métis communities represented by the MNO's governance structures that are impacted by the EWT/LSL are the Northern Lake Superior and Historic Sault Ste. Marie and Environs Métis Communities.

12. This project, whether it's called the EWT or the LSL, runs through the heart of the traditional territory of the Northern Lake Superior Métis Community. This is a regional rights bearing Métis community that is represented through a Regional Consultation Committee ("RCC"). The RCC includes local representation and an elected regional councillor. The three MNO Community Councils of this community, representatives of which sit on the RCC, were

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[14] Hr Tr, EB-2017-0182/EB-2017-0194/EB-2017-0364 at 173:14–24, October 9, 2018, online (Word): http://www.rds.oeb.ca/HPECMWebDrawer/Record/622689/File/document [Tab 13].

[15] *Metis Nation of Ontario Secretariat Act*, *2015*, SO 2015, c 39 [MNO Evidence, EB-2017-0364, filed May 7, 2018, at Appendix A, online (PDF): http://www.rds.oeb.ca/HPECMWebDrawer/Record/607846/File/document].

identified by the Ministry of Energy as requiring consultation on the EWT and LSL. The three MNO Community Councils are: (1) the Thunder Bay Métis Council, (2) the Superior North Shore Métis Council, and (3) the Greenstone Métis Council.[16] The Sault Ste. Marie and Environs Métis Community was recognized by the Supreme Court of Canada ("SCC") in *R v Powley* as part of a larger Great Lakes Métis collective.[17]

13. These Communities assert and exercise aboriginal rights throughout their territory, including, among other things, hunting, fishing (food and commercial), trapping (food and commercial), gathering, sugaring, wood harvesting, use of sacred and communal sites (i.e., incidental cabins, family group assembly locations, etc.), and use of water. These rights are protected as aboriginal rights within the *Constitution Act, 1982*. These rights have not been extinguished by the Crown by way of treaty or other means.

14. The rights, claims, and interests of these two Métis Communities are credible and well-established. The evidence submitted by the MNO during its intervention in NextBridge's motion to dismiss the LSL leave to construct application (the "NextBridge Motion") sets out

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16 Letter from Ministry of Energy to Hydro One Networks Inc, dated March 2, 2018 [Hydro One Additional Evidence, EB-2017-0364, filed May 7, 2018, Attachment 9, online (PDF): http://www.rds.oeb.ca/HPECMWebDrawer/Record/607852/File/document].

17 *R v Powley*, 2003 SCC 43 at para 53, [*Powley*] [Tab 29].

some of the significant recent developments related to the recognition of Métis rights across the province and specifically in the EWT/LSL project areas.[18]

15. One of these developments is the joint recognition by Ontario and the MNO in August of 2017 of six historic Métis communities in Ontario, in addition to the one identified by the SCC in the *Powley* case.[19] Present-day Métis rights flow from the use and occupation of the land by distinctive Métis communities prior to effective European or Canadian control of that area.[20] The identification of a distinctive historic Métis community is therefore a critical aspect of recognizing, respecting, and determining Métis rights. One of these six jointly identified historic Métis communities runs along the north shore of Lake Superior. The descendants of this historic Métis community are the modern-day citizens of Northern Lake Superior Métis Community and live, work, and exercise their unique Métis rights and way of life on the territory of their ancestors. [21]

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[18] MNO Evidence, *supra* note 15. Also see the MNO's Oral Argument in NextBridge Motion, Hr Tr, EB-2017-0364 at 63:15–67:7, June 4, 2018, online (PDF): http://www.rds.oeb.ca/HPECMWebDrawer/Record/610480/File/document [Tab 10].

[19] Fact Sheet for Northern Lake Superior Historic Métis Community, August 18, 2017; Fact Sheet for the Sault Ste. Marie Historic Métis Community, August 18, 2017; and MNO Press Release, *Ontario and the MNO announce identification of historic Métis communities*, August 21, 2017 [MNO Evidence, *supra* note 15, Appendices E, H and L]. Also see the MNO's Oral Argument in NextBridge Motion, Hr Tr, EB-2017-0364 at 64:14–66:17, June 4, 2018 [Tab 10].

[20] *Powley*, *supra* note 17 at para 18 [Tab 29].

[21] Framework Agreement on Métis Harvesting between the Province of Ontario and the Métis Nation of Ontario, Schedule C, Métis Nation of Ontario's Métis Harvesting Areas ("MNO Harvesting Agreement") [MNO Evidence, *supra* note 15, Appendix F at 15].

16. The harvesting rights of the Sault Ste. Marie and Environs Métis Community was confirmed by the SCC in *Powley*, which confirmed a constitutionally protected Métis right to hunt in Sault Ste. Marie and environs. The SCC affirmed the trial judge's findings in that case that the Métis living in and around Sault Ste. Marie were part of a larger Great Lakes Métis population, agreeing that "a distinctive Métis community emerged in the Upper Great Lakes region in the mid-17th century."[22]

17. The EWT/LSL project is entirely contained within the Métis Harvesting Areas of the Northern Lake Superior and Sault Ste. Marie Métis Communities, where Ontario has accommodated Métis harvesting rights since 2004.[23]

18. In 2004, the MNO and Ontario negotiated a harvesting agreement that accommodates Métis rights in the EWT/LSL project area, among other areas. This was consistent with the SCC's direction in *Powley* that:

> In the longer-term, a combination of negotiation and judicial settlement will more clearly define the contours of the Métis right to hunt, a right that we recognize as part of the special aboriginal relationship to the land.[24]

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22 *Powley*, *supra* note 17 at para 21 [Tab 29].

23 This is represented in a map in Appendix D to the MNO's written evidence on NextBridge's Motion. This map illustrates that the EWT/LSL project is **entirely** contained within the Métis Harvesting Areas of the Northern Lake Superior and Sault Ste. Marie Métis Communities; see Métis Communities and Proposed East-West Tie Transmission Project (Territories and Administrative Geography) [MNO Evidence, *supra* note 15, Appendix D].

24 *Powley*, *supra* note 17 at para 50 [Tab 29].

19. Earlier this year, on April 30, 2018, the MNO and Ontario signed a new harvesting agreement, called the *Framework Agreement on Métis Harvesting*, which continues to accommodate Métis harvesting rights in the area through which the EWT/LSL project will pass.

20. This traditional territory is shared with First Nations, some of whom are also intervenors in this proceeding. These First Nations were signatories to the Robinson Superior Treaty and have treaty rights in this area, as well as asserting other Aboriginal rights. Métis rights coexist with the rights of First Nations. The law does not distinguish between the two. The *Constitution* recognizes and respects these rights equally.[25]

21. The MNO is currently engaged in exploratory discussions with both the provincial and federal governments regarding, among other things, the recognition of the MNO as an Indigenous public government pursuant to a tripartite *Framework Agreement on Advancing Reconciliation*.[26] The significance of this *Agreement* is discussed further in Part 5, Section B.

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[25] *Constitution Act*, *1982*, Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 35 [Tab 14].

[26] Framework Agreement for Advancing Reconciliation between the Métis Nation of Ontario, the Government of Canada, and the Province of Ontario, executed on December 11, 2017 ("MNO-GOC-ON Reconciliation Framework Agreement") [MNO Evidence, *supra* note 15, Appendix N].

PART 4: THE BOARD'S LEAVE TO CONSTRUCT DECISION MUST BE CONSISTENT WITH SECTION 35 OF THE *CONSTITUTION ACT, 1982*

22. Section 35 of the *Constitution Act, 1982* imposes obligations on all Crown decision-makers. These obligations include the broad duty to uphold the honour of the Crown, which is always at stake when the Crown is dealing with Indigenous peoples, and the duty to consult and accommodate which arises in specific situations.

23. The Board is an agent of the Crown. As such, the Board's decision in the Combined Hearing must be consistent with section 35 of the *Constitution Act*, including: ensuring that the duty to consult and accommodate is discharged, uphold the Crown's honour, and further section 35's fundamental purpose of reconciliation with Aboriginal peoples.[27]

A. The Role of the Duty to Consult and Accommodate

24. The Board has previously considered the adequacy of consultation in the context of a leave to construct application and imposed conditions to satisfy itself that the duty would be met prior to construction:

> The Board's leave to construct order is conditioned on the granting of all other necessary approvals and permits. Specifically, **the Board's order is conditional on successful completion of the EA process. In this way, the Board has satisfied itself that the process of assessment of the duty to consult (including**

[27] The MNO made oral submissions about the role of section 35 of *the Constitution Act, 1982* in the Board's decision-making at the hearing of the NextBridge Motion. The MNO continues to rely on those submissions in addition to those contained herein. See Hr Tr, EB-2017-0364 at 72:5–75:16, June 4, 2018 [Tab 10].

> **the duty to accommodate where appropriate) will be completed prior to the commencement of the project** and in a practical and workable manner.[28]

25. The Board further explained that consultation issues are to be considered on a case-by-case basis:

> The Board has recognized that whatever consultation responsibilities it has exist irrespective of the existence of a formal consultation policy. For that reason **it has considered Aboriginal consultation issues on a case by case basis** as proceedings have come before the Board.[29]

26. In accordance with that case by case approach, the Board has held, in other instances, that it "has no jurisdiction to conduct Aboriginal consultation itself, nor to assess the adequacy of the Crown's consultation efforts in a section 92 application (except as they may arise within the limits of section 96(2))."[30]

27. The jurisprudence concerning the role of administrative tribunals and the duty to consult and accommodate has evolved since the 2008 and 2012 Board decisions referenced above. The Combined Hearing offers an opportunity for the Board to clarify its approach to align it with the current state of the law. Today, the caselaw supports the Board having both the authority and the

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28 *Hydro One Networks Inc* (*Re*), 2008 LNONOEB 9 at para 264 (emphasis added) [*Re Hydro One Networks*] [Tab 20].

29 *Re Hydro One Networks*, *supra* note 28 at para 267 (emphasis added) [Tab 20].

30 Decision and Order, Hydro One Networks Leave to Construct, EB-2012-0082, November 8, 2012, at 12, online (PDF): http://www.rds.oeb.ca/HPECMWebDrawer/Record/372590/File/document.

duty to ensure its decisions comply with section 35. The recent caselaw and its relevance to the Board's decision in the Combined Hearing is outlined below.

(i) The Board Has the Authority and Duty to Make Decisions that Consider Section 35 of the Constitution Act, 1982

28. In 2017, the SCC considered the role of administrative tribunals in assessing the adequacy of the duty to consult in detail. In *Clyde River*, the SCC held that:

> [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". **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**. **It follows that they must ensure their decisions comply with s. 35 of the Constitution Act, 1982**.[31]

29. The Board has the overarching jurisdiction to consider all questions of law and fact. The *OEB Act* sets out that "the Board has in **all matters within its jurisdiction authority to hear and determine all questions of law** and fact."[32] This authority extends to every matter before the Board, including the Combined Hearing.

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31 *Clyde River* (*Hamlet*) *v Petroleum Geo-Services Inc*, 2017 SCC 40 at para 36 (citations omitted, emphasis added) [*Clyde River*] [Tab 17].

32 *Ontario Energy Board Act*, 1998, SO 1998, c 15, Sched. B, s 19(1) [*OEB Act*] [emphasis added] [Tab 15].

30. The Federal Court of Appeal ("FCA") in the *Gitxaala* case recently dealt with a similar issue. The FCA was tasked with interpreting section 54 of the *National Energy Board Act,* in the same way that this Board is tasked with interpreting and applying sections 92 and 96 of the *OEB Act*.[33] The FCA held that, while section 54 was enacted before the duty to consult was "well-established in our law" and "does not refer to the duty to consult," it was:

> **inconceivable that section 54 could operate in a manner that ousts the duty to consult. Very express language would be required to bring about that effect. And if that express language were present in section 54, tenable arguments could be made that section 54 is inconsistent with the recognition and affirmation of Aboriginal rights** [under section 35].[34]

31. In *Gitxaala*, the FCA explained that "statutory provisions that are capable of multiple meanings should be interpreted in a manner that preserves their constitutionality."[35] In accordance with this fundamental principle of statutory interpretation, the FCA read in a requirement to section 54 of the *National Energy Board Act* that the decision-maker under that section ensure that the duty to consult was fulfilled prior to issuing an approval.

32. Like section 54 of the *National Energy Board Act,* section 96 of the *OEB Act* does not clearly withdraw the Board's jurisdiction to consider all questions or law, nor expressly prohibit the Board's consideration of section 35. A listing of criteria for the Board to consider is not "very

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33 *OEB Act*, *supra* note 32, ss 92, 96 [Tab 15].

34 *Gitxaala Nation v Canada*, 2016 FCA 187 at para 160 (emphasis added) [*Gitxaala*] [Tab 18].

35 *Gitxaala*, *supra* note 34 at para 161 [Tab 18].

express language" that **specifically** ousts consideration of the duty to consult and accommodate. Without this, "it follows that [the Board] must ensure [its] decisions comply with s. 35."[36] An interpretation of section 96 of the *OEB Act* that ousts the Board's authority to consider the duty to consult and accommodate is inconsistent with *Clyde River* and *Gitxaala*.[37]

(ii) Constitutionally-Protected Aboriginal Rights Must Play a Special Role in the Board's Public Interest Analysis Under Section 96 of the OEB Act

33. Recent jurisprudence clarified how Aboriginal consultation and accommodation must be weighed by administrative decision makers charged with making a determination "in the public interest." The courts have held that it is impossible to separate out constitutionally-protected Aboriginal rights and the constitutional imperative of the duty to consult from the public interest. For this reason, any "project authorization that breaches the constitutionally protected rights of Indigenous peoples cannot serve the public interest."[38] Further, the SCC in *Clyde River* held that: "**[t]he duty to consult, being a constitutional imperative, gives rise to a special public interest that supercedes other concerns typically considered by tribunals tasked with assessing the public interest**."[39]

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36 *Clyde River*, *supra* note 31 at para 36 [Tab 17].

37 And as *Gitxaala* stated, such an interpretation or such express language may be inconsistent with the recognition and affirmation of Aboriginal rights under section 35. *Gitxaala*, *supra* note 34 at para 160 [Tab 18].

38 *Clyde River*, *supra* note 31 at para 40 [Tab 17].

39 *Clyde River*, *supra* note 31 at para 40 (emphasis added) [Tab 17].

34. Under section 96, the Board is required to make a decision in the public interest. It would be an absurd result if the *OEB Act* was interpreted so as to confine a decision that is intended to be made in the public interest to only "price, reliability and quality," when the duty to consult is a "constitutional imperative…that supercedes other concerns." Such an interpretation is unlikely to pass constitutional muster.[40]

(iii) As a Final Decision Maker, The Board Must Further the Objective of Reconciliation

35. The nature of the decision being made by the Board is also critical to this analysis. The SCC recently held that "the duty [to consult]…does not evaporate simply because a final decision has been made by a tribunal established by Parliament, as opposed to Cabinet."[41] The Crown cannot avoid its duties by delegating decisions to administrative decision makers:

> permitting the Crown to do by one means that which it cannot do by another would undermine the endeavour of reconciliation, which animates Aboriginal law. The principle of reconciliation and not rigid formalism should drive the development of Aboriginal law.[42]

36. Similar to the National Energy Board, the OEB is a final decision maker. The leave to construct order of the Board is not subject to further review or confirmation by any other

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40 *Gitxaala*, *supra* note 34 at paras 160–161 [Tab 18].

41 *Clyde River*, *supra* note 31 at para 29 [Tab 17].

42 *Mikisew Cree First Nation v Canada* (*Governor General in Council*), 2018 SCC 40 at para 44 [*Mikisew 2018*] [Tab 24].

governmental decision-maker. This means that the duty to ensure that the duty to consult and accommodate is discharged rests with the Board.

(iv) Section 35 Requires that the Board Ensure the Duty to Consult and Accommodate is Discharged Prior to Granting Approval

37. The Crown's duty must be fully discharged before any proponent receives final project approval:

> [I]rrespective 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.[43]

38. The two necessary approvals for the EWT or LSL are the environmental assessment ("EA") approval and the Board's leave to construct approval.

39. As the final decision-maker tasked with one of the two major approvals required for the EWT/LSL, the Board must consider whether NextBridge and Hydro One have discharged the procedural aspects of consultation delegated to them by the Crown, as part of whether the Crown has discharged its overall duty to consult and accommodate Métis communities impacted by the projects. From the MNO's perspective, NextBridge has done so. Hydro One has not. As a result, this Board must consider whether conditions could be placed on Hydro One. These procedural obligations will be discharged as part of the Crown's overall fulfillment of its duty. The MNO

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43 *Clyde River*, *supra* note 31 at para 24 [Tab 17].

expects that the Board will also consider what impacts these conditions will have on Hydro One's project, including cost and delay.

40. In summary, while the OEB has previously adopted a narrow approach to the factors it can consider under s. 96(2),[44] the OEB has engaged in an analysis of consultation in both the context of electricity[45] and natural gas[46] projects. The lack of a positive exclusion of the *Constitution Act, 1982* from the list of factors under s. 96(2) of the *OEB Act*, coupled with the caselaw reviewed above previous Board decisions, lead to the conclusion that the Board has the duty and authority to consider section 35, including the adequacy of consultation and accommodation efforts with First Nations and Métis communities. This interpretation of section 96 is consistent with the SCC's comments on the furtherance of reconciliation[47] and the special nature[48] of section 35 to the public interest analysis.

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44 *Pavao v Ministry of the Environment and Climate Change*, 2016 ONSC 6040 at paras 30 and 41 [Tab 27].

45 *Re Hydro One Networks*, *supra* note 28 at paras 249, 264, 267 [Tab 20].

46 *Union Gas Ltd* (*Re*), 2011 LNONOEB 201 at paras 20, 25, 29, 34, 50, 63 [Tab 35].

47 *Clyde River*, *supra* note 31 at paras 24, 44 [Tab 17].

48 *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43 at para 70 [*Carrier Sekani*] [Tab 30]; also cited with approval in *Clyde River*, *supra* note 31 at para 40 [Tab 17].

B. The Role of the Honour of the Crown

(i) The Honour of the Crown Is Always At Stake in the Crown's Dealings with Indigenous Communities

41. The Board, as an agent of the Crown discharging the Crown's responsibilities, must make decisions and implement processes that uphold the honour of the Crown. The SCC has been clear that "servants of the Crown must conduct themselves with honour when acting on behalf of the sovereign."[49]

42. The Board has a role in advancing reconciliation with the Métis, reconciliation being a process that "flows from the Crown's duty of honourable dealing toward Aboriginal peoples."[50]

43. The honour of the Crown is broader than just the duty to consult and accommodate. It infuses every interaction that the Crown—or an agent of the Crown—has with Indigenous communities.[51] The Crown's honour "is always at stake in its dealings with Aboriginal peoples. It is not a mere incantation, but rather a core precept that finds its application in concrete practices."[52]

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49 *Manitoba Metis Federation Inc v Canada* (*Attorney General*), 2013 SCC 14 at para 65 [Tab 23].

50 *Haida Nation v British Columbia* (*Minister of Forests*), 2004 SCC 73 at para 32 [*Haida*] [Tab 19].

51 *R v Badger*, [1996] 1 SCR 771 at para 41 [*Badger*] [Tab 28]: "The honour of the Crown is always at stake in its dealings with [Indigenous] peoples."

52 *Haida, supra* note 50 at para 16 (citations omitted) [Tab 19].

(ii) The Honour of the Crown Requires the Board to Uphold its Own Processes and Commitments to Indigenous Communities

44. In this instance, the honour of the Crown—the "concrete practice"—calls for this Board to uphold the commitments that it made during the designation process, and act to further the priorities that it identified during that process. The honour of the Crown requires the Board to consider and respect the reasonable reliance that the MNO placed on this Board's previous process and decisions on the EWT.

45. This is not just a matter of procedural fairness. The courts have held that "where Aboriginal peoples are concerned, the concepts of honour, reconciliation and fair dealing—matters of constitutional import—may bear upon the matter, sometimes significantly, affecting the level of procedures to be afforded."[53]

46. The procedure and process that must be afforded in this instance is for this Board to respect its process, decisions, and the reliance that Indigenous peoples have placed upon them. Ignoring this—"changing the rules of the game," so to speak—at this late stage has the appearance of "sharp dealing." This is not consistent with the Crown's honour.[54]

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53 *Long Plain First Nation v Canada* (*Attorney General*), 2015 FCA 177 at para 108 [Tab 22].

54 *Badger*, *supra* note 51 at para 41 [Tab 28]; *Mikisew 2018*, *supra* note 42 at para 28 [Tab 24].

(iii) The Honour of the Crown Requires Meaningful Consideration of Indigenous Concerns

47. The honour of the Crown also requires that the Board explain in its decision how it has considered Indigenous concerns:

> 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 [or another administrative tribunal like the Board], where its approval process triggers the duty to consult, to explain how it considered and addressed these concerns.[55]

48. As set out below in Part 5, Section B, the MNO is owed deep consultation on the EWT and LSL. The honour of the Crown obligates the Board to provide detailed reasons as to how it as considered and addressed the MNO's concerns, which have been squarely raised throughout this proceeding. The Board committed to addressing the issue of the Board's role in discharging the Crown's duty to consult in its decision in the Combined Hearing.[56] However, the MNO has raised concerns that go beyond the duty to consult (for instance, the role of the honour of the Crown). These must also be addressed by the Board.

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55 *Clyde River*, *supra* note 31 at para 42 [Tab 17]. As the MNO has squarely raised its concerns about the honour of the Crown, the Board must, in its ruling on this motion, turn its mind to these concerns. The Supreme Court of Canada has repeatedly held that written reasons are a sign of respect that foster reconciliation, which is the goal of the honour of the Crown, and this is explained in both *Haida*, *supra* note 50 at para 44 [Tab 19]; *Clyde River*, *supra* note 31 at para 41 [Tab 17].

56 OEB Decision and Order, EB-2017-0364, issued July 19, 2018, at 5, online (PDF): http://www.rds.oeb.ca/HPECMWebDrawer/Record/614636/File/document.

PART 5: THE DUTY TO CONSULT AND ACCOMMODATE

A. The Law on the Duty to Consult and Accommodate

49. The Supreme Court of Canada has been clear that the rights of Aboriginal peoples must:

> 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.[57]

50. Where the possibility of accommodation is excluded from the outset, Aboriginal consultation is meaningless.[58] 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. [59]

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57 *Haida*, *supra* note 50 at para 25 [Tab 19].

58 *Mikisew 2005*, *supra* note 3 at para 54 [Tab 25].

59 *Haida, supra* note 50 at paras 47, 49 (emphasis added) [Tab 19].

51. 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.[60]

52. 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 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."[61] Courts have stated that in some instances "financial compensation could be found to be an appropriate measure of accommodation."[62]

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60 *Musqueam Indian Band v British Columbia* (*Minister of Sustainable Resource Management*), 2005 BCCA 128 at para 97 [*Musqueam*] [Tab 26].

61 Jack Woodward, *Native Law*, Vol 1, (Toronto: Thomson Reuters, 1994) (loose-leaf updated 2017, release 5), ch 5, at 5-111 to 5-112, 5§2280 [Tab 36].

62 *Musqueam, supra* note 60 at para 100 [Tab 26].

53. The duty to consult and accommodate plays a critical role in striving towards section 35's fundamental purpose of reconciliation, which is:

> a process flowing from rights guaranteed by section 35(1) of the *Constitution Act, 1982*. This process of reconciliation flows from the Crown's duty of honourable dealing toward Aboriginal peoples, which arises in turn from the Crown's assertion of sovereignty over an Aboriginal people and de facto control of land and resources that were formerly in the control of that people.[63]

54. The Crown's duty to consult Aboriginal peoples and accommodate their rights is grounded in the honour of the Crown.[64] In keeping with the Crown's honour and the overarching purpose of reconciliation, the duty to consult and accommodate arises when the Crown has knowledge of the potential existence of the Aboriginal right and contemplates conduct that may adversely affect it.[65]

55. What is required to discharge the duty to consult varies in the circumstances: "A dubious or peripheral claim may attract a mere duty of notice, while a stronger claim may attract more stringent duties."[66] At a minimum, the Crown must ensure that its actions are consistent with the honour of the Crown.[67]

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63 *Haida*, *supra* note 50 at para 32 [Tab 19].

64 *Haida*, *supra* note 50 at para 16 [Tab 19].

65 *Haida*, *supra* note 50 at para 35 [Tab 19].

66 *Haida, supra* note 50 at para 37 [Tab 19].

67 *Haida, supra* note 50 at para 38 [Tab 19].

B. Deep Consultation is Owed to the Northern Lake Superior and Sault Ste. Marie Métis Communities

56. The Crown has acknowledged that the duty to consult and accommodate has been triggered with respect to the Northern Lake Superior Métis Community regarding the EWT and LSL.[68]

57. The scope and content of the Crown's duty to consult Aboriginal people is assessed on a spectrum on which strong *prima facie* claims by Aboriginal groups regarding rights and interests of high importance attract deep consultative duties.[69] The SCC has made clear that "[a]s the claim strength increases, the required level of consultation and accommodation correspondingly increases."[70]

58. Courts have acknowledged that, in determining the scope and content of the duty to consult owed to an Aboriginal group, "[w]hile not a determinative factor, the Crown's participation in the land claims process is a factor that may inform the Court in assessing the strength of the Applicants' asserted claim."[71] Similarly, courts have found that as the assertion of

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68 Letter from the Ministry of Energy to the Métis Nation of Ontario, dated March 2, 2018 [MNO Evidence, *supra* note 15, Appendix Q].

69 *Haida, supra* note 50 at para 44 [Tab 19].

70 *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 91 [Tab 34].

71 *Ka'a'Gee Tu First Nation v Canada* (*Attorney General*), 2007 FC 763, at para 104 [Tab 21]; *Taku River Tlingit First Nation v British Columbia* (*Minister of Forests*), 2004 SCC 73 at paras 30, 33 [Tab 33].

an Aboriginal right or claim advances through the stages of claim, proof, and negotiation, the Crown's duty to consult and accommodate the Aboriginal group in question with respect to their asserted rights and claims increases.[72]

59. On December 11, 2017, the MNO, Canada, and Ontario concluded the *Framework Agreement on Advancing Reconciliation*.[73] The *Framework Agreement* puts the MNO and Canada firmly on the path of reconciliation by providing the basis for negotiating a modern-day treaty, land claims agreement or other agreement. It provides for a formal negotiation process for the MNO and Canada to negotiate on a variety of subject matters, including self-government, settlement lands, water and subsurface rights, forestry, environmental assessment, and land management.[74]

60. Consultation with the MNO and the communities it represents, and accommodation of their rights, claims, and interests in relation to the EWT/LSL must be informed by the ongoing negotiations between the MNO and the Crown pursuant to the *Framework Agreement.* Consultation with the MNO on the EWT/LSL must also be informed by the provincial Crown's accommodation of section 35 Métis harvesting rights in the EWT/LSL project area. These rights

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[72] *Sambaa K'e Dene First Nation v Duncan*, 2012 FC 204 at paras 133, 137, and 139 [Tab 32]; *Ross River Dena Council v Government of Yukon*, 2011 YKSC 84 at para 46 [Tab 31].

[73] MNO-GOC-ON Reconciliation Framework Agreement, *supra* note 26 [MNO Evidence, *supra* note 15, Appendix N].

[74] MNO-GOC-ON Reconciliation Framework Agreement, *supra* note 26 [MNO Evidence, *supra* note 15, Appendix N].

are not mere speculation or assertions. Given the strong *prima facie* case for Métis rights in the EWT/LSL project areas and the obvious potential for a large transmission line to impact those rights, a deep duty of consultation and accommodation applies in this instance.

C. Consultation and Accommodation with NextBridge on the EWT

(i) NextBridge was Delegated Procedural Aspects of Consultation by the Ministry of Energy

61. It is common practice for the Crown to delegate procedural aspects of the duty to project proponents.[75] 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."[76] 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;
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> (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;

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75 *Haida*, *supra* note 50 at para 53 [Tab 19].

76 Memorandum of Understanding between the Ontario Ministry of Energy and NextBridge, dated November 4, 2013, Schedule E, s 2.2 (b), EB-2011-0140, filed November 21, 2013, online (PDF): http://www.rds.oeb.ca/HPECMWebDrawer/Record/417859/File/document (the "MOU").

(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;

(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.[77]

62. Multiple MNO Community Councils were listed as "Aboriginal Communities" with whom NextBridge needed to consult under the MOU.[78]

(ii) Five Years of Consultation and Relationship Building

63. NextBridge began consultation with the MNO in December of 2013, just a few weeks after the execution of the MOU with Canada, and several months after receiving designation from this Board.[79]

64. Through almost five years of consultation, NextBridge and the MNO have built a strong relationship, as required by the MOU. This is illustrated by the fact that NextBridge has received two traditional knowledge and land use studies from the MNO, one in November 2016, and another in March 2017 (the "MNO Reports"). NextBridge gave evidence that a second report was required because of the iterative nature of consultation and the MNO and NextBridge's evolving relationship: "as [NextBridge] started to refine [its] plan and environmental

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77 MOU, *supra* note 76, s 4.1 (emphasis added).

78 MOU, *supra* note 76, Appendix A: List of Communities at 8.

79 Hr Tr, EB-2017-0182 at 125:15–19, May 7, 2018 [Tab 7].

assessment…it was best if the MNO working together with updated information could provide [NextBridge] a second report."[80]

65. NextBridge has used the confidential traditional land use information and knowledge[81] in these two MNO Reports in project planning, including to identify, mitigate and avoid potential adverse effects.[82] NextBridge confirmed that it could not have engaged in this project planning and mitigation without the confidential information contained in the MNO Reports.[83]

66. NextBridge and the MNO agree that this consultation timeline could not have been truncated. NextBridge gave evidence that it did not "believe there could have been a much shorter timeline, considering the ongoing development of the project and the amount of information that was shared between MNO and NextBridge, especially when it came to getting our detailed information from [NextBridge's] general contractor."[84]

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80 Hr Tr, EB-2017-0182 at 126:3–13, May 7, 2018 [Tab 7].

81 For evidence on the confidential nature of the MNO's reports, see Hr Tr, EB-2017-0182 at 126:14–129:11, May 7, 2018 [Tab 7], as well the MNO's Oral Argument on the NextBridge Motion, Hr Tr, EB-2017-0364 at 87:5–88:13, June 4, 2018 [Tab 10].

82 Hr Tr, EB-2017-0182 at 129:19–28, May 7, 2018 [Tab 7].

83 Hr Tr, EB-2017-0182 at 130:1–6, May 7, 2018 [Tab 7].

84 Hr Tr, EB-2017-0182 at 132:16–27, May 7, 2018 [Tab 7].

(iii) The MNO-NextBridge Agreement's Role in the Discharge of the Crown's Duty

67. The MNO and NextBridge have concluded *MNO-NextBridge Agreement.* Through the MNO-NextBridge Agreement, and consistent with its implementation, the MNO has provided its support for the EWT. The MNO expects that this will factor into the overall determination of whether the Crown's duty to consult and accommodate Métis communities has been met.

D. Consultation and Accommodation with Hydro One on the LSL[85]

(i) Hydro One has Been Delegated Procedural Aspects of Consultation by the Ministry of Energy

68. Like NextBridge, Hydro One has been delegated procedural aspects of consultation for the LSL.[86] The MNO assumes Hydro One has been delegated a similar range of activities to those delegated to NextBridge.[87]

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85 The MNO made submissions on Hydro One's failure to adequately plan for, or consult with, the MNO in its oral submissions in the NextBridge Motion and continue to rely on those submissions. See Hr Tr, EB-2017-0364 at 78:9–88:13, June 4, 2018 [Tab 10].

86 Letter from the Ministry of Energy to the Métis Nation of Ontario, dated March 2, 2018 [MNO Evidence, *supra* note 15, Appendix Q].

87 The MNO is not aware that the MOU was ever filed as evidence in this proceeding.

(ii) Seven Months of Consultation; Two Preliminary Meetings with the MNO

69. Hydro One is seven months into its consultation efforts.[88] In that seven-month period, Hydro One has had two preliminary meetings with the MNO. No traditional land use studies have been commissioned. MNO President Margaret Froh characterized the relationship between the MNO and Hydro One with respect to the LSL as "poisoned."[89]

(iii) Building a Relationship from a Deficit

70. The MNO has provided evidence to this Board previously on Hydro One's flawed approach to consultation with the MNO on the LSL and the damage that this approach has caused to the relationship.[90] Building a respectful relationship is a key aspect of the discharge of the duty to consult and accommodate. The SCC held in *Carrier Sekani* that "consultation is '[c]oncerned with an ethic of ongoing relationships.'"[91] MNO President Margaret Froh echoed this in her evidence, stating that consultation with Hydro One would require "establishing that relationship of trust." President Froh went on to explain that given the assumptions made by

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88 Hr Tr, EB-2017-0182/EB-2017-0194/EB-2017-0364 at 106:25–28, October 4, 2018, online (Word): http://www.rds.oeb.ca/HPECMWebDrawer/Record/622361/File/document [Tab 12].

89 Hr Tr, EB-2017-0364 at 7:11–15, May 17, 2018, online (Word): http://www.rds.oeb.ca/HPECMWebDrawer/Record/608887/File/document [Tab 9].

90 Hr Tr, EB-2017-0364 at 5:16–8:16, May 17, 2018 [Tab 9]. Also see MNO's Oral Arguments in the NextBridge Motion, Hr Tr, EB-2017-0364 at 80–86, June 4, 2018 [Tab 10].

91 *Carrier Sekani*, *supra* note 48 at para 38 [Tab 30].

Hydro One about the MNO and Métis rights to date, this relationship is starting from a "deficit position" and that Hydro One has "poisoned the well" for consultation with the Métis.[92]

71. This "deficit" position is the result of Hydro One's pre-judgement of impacts to Métis rights and interests from the LSL.[93] This pre-judgment is clear from Hydro One's evidence:

> Hydro One's Indigenous Consultation project costs were developed in absence of the delegation letter from the Crown (Hydro One requested it in November 2017 but did not receive until March 2018) with regards to consultation and therefore had to be amended to reflect delegation from the Crown. **Hydro One** anticipated that the Ministry of Energy would identify the depth of consultation required for each of the 18 Indigenous communities and **assumed that the 6 BLP communities would be identified as requiring deeper consultation**…the March 2, 2018 delegation letter identified all 18 Indigenous communities as "rights-based" and therefore Hydro One was not provided with depth of consultation required for each community but instead was directed to consult with all Indigenous communities equally. This leads to additional time and costs than what was included in the original Indigenous Consultation estimate.[94]

72. Reading the above, it is reasonable to assume that Hydro One corrected its mistaken assumptions about the depth of consultation owed to the MNO after receiving the Minister's delegation on March 2, 2018. This did not occur.

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92 Hr Tr, EB-2017-0364 at 7:11–21, May 17, 2018 [Tab 9].

93 Hydro One's approach to consultation with the MNO is set out in the MNO's Oral Submissions on the NextBridge Motion, Hr Tr, EB-2017-0364 at 80–86, June 4, 2018 [Tab 10].

94 HONI response to OEB Staff IR 11, EB-2017-0182/EB-2017-0194/EB-2017-0364, filed September 24, 2018, Exhibit I, Tab 1, Schedule 11 at 5 of 8, online (PDF): http://www.rds.oeb.ca/HPECMWebDrawer/Record/620876/File/document [Tab 4].

73. In an April 12, 2018 letter from Hydro One to Bamkushwada Limited Partnership's ("BLP") legal counsel, Hydro One stated that "**we will also be engaging with the First Nations and Métis communities that are less directly affected including the Métis Nation of Ontario**. Although the frequency of meetings will be less than with the BLP communities, their input is valuable and informative."[95] This correspondence illustrates that Hydro One's assumptions about the depth of consultation required were not, in fact, corrected by the Ministry of Energy's delegation letter that identified all Indigenous communities—including three MNO Community Councils—as requiring equal consultation.

74. Hydro One pre-determined what kinds of accommodation measures may be required for impacts on Métis rights, claims and interests. This is illustrated through Hydro One's approach to economic participation. Hydro One has repeatedly stated that economic participation is a form of accommodation that may be required to fulfill the duty to consult and accommodate. Hydro One agreed that economic accommodation measures fall along a spectrum, with equity being the highest form of such accommodation.[96] Hydro One, in offering equity only to the BLP communities, has determined that impacts to the BLP community's rights merit the highest form of economic accommodation. Hydro One confirmed that it made this decision before any

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95 Letter from Hydro One Networks to OKT, counsel to Bamkushwada LP, dated April 12, 2018 (emphasis added) [HONI Additional Evidence, EB-2017-0364, filed May 7, 2018, Attachment 12 at 2, online (PDF): http://www.rds.oeb.ca/HPECMWebDrawer/Record/607852/File/document].

96 Hr Tr, EB-2017-0182/EB-2017-0194/EB-2017-0364 at 64:7–23, October 4, 2018 [Tab 12].

consultation occurred with the MNO whatsoever.[97] This pre-determines what may be needed to accommodate impacts to Métis rights caused by the LSL.

(iv) A Rushed and Truncated Process

75. MNO President Froh gave evidence that building a relationship, given what has already occurred, in the timeline proposed by Hydro One will be next to impossible. She set out that it took, "four years to do this work with NextBridge. It's going to take us a very extended period of time to have that kind of deep consultation and engagement with Hydro One…starting from scratch again is a real risk for our communities."[98]

76. Hydro One has acknowledged that they have "had some [Indigenous] communities express concerns about tight timelines. Our timelines are short, and we all understand that communities may not have the capacity to do all of the work that we are asking them to do within a short period of time, which is why we have the capacity funding agreements…"[99] However, capacity becomes irrelevant if there is insufficient time to use that capacity to support meaningful consultation.

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97 Hr Tr, EB-2017-0182/EB-2017-0194/EB-2017-0364 at 66:1–8, October 4, 2018 [Tab 12].

98 Hr Tr, EB-2017-0364 at 8:11–16, May 17, 2018 [Tab 9].

99 Hr Tr, EB-2017-0182/EB-2017-0194/EB-2017-0364 at 19:17–27, October 4, 2018 [Tab 12].

77. Hydro One needs to have traditional studies from the MNO in time to incorporate that information into its EA—the way that Nextbridge has done. Hydro One intends to file its EA by March 8, 2019.[100] Assuming that the MNO began a traditional land use study immediately, and assuming that Hydro One would require a month to incorporate MNO traditional knowledge into its EA, the MNO would only have three months to commission and carry out a traditional knowledge study. This three-month timeline includes the month of December when it is typically difficult to send consultants into the field and conduct interviews. It includes no time for collaborative review of results for MNO review and feedback on Hydro One's proposed mitigation measures based on MNO's traditional knowledge, nor for further studies if required. This kind of rushed and truncated process is unlikely to result in meaningful consultation.

(v) Comparing Consultation and Accommodation on the EWT Versus LSL

78. Comparing the consultation efforts of these two proponents is comparing apples to oranges. Hydro One is far behind NextBridge in its consultation efforts.

79. NextBridge's relationship with the MNO is well-established. The MNO and NextBridge have conducted two traditional knowledge studies which have been incorporated into NextBridge's project design and mitigation measures through collaboration and information sharing between the MNO and NextBridge. The MNO and NextBridge have executed an Economic Participation Agreement through which the MNO has offered its support for the EWT,

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[100] Hr Tr, EB-2017-0182/EB-2017-0194/EB-2017-0364 at 60:2–5, October 3, 2018, online (Word): http://www.rds.oeb.ca/HPECMWebDrawer/Record/622199/File/document [Tab 11].

and which must be factored into an overall decision on the discharge of the Crown's duty to consult and accommodate Métis communities.

80. In contrast, Hydro One and the MNO have had two preliminary meetings. The MNO has shared no traditional knowledge with Hydro One, nor have any traditional land use studies commenced. Most importantly, the relationship between the MNO and Hydro One must be rebuilt from a deficit. The MNO has serious doubts about Hydro One's proposed timeline to conduct meaningful consultation with Métis communities.

81. No proponent can move forward with a new transmission project unless and until the duty to consult and accommodate Aboriginal peoples has been fully discharged.[101] Hydro One cannot obtain the approvals that it needs from this Board and the Ministry of Environment without fulfilling the procedural aspects of consultation delegated to them by the Crown, as this means that Crown's overall duty will not have been met.[102] This uncertainty poses a credible risk to Hydro One's project schedule which Hydro One has failed to account for.[103]

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[101] *Clyde River*, *supra* note 31 at para 24 Tab 17]; *Chippewas of the Thames First Nation v Enbridge Pipelines Inc*, 2017 SCC 41 at paras 36–37 [Tab 16].

[102] *Clyde River*, *supra* note 31 at para 24 [Tab 17]; *Chippewas*, *supra* note 101 at paras 36–37 [Tab 16].

[103] Hr Tr, EB-2017-0182/EB-2017-0194/EB-2017-0364 at 71:23–72:18, October 4, 2018 [Tab 12]: Hydro Ones witness stated that "it's not a credible scenario that we would put into out risk methodology matrix."

E. Métis Economic Participation

(i) Métis Economic Participation is Required for New Transmission Projects in Ontario

82. The Board is required to consider economic participation for two reasons: first, Métis economic participation may be required to fulfill the duty to consult and accommodate (dealt with above), and; second, Ontario energy policy and previous Board decisions are clear that prospective transmitters must explore economic participation with both First Nations and Métis.[104]

83. The MNO made extensive submissions on why economic participation discussions must take place with Métis communities **prior** to leave to construct being granted in its written submissions on NextBridge's development costs, which the MNO relies on to support the following propositions:

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

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

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[104] Hydro One has agreed that this is the case. See Hr Tr, EB-2017-0182/EB-2017-0194/EB-2017-0364 at 40:13–41:7, October 4, 2018 [Tab 12].

c) The Board cannot approve a leave to construct application that does not further Ontario policies regarding First Nations and Métis economic participation in new transmission projects.[105]

F. Métis Economic Participation in the EWT

(i) The MNO-NextBridge Agreement is an Implementation of Previous Board Decisions and Ontario Policy

84. The MNO and NextBridge understood that Ontario law and policy, as well as the Board's Phase 1 and 2 Decisions required NextBridge to pursue economic participation with the Métis and First Nations in addition to carrying out procedural aspects of consultation.[106]

85. It was based on this understanding and reliance that the MNO and NextBridge entered into negotiations about economic participation in late 2013.[107] These economic participation negotiations have run in parallel to and been informed by the MNO and NextBridge's consultation activities. NextBridge highlighted one example of this, explaining during cross-examination that:

> …as [Nextbridge] went through [its] 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

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105 MNO Written Submissions on NextBridge Development Costs, EB-2017-0182/EB-2017-0194/EB-2017-0364, filed September 19, 2018, at paras 19–43, online (PDF): http://www.rds.oeb.ca/HPECMWebDrawer/Record/620436/File/document ("MNO Development Costs Submissions").

106 Hr Tr, EB-2017-0364 at 90:11–92:26, May 16, 2018, online (Word): http://www.rds.oeb.ca/HPECMWebDrawer/Record/608777/File/document [Tab 8].

107 Hr Tr, EB-2017-0182 at 130:26–131:4, May 7, 2018 [Tab 7].

> added to them that were in the project area. Those two extra communities ended up becoming part of [the] participation discussions as well.[108]

86. In June 2018, the MNO and NextBridge reached an agreement on economic participation.[109] The MNO-NextBridge Agreement advances this Board's directions and implements Ontario policy. As discussed above, through the MNO-NextBridge Agreement, and consistent with its implementation, the MNO has provided its support for the EWT. The MNO expects that this will weigh into the overall determination of whether the Crown's duty to consult and accommodate Métis communities has been met.

87. Given the complexity of the negotiations and the need to conduct consultations and build a relationship with the MNO in tandem to negotiating on economic participation, NextBridge confirmed that this entire process could not have occurred over a much shorter timeframe (i.e., less than four years).[110]

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108 Hr Tr, EB-2017-0182 at 130:13–19, May 7, 2018 [Tab 7].

109 Hr Tr, EB-2017-0182/EB-2017-0194/EB-2017-0364 at 173:14–22, October 9, 2018 [Tab 13].

110 Hr Tr, EB-2017-0182 at 132:16–27, May 7, 2018 [Tab 7].

G. Métis Economic Participation in the LSL

(i) Hydro One's Approach, Which Prioritizes First Nations Economic Participation, is Contrary to Ontario Policy and Previous Board Decisions

88. Hydro One did not have a credible plan to negotiate economic participation with impacted Métis communities during the designation process (where it participated in a bid as part of EWT LP) and Hydro One does not have one now. In fact, Hydro One's LSL application has less confirmed First Nations and Métis participation—it has none—than its previously unsuccessful designation bid.

89. Hydro One has prioritized partnership with First Nations to the exclusion of the MNO, both during designation, and again in its leave to construct application for the LSL. During Phase 2 of the designation process, the MNO made submissions on EWT LP's discriminatory attitude towards the Métis, arguing that its approach could not possibly fulfill the Board's designation

criteria.[111] The MNO also wrote to the Minister of Energy on January 15, 2013 with similar concerns.[112]

90. In the designation process, the Board did not award EWT LP a top score in either of the two criteria that related to First Nations and Métis people. In particular, regarding the First Nations and Métis economic participation criteria, the Board commented that:

> While EWT LP's plan is good for the six First Nation partners comprising BLP, there are more limited opportunities for other affected First Nations and Métis communities to participate in the various aspects of this project, and no opportunity for equity participation.[113]

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111 The MNO stated in its Final Submissions to this Board in Phase 2 of the EWT designation process at 12 that: "…any application that expressly denies a proximate aboriginal community the opportunity to discuss partnership or equity participation should be rejected by this Board on the basis that it is inconsistent with the language and goals of Ontario policy. The MNO does not say that Ontario policy requires that proponents enter into partnership agreements with any interested community. These arrangements must be realistic and commercially feasible. However, an approach taken by a prospective transmitter that precludes even the possibility of partnership is inconsistent with policy. If the Board were to accept such a plan in these designation proceedings, it would permit and legitimize an approach to aboriginal participation that could fundamentally undermine the goals of Ontario policy and set a dangerous and destructive precedent for future designations." The MNO specifically detailed the harms that would occur from accepting this kind of approach in designation, which apply equally, if not more so, at the leave to construct stage [Métis Nation of Ontario Written Submissions—Phase II, EB-2011-0140, EB-2015-0216, dated May 9, 2013, at 12–13, online (PDF): http://www.rds.oeb.ca/HPECMWebDrawer/Record/396007/File/document] ("MNO Phase 2 Submissions") [Tab 2].

112 Letter from Gary Lipinski, President, Métis Nation of Ontario to Chris Bentley, Minister of Energy, dated January 15, 2013, EB-2011-0140, EB-2015-0216, Exhibit I.15, online (PDF): http://www.rds.oeb.ca/HPECMWebDrawer/Record/379607/File/document [Tab 1].

113 OEB Phase 2 Decision, *supra* note 9 at 16–17.

91. Just as this Board recognized in 2013 that Hydro One excluded the Métis from equity participation in its bid, Hydro One has done so again. The MNO's submissions made during Phase 2, and the MNO's letter to the Minister of January 2013 remain relevant to the Board's decision in the Combined Hearing, as Hydro One has sought to resurrect its previously unsuccessful designation approach in its leave to construct application.

92. Hydro One has confirmed that there is no opportunity for the MNO to have equity in the LSL.[114] In contrast, Hydro One is offering 34% equity to the BLP communities and is open to

[114] Hr Tr, EB-2017-0182/EB-2017-0194/EB-2017-0364 at 43:17–22, October 4, 2018 [Tab 12].

discussing equity opportunities with at least two other First Nations.[115] As the MNO has argued before, Hydro One's First Nations-centred approach is contrary to Ontario energy policy.[116]

93. The MNO wishes to clarify a statement made by Hydro One in its Final Written Arguments in the Combined Hearing. Hydro One stated "that HONI has been unable to discuss, let alone reach, economic participation agreements with BLP and MNO is **only** the result of exclusivity agreements prepared by NB."[117] The evidence demonstrates that this is not the case. Hydro One, prior to being informed of the MNO-NextBridge Agreement on August 23, 2018,

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[115] When asked if Hydro One would consider exploring equity with Biinjitiwaabik Zaaging Anishinaabek First Nation and Batchewana First Nation ("BFN"), rather than the clear and unequivocal "no" that was given to the MNO, Hydro said, "I don't know," or in the case of BFN, that "should Batchewana indicate that equity is an appropriate form of accommodation and want to have a discussion with Hydro One about that, we would be open to having a discussion." See Hr Tr, EB-2017-0182/EB-2017-0194/EB-2017-0364 at 81:20–21, 109:24–27, October 4, 2018 [Tab 12].

[116] Ontario energy policy requires that economic participation be pursued with both First Nations and Métis that are impacted by a project and interested in such participation. See *Ontario's Long-Term Energy Plan: Achieving Balance* (Toronto: Queen's Printer for Ontario, 2013) at 69–70, online (PDF): https://files.ontario.ca/books/ltep_2013_english_web.pdf. The current LTEP does not displace this commitment which states that Ontario "will continue the direction established in the 2013 LTEP and support First Nations and Métis leadership and capacity in Ontario's evolving energy sector." Ontario, *Ontario's Long-Term Energy Plan: Delivering Fairness and Choice*, (Toronto: Queen's Printer for Ontario, 2017) at 169, online (PDF): https://files.ontario.ca/books/ltep2017_0.pdf. The MNO discussed EWT LP's approach to Métis economic participation in its Phase 2 Final Submissions, stating that: "While EWT LP's participation plan for First Nations is robust, its plan in relation to Métis participation is deficient and inconsistent with Ontario policy." This remains the case today [MNO Phase 2 Submissions, *supra* note 111 at 17] [Tab 2].

[117] Argument-in-Chief of Hydro One Networks INC, EB-2017-0182/EB-2017-0194/EB-2017-0364, filed October 22, 2018, at para 80, online (PDF): http://www.rds.oeb.ca/HPECMWebDrawer/Record/623909/File/document ("HONI Argument") [emphasis added].

had made **no** attempt to begin economic participation negotiations with the MNO. Hydro One was clearly informed in May 2016 that the MNO did not yet have an agreement with NextBridge. Hydro One made no overtures at this, or any other time to the MNO to begin its own economic participation negotiations.[118] In preparing its leave to construct application, there is no indication that Hydro One ever considered an approach that would explore equity with both First Nations and the MNO.[119] It is Hydro One's own reticence and delays in engaging with the MNO on economic participation that has resulted in the current state of affairs, not any "exclusivity" arrangement.

94. Hydro One claims that it will negotiate an economic participation arrangement with the MNO after it obtains leave to construct. Setting aside the issue of whether this approach consistent with Ontario policy,[120] the MNO has no assurance that Hydro One will in fact negotiate such an agreement once it obtains leave to construct. As MNO President Froh stated in her evidence to the Board, this means that Hydro One's application poses significant risks for the MNO's communities: "…there is no guarantee that we are going to actually come out the other end with the benefits for communities that we have been successful in…achieving in our

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118 Hr Tr, EB-2017-0182/EB-2017-0194/EB-2017-0364 at 47:6–49:3, October 4, 2018 [Tab 12].

119 Hr Tr, EB-2017-0182/EB-2017-0194/EB-2017-0364 at 50:21–51:21, October 4, 2018 [Tab 12].

120 The MNO's position is that waiting until after leave to construct to negotiate economic participation arrangements with the MNO is contrary to Ontario policy and this Board's statutory mandate: see MNO Development Costs Submissions, *supra* note 105 at paras 41–42.

discussions with Nextbridge."[121] Despite Hydro One's assertion that it "anticipates that benefits to the MNO will be equal to or superior to those offered by NextBridge,"[122] Hydro One is unwilling to recommend a condition to this effect to the Board.[123] Contrasted with Hydro One's unwillingness to include a Métis-specific economic participation condition is Hydro One's suggestion that this Board include a BLP-specific condition related to a timeline for the negotiation of an equity arrangement.[124] This is a continuation of Hydro One's uneven and inequitable approach to both consultation and economic participation with the Métis, which this Board cannot honourably condone.

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121 Hr Tr, EB-2017-0364 at 8:7–10, May 17, 2018 [Tab 9].

122 Hr Tr, EB-2017-0182/EB-2017-0194/EB-2017-0364 at 55:3–22, October 4, 2018 [Tab 12]; HONI response to BZA IR 7, EB-2017-0182/EB-2017-0194/EB-2017-0364, filed September 24, 2018, Exhibit I, Tab 9, Schedule 7 at 1, online (PDF): http://www.rds.oeb.ca/HPECMWebDrawer/Record/620903/File/document [Tab 6].

123 Hr Tr, EB-2017-0182/EB-2017-0194/EB-2017-0364 at 55:23–56:3, October 4, 2018 [Tab 12].

124 HONI Section 92 Lake Superior Link Project Application and Evidence, EB-2017-0182, filed February 15, 2018, Exhibit B, Tab 1, Schedule 1 at 12:1–3, online (PDF): http://www.rds.oeb.ca/HPECMWebDrawer/Record/603654/File/document [Tab 3]. Also see HONI response to NextBridge IR #3, EB-2017-0182/EB-2017-0194/EB-2017-0364, filed September 24, 2018, Exhibit I, Tab 2, Schedule 3, Attachment 1 at 5, online (PDF): http://www.rds.oeb.ca/HPECMWebDrawer/Record/620902/File/document [Tab 5]. Hydro One has clarified that the 45-day timeline it proposed in its application solely applies to the negotiation of a commercial partnership with the BLP communities. Hr Tr, EB-2017-0182/EB-2017-0194/EB-2017-0364 at 95:9–19 and 96:1–11, October 4, 2018 [Tab 12].

(ii) Comparing Métis Economic Participation on the EWT Versus the LSL

95. Ontario policy must play a role in this Board's decision-making process, in particular through section 96 and 1(1)5 of the *OEB Act.*[125] Section 1(1) of the *Ontario Energy Board Act* includes the following objective for the Board:

> 5. To promote the use and generation of electricity from renewable energy **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.[126]

96. The EWT or LSL falls squarely within "the timely expansion or reinforcement of transmission systems and distribution systems to accommodate the connection of renewable energy generation facilities."[127] As such, the MNO submits that a leave to construct decision must be undertaken "in a manner consistent with the policies of the Government of Ontario".

97. Hydro One has stated that there is no difference between Hydro One and NextBridge in terms of their implementation of Ontario energy policy.[128] The MNO disagrees.[129] When it

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125 *OEB Act*, *supra* note 32, s 96 [Tab 15].

126 Emphasis added.

127 *OEB Act*, *supra* note 32, s 1 (1) 5 [Tab 15]; the need for the East-West Tie Line is articulated as followed in LTEP 2010, *supra* note 5 at 46.

128 Hr Tr, EB-2017-0182/EB-2017-0194/EB-2017-0364 at 190:17–191:12, October 4, 2018 [Tab 12].

129 The MNO detailed the requirements of Ontario LTEPs in MNO Development Costs Submissions, *supra* note 105 at paras 29–33.

comes to furthering the policy commitments made to First Nation and Métis communities in successive LTEPs, the EWT and LSL are anything but equal.

98. NextBridge has economic participation arrangements with the nine most proximate First Nations and Métis communities to the EWT, including the MNO and BLP communities. Hydro One has not a single First Nations or Métis economic participation agreement. Hydro One has a clear plan to exclude the MNO from any discussions of equity participation. Hydro One has declined to support that its leave to construct approval be conditional on reaching an economic participation arrangement with the MNO, while recommending a condition specific to First Nations' economic participation.

99. In summary, Hydro One is asking the Board to trust that Hydro One will fairly implement Ontario policy, when Hydro One has not done so up until this point. From the MNO's perspective, Hydro One's approach is inconsistent with Ontario policy and the Board's Phase 2 Decision that economic participation must be explored with both First Nations **and** Métis who are potentially impacted by the project and who have an interest in such participation.[130] Awarding leave to construct to Hydro One based on this flawed approach effectively negates the seven years of process on the EWT and the priorities the Board identified therein regarding First

[130] See MNO Oral Arguments on the NextBridge Motion at Hr Tr, EB-2017-0364 at 75–80, June 4, 2018 [Tab 10]. Also see the MNO Development Costs Submissions, *supra* note 105 at paras 29–33.

Nations and Métis economic participation. It negates the reliance that First Nations and Metis communities have placed on that process and those commitments. This is not honourable.

PART 6: CONCLUSION AND ORDERS REQUESTED

100. The Crown's honour is not meant to be applied narrowly or technically. A purposive and generous application of this constitutional principle requires the Board to respect its own process—one which was precedent-setting for First Nations and Métis communities in the province[131]—and the reliance that these communities have placed upon them.

101. The Board cannot turn a blind eye to the impact that granting leave to construct to Hydro One will have on Métis communities represented by the MNO. The Board cannot disregard the fact that Métis communities have been engaged in almost five years of negotiations—pursuant to previous directions from this Board—with NextBridge. The Board cannot overlook that the MNO and NextBridge have an economic participation agreement—reached in accordance with previous Board orders, Ontario policy, and through which the MNO is supporting the EWT—and that no such agreement has been reached with Hydro One. Nor can this Board ignore that Hydro One's LSL application is considerably worse on the two First Nations and Métis specific criteria than what it proposed as part of EWT LP in 2011 when it failed to be designated. Finally, this Board cannot fail to consider whether the duty to consult and accommodate has been discharged with respect to the two applications. Anything less will undermine reconciliation with

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131 Submissions were made on this point by the MNO during its MNO Phase 2 Submissions, *supra* note 111 at 1 [Tab 2].

the MNO and the Métis communities it represents. Anything less will fail to uphold the honour of the Crown.

102. From the MNO's perspective, NextBridge has discharged the procedural aspects of consultation with the MNO and has implemented Ontario energy policy and previous Board decisions through five years of meaningful consultation efforts and the execution of the MNO-NextBridge Agreement. This should weigh heavily in the overall determination of whether the Crown has discharged its duty to consult and accommodate Métis communities. The MNO supports the granting of leave to construct to NextBridge.

103. If the Board determines that it will grant leave to construct to Hydro One—which the MNO does not support—the MNO submits that the Crown's honour can only be upheld through the imposition of the following conditions:[132]

a) That construction on the LSL cannot begin unless and until the duty to consult and accommodate Métis communities impacted by the LSL has been discharged; and

b) That construction on the LSL cannot begin unless and until an economic participation agreement has been reached with the MNO that is equal or superior to the MNO-NextBridge Agreement.

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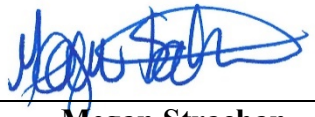
[132] The Board, in making an order such as an order granting leave to construct under section 92, has a broad power to impose conditions: see section 23 (1) of the *OEB Act*, *supra* note 32 [Tab 15]: "The Board in making an order may impose such conditions as it considers proper, and an order may be general or particular in its application."

104. All of which is respectfully submitted this 31st day of October 2018.



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Intervenor Written Submissions Supporting Documents

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January 15, 2013

Minister Chris Bentley
Ministry of Energy
900 Bay Street, 4th Floor
Hearst Block
Toronto ON M7A 2E1

Dear Minister Bentley,

RE: MÉTIS CONCERNS ON EAST-WEST TIE DESIGNATION PROCESS

I write on behalf of the Métis Nation of Ontario ("MNO") to bring to your attention our concerns respecting how Ontario Government policy is being implemented and understood in the context of the Ontario Energy Board ("OEB") designation process for East-West Tie Transmission Line (the "EWT"),

As you know, the current designation process is the first of its kind for Ontario. It is the first application of Ontario Government policy as set out in the Long Term Energy Plan ("LTEP") with respect to encouraging aboriginal partnerships in new transmission projects. It is also the first time in which the OEB will exercise its new mandate pursuant to section 1(1)5 of the *Ontario Energy Board Act* to promote Ontario Government policy with respect to a major transmission project.

As I have indicated in previous letters and public statements, the MNO is very supportive of the Ontario Government's agenda to build a green economy and increase renewable energy production. The MNO is also very supportive of the Ontario Government's commitment to increasing aboriginal community involvement in energy planning as well as aboriginal community participation and partnerships in both energy generation and transmission. As such, we have a common goal in seeing the policy objectives of the LTEP being achieved.

The MNO is increasingly concerned, however, that the implementation of the LTEP's policy commitments, in the context of the current EWT designation process, run the risk of being compromised and falling short of the promise Métis communities have relied upon. This would be a truly unfortunate result and I am writing in an attempt to avoid such a situation from arising.

The starting point for the MNO is the LTEP, which was released on November 23, 2010. The LTEP is the Ontario Government's clearest articulation of its policy with respect to energy planning and development, including, new transmission, in the province. It is intended to guide the decisions and actions of the Ministry of Energy, along with Ontario's energy related agencies, authorities and corporations such as the Ontario Energy Board, the Ontario Power Authority, Hydro One, Ontario Power Generation and the Independent Electricity System Operator. The MNO, along with other aboriginal communities, provided input into the LTEP's development and rely on its commitments in relation to our participation in Ontario's energy sector. Specifically, in relation to new transmission, Ontario makes the following policy commitments with respect to First Nations and Métis communities in the LTEP:

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

In March 2011, your predecessor, Minister Duguid, wrote to the OEB asking the Board to initiate a designation process for the EWT "consistent with the intents identified in the Long-Term Energy Plan". In that same letter, Minister Duguid reminded the OEB of the LTEP's policy commitments to aboriginal communities in the context of the EWT. Based on this direction, the OEB initiated a proceeding to designate a transmitter for the EWT in February 2012. At that time, the Board also invited submissions on the appropriate criteria for the designation process.

It is worthwhile to note that in the Board's consideration of the criteria for designation, a number of intervenors and prospective transmitters made submissions that would have minimized the significance of the LTEP's policy commitments to aboriginal communities in relation to the EWT. Notably, OEB staff submissions argued that aboriginal participation in the EWT should only be a filing requirement, as opposed to a designation criterion. The MNO made submissions seeking to rectify this confusion, and ultimately, the Board's decision of July 12, 2012, stated clearly that aboriginal participation was, in fact, a distinct designation criterion.

The designation process has moved on to a next phase. All prospective transmitters have now filed their proposals to build the EWT with the OEB. Unfortunately, it appears that some potential transmitters continue to misunderstand or ignore the commitments made to First Nation and Métis communities in the LTEP. Some prospective transmitters have proposed "aboriginal participation models" that effectively preclude any potential for commercially feasible partnerships with Métis communities whose traditional territories will be physically crossed by the EWT.[1] Specifically, some prospective transmitters have set out fixed EWT partnership arrangements with First Nations that expressly exclude even the potential of Métis community partnerships, or they propose to offer EWT partnership opportunities only to First Nations.

These exclusionary approaches to EWT partnership opportunities are fundamentally inconsistent with Ontario policy.[2] As set out above, the LTEP commits that Ontario will "encourage transmission companies to enter into partnerships with aboriginal communities" where: (1) the aboriginal communities have expressed an interest in partnership, and, (2) the new transmission project crosses the traditional territories of those aboriginal communities. Importantly, this policy commitment is made to all "aboriginal communities" who meet the abovementioned conditions, including, First Nation and Métis communities. Logically, this policy commitment is not made to aboriginal communities whose traditional territories would not be crossed by the new transmission project.[3]

In the context of the EWT, we have Métis communities that meet these conditions. Firstly, the MNO has "expressed an interest" to partner on the EWT. This has been conveyed in meetings with government officials as well as to prospective transmitters that have been willing to meet with the MNO. Also, as you are well aware, the $30 million Métis Voyageur Development Fund was created to facilitate these types of equity partnerships with Métis communities in resource related projects. Secondly, the EWT will be "crossing through [the] traditional territories" of recognized rights-bearing Métis communities. These communities meet the legal test set for establishing Métis rights set out by the Supreme Court of Canada in *R. v. Powley*, [2003] 2 S.C.R. 207 ("*Powley*"). Notably, Ontario has already identified Métis communities in the areas the EWT will directly pass through for the purposes of Crown consultation.[4] This identification was based on the actual knowledge Ontario has with respect to Métis rights claims in this region as well as discussions and negotiations between Ontario and the MNO on Métis rights issues.[5] Further, Ontario has already accommodated Métis harvesting rights in this region through a negotiated harvesting agreement with the MNO.

[1] The MNO notes that in the LTEP the commitment to potential "partnership" (i.e., ownership) with aboriginal communities whose traditional territories are crossed by new transmission is different from "participation", which may include training, employment, contract opportunities, etc. "Partnership" provides the opportunity for an aboriginal community to share in the earnings from the project, whereas "participation" is temporal and usually limited to pre-development and construction phases. "Partnership" is more fitting for a project that will remain on an aboriginal community's traditional territory for generations, enabling the community to share in benefits for the project's lifetime.

[2] The MNO notes that the exclusion of Métis communities from partnership opportunities is inconsistent with the implementation of other aspects of the LTEP. For example, in the recent call for small Feed-In-Tariff (FIT) projects (which includes a 25 MW set aside for aboriginal community partnership projects) a total of 8.3 MW of this set aside is for Métis communities.

[3] For example, for the purposes of Crown consultation, Ontario may identify a larger number of First Nation and Métis communities who require consultation in relation to the project, but the line may not directly cross the traditional territories of those First Nations or Métis communities, thereby not triggering this policy commitment.

[4] Letter from Ministry of Energy to Ontario Power Authority re: aboriginal consultation dated May 31, 2011.

[5] For historic research on Métis claims see: http://www.metisnation.org/registry/historicresources.

The law is clear that Métis communities have traditional territories, similar to First Nations. Specifically, in *Powley*, the Supreme Court upheld expert evidence that concluded "[i]n the mid-19th century, the Métis way of life incorporated many resource harvesting activities. These activities, especially hunting and trapping, were done within traditional territories located within the hinterland of Sault Ste. Marie."[6] Further, the Supreme Court has confirmed there is no hierarchy between First Nation treaty rights and aboriginal rights *qua* Métis that are protected by s. 35 of the *Constitution Act, 1982*.[7]

While the law as it relates to Métis rights provides important context for the MNO's concerns, I want to make it clear that the concerns raised in this letter are not grounded in a rights claim. The government's LTEP policy commitments as they relate to new transmission seek to remedy part of the difficult history of energy development in Ontario and its disproportionate impacts on First Nations and Métis communities. This policy (along with other aboriginal participation policies set out in the LTEP) are now stand-alone policy goals and operate independently of any other legal obligations of the Crown respecting the duty to consult and accommodate or other constitutional duties.

The Ontario Government, through its clearly stated policy objectives, has obligated itself to ensure these commitments can be realized through the processes it uses to operationalize the LTEP generally and the EWT's transmitter designation specifically. The MNO acknowledges that this policy commitment does not require partnership agreements be reached with all eligible aboriginal communities. However, at the very least, the policy requires the opportunity for partnership be provided to all eligible aboriginal communities. A course of action that renders these LTEP commitments meaningless to either First Nations or Métis communities cannot be pursued. Put simply, a process that could result in the selection and designation of a transmitter whose proposal completely forecloses opportunities for eligible aboriginal communities would be a breach of current Ontario policy.

Consistent with other government policy commitments made in a wide array of areas to Ontarians generally or aboriginal communities specifically, these policies must be implemented and applied fairly and in a non-discriminatory manner. The LTEP's aboriginal partnership policy objective with respect to new transmission was created for First Nations and Métis communities. The LTEP does not support an interpretation that aboriginal partnership opportunities on new transmission are to be limited to First Nations. If this policy was to be implemented in a manner that completely excludes Métis communities from potentially benefiting from it, such a result would be discriminatory.[8] Further, a government decision that permits or promotes such an exclusion would clearly be unreasonable.

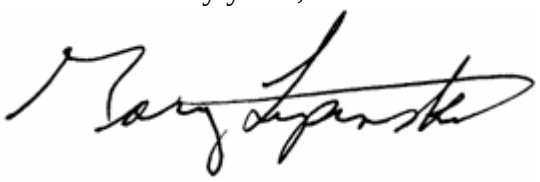
[6] *Powley*, para. 43. See also *Powley*, para. 20.
[7] *Powley*, para. 50.
[8] The MNO notes that this policy was created for the benefit of First Nations and Métis communities. While section 15(2) of the *Canadian Charter of Rights and Freedoms* allows for governments to create distinct programs and policies for First Nations or Métis communities that would not amount to discrimination, this policy was created for the benefit of both First Nations and Métis communities. It was not targeted solely to First Nations. As such, the exclusion of Métis communities would not fall within the protection of s. 15(2).

In addition, since this is the first designation process in Ontario, the improper interpretation and application of policy now is particularly damaging as it will set a precedent that will remain a detriment to aboriginal communities as well as the development of a new and competitive energy sector. If an established designation process permits prospective transmitters to arbitrarily exclude eligible aboriginal communities from economic partnership opportunities, it will create a dangerous situation where companies can "pick and choose" among aboriginal communities with whom to partner, rather than providing equal opportunity to all that are eligible. In the future, transmitters may "game" the process by making excessive or commercially unfeasible offers to only a few aboriginal communities in order to "lock up" designation based on a participation proposal that excludes many eligible aboriginal communities who should benefit from a transmission project on their traditional territories. Such outcomes will only sow seeds of inequity and discontent among neighbouring aboriginal communities, undermine the laudable objects of the LTEP and frustrate energy sector efficiency.

Based on the points outlined above, it is clear that the policy commitments set out in the LTEP with respect to EWT aboriginal partnership must be facilitated by both the Ontario Government as well as the OEB in this designation process. These policy objectives will be undermined if a transmitter is designated who has refused to engage in or even consider the possibility of a commercially feasible partnership with relevant Métis communities. Such a result would constitute a breach of the commitments in the LTEP owing to Métis communities, and discrimination against Métis communities.

It is clear to the MNO that Ontario policy requires, at a minimum, that a designated transmitter must be willing to engage in partnerships discussion with aboriginal communities whose traditional territories will be crossed by the EWT. In its future submissions to the OEB, the MNO will take the position that the Board should not even allow a prospective transmitter to proceed with a proposal that is destined to run afoul of the commitments in the LTEP without fair notice to that transmitter and an opportunity to clarify or remedy their proposal. In the meantime, the MNO is bringing this issue to your attention, as your Ministry has an interest and responsibility to ensure that the policy objectives and commitments in the LTEP are met.

Sincerely yours,



Gary Lipinski
President

c.c. Ontario Energy Board
Parties to EB-2011-0140
Cam Burgess, MNO Regional Councilor
Trent Desaulnier, President, Superior North Shore Métis Council
Jean Carmirand, President, Thunder Bay Métis Council
William Gordon, Greenstone Métis Council

EB-2011-0140

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

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

MÉTIS NATION OF ONTARIO

WRITTEN SUBMISSION – PHASE II

I. OVERVIEW

The Métis Nation of Ontario (MNO) makes the following submissions with respect to Phase II of these designation proceedings for the proposed East-West Tie transmission line (EWT). The EWT is identified as a priority transmission project in Ontario's Long-Term Energy Plan (LTEP).

The MNO also relies on its presentations from the community sessions held by the Board in Thunder Bay on May 2 and 3, 2013 as well as the MNO's letter to the Minister of Energy dated January 15, 2013. These materials have been filed with the Board.

In this Phase, the Board must apply the Decision Criteria established in Phase I to the applications submitted by seven prospective transmitters. Based on this assessment, the Board will select the most qualified transmission company to develop, and subsequently seek a leave to construct approval for the EWT.

The MNO has focused its submissions on the proper interpretation, application and assessment of: (1) First Nation and Métis Participation, and, (2) First Nation and Métis Consultation, in the context of the EWT designation. The Board, in its Phase I Decision has established that these are two distinct criteria that must be addressed in all applications, and which will be used to assess and determine the successful applicant.

II. INTRODUCTION

The Intervener

The Métis Nation of Ontario (MNO) represents Métis individuals and communities throughout Ontario. In this proceeding, it is intervening on behalf of three of its Community Councils: the Thunder Bay Métis Council, the Superior North Shore Métis Council and the Greenstone Métis Council (the "Community Councils"). A map of these Community Councils in relation to the EWT is attached as Appendix A. Both the Thunder Bay Métis Council and the North Shore Métis Council are located within 40 kilometers of the proposed EWT.

Collectively with the MNO, along with these Community Councils, represent a regional rights-bearing Métis community that spans the north shore of Lake Superior as a part of the Upper Great Lake Métis community acknowledged in *R. v. Powley*, [2003] 2 S.C.R. 207.[1] This Métis community has rights and interests related to land and resources within their shared traditional territory, which will be traversed by the EWT.

The rights and outstanding claims of this Métis community are well-documented and well-known in this traditional territory.[2] Specifically, the harvesting rights of this community have been accommodated by the Crown through a negotiated agreement with the MNO.[3] As well, the Community Councils have been identified by the Ontario Government for Crown consultation in relation to the EWT.[4]

The Importance of this Designation

This designation is extremely important for the MNO and its Community Councils. It represents the first opportunity to test and implement the First Nation and Métis participation policies in the LTEP with respect to new transmission, which the MNO has worked with the Ontario Government to advance over the last several years in order to ensure fair and equitable Métis inclusion.[5]

It also represents an opportunity for the Community Councils, on behalf of the Métis community in the region, to meaningfully participate in the building of

[1] *R. v. Powley*, [2003] 2 S.C.R. 207, para. 21. **[MNO Case Law for Oral Sessions, Tab 1]**
[2] MNO Materials for Oral Sessions, Tabs 14-16.
[3] MNO Materials for Oral Sessions, Tabs 14-16.
[4] MNO Case Law for Oral Sessions, Tab 3.
[5] Letter from Minister of Energy to Ontario Power Authority dated May 31, 2011.

Ontario's green energy economy as well as benefit from new transmission that will cross the community's traditional territory for generations.

For the Métis, this will be a precedent-setting designation. It will either send the message that the policy commitments in the LTEP are real and that they will be meaningfully implemented for both First Nations and Métis communities. Or, it will send a signal that the Métis community, whose traditional territory is crossed, will likely not meaningfully participate in the EWT in a manner consistent with the commitments in the LTEP. The MNO intervenes to ensure the later is not the result of this designation, or the template for future designations.

Moreover, for Ontario as a whole, this designation is the first-of-its-kind. As Ontario citizens and ratepayers, Métis also has an interest in ensuring this designation serves the public interest and advances the development of the province's green energy economy. The MNO hopes that through this designation a positive, effective and durable framework for the advancement of future transmission in the province is developed.

III. THE INCLUSION OF FIRST NATION AND MÉTIS PARTICIPATION AND CONSULTATION AS DECISION CRITERIA

Aboriginal Participation and Consultation as Distinct Decision Criteria

In undertaking this Board-initiated designation proceeding pursuant to sections 70 and 78 of the *Ontario Energy Board Act, 1998*, the Board is also obligated to fulfill its related statutory roles within its governing legislation.

Section 1(1) of the *Ontario Energy Board Act*, which was amended by the *Green Energy Act, 2009*, includes the following Board objective:

> 5. To promote the use and generation of electricity from renewable energy 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. (emphasis added)

In its Phase I Decision, the Board confirms that the LTEP articulates Ontario Government policy with respect to energy development in the province.[6]

[6] EB-2011-0140, Phase I Decision and Order, p. 7 (Issue #4).

The LTEP states the following with respect to new transmission projects being advanced in Ontario,

> Where new transmission lines are proposed, Ontario is committed to meeting its duty to consult First Nations and Métis communities in respect of their aboriginal and treaty rights and accommodate where those rights have the potential to be adversely affected. Ontario also recognizes that Aboriginal communities have an interest in economic benefits from future transmission projects crossing through their traditional territories and that the nature of this interest may vary between communities.[7]

These two related requirements with respect to new transmission in Ontario – aboriginal participation and aboriginal consultation – originate from different sources and are distinct. In its Phase I submissions, the MNO explained this distinction as follows:

> It is critical to recognize that the government's policy commitment to First Nation and Métis participation in energy projects (i.e., Aboriginal Participation), and its constitutional and legal obligations flowing from the Crown's duty to consult and accommodate affected First Nations and Métis communities in relation to energy projects (i.e., Aboriginal Consultation) are inter-related, but distinct from one another. These two issues must not be conflated in the East-West Tie Line designation process.
>
> The support and encouragement of **Aboriginal Participation** in energy projects is a distinct policy-based commitment of the Government of Ontario. The policy seeks to remedy part of the difficult history of energy development in Ontario and its disproportionate impacts on First Nations and Métis communities. Part of this history is the systematic exclusion of Aboriginal people from decision-making and benefits relating to energy project planning and development. While these policies may have their origins in Canadian constitutional and common law respecting Aboriginal and treaty rights, they are now stand-alone policy goals and operate independently of any other legal obligations of the Crown respecting a duty to consult. …
>
> The adequacy of **Aboriginal Consultation** is a constitutional obligation that applies to any and all government decisions that stand to affect the Aboriginal or treaty rights (recognized, proven or asserted) of an Aboriginal people. The Crown's duty flows from the honour of the Crown and "a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution."[8]

[7] LTEP, p. 49.
[8] *Haida Nation v. British Columbia*, [2004] 3 S.C.R. 511, para. 32. **[MNO Case Law for Oral Session, Tab 6]**

Consistent with Ontario policy and the Crown's duty to consult and accommodate, the Board added "First Nation and Métis Participation" and "First Nation and Métis Consultation" as distinct decision criteria for designation in the EWT proceeding, and issued corresponding filing requirements for both criterion.

The MNO agrees with the Board's addition of these two independent decision criterion in the context of the EWT specifically, as well as for future designations related to other priority transmission projects indentified in the LTEP.

The MNO submits that credible and viable First Nation and Métis participation and consultation plans are requirements for designation. They are not optional. The sections below outline what is required in the context of these two distinct decision criteria, along with submissions on how the respective plans of prospective transmitters should be assessed in the context of this designation.

IV. THE OVERALL ASSESSMENT OF DECISION CRITERIA IN THIS DESIGNATION

The Board made clear in its Phase I Decision, that it would not articulate an assessment methodology to be applied to decision criteria. Rather, the Board confirmed that "[a]ll the decision criteria are important, and the Board is unwilling to restrict its ability to give full consideration to each criterion before it is informed by the context of the applications for designation."[9]

As a result, the Board has rejected an approach that assesses distinct decision criteria through the lens of other decision criteria (*e.g.*, First Nation and Métis plans should not be assessed on the basis of cost and reliability, but as a stand-alone criterion).[10]

The MNO agrees with this approach to the Board's assessment and decision-making process and submits that each decision criteria, including First Nation

[9] EB-2011-0140, Phase I Decision and Order, p. 9.
[10] This MNO notes that the oral submissions of Pic River First Nation, on behalf of Bamkushwada LP, are inconsistent with the Board's Phase I Decision and Order on this issue. These First Nations argue that aboriginal consultation and participation plans should be assessed "from the perspective of cost and reliability to customers."[EB-2011-0140, Oral Session Transcripts, May 2, 2012, p. 109 (lines. 4-9)]. This is inconsistent with the Board's decision on this issue as well as Ontario policy. The MNO submits that the formulated "questions" these First Nations suggest need to be answered by the Board in relation to assessing each prospective transmitter's aboriginal consultation and participation plans are unsound and would lead to the Board contradicting its previously stated approach to applying the decision criteria in this designation process for the EWT.

and Metis participation and consultation, must be given a full and independent assessment based on the plans submitted by the prospective transmitters.

The MNO submits that this is the only way the Board can achieve its "primary objective" of selecting the "most qualified transmission company to develop, and bring a leave to construct application for the EWT line,"[11] consistent with the Board's statutory mandates and obligations.

V. THE REQUIREMENT OF FIRST NATION AND MÉTIS PARTICIPATION

Ontario's Policy and First Nation and Métis Participation in New Transmission

The LTEP clearly recognizes that First Nations and Métis participation is a distinct and stand-alone policy objective that must be advanced in relation to future designation, development, construction and operation of priority transmission projects in Ontario.

> Where new transmission lines are proposed, Ontario is committed to meeting its duty to consult First Nations and Métis communities in respect of their aboriginal and treaty rights and accommodate where those rights have the potential to be adversely affected. Ontario also recognizes that Aboriginal communities have an interest in economic benefits from future transmission projects crossing through their traditional territories and that the nature of this interest may vary between communities.[12] (emphasis added)

The plan specifies core aspects of the policy of aboriginal participation, as well as the objectives of the policy:

> Ontario recognizes that successful participation by First Nation and Métis communities will be important to advance many key energy projects identified under the Long-Term Energy Plan. …
>
> There are a number of ways in which First Nation and Métis communities could participate in transmission projects. Where a transmission line crosses the traditional territories of aboriginal communities, Ontario will expect opportunities to be explored:
>
> - Provide job training and skills upgrading to encourage employment on the transmission project development and construction.

[11] EB-2011-0140, Phase I Decision and Order, p. 3.
[12] LTEP, p. 49.

- Further Aboriginal employment on the project.
- Enable Aboriginal participation in the procurement of supplies and contractor services.

Ontario will encourage transmission companies to enter into partnerships with aboriginal communities, where commercially feasible and where those communities have expressed interest. The government will also work with the OPA to adjust the Aboriginal Energy Partnerships Program – currently focused on renewable energy projects – to provide capacity funding for aboriginal communities that are discussing partnerships on future transmission projects.[13]

Based on the language in the LTEP, there are several fundamental aspects of Ontario aboriginal participation policy as it relates to new transmission. These are:

- The policy is separate and distinct from any obligations flowing from the Crown's duty to consult and accommodate. It is not meant to discharge the Crown's duty, but "recognizes that Aboriginal communities have an interest in economic benefits from future transmission."

- The policy's goal is to "advance key energy projects" through First Nation and Métis participation. As such, it should not be implemented in a manner that will potentially delay, frustrate or hinder transmission projects.

- The policy is only applicable to aboriginal communities whose "traditional territories will be crossed by the new transmission" (i.e., there is a geographic nexus required to have an interest in these non consultation-based economic benefits).

- The policy applies to "First Nation and Métis communities" equally. There is no hierarchy between aboriginal groups and an assessment of rights, claims or interests is not required in order to have an interest in these economic benefits flowing from new transmission.

- The policy creates positive obligations on transmitters to engage in participation related discussions with aboriginal communities that are proximate to a new transmission project (i.e., "expect opportunities to be explored", "further" employment, "enable" participation). It is not advanced by transmitters refusing to engage some aboriginal communities, prescriptive approaches or largely meaningless commitments.

[13] EB-2011-0140, Phase I Decision and Order, p. 7.

The MNO submits that these aspects of the LTEP's aboriginal participation commitments with respect to new transmission must be appreciated and understood in order for the Board to properly facilitate and implement Ontario policy as well as assess the participation plans of prospective transmitters in the context of the EWT designation. Anything less would be inconsistent with Ontario policy.

Further, the MNO notes that this interpretation of the LTEP's aboriginal participation commitments with respect to new transmission is consistent with other government actions and initiatives, as described in detail in the MNO's oral submissions to the Board.[14]

First Nation and Métis Participation as a Distinct Criteria and Filing Requirement

As discussed above, although the Board would not set out a rigid methodology, it has given "guidance" to applicants through its articulation of the decision criteria and filing requirements. With respect to aboriginal participation, the filing requirements are:

3.1 If arrangements for First Nation and Metis participation have been made, a description of:
- The First Nation and Metis communities that will be participating in the project;
- The nature of the participation (e.g. type of arrangement, timing of participation);
- Benefits to First Nation and Metis communities arising from the participation; and
- Whether participation opportunities are available for other First Nation and Metis communities in proximity to the line.

3.2 If arrangements for First Nation and Metis participation have not been made but are planned, a description of:
- The plan for First Nation and Metis participation in the project, including the method and schedule for seeking participation;
- The nature of the planned participation; and
- The planned benefits to First Nation and Metis communities arising from the participation;

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

[14] MNO Oral Submission, Presentation by MNO President Gary Lipinski, pp.6-8.

The MNO submits that having a First Nation and Metis participation plan that is credible, meets the Board's filing requirements and is consistent with Ontario policy as well as the Board's decision criteria are threshold issues that must be met in order for a transmitter to be designated in this proceeding. A prospective transmitter that has submitted a plan that fails to meet these requirements, or is otherwise inconsistent with or does not operationalize Ontario policy, as set out in the LTEP, cannot be designated.

Further, the MNO submits that a clear statement from the Board that these decision criteria are threshold issues will be of assistance to prospective transmitters contemplating participation in future designations. It will also strengthen the importance of the LTEP's commitments with respect to First Nation and Métis participation in new transmission.

Key Considerations for Assessing Participation Plans

The Board has stated that it will exercise its judgment for each criterion, with the assistance of evidence and submissions of interested parties. The MNO respects the Board's jurisdiction to make decisions in this way and in a manner consistent with its mandate under the *Ontario Energy Board Act, 1998,* including, its new responsibilities to implement Ontario policy in relation to new transmission.

The MNO submits that the objectives of the Board require it to ultimately select a designated transmitter whose First Nation and Métis participation plan meets and promotes the objectives of Ontario policy with respect to aboriginal participation as set out in the LTEP. A transmitter with a participation plan that is inconsistent with or undermines Ontario policy cannot be designated, since such a result would breach the Board's statutory obligations in the context of this proceeding.

The MNO submits that there are a number of key considerations that must be brought into the assessment of each application and its First Nation and Metis participation plan. These are core concepts and objectives of the policy set out in the LTEP.

Building healthy and sustainable aboriginal economies through participation

One of the overarching objectives of the LTEP policy with respect to First Nation and Metis participation in new transmission projects is to promote the development of new, healthy and sustainable economies within Aboriginal communities.

The Ontario Government, First Nations and Métis communities recognize this objective cannot be achieved through short-term, temporal or fleeting economic benefits from energy development occurring on the traditional territories of aboriginal communities. It can only be achieved through stable sources of new wealth and revenue in order to support aboriginal communities.

As a part of building a green energy economy in the province, the Ontario Government has repeatedly affirmed its commitment to working with "First Nation and Métis partners to help create economic opportunities that will improve the quality of life for current and future generations" and "unlocking Ontario's clean energy potential and creating real and lasting opportunities for First Nation and Métis communities."[15] (emphasis added)

Consistent with this approach, government commitments in the LTEP, such as the Aboriginal Loan Guarantee Program, have been designed to help First Nation and Métis communities buy equity in green energy projects to "provide a community with guaranteed and sustainable long term sources of revenue."[16] Similarly, as discussed above, the LTEP states, "Ontario will encourage transmission companies to enter into partnerships with aboriginal communities" whose traditional territories are crossed.[17]

The goal of these Ontario policies is to enable aboriginal communities to grow and participate in the real economies of energy development and provides long-term economic benefits based on a sharing of the wealth generated in and from their traditional territories.[18] The MNO notes that this model of First Nation and Metis participation is very different than traditional Impact and Benefit Agreements (IBA) approaches.[19]

Aboriginal participation in energy development allows new relationships to be built and promotes new and diverse entrants into the energy sector. Another key advantage of this type of approach is that it provides the opportunity for the interests of government, the ratepayer, industry, First Nations and Métis to align in relation to energy development. As specifically noted in the LTEP, it assists in projects achieving a "social licence" to be developed: "Ontario recognizes that successful participation by First Nation and Métis communities will be important

[15] MNO Materials for Oral Sessions, Tab 10, p. 2.
[16] MNO Materials for Oral Sessions, Tab 10, p. 1.
[17] LTEP, p. 49.
[18] The MNO also notes that these types of partnerships enable First Nation and Métis communities to assume financial risk as well as share in the revenue stream generated by the project by putting them in the place of a transmitter, rather than adding to project related costs.
[19] IBA's are often, in the best sense, an accommodation that is the outcome of a consultation process. However, historically IBA's have been little more than one time payments that provided little in the way of capacity building or sustainable income streams. The MNO submits that IBA's or similar community impact agreement models will continue to have a place as an accommodation, but they cannot supplant the commitment to aboriginal participation that is set out in Ontario policy.

to advance many key energy projects identified under the Long-Term Energy Plan".[20]

It is submitted that, based on Ontario policy, it is fundamental that the designated applicant have put forward a credible plan for First Nation and Metis participation that can achieve the overarching goal of promoting health and sustainable aboriginal communities, and does not only offer a traditional IBA style arrangements.

Providing a range of opportunities for participation

As described above, the LTEP specifies the expectations that form Ontario policy with respect to First Nation and Metis community participation in new transmission projects:

- Partnerships with aboriginal communities, where commercially feasible and where those communities have expressed interest.
- Provide job training and skills upgrading to encourage employment on the transmission project development and construction.
- Further Aboriginal employment on the project.
- Enable Aboriginal participation in the procurement of supplies and contractor services.

The Board's filing requirements reflect a recognition of these expectations, and the MNO submits that no application that fails to address these categories for both First Nations and Métis should be accepted. While it is recognized that no two aboriginal communities' circumstances are the same, and all communities and proponents are free to enter into agreements that meet their mutual needs and interests, communities should, at the very least, be given the opportunity to explore all means of participation identified in the LTEP.

A participation plan that dictates, limits or completely excludes the opportunity for these participation related discussions to be engaged with First Nation or Métis communities whose traditional territories are crossed by a transmission line is inconsistent with Ontario policy and the Board's filing requirement. These types of approaches do not implement Ontario policy, but "claw back" commitments made to First Nation and Métis communities.

If there is no demonstration of an opportunity for participation consistent with the LTEP for First Nations or Métis communities proximate to a transmission line, this must be explained in the aboriginal participation plan. Where a plan fails to

[20] LTEP, p. 49.

provide an adequate explanation, that plan should be rejected by the Board because it does not implement Ontario policy.

The opportunity for partnership or equity participation

Following from the above, no application should be accepted that precludes the opportunity for certain kinds of participation by a proximate community that has expressed interest. Specifically, any application that expressly denies a proximate aboriginal community the opportunity to discuss partnership or equity participation should be rejected by this Board on the basis that it is inconsistent with the language and goals of Ontario policy.

The MNO does not say that Ontario policy requires that proponents enter into partnership agreements with any interested community. These arrangements must be realistic and commercially feasible. However, an approach taken by a prospective transmitter that precludes even the possibility of partnership is inconsistent with policy. If the Board were to accept such a plan in these designation proceedings, it would permit and legitimize an approach to aboriginal participation that could fundamentally undermine the goals of Ontario policy and set a dangerous and destructive precedent for future designations.

This would send a signal to all future designations that transmitters should no longer attempt to work with and align interests with all of the aboriginal communities whose traditional territories will be crossed by project – just pick the communities you think are the most important to win designation and the rest can be left out entirely or promised meaningless opportunities that do not align with their community's capacities, interests or needs, and will not result in any real participation in the project.

Moreover, the message will also be sent that participation by proximate Métis communities is not really needed in new transmission in order to be designated. Essentially, First Nations and prospective transmitters can allocate out all participation opportunities amongst themselves, and then hide behind "freedom to contract" or "self-determination" claims. This puts Métis in an untenable and adversarial position. The MNO submits it makes a mockery of the policy's overall goals.

The MNO acknowledges Ontario policy does not require all parties to become partners or enter into contractual relationships, but it also cannot be implemented in a manner that shields prospective transmitters from having to preserve some space or opportunities for other aboriginal communities to meaningfully participate in a manner consistent with the commitments in the LTEP.

An approach to aboriginal participation where geographically proximate and interested First Nation and Metis communities are excluded from discussions

relating to categories of participation opportunities will lead to the following kinds of harms:

- To allow a proponent to selectively engage communities, and *achieve* designation on this basis, could lead to negative practices whereby a proponent would "shop" for aboriginal communities that are willing to accept a lesser deal. This cannot help but precipitate a "race to the bottom" dynamic where communities will be put into competition with one another for the opportunity to participate in a project, with each community feeling the pressure to accept less or risk being left out.

- Proponents and/or aboriginal communities will be put in *de facto* positions where they are allowed to determine which First Nations or Metis communities they deem are "most directly affected" or worthy of partnership in order to secure designation, rather than developing robust and inclusive participation plans for all aboriginal communities whose traditional territories are crossed.[21]

- These types of "winner take all" approaches for a few communities *will* lead to deep resentment among and between neighbouring aboriginal communities, which will undermine the LTEP's policy goal of attaining a "social license" for new transmission projects and will create new obstacles and delays for their development. Very likely, these models will lead to decisions being challenged because policy is not being implemented or applied in a non-discriminatory manner.

- This type of approach would likely benefit business "savvy" or "sophisticated" aboriginal communities with financial means, while excluding similarly situated aboriginal communities with more limited capacities or experience in commercial enterprises or energy development will be excluded.

For these reasons, the Board should not accept a plan that precludes the possibility of partnership discussions, or any other form of participation identified in the LTEP with proximate aboriginal communities.

Maximizing opportunities for participation

It is axiomatic that plans that offer the greatest range and level of First Nation and Metis participation will do the most to achieve the goals and objectives of Ontario policy. Clearly, plans that provide for up to 49% equity ownership for

[21] The MNO notes that this type of "asserted claim positioning" over other aboriginal communities who should also benefit from the Ontario policy is evident in the plan and written submissions of the EWT LP as well as the oral submissions of Pic River First Nation. [EB-2011-0140, Oral Sessions, May 2, 2013, p. 94 (lines 13-18)]

aboriginal communities are better than those offering 25% or no ownership opportunity at all. Similarly, plans that demonstrate the willingness of transmitters to share the project's profit-related or ancillary benefits with proximate communities are more beneficial than those that don't.

The MNO submits that those applications that demonstrably maximize opportunities for aboriginal participation should be viewed more favourably by the Board. Moreover, Ontario policy will be advanced through the designation of a transmitter that offers the greatest amount of participation opportunities to First Nation and Métis communities. It will send a clear message to prospective transmitters that the Board has embraced its role in advancing and implementing Ontario policy with respect to aboriginal participation. Notably, such an approach is consistent with Minister of Energy's directions and actions, who is also tasked with implementing Ontario participation policy in different ways.[22]

The MNO also submits that a plan that sets out clear and tangible commitments with respect to aboriginal participation should be preferred by the Board, rather than those that make general or vague commitments.

Opportunities for proximate aboriginal communities

Ontario policy on aboriginal participation, as set out in the LTEP, is linked to geography of where the transmission line will be situated. This policy commitment is made to aboriginal communities – First Nations and Métis – where a new transmission project will be "crossing through their traditional territories". The policy identifies the need for a geographic nexus between the project's location and aboriginal communities that will have an "interest in economic benefits" flowing from the project. The Board's filing requirements acknowledge the need for a geographic nexus, stating that applicants must demonstrate: "whether participation opportunities are available for other First Nation and Metis communities in proximity to the line."

MNO submits that this is relevant for two reasons. First, it is an acknowledgement that proximate communities will have a greater interest in economic participation in a project, and greater expectations that they will be given the opportunity to participate in the wealth generated from new transmission within their traditional territory. Second, it narrows the scope of the Ontario policy and makes its implementation practical.

The MNO notes that some intervenors have argued that the policy cannot be read to require engagement of aboriginal communities that are remote from the project area**.** With respect, these concerns are unfounded. A plain reading of

[22] For example, for a description of government activities, directives and programs to support aboriginal participation in energy development see: MNO Oral Submission, Presentation by MNO President Gary Lipinski, pp.4-8.

the policy indicates that expectations regarding aboriginal participation are only applicable to communities who are proximate to the new transmission – any level of "aboriginal participation" (i.e., aboriginal communities outside a project's study area being owners) will not be sufficient to meet the policy's goal.

Implementation of policy for First Nation and Metis communities

There is no question that the level of consultation, and potential accommodation measures, required in relation to a new transmission project will be commensurate with the recognized or asserted aboriginal or treaty rights at issue and the potential impacts on those rights. However, such considerations do not apply to the application of policy with respect to First Nation and Metis participation.

As explained above, the LTEP sets out the requirement of a geographical nexus between a project and aboriginal communities. However, it does not contemplate any strength of claim tests, or assessment of impacts among communities whose traditional territories will be crossed by new transmission. Importantly, it does not set out any hierarchy among First Nations and Métis communities. The LTEP's commitments are based in broader policy objectives of promoting the economies and health of proximate aboriginal communities, and it applies to First Nations and Métis communities equally.

This does not mean that all aboriginal communities must ultimately be offered identical partnership or participation agreements. In fact, it is well-recognized that "one-size-fits-all" approaches do not work for First Nation and Métis communities.[23] However, plans that purport to offer opportunities based on an assessment of rights claims or impacts, or an arbitrary distinction between First Nation or Metis communities whose traditional territories will be crossed, should be rejected.

The MNO submits that such proposals are inconsistent with Ontario policy, and more importantly, if sanctioned by the Board, would lead to a discriminatory application of Ontario policy. The MNO is not arguing that private commercial arrangements made between First Nations and prospective transmitters are discriminatory. However, the MNO submits that if a Crown actor, such as the Board, designates a transmitter that precludes the meaningful implementation and application of Ontario policy for the benefit of proximate Métis communities – that is a discriminatory. It is trite law that discrimination claims cannot be made against private actors contracting amongst themselves. The concern for the MNO is the non-discriminatory application of Ontario policy – through this designation process – not how private actors choose to arrange their affairs.

[23] LTEP, p. 49.

The MNO submits that the above considerations must be considered in the assessment of the Board's decision with respect to each applicant's First Nation and Métis participation plan. Any application that fails to meet these requirements should be rejected in these proceedings, or must only be accepted with remedial conditions being imposed by the Board in order for them to align with Ontario policy.

MNO's Assessment of Participation Plans

Within this designation process, the MNO is encouraged by the level of importance and commitment shown by all transmitters in ensuring aboriginal participation in the EWT. The MNO believes this is a testament to the Board's commitment to implementing Ontario policy in this proceeding.

Given the fact that the MNO will likely need to work with the designated transmitter in the future, it has not determined what it considers the "best" plan. Instead, it has reviewed the plans in relation to the requirements of Ontario policy as well as the key considerations for assessment set out above.

Based on this assessment, all of the prospective transmitters' plans appear to be willing to provide or consider some participation to First Nation and Métis communities if designated, with the exception of EWT LP. While EWT LP's participation plan for First Nations is robust, its plan in relation to Métis participation is deficient and inconsistent with Ontario policy.

For example, instead of expressing a willingness to discuss Métis participation opportunities, as required by Ontario policy, EWT LP limits Métis communities to the following opportunity:

> Where all applicable technical and professional standards are met, the costs are commercially reasonable and the BLP Participating First Nations are not selected to provide the goods or services (due to lack of ability to provide or higher cost option), then EWT LP will give priority with respect to employment, training and commercial opportunities to other Aboriginal community members and to the businesses which they own or control.[24]

This prescriptive approach does not align with the LTEP's commitment that participation opportunities will be discussed with aboriginal communities in order to meet their unique needs or aspirations. Moreover, this commitment is likely hollow based on the MNO's experience. For example, there may be reasonable no employment or contracts that BLP Participating First Nations do not access. Similarly, since EWT LP has refused to engage the MNO in relation to

[24] EWT LP Plan, Part A, Exhibit 7, p. 7.

participation related issues, it has not considered where there are opportunities that Métis communities or Métis businesses could actually access. From the MNO's experience, the caveat of having to meet "applicable technical and professional standards", without related supports, results in Métis communities not accessing employment or contracting opportunities.

The MNO submits that this prescriptive approach to Métis participation is largely an empty promise and does not meet any of the aboriginal participation opportunities set out in the LTEP. Instead of "providing", "enabling" or "furthering" participation opportunities, EWT LP takes the approach that since, in their minds, Métis have been "sitting on the sidelines" prior to designation,[25] they should not share in any benefits from the EWT. This perspective is also reflected in their participation plan. This positioning is wrong, and dangerous to this and other designations. It threatens the effective implementation of Ontario policy.

The MNO also submits that this plan does not meet the basic filing requirements and is inconsistent with Ontario policy as it relates to providing some Métis community participation opportunities. Moreover, the EWT LP plan, in relation to the Métis communities whose traditional territories will be crossed, fails to meet any of the key considerations set out by the MNO above. It must be rejected by the Board in its current form, or modified by a condition of the Board in order to comply with Ontario policy.

The MNO also notes that while most of the other participation plans include general commitments to discuss opportunities for equity ownership, training, employment and contracting, some include significant commitments to potential equity ownership for both First Nation and Métis communities. Notably, AltaLink offers up to 49% ownership to proximate aboriginal communities, which could accommodate both the BLP First Nations (33%) as well as Métis communities (remaining 16%).

The AltaLink participation plan demonstrates the success this designation process has had in potentially maximizing participation opportunities for all proximate aboriginal communities. It also illustrates the MNO concerns that through transmitters "locking up" some aboriginal communities at a lower ownership percentage (i.e. BLP First Nation's 33%), without leaving any space for remaining aboriginal communities, less robust and "race to the bottom" dynamics will likely play out in future designations, having a negative effect on all proximate aboriginal communities. Put simply, why would a transmitter ever offer 49% ownership again, if it can secure designation by excluding some proximate communities and only offering 33% to a few?

In implementing Ontario policy, the Board should prefer plans that maximize partnership opportunities for proximate aboriginal communities, consistent with

[25] EB-2011-0140, Oral Session Transcripts, May 2, 2012, p. 93 (lines 25-28).

Ontario policy and the key considerations set out above.[26] This is the logical way the Board will encourage transmitters to enter into partnerships with proximate aboriginal communities who indicate an interest. Conversely, the Board must reject designating transmitters where some proximate aboriginal communities will see significant benefits, while others will see none.

IV. REQUIREMENT OF ABORIGINAL CONSULTATION

First Nation and Métis Consultation is a Legal Requirement and is Distinct from Ontario Policy as set out in the LTEP

The Crown's duty to consult and accommodate owing to aboriginal communities flows from the honour of the Crown. The honour of the Crown is "the principle that servants of the Crown must conduct themselves with honour when acting on behalf of the sovereign."[27] In the aboriginal context, this arises "from the Crown's assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people."[28]

The honour of the Crown is "not a cause of action itself; rather, it speaks to *how* obligations that attract it must be fulfilled."[29] The "honour of Crown informs the purposive interpretation of s. 35 of the *Constitution Act, 1982*, and gives rise to a duty to consult when the Crown contemplates an action that will affect a claimed but yet unproven Aboriginal interest."[30] The Supreme Court has also recognized that the duty applies where Aaoriginal rights and interests have been reconciled through historic treaties[31] as well as modern day land claim agreements.[32]

In the context of the EWT, the duty arises from the honour of the Crown and the aboriginal and treaty rights (recognized and asserted) in the region where transmission line will be located. For the First Nations that are most proximate to

[26] The MNO wants to address the point made in Pic River First Nation's oral submission that an offer of 49% equity does not mean agreements will ultimately be reached. While that is true, the commitment provides a solid basis for all communities to work together in order to realize the opportunity. Moreover, if arrangements are not reached, the designated transmitter will be required to explain why these arrangements could not be reached at a s. 92 hearing. This open, inclusive model provides incentive for all parties to work together to align interests and achieve the designated transmitters commitment.
[27] *Manitoba Métis Federation v. Canada (Attorney General)*, [2013] S.C.J. No. 14, para. 65. **[MNO Case Law for Oral Sessions, Tab 5]**
[28] *Ibid.*, para 66. **[MNO Case Law for Oral Sessions, Tab 5]**
[29] *Ibid.*, para. 73. **[MNO Case Law for Oral Sessions, Tab 5]**
[30] *Ibid.*, para. 73. **[MNO Case Law for Oral Sessions, Tab 5]**
[31] *Mikisew Cree First Nation v. Minister of Canadian Heritage*, [2010] 2 S.C.R. 650.
[32] *Beckman v. Little Salmon/Carmacks First Nation*, [2010] 3 S.C.R. 103.

the line, these are treaty rights flowing from the Robinson-Superior treaty.[33] For the Métis community, these are aboriginal rights, including, land and resource rights and interests that are claimed, but not yet proven or resolved.

The super-added, constitutional Crown duty that is owed to First Nation and Métis communities is distinct from Ontario policy with respect to aboriginal participation as set out in the LTEP. While the LTEP confirms that the Crown's duty will be met in relation to the EWT, it is not dependent on the LTEP for its foundation or implementation.

Moreover, accommodations that may ultimately flow from the proper discharge of the Crown's duty to consult are not that same as the stand-alone aboriginal participation commitments set out in Ontario policy. The potential of some form of accommodation based on a project's adverse impacts on aboriginal rights or interest is not fulfillment of the Ontario's aboriginal participation policy.

The Board's approval of a First Nation and Métis Consultation Plan must uphold the Honour of the Crown

The Supreme Court of Canada has recognized that the Crown "may delegate procedural aspects of consultation to industry proponents seeking a particular development."[34] However, the honour of the Crown, which underlies the duty to consult and accommodate, cannot be delegated to industry.[35]

So, for example, the Crown may ask a proponent to work with identified aboriginal communities in order to collect traditional knowledge, undertaken independent studies, and gather information, which ultimately assists the Crown to meaningfully discharging its duty owing to aboriginal communities. In undertaking these procedural aspects of consultation, a proponent is not judging, assessing or determining the rights claims of aboriginal communities. Government actors maintain the responsibility to ensure the Crown's honour is maintained and the duty itself fulfilled.

In *Rio Tinto v. Carrier Sekani Tribal Council*, the Supreme Court of Canada rejected arguments that the duty was only engaged when decisions made will directly impact specific lands or harvesting rights.

[33] In its oral submissions to the Board, the Pic River First Nation outlined its ongoing aboriginal title litigation that is based on its claim that its pre-existing title and rights that were not being extinguished and converted to treaty rights protected by the Robinson-Superior treaty. These are not yet proven or resolved claims.
[34] *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, para. 53. **[MNO Case Law for Oral Sessions, Tab 6]**
[35] *Ibid*., para. 53. **[MNO Case Law for Oral Sessions, Tab 6]**

> [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.[36] (emphasis added)

This principle has been applied by the courts in the context of regulatory proceedings similar to the one before the Board.

> [66] The Crown's obligation to First Nations requires interactive consultation and, where necessary, accommodation, at every stage of a Crown activity that has the potential to affect their Aboriginal interests. In my view, once the Commission accepted that BCTC had a duty to consult First Nations regarding the project it was being asked to certify, it was incumbent on the Commission to hear the appellants' complaints about the Crown's consultation efforts during the process leading to BCTC's selection of its preferred option, and to assess the adequacy of those efforts. Their failure to determine whether the Crown's honour had been maintained up to that stage of the Crown's activity was an error in law.[37] (emphasis added)

The MNO submits that, as the Crown decision-maker that is selecting a transmitter to undertake procedural aspects of the duty based on their proposed First Nation and Métis Consultation plan, the Board is required to ensure the plan maintains the honour of the Crown. A plan that is biased or prejudicial towards either First Nation or Métis communities is not a reasonable choice, and will not advance the fulfillment of the Crown's duty to consult and accommodate in relation to the EWT.

Similarly, the MNO submits that a Crown decision-maker that does not consider legitimate concerns raised by an aboriginal community in relation to the ability of a proposed transmitter to undertake procedural aspects of the Crown's duty in a fair and non-discriminatory manner is not consistent with the honour of the Crown and has the potential to frustrate the fulfillment of the Crown' duty.

First Nation and Métis Consultation as a Distinct Criteria and Filing Requirement

In light of the legal and constitutional imperative of aboriginal consultation in relation to transmission projects, the Board added First Nation and Métis

[36] *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, [2010] 2 S.C.R. 650, par. 44. **[MNO Case Law for Oral Sessions, Tab 7]**

[37] *Kwikwetlem First Nation v. British Columbia (Utilities Commission)*, 2009 BCCA 68 at par. 62. **[MNO Case Law for Oral Sessions, Tab 8]**

consultation as a separate decision criteria. Additional filing requirements in relation to aboriginal consultation include:

> 10. First Nation and Métis Consultation
>
> The applicant must demonstrate the ability to conduct successful consultations with First Nation and Métis communities, as may be delegated by the Crown.
>
> As part of its Plan, the applicant must file:
>
> 10.1 a proposed First Nation and Métis consultation plan, including:
>
> - a list of First Nation and Métis communities that may have interests affected by the project;
> - an approach for engaging with affected First Nations and Métis communities, along with rationale or other justification for such an approach;
> - a description of any significant First Nation or Métis issues anticipated in consultation and a plan to address them;
> - an overview of expected outcomes from the proposed consultation plan.
>
> 10.2 evidence of experience in undertaking procedural aspects of First Nations and Métis consultation in the development, construction or operation of transmission lines or other large construction projects. If applicable, previous engagement or existing relationships with the First Nation and Métis communities to be engaged. (emphasis added)

The MNO notes that given the Crown's stated intent that it will delegate procedural aspects of its duty to the designated transmitter, the Board set out the requirement that an aboriginal consultation plan "must" be filed as a part of an application. The MNO submits that any application that does not include an aboriginal consultation plan cannot be delegated.

Further, the MNO submits that based on the filing requirements, if a transmitter is proposing a specific consultation approach for First Nation and Métis consultation it must provide "the rationale or other justification for such an approach". A plan that does not provide an explanation for a specific consultation approach does not allow the Board to assess the credibility or viability of the plan's success, and should be avoided.

Key Considerations for Assessing Consultation Plans

The MNO restates its submission from Phase I of this proceeding with respect to what should be considered by the Board in relation to First Nation and Métis Consultation Plans provided by transmitters,

> The Board … should consider the adequacy and quality of an applicant's Aboriginal consultation plan to assess whether it has the capacity to carry out the procedural aspects of the duty if those are delegated to it, and how that plan compares with the plans proposed by other applicants.

More specifically, the MNO submits that the following questions should be considered by the Board in assessing whether the plan is credible and viable in the context of a designation,

- Has the transmitter demonstrated the capacity that it can undertake procedural aspects of the Crown's duty to consult (i.e., previous experience)?

- Does the plan outline a process that is likely capable of meeting the Crown's procedural requirements for consultation?

- Has sufficient detail been provided in order to understand the plan and assess its potential for success?

- Does the transmitter allocate realistic funding to carry out the proposed plan, along with contingencies?

- Is the plan adaptive and flexible enough to incorporate input from First Nation and Métis communities?

Related to the last question, the MNO stresses that at this stage of the EWT's development plans need to be able to be responsive and flexible in order to address the distinct and diverse consultation requirements and needs of First Nation and Métis communities. A responsive consultation process is essential to meaningful and successful consultations.

The MNO submits that plans that are overly prescriptive in relation to consultation with First Nations or Métis communities, without any engagement of those communities or direction from the Crown to warrant differential approaches to consultation, are not credible and viable plans. Similarly, plans that arbitrarily limit how First Nation and Métis communities will be consulted are unsound and will likely not be able to be successfully executed.

MNO's Assessment of the Aboriginal Consultation Plans

Given the fact that the MNO will likely need to work with the designated transmitter in the future, it has not determined what it considers the "best" consultation plan. Instead, it has reviewed the plans in relation to the key considerations for assessment set out above.

Based on this assessment, the MNO believes that most prospective transmitters have demonstrated a capacity to undertake procedural aspects of Crown consultation.

Similarly, most have outlined processes that will likely be flexible and responsive enough to address the distinct and diverse consultation needs of First Nation and Métis communities whose rights and interests will be impacted by the EWT project.

However, the MNO is concerned in relation to wide disparities between the aboriginal consultation budgets proposed by some designated transmitters in comparison to others. Given the significance of aboriginal consultation in relation to the EWT, the MNO believes plans that have limited consultation budgets should be closely scrutinized by the Board in order to assess whether they are realistic.

The MNO also cautions against the Board Staff's suggestion that modifications to aboriginal consultation plans would require Board approval. These plans, as they currently stand, are frameworks. They must be robust and iterative in order to meaningfully consult with aboriginal communities. If the designated transmitter is required to seek adjustments for additional resources or for environmental studies to be undertaken, consultation could be stifled and delayed. This will be unhelpful to the timely advancement of the EWT project.

While the MNO believes that, by and large, most the prospective transmitters have provided viable First Nation and Métis consultation plans, it believes that the EWT LP plan is deficient and should be rejected, as it is currently proposed.

From the MNO's perspective, the EWT LP's consultation plan is unsound and not viable. A chart outlining the MNO's specific concerns with the EWT LP consultation plan is attached as Appendix B. Key reasons for the MNO concerns include:

- The plan does not approach Métis consultation in a fair and equitable manner to First Nations. The plan sets out a hierarchy between First Nations and Métis, yet it does not explain its justification for these disparities. Also, it repeatedly excludes Métis from consultation opportunities provided to First Nations.

- The plan is driven and controlled by First Nations that are adverse in interests to the Métis community and who have taken the public positions that Métis "are not entitled to consultation and accommodation in regards to land, water and resources in the treaty and traditional territories of the Anishnabek."[38] The MNO does not feel comfortable with individuals from these communities sitting in judgment at discussions where the Métis communities discuss their rights, traditional use and interests in the region.

- The plan proposes a traditional knowledge collection process that the MNO will not participate in because it requires Métis knowledge holders and Elders to disclose information to First Nations that are adverse in interest to Métis rights and claims. This type of approach is inconsistent with other consultation approaches, such as in the development of the Bruce to Milton line, that have allowed the MNO to retain independent professionals to undertake a Métis-specific traditional knowledge study.

- The plan proposes a traditional knowledge study that is methodologically unsound, skewed towards First Nation participation and will not provide for an adequate sample of the impacted Métis community in order to assess EWT's routing and impacts.

Based on the concerns outlined above, the MNO would refuse to participate in this consultation plan as proposed. It would likely ask the Crown not to delegate procedural aspects of the duty to EWT LP based on this plan. The MNO also submits that the Board's approval of this plan would not uphold the honour of the Crown, and would likely delay consultation in relation to the EWT.

Moreover, the MNO submits that the EWT LP plan does not meet the Board's filing requirements. Specifically, these requirement state the plans will include "an approach for engaging with affected First Nations and Métis communities, along with rationale or other justification for such an approach". The EWT LP plan does not include any justification or explanation for the differential treatment of the Métis in relation to consultation. The MNO submits this reasoning was required pursuant to the filing requirements.

The MNO submits that the EWT LP plan should be rejected by the Board, or remedial conditions are required in order to allow for this plan to be approved.

[38] MNO Materials for Oral Session, Tab 13.

VI. CONCLUSION

In closing, the MNO once again stresses the importance of this designation process in implementing Ontario policy for First Nation and Métis participation in new transmission as well as ensuring that the Crown's duty to consult and accommodate is met in relation to the EWT. It is also a precedent-setting designation on whether government, the ratepayer, industry, First Nation and Métis interests can align in relation to the EWT and other new transmission.

The MNO asks the Board to ensure Ontario policy for both First Nation and Métis participation is advanced through this process. In determining the "best" application and transmitter to advance the EWT, the MNO believes the importance of First Nation and Métis participation and consultation is fundamental. The MNO requests that the Board factor in its key considerations and assessments in making its ultimate determination.

The MNO submits that both the EWT LP's participation and consultation plans are deficient in relation to the Métis communities. The Board should reject these plans as they are currently proposed, or, remedial conditions should be attached to any designation. For example, the following conditions should be included, if EWT is designated:

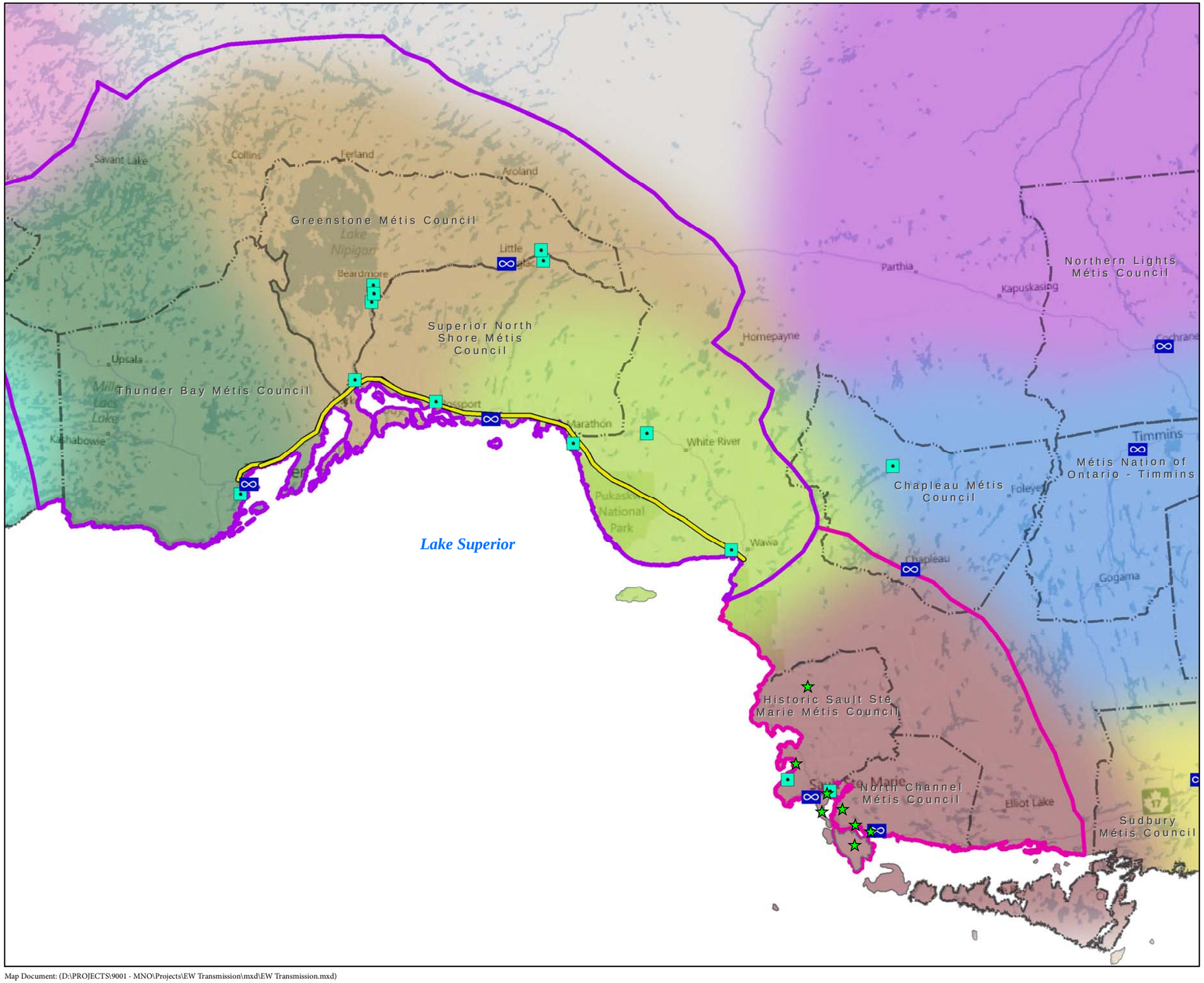
- That the designated transmitter commit to exploring participation opportunities with Métis communities whose traditional territories will be crossed by the EWT as set out in the LTEP, including, the potential of some form of partnership, if commercially feasible partnership.

- That the designated transmitter commit to developing a revised Métis consultation plan through discussions with identified Métis communities that meets the Board's filing requirements.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

May 9, 2013

Appendix A



Legend

East-West Transmission Line

Métis Consultation Protocol Areas

- Lakehead/Nipigon/Michipicoten
- Sault Ste Marie Region

Métis Traditional Harvesting Territories

- Abitibi/Temiscamingue
- Historic Sault Ste. Marie
- James Bay
- Lake of the Woods/Lac Seul
- Lakehead
- Michipicoten
- Nipigon
- Rainy Lake/Rainy River
- Locations Identified As Part of Sault Ste. Marie Métis Community in R. v. Powley

MNO Community Councils

- Administrative Boundaries
- Office or Mailing Address Location

First Nations Identified for Consultation

- First Nation

Métis Communities and Proposed East-West Tie Transmission Project (Territories and Administrative Geography)

Métis Nation of Ontario

0 15 30 60
Kilometers
1:2,500,000

Map Document: (D:\PROJECTS\9001 - MNO\Projects\EW Transmission\mxd\EW Transmission.mxd)
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Consultation with 6 First Nations	Consultation with the Métis	Métis Concerns with Consultation Plan
An Aboriginal Liaison Officer ("ALO") will be identified in each of the 6 First Nations to assist in consultations. (EWT LP Plan, Exhibit 10, Part B, Appendix 10A, p. 24, 31)	No equivalent ALO in any Métis community.	The MNO and its communities do not want or feel comfortable with a member of a First Nation being unilaterally identified to "provide ongoing support for consultation activities" within Métis communities for the project. This prescriptive approach to consultation is contradictory to EWT LP's claims that it will respect how other Aboriginal communities want to be consulted. It demonstrates the lack of equity and fairness in the EWT LP Consultation Plan.
Training, orientation and costs for Aboriginal Liaison Officers. (EWT LP Plan, Exhibit 10, Part B, p. 7)	No training, orientation or costs for any Métis community.	This commitment further illustrates the lack of equity and fairness within the EWT LP Consultation Plan in relation to MNO and its communities. Métis communities will be excluded from this training and ability to build internal capacity, while the 6 First Nations will.
Because of the "far-reaching traditional knowledge and traditional ecological knowledge within the project study area … [the 6 First Nations] will have a representative present at all meetings with the public and with Aboriginal communities." (EWT LP Consultation Plan, p. 6)	No similar acknowledgement of Métis knowledge in project study area and Métis community. No Métis participation in meetings with public or other Aboriginal communities."	The MNO and its communities do not want the identified First Nation ALOs attending Métis meetings given the UOI Resolution and the fact that Métis citizens will not feel comfortable or be willing to speak freely. Moreover, the MNO will not feel comfortable discussing its rights and legal claims in the presence of groups that are adverse in interest to those claims and could use that information in a detrimental manner against the MNO.
"EWT LP will work to understand the Traditional Territories of all potentially affected First Nation communities early in the project." (EWT LP Plan, Exhibit 10, Part B, p. 8)	"EWT LP will work to understand the traditional land use of potentially affected Métis communities in accordance with the above mitigation strategy." (EWT LP Plan, Exhibit 10, Part B, p. 8)	The plan does not acknowledge that Métis communities also have traditional territories. This lack of understanding or deliberate prejudice permeates the plan and approach to Métis consultation. This will contribute to mistrust and likely a failed consultation process.

"The communities of the Participating First Nation are all located with 40 km of the existing East-West Tie line, which lies entirely within their traditional territories …" (EWT LP Argument in Chief, p. 5 (footnote 1).	There is no recognition of the fact that the East-West Tie will cross areas that are common traditional territories with Métis communities.	Consistent with the UOI Resolution, the plan portrays a level of exclusivity of the 6 First Nations and that the rights and interests of other Aboriginal groups are subordinate. This approach cannot be sanctioned by a Crown actor. The MNO is also concerned that EWT LP's partners may be beholden to the political and legal positions of the 6 First Nations to Métis rights, consultation and accommodation (i.e. UOI Resolution) and given the governance structure of EWT LP this bias and discrimination may be institutionalized and affect consultation.
"EWT LP plans to produce a traditional knowledge and land use report as a part of the environmental assessment process." (EWT LP Plan, Exhibit 10, Part B, p. 8) EWT LP will initiate an Aboriginal Land Use and Occupancy study ("TK/LUO") for the region. (EWT LP Plan, Exhibit 10, Part B, p. 25-26)	Métis traditional knowledge will be collected by First Nation ALOs as a part of an overall TK/LUO study. The distinct impacts of the project on Métis use and occupancy will not be understood or assessed. Métis will not be allowed to complete their own TK/LUO study through an adequate representative sampling of the Métis community, interviews being conducted in an environment where Métis do not need to feel guarded or free from judgment and a level of confidence over the security and quality of the study completed.	The MNO and its communities will not participate in the TK/LUO study proposed by EWT LP. The methodology is unsound (see below). Métis will not feel comfortable providing sensitive traditional knowledge to ALOs whose communities deny Métis right or the need to consult and accommodate Métis. The Métis should not be forced to disclose confidential information to ALOs that are adverse in interests to Métis rights and claims. Nor will MNO allow the distinct use and occupancy of Métis to be subsumed under one "Aboriginal" TK/LUO study. The MNO objects to a process that does not allow for an independent Métis TK/LUO study to inform routing, environmental assessment, etc. The MNO also believes that the costs associated with creating a documentary film are a waste of ratepayer resources and diverts resources away from undertaking more interviews to better understand First Nation and Métis use.

A total of 96 TK/LOU interviews will be undertaken with the 6 First Nations. (EWT LP Plan, Exhibit 10, Part B, p. 28-29)	Less than 31 TK/LUO interviews will be undertaken with the MNO and its communities. Given the fact that these 31 interviews are to be allocated amongst other First Nation as well, it is likely MNO and its communities could have less than 15 interviews.	The methodology proposed by EWT LP is professionally and methodologically unsound. By and large, professionals agree that a sampling of 5-10% of an Aboriginal community's population is required for a credible TK/LUO study. The number of interviews proposed are arbitrary and do not correlate with obtaining an adequately samplings from the distinct First Nation and Métis populations in the study area. This type of inadequate sampling data would not result in a study that could assist with effective routing avoidance, identification of Métis community values and interests in the environmental assessment process, etc.
"EWT will initiate the training of Aboriginal community environmental monitors …" (EWT LP Plan, Exhibit 10, Part B, p. 28-29)	There is no commitment to Métis community monitors.	The MNO is concerned that consistent with the rest of the EWT LP's Consultation Plan, the Métis community will be excluded. Instead of indicating First Nation and Métis monitors will be hired, the term "Aboriginal" is used. Based on EWT LP"s overall approach to Aboriginal consultation, the MNO does not trust that these consultation commitments will be implemented in an equitable or fair manner towards the Métis community. Explicit commitments for MNO community monitors are required.
"EWT LP wishes to develop an MOU with the Crown on the delegation of the procedural aspects of consultation" (EWT LP Plan, Exhibit 10, Part B, Appendix 10A, p. 24, 31)	MNO will object to procedural aspects of the Crown's duty being delegated to EWT LP based on the inequity and unfairness of the current Consultation Plan as well as the apprehension of bias by EWT LP's partners against Métis consultation and accommodation.	Given the lack of fairness and equity within the EWT LP's Consultation Plan and the apprehension of bias towards Métis consultation and accommodation by partners in the EWT LP (i.e., the UOI Resolution), the MNO will ask that procedural aspects of Crown consultation not be delegated to EWT LP.

Hydro One's application provides many environmental benefits in addition to providing economic benefits. The environmental benefits are discussed in **Exhibit C, Tab 1, Schedule 1**.

3.4 Project Costs and Ratepayer Benefit

Hydro One's forecast cost to complete the Lake Superior Link Project is $636.2 million as compared to NextBridge's forecast cost of $757.3 million ($779.7[15] million less $22.4 million development costs approved in the designation hearing). Details on the cost components of this Project are included in **Exhibit B, Tab 7, Schedule 1**. In addition to the capital cost savings, ongoing OM&A costs are forecast to be $1.5 million annually as compared to NextBridge's $4.7 million annually. Together, these cost savings provided by Hydro One allow Ontario ratepayers to save on average approximately $13 million annually on Network Pool Transmission charges (see **Exhibit B, Tab 9, Schedule 1** for further detail on Project Economics).

3.5 Indigenous and Community Communications

Hydro One recognizes the importance of First Nation and Métis engagement in connection with the Project. Hydro One has strong existing relationships with these Indigenous Communities across the Province including the six directly impacted First Nation communities. Hydro One has a well-established engagement process, outlined in **Exhibit H, Tab 1, Schedule 1**, which will be implemented if Hydro One is designated to construct the line. Hydro One will explore and discuss various participation benefits with the impacted Indigenous Communities, including equity partnerships. Hydro One does not want to interfere with any contracts entered into between First Nations and

[15] Construction Cost of $736.97M + Development $42.77M)

NextBridge for land rights. As such, Hydro One requests that upon approval of this Application, that the OEB allows Hydro One a minimum of 45 days to negotiate any necessary agreements with Indigenous Communities.

Hydro One believes that engaging the local community and understanding local concerns is crucial to the success of a capital project. Once this Application is filed with the OEB, Hydro One will initiate its consultation process as described in **Exhibit H, Tab 1, Schedule 2.**

3.6 Other

Information on the status of the System Impact and Customer Impact Assessments is found in **Exhibit F, Tab 1, Schedule 1** and **Exhibit G, Tab 1, Schedule 1** respectively.

This Application is supported by written evidence which includes details of the Applicant's proposal for the transmission station work. The written evidence is prefiled and may be amended from time to time prior to the Board's final decision on this Application.

Given the information provided in the prefiled evidence, Hydro One submits that the Project is in the public interest. The East-West Tie Line is a Government of Ontario priority project to support expansion of transmission infrastructure in northwestern Ontario.

Hydro One requests a written hearing, in English, for this proceeding. Hydro One requests that a decision on this Application be provided by October, 2018.
Hydro One requests that a copy of all documents filed with the Board be served on the Applicant and the Applicant's counsel, as follows:

Filed: 2018-09-24
EB-2017-0364
Exhibit I
Tab 1
Schedule 11
Page 1 of 8

OEB Staff Interrogatory # 11

Reference:

EB-2017-0364 Evidence, Hydro One's Application filed on February 15, 2018, Exhibit B, Tab 7, Schedule 1, Page 1 and 3
Hydro One's Development Cost Estimates

Hydro One stated that the development costs are estimated at approximately $12.2 million and that the forecast is based on an October 2018 approval date.

Interrogatory:

a) Please provide an updated development cost estimate in the event that OEB approval is received by end of November, or December 2018, respectively.

b) Please elaborate how the response in part (a) would change Hydro One's overall project budget and completion date.

c) Does Hydro One have monthly or quarterly development cost estimates including major components? If so, please provide those current estimates.

Response:

Prior to responding to these interrogatories, Hydro One would like to inform the OEB that the Project cost estimate has been updated to reflect current information. Please also note that Hydro One's updated development costs include costs up to the OEB's decision on Hydro One's Leave to Construct application projected for January 2019, whereas in the original application in February, there was a projection of an October 2018 decision on the application.

Filed: 2018-09-24
EB-2017-0364
Exhibit I
Tab 1
Schedule 11
Page 2 of 8

DEVELOPMENT COSTS

The Project development costs provided at Exhibit B, Tab 7, Schedule 1, have been amended in as follows in Table 1 below:

Table 1 – Development Cost ($ thousand)

	February 2018	September Update
Real Estate	$3,813	$3,442
Engineering & Design	$2,034	$4,317
Environmental Approvals	$1,949	$4,328
Regulatory & Legal	$1,782	$528
First Nations & Métis Consultation	$983	$1,990
Project Management	$138	$264
Other Consultations	$217	$423
Interest	$100	$195
Overhead	$1,200	$1,485
Total Development	**$12,215**	**$16,972**

These development cost have been updated to account for various changes that have occurred since Hydro One filed its leave to construct application in February of 2018.

Real Estate Costs – Development Phase

Real Estate activities have been progressing favourably, generally in accordance with plan, but slightly behind schedule. The development costs have decreased by ($0.37 million). At the outset, there was an approximate 8 week delay in contracting for field property agent services. In addition there was an approximate 4 week delay in establishing meaningful property owner contacts to launch direct field activities. These delays have contributed to the under expenditures to plan through a delayed offer process.

Engineering & Design Costs – Development Phase

Engineering and Design Development cost have increased by $2.30M due to the Development phase being shifted from previously assumed LTC approval dated October 2018 to the now assumed approval in January 2019. The total Engineering and Design cost, including both Development and Construction phase costs, has increased by ($0.75M) Consequently Construction Management, Engineering, Design and Procurement costs have been decreased in the Construction phase.

The extra work to be done in Development phase encompasses:

- Engineering survey of tower and foundation in Pukaskwa Nation Park
- Engineering work required to initiate geotechnical work in the field
- Engineering work required to define extent of construction permits
- Engineering work required so that firm offers can be obtained for fabrication and testing of tower prototypes.

Environmental Approvals Costs – Development Phase

The increase in Environmental Approvals development costs of approximately $2.4M can be attributed predominately to the following:

- inclusion of some contingency costs in the updated cost, as the risk has been realized, ($150K); and,
- increases in approach to environmental approvals and scope of studies and consultation ($2.2 million).

Contingency costs realized of $150K in the updated cost included additional activities identified as potentially being required based on a very narrow scope of an EA amendment.

Additional costs attributed to changes in approach to environmental approvals and scope of studies and consultation include:

- additional Stage 2 archaeology costs as differences in tower locations between NextBridge and Hydro One designs became evident after additional studies were completed along the route for tower siting
- a portion of the cost of the Parks Canada Detail Impact Assessment. Although either a basic or detailed impact assessment is expected under CEAA, no additional cost was originally included in the budget for this, as Parks Canada indicated they would allow use of Hydro One's provincial EA documentation for review. However, this is now not the case (as conveyed in July 2018 communication letter provided in Exhibit I, Tab 1, Schedule 14) due to the more complicated scope and the addition of the Dorion route in the Hydro One IEA, as outlined in the ToR
- a portion of the cost of the Dorion Route Alternatives. There were changes in the scope of the Declaration Order/EA that resulted from the addition of the Dorion route alternative. This increased costs for consulting, additional meetings, stakeholder consultation, reporting, travel, and various studies (eg., additional visual assessment and

simulation around Dorion, biological, human health, cultural heritage, socio economic etc.)

- a portion of about the cost of conducting an Individual EA Process concurrently with the Declaration Order approach. Based on MECP feedback, the Individual IEA Process has been undertaken in parallel with the Declaration order process. This results in additional costs to cover the IEA process, the ToR, the increased scope and study area and different processes. These cost include additional labour, consulting costs (studies for biological, human health, cultural heritage, socio-economic etc.), disbursements for meetings, consultations, documentation, reporting, travel.

Regulatory & Legal Costs – Development Phase

Regulatory and legal costs have decreased (-$1.3M) as the original budget was based on the assumption that the OEB hearings were going to be held in Thunder Bay, increasing both internal, regulator, and intervenor funding costs. Additionally, with the combined hearing, Hydro One now assumes that the OEB will follow a similar cost sharing approach that was utilized in the NextBridge Motion to Dismiss Hearing where both transmitters will be responsible for funding the procedural costs of the hearing.

Indigenous Consultation Costs – Development Phase

The Indigenous consultation estimate has increased by ($1 million), which is a function of increased consultation given the Environmental Assessment scope has changed from the Declaration order to an Individual EA, as well as risks that have materialized and hence been removed from project contingency. Although the preferred option remains the Declaration order, the additional studies and resources required for an Individual EA have led to an increase in the Indigenous Consultation budget to allow for the Indigenous communities to be meaningfully consulted on the Project, including the EA. Also related to the change in the EA scope, Hydro One is required to meet with 18 Indigenous communities and the Métis on a more frequent basis than originally budgeted for. In addition, the following four Indigenous communities have expressed an interest in the project and Hydro One has engaged them. Métis Nation of Ontario - North Channel Métis Council, Métis Nation of Ontario – Historic Sault St. Marie Council, Jackfish Métis Association, and the Ontario Coalition of Indigenous Peoples. Hydro One is required to consult with any Indigenous community that expresses an interest on the Project, hence the need for additional resources to accommodate the interest of these additional four communities.

Additional costs are also associated with the need for further consultation with two of the First Nations who have a real estate permit interest in the Project. Pays Plat and Michipicoten First Nation have existing on reserve real estate permits that require negotiations which leads to additional costs.

Hydro One's Indigenous Consultation project costs were developed in absence of the delegation letter from the Crown (Hydro One requested it in November 2017 but did not receive until March 2018) with regards to consultation and therefore had to be amended to reflect delegation from the Crown. Hydro One anticipated that the Ministry of Energy would identify the depth of consultation required for each of the 18 Indigenous communities and assumed that the 6 BLP communities would be identified as requiring deeper consultation. Although this is something the Ministry of Energy is required to provide as part of its MOU with Hydro One regarding consultation on projects, the March 2, 2018 delegation letter identified all 18 Indigenous communities as "rights-based" and therefore Hydro One was not provided with depth of consultation required for each community but instead was directed to consult with all Indigenous communities equally. This leads to additional time and costs than what was included in the original Indigenous Consultation estimate.

Project Management Costs – Development Phase

Project Management cost have increased ($0.1M) due to Development phase being shifted from previously assumed LTC approval in October of 2018 to now assumed approval in January of 2019.

Other Consultation Costs – Development Phase

Other consultation costs have increased by $0.2M due to the requirement to consult on the Dorion Route alternative.

Interest During Construction & Overhead Capitalization – Development Phase

Interest during construction and overhead capitalization costs were initially budgeted and spread among the various cost items provided in Table 2 of Exhibit B, Tab 7, Schedule 1. Hydro One has a standard methodology for allocation of interest and applies an overhead capitalization rate to all its projects to account for non-direct staff's time working on capital projects. This overhead rate is determined by spreading a portion of overhead staff across budgeted capital projects. In this update, we have shown both of these numbers as separate line items. The

increase in costs ($0.4M) are a function of timing and the increase in the cost update as provided above.

CONSTRUCTION COSTS

The Project costs provided at Table 3 of Exhibit B, Tab 7, Schedule 1 for Project Costs have been amended as follows in Table 2.

Table 2 – Construction Costs ($ thousand)

	February 2018	**Sept. Update**
Construction	354,030	355,530
Site Clearing, Preparation & Site Remediation	104,339	104,339
Material	58,713	58,713
Project Management	5,802	6,085
Other Costs	9,451	9,451
Construction Management, Engineering, Design & Procurement	17,828	16,304
Real Estate	9,798	10,558
First Nations & Métis Consultations	1,133	3,615
Environmental Approval	819	2,423
Other Consultations	160	30
Contingency	10,775	5,401
Interest During Construction("IDC")	42,596	43,845
Overhead	8,502	8,506
Total Construction Cost	**623,946**	**624,800**

EPC Construction Costs: (Construction; Site Clearing; Material; Other costs; Construction Management, Engineering Design & Procurement)

Construction Management, Engineering, Design & Procurement cost has decreased (-$1.5M) due to Construction phase being shifted from assumed November 2018 to now assumed February 2019 and associated planned costs being allocated to the Development phase.

The overall cost for the fixed-price EPC contract has not changed, across the development and construction phases. Through further development work on the project, it was identified by Hydro One that some relocation costs for the T1M section of line were not included in the total project estimate although they are included in the scope of EA activities. They have since been added into the Construction phase of the project at $1.5 million. Of note, these costs are also not

included in the NextBridge application, and should be borne by the transmitter selected to construct the project.

Real Estate Costs – Construction Phase

The cost increase for Construction of $0.8M to the Original Application Estimated is attributable to the delays outlined in the Development Costs rationale for Real Estate above.

Project Management Costs – Construction Phase

Project Management cost in Construction phase have increased slightly ($0.3M) through this phase.

Indigenous Consultation Costs – Construction Phase

Certain costs during the construction phase of the Project have been identified to have increased, such as First Nations and Métis costs and Environmental Approval costs. However, these costs have been off-set by the reduction in Hydro One's contingency costs. The rationale for these increased costs are explained in the section above that deals with development costs.

Environmental Approval Costs – Construction Phase

The increase in Environmental Approval costs during the Construction phase of approximately $1.6 million can be attributed to a number of factors including:

- $890K in contingency costs expected to be realized during the construction phase for post-EA work such as permitting and additional approvals;
- changes in the approach to environmental approvals, scope of studies and consultation as a result of these activities continuing past the LTC date (approximately $714K). These items include: Parks Canada Detail Impact Assessment, Dorion Route Alternatives studies, and conducting the Individual EA Process concurrently with the Declaration Order approach. These additional scope activities are all described in the Development Phase Environmental Approval cost increases above.

Contingency – Construction Phase

Estimated contingency has been reduced (-$5.4M) due to a number of risks being materialized, mostly related to Environmental Approval and Indigenous Consultation. Interest during

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construction and contingency cost have been updated to reflect the changes in the updated construction costs provided above.

Hydro One's total Project costs are now approximately $642M, an increase of less than 1% from the original filing and still considerably less than the original NextBridge estimate of $777M.

a) An updated development cost estimate is provided as Table 3 of this response. Hydro One now expects that LTC approval will be obtained by the end of January, 2019. If approval is received by end of November or end of December, refer to Figure below for expected development costs.

Table 3 - Life to Date & Forecast Development Cost ($000s)

	Feb 15, 2018 (S.92)[1]	Life to Date (31/08/2018)	End of Sept 2018	End of Oct 2018	End of Nov 2018	End of Dec 2018	End of Jan 2019
Real Estate	3,813	1,235	1,735	2,235	2,735	3,035	3,442
Engineering and Design	2,034	1,277	1,523	2,234	2,798	3,202	4,317
Environmental Approval	1,949	727	1,527	2,327	3,137	3,528	4,328
Regulatory & Legal	1,782	253	303	353	403	453	528
First Nations and Metis Consultations	983	57	357	657	1,157	1,490	1,990
Project Management	138	110	125	161	197	228	264
Other Consultations	217	223	273	323	373	402	423
Interest	100	18	16	25	35	46	195
Overhead	1,200	512	110	235	258	153	1,485
Total Development Cost	**12,215**	**4,412**	**5,969**	**8,550**	**11,093**	**12,537**	**16,972**

b) There would be no change to the overall project costs. Refer to Exhibit I, Tab 4, Schedule 3 for a scenario analysis that assesses the impact of regulatory approval delays will have on total project costs.

c) Please refer to a) above.

[1] Updated to identify interest and overheads separately

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NextBridge Interrogatory # 3

Reference:

EB-2017-0364 - February 15, 2018 HONI Lake Superior Link Application.

Interrogatory:

a) Provide all documents, analyses, and studies presented or provided to HONI's Board of Directors that discuss the NextBridge East West Tie Line.

b) Provide all documents, analyses, and studies presented or provided to the HONI Board of Directors that discuss the Lake Superior Link project.

Response:

a) and b)

Information provided to the Hydro One Board of Directors discussing both the NextBridge East West Tie Line and the Lake Superior Link Project was provided in Exhibit JT.2.19 of EB-2017-0364. That undertaking response provided the business case for the Development costs as well as presentations leading up to the February 13, 2018 meeting of the Hydro One Board of Directors.

In addition to those materials the following are included as attachments to this interrogatory response:

- Attachment 1: January 15, 2018 - Briefing re follow-up to December 8, 2017 Meeting
- Attachment 2: July 3, 2018 - Lake Superior Link Project Update
- Attachment 3: August 10, 2018 - Lake Superior Link Summary Slide

BriefingNote

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hydro one

Date: January 15, 2018
Topic: **Follow-up to December 8th Board Meeting, re: East West Tie**
Submitted by: Greg Kiraly, Chief Operating Officer

Background

At the December 8, 2017 meeting, the Board discussed the strategic content of the proposed application for Leave to Construct (LTC) to the OEB. The Board did not approve at the meeting, and asked Management to consider alternatives based on the Board's feedback and questions and return with additional information and recommendation for consideration. The team has assessed a number of alternatives to mitigate the negative effect of the risk and associated uncertainties. All alternatives all have both risk and reward to be considered. This briefing touches on three key areas as follows:

1. Risk exposure to Hydro One regarding the Not-to-Exceed price;
2. Risk of Environmental Assessment approvals, and what that means to the not-to-exceed price;
3. Project commitment with uncertainty of First Nations partnerships.

This briefing provides information and recommended path-forward around these three key areas, and will be complemented by materials to be presented at the February meeting.

Not-to-Exceed Capital Cost

Management recommended a not-to-exceed price as a strategic differentiator to the NextBridge LTC submission, and strongly believes it would de-risk our bid being rejected by the OEB. Although Nextbridge's application is significantly higher cost, they are further advanced on the underlying project work and can offer an earlier completion date, having been selected for the development phase in 2013. A price-cap from Hydro One would likely be seen as a very attractive bid component for the regulator.

The Board expressed concern regarding the risk profile of the investment, particularly the potential for unrecovered costs given the number of uncertainties and the fixed price stipulation. The team has assessed a number of alternatives to mitigate the negative effect of the risk and associated uncertainties taking into account the fact that as the risk profile for unrecovered costs increases with the inclusion of price cap, but the risk of being rejected by the OEB also decreases. On the balance of our review, we intend to withdraw the price-cap component of our proposal. We will be returning to the Board in February to request the approval to submit the application for leave to construct, which will include our final assessment of risks and mitigation.

The proposed Hydro One LTC application to the OEB provides substantial benefits to customers as compared to the NextBridge LTC application in the form of both lower capital costs of over $100million and lower on-going annual operation costs. The annual OM&A savings of $5.6million, translates into an equivalent $110million of capital savings when expressed on an NPV basis over a 30-year study period.

In the absence of the price-cap, Hydro One will continue to manage to a well-defined and tightly controlled project plan, targeting a delivery price of $636 million utilizing fixed price lump-sum turn-key (LSTK) Engineer-Procure-Construct (EPC) contract with SNC-Lavalin.

Project Cost Comparison

During the December 8th board meeting, a number of large-scale transmission projects were referenced to demonstrate the potential for cost increase from initial approved amounts. A total project cost and variance analysis of the several referenced large scale transmission projects with cost variances has been completed and summarized below, with additional details in Appendix 1.

- Each project has its own set of circumstances and variance explanation, but on average they are at a 22% variance between the Initial Cost and Final Cost.
- Note that Final Cost in below table accounts for changes such as approved scope-change notices during project execution, as well as more impactive changes like re-routing, changes to contracting strategy, and in-flight design changes.

Project Name	East West Tie (Hydro One)	East West Tie (NextBridge)	NTL Northwest BC Transmission Line (BC Hydro)	ILM Interior Lower Mainland Transmission (BC Hydro)	WATL Western Alberta Trans. Line (AltaLink)	EATL Eastern Alberta Trans. Line (ATCO)	Fort McMurray West Transmission (Alberta Powerline)	Bipole III (Manitoba Hydro) *On-going*
INITIAL COSTS ($M)	$636 Target	$737 target	$561	$602	$1,499	$1,665	$1,430	$3,300
FINAL COSTS ($M)			$736	$743	$1,699	$1,900	$1,600	$4,600+
Variance ($M)			$175	$141	$200	$235	$170	$1,300
Variance (%)			**31%**	**23%**	**13%**	**14%**	**12%**	**39%+**

Northwest BC Transmission Line (NTL) and Interior Lower Mainland (ILM) Projects had similar challenges that substantially drove project variances:

- Both contracts were initially planned under the BC Transmission Company (BCTC) entity and the concept was to utilise functional specifications and award as EPC contracts.
- During the course of the project, BCTC was re-integrated back into BC Hydro.
- The contracting strategy was changed mid-project in that BC Hydro introduced their own prescriptive standards and requirements which resulted in delay in the design period due to re-design, and changes to material and equipment to be procured
- BC Hydro introduced a requirement of live-line maintenance after the initial project budget was set. This modified the clearances and impacted the tower design, steel procurement, foundation design, line hardware. Equitable adjustments (schedule and cost) were claimed by the EPC contractor.
- On NTL, 76 structures had to be changed from lattice to monopole to fit within the revised route alignment.
- On NTL, the contracting strategy with corridor vegetation clearing was not done in a manner that drove efficient budget and schedule alignment. The clearing work was contracted directly to the FN Contractors by BC Hydro, with the contract between BC Hydro and FN Contractors. The work was project managed by the EPC contractor (Valard), but there was no tie-back to the EPC Contract. Hence corridor and access clearing requested by Valard to the FN Contractors was to BC Hydro account and wasn't being managed in an integrated cost-manner. Valard were also able to claim delays resulting from delays in the execution of the works by the FN Contractors.
- Specific to the ILM project, the general contractor (Graham-Flatiron JV) had no prior transmission line construction experience

Final cost variances on the **WATL, EATL and Fort McMurray West** projects were largely a result of changes in project evolution between the initially approved project amount, including routing changes following Environmental Assessment approvals and out-of-scope change notices approved by the utility.

The Manitoba Hydro Bipole III project has been a project with extensive changes driven largely by political forces, and has been the subject of multiple critical reviews.

- The transmission line routing was altered by the NDP government in power at the time, and resulted in a substantially longer to the west of Lake Winnipeg as opposed the original lower cost route to the east
- The Conservatives won a majority government in the spring 2016 election and immediately made substantial changes to the Manitoba Hydro board and executive. Boston Consulting Group was retained by the new Board to complete an independent review of contentious major capital projects, which is publically available.
- The incoming chair of the Manitoba Hydro board is on record as saying "Rerouting the Bipole III transmission line down the west side of the province was obviously a wrong decision, one forced on [Manitoba] Hydro by the previous government, and has cost Manitobans an additional $900 million."
- In-flight alternatives were assessed in 2016, but it was determined the lowest-cost option was to complete construction along the updated route. The project is still on-going and forecast to be completed in late 2018.

With respect to East West Tie, Hydro One and SNC-Lavalin have taken into account the lessons learned regarding other projects in developing the proposal for the EWT. The parties have been working together in a cost-shared collaborative and open-book manner throughout the entire project development phase, which has resulted in the following differences with some of the above referenced projects:

1. Clear engineering and construction solution built on a mature and stable project specification
2. Up-front clarity and agreement on design standards, material standards, and maintenance standards to minimize extension of design cycle and re-work
3. Clarity and commitment on contracting strategy with accountability and risk management clearly defined between SNC-Lavalin and Hydro One
4. Utilization of construction contractors who are experienced with transmission line construction
5. Hydro One's solution is a generally widening of existing corridor, which is inherently less risky than creating new corridor as was the case in several of the comparator projects.
6. A contingency of $68 million (10.7%) is included within the project total, and built upon industry best-practice of risk definition and probabilistic modeling.
7. SNC-Lavalin has extensive experience in delivering LSTK EPC projects on a fixed-price basis. A letter from the President of their Power division is attached as Appendix 4, outlining their commitment.

In the event that a designated transmitter was to incur costs beyond their approved LTC, they may elect to seek cost recovery for the incremental amount from the OEB as per established regulatory process. Hydro One would plan to seek recovery for costs prudently incurred outside of our control including such things as force majeure events; scope changes driven by government or regulatory policy; archeological discovery; changes to import duties; commodity pricing & foreign exchange risk beyond November 2018. These will be articulated in our LTC application.

Cost Benchmarking Comparison

The project team has undertaken a benchmarking and comparison review of other large-scale 230kV transmission projects in Canada which are similar to the EWT. Supporting details are contained within Appendix 2, and the following key excerpts of the benchmarking review:

- The Hydro One EWT proposal has an EPC cost of $1.34 million per kilometer
- Similar completed comparison projects, when normalized for such factors as material and labour costs, range from $1.27 million to $1.37 million per kilometer. The NextBridge submission is$1.41 million per kilometer.
- After normalizing the other projects to a unitized basis, making index adjustments for material and labour costs, and applying these factors to the 400km length of the Hydro One proposed solution, the variance across the similar projects sits in a range of -$31 million to +$25 million, or a -6% to +5% spread compared to Hydro One. This is a tight range and gives confidence that our unitized EPC price is appropriate.

Environmental Assessment Approvals

Based on a review of past precedents and the current situation, we confirm that proceeding with the LTC application to the OEB is an acceptable risk to Hydro One, due to the following considerations:

- A LTC application can be filed prior to obtaining an approved Environmental Assessment (EA) from the Ministry of Environment & Climate Change (MOECC).
- Hydro One will clearly indicate in the LTC application that receipt of EA related approvals is a condition to our proposal and Hydro One's ability to meet the cost and schedule commitments. The Hydro One solution cannot proceed as described if there is no regulatory solution to meeting EA requirements.
- Regulatory options exist to allow Hydro One to utilize the EA work already completed by NextBridge, and address changes in proposed route, should our proposal be compelling enough to the Province. Additional information is provided in Appendix 3.

It is typical to file a LTC application prior to EA approval for this large transmission projects. NextBridge filed its LTC application on July 31, 2017, however, approval of the associated Individual EA is not anticipated until Q2 2018. It is likely that approval will be delayed longer, given that NextBridge is currently amending their EA. Hydro One is assuming Q2 2019 for EA approval for the Hydro One solution.

It should be noted that, in the case of the EWT, the Terms of Reference (TOR) prepared by NextBridge has already been approved by the MOECC, and include the route proposed by Hydro One. The original reference route proposed in the NextBridge TOR is actually the route through Pukaskwa National Park as proposed by Hydro One.

EA Approval as a Condition

Hydro One proposes to reduce the risk of cost recovery associated with delays in obtaining, or inability to obtain EA approval by clearly stating the nature of the EA dependency in the LTC application. Hydro One will be clear that receipt of EA related approvals is a condition of being able to meet the cost and schedule commitments. The project cannot proceed as described if there is no regulatory solution to meeting EA requirements for the proposed route and associated cost savings.

Hydro One will also outline to the OEB that if through the process to finalize the EA approvals, the MOECC were to impose substantial conditions, or mandate substantial changes that would impact Hydro One's price and schedule, we would submit to the OEB for their approval of the associated incremental costs. This instrument would be reserved for substantial changes that cannot be managed within project contingencies (i.e. route alterations). Approval for recovery of these costs would still be subject to OEB approval, but are viewed as low risk given they would have been mandated by another agency and the concept of additional costs due to EA obligations will be outlined in the LTC application.

First Nations Partnerships

Hydro One has not undertaken exchanges with Bamkushwada LP, the partnership formed by the directly affected First Nations communities, nor with Supercom Industries LP, its commercial arm, given the alleged exclusivity agreements with NextBridge. We will clearly indicate Hydro One's positive intentions on First Nations partnership without specific commercial details in our Leave to Construct submission to the OEB. We expect the OEB will be interested in considering the matter of First Nations partnerships on the overall context of the LTC process.

Regardless of any exclusivity agreements, Hydro One can begin the consultation process with First Nations, because consultation is a constitutional duty. If the OEB feels that Hydro One's proposal is compelling and in the interest of electricity customers, the OEB could elect to award to the LTC to Hydro One on a conditional basis, subject to reaching agreement with First Nations partners within a short period of time, say 45 days. This will be signalled in our LTC application.

The concept of conditions is not new to the OEB; the normal practice in granting LTC approvals is to include Conditions of Approval, which typically include that the applicant apply with the requirement of the Class EA. However, this concept of a condition associated with a Partnership agreement will be new.

It is Hydro One's view that the exclusivity agreements entered into between NextBridge and affected communities are anti-competitive, and not in the best interests of customers. Although the OEB does not have authority to nullify such agreements, our view is the OEB will not look kindly on them, and the OEB may be persuaded that NextBridge's entering into such agreements was not part of "development work" awarded by the OEB to NextBridge in 2013. Therefore, NextBridge should not have presumed that it would be the successful bidder to construct the project, and NextBridge should not have taken the step of "locking up" First Nations in a way that would preclude another transmitter from bidding to construct the project.

Also of note, Bamkushwada LP was a 33.3% partner with Hydro One and Brookfield in the 2012 EWT LP submission to the OEB. The impacted communities maintain constructive relations with Hydro One, and we strongly believe the affected communities will welcome our interest in the project and will be open to working with Hydro One again.

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Biinjitiwaabik Zaaging Anishinaabek Interrogatory #7

Reference:

HONI Application EB-2017-0364 Exhibit B, Tab 1, Schedule 1 pages 11 -12 and Exhibit H, Tab 1, Schedule 1 pages 4-5 (February 15, 2018);

Interrogatory:

1. In fulfilling Indigenous participation obligations, will HONI offer economic participation agreements with equity options to all of the affected First Nation and Metis communities or only those in the BLP? If not, which First Nation and Metis communities will HONI offer economic participation agreements with equity options to, and who determines which affected communities will be offered these agreements?

2. Further, please provide a detailed explanation of:
    1. what economic participation agreements may look like;
    2. what equity will be offered to each First Nation and Metis community; and
    3. what other economic participation options will be offered.

3. Will HONI offer differing economic participation opportunities to different First Nations and Metis communities? If so, please provide a detailed explanation as to why.

Response:

1. As per its demonstrated track record (B2M, Niagara Reinforcement), Hydro One has been a leading promoter and facilitator of First Nations participation to promote and support Indigenous engagement, benefits and equity participation in projects directly impacting communities. Hydro One is offering BLP up to 34% equity on this project. This is consistent with the equity participation approach contemplated in the Hydro One Leave to Construct for the East-West tie and designation proceedings, and we understand it is more favourable than NextBridge's offer of equity participation to BLP. For Hydro One, the participation of impacted Communities is not only a financial matter but is also about promoting long-term sustained benefits for BLP communities. We have engaged in discussions with the Métis and will first need to understand their expectations in terms of procurement and other contract benefits. Hydro One anticipates that benefits to The Métis Nations of Ontario (MNO) will be equivalent to or superior to those offered by NextBridge. If Hydro One is selected to build the LSL Project, Hydro One is committed to discussing benefits, including economic options, as part of the consultation process. Hydro One has been advised by the MNO's legal counsel

that the MNO cannot enter into discussions regarding accommodation measures, including economic participation, because of exclusivity agreements they have with NextBridge.

2. 1) The terms and conditions of economic participation agreements are not finalized as Hydro One has not yet commenced discussions on accommodation measures. Hydro One has been forbidden by BLP's lawyer from discussing economic accommodations and/or participation with these six First Nations[1], and Hydro One has also been told that BLP has entered into exclusivity agreements with NextBridge.

2) As stated previously, Hydro One is prepared to offer a 34% equity interest to BLP.

3) Potential methods of economic participation for all Indigenous communities on the LSL Project have also already been documented in this proceeding. To assist BZA, the applicable references are Undertaking JT 2.15 and JT 2.16 from the NextBridge Motion to Dismiss the Hydro One LSL application filed on May 25, 2018 (EB-2017-0364). Hydro One's construction partner, SNC-Lavalin, is prepared to offer contracting, training and employment opportunities. In addition, Hydro One is in a unique position to provide lasting employment opportunities throughout its network across the province for skilled Indigenous workers, beyond the construction of this Project.

3. All Indigenous communities have been offered capacity funding agreements in relation to this project. Hydro One's construction partner, SNC-Lavalin, has an established track record in Indigenous partnerships, joint companies and procurement for major projects in Ontario and across the country, including specifically in Ontario's transmission sector. For many years, they have developed proven relations and an ability to engage suppliers and optimize Indigenous procurement. They have reflected on how to optimize opportunities and will be including qualified Indigenous suppliers and companies who have strong relationships with local Indigenous communities and businesses in their procurement of goods and services.

In addition to its economic participation offer to BLP, Hydro One is planning to install fiber optic cable along the new transmission line and is committed to investigate the potential to make available the excess fiber to support improved connectivity along the corridor of the new line. Connectivity is especially weak along the corridor of the planned tie line, and improved telecom access will open the possibility for several essential community services, e.g. education, medical, etc. This could in turn provide economic opportunities for

[1] BLP evidence - May 7 2018 – March 5, 2018 Letter from BLP lawyers to Hydro One.

Indigenous telecom providers or Indigenous community-owned providers alone or in partnership, or for other telecom providers, to develop the 'last mile connection' to residences and businesses.

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ONTARIO ENERGY BOARD

FILE NO.:	**EB-2017-0182** **EB-2017-0194**	**Upper Canada Transmission Inc. (on behalf of NextBridge Infrastructure) and Hydro One Networks Inc.**

VOLUME: **Technical Conference**

DATE: **May 7, 2018**

EB-2017-0182
EB-2017-0194

THE ONTARIO ENERGY BOARD

Application for leave to construct an electricity transmission line between Thunder Bay and Wawa, Ontario

- and -

Application to upgrade existing transmission station facilities in the Districts of Thunder Bay and Algoma, Ontario

Hearing held at 2300 Yonge Street,
25th Floor, Toronto, Ontario,
on Monday, May 7, 2018,
commencing at 9:43 a.m.

REDACTED - PUBLIC

TECHNICAL CONFERENCE

A P P E A R A N C E S

LAWREN MURRAY	Board Counsel
NANCY MARCONI MICHAEL LESYCHYN SALAH LAVEE ZORA CRNOJACKI MARK ROZIK	Board Staff
FRED CASS KRISTA HUGHES BRIAN MURPHY	NextBridge Infrastructure
ROBERT WARREN ANDREW SPENCER	Hydro One Networks Inc. (HONI)
MICHAEL BUONAGURO	Consumers' Council of Canada (CCC)
MEGAN STRACHAN	Métis Nation of Ontario (MNO)
MARK RUBENSTEIN	School Energy Coalition (SEC)
MARK GARNER	Vulnerable Energy Consumers' Coalition (VECC)

appropriate documentation in place.

MR. RUBENSTEIN: So the staff that will be the operations staff that I believe will be located in -- I think we talked about Thunder Bay earlier on, will they be NextEra employees or NextBridge employees?

MS. TIDMARSH: I think I understand your question. They will be NextEra employees. We talked about how NextBridge is set up, and so different leads take on different roles and responsibilities. And Enbridge does regulatory, et cetera, et cetera. So it's NextEra that will be doing the O&M work.

MR. RUBENSTEIN: Thank you very much. Those are my questions.

QUESTIONS BY MS. STRACHAN:

MS. STRACHAN: Good afternoon. My name is Megan Strachan and I'm counsel to the Métis Nation of Ontario, who I'll refer to as the MNO.

First, I have a few questions that flow from NextBridge's response to OEB Staff IR number 22, and I would like to start off with a very straightforward clarification of NextBridge's response.

So NextBridge states that it followed policy direction from Ontario contained in the 2013 long-term energy plan regarding Indigenous consultation, as well as Indigenous economic participation. And that response also states that the OEB in its August 7, 2013, decision indicated there would be a presumption that the designated transmitter, NextBridge, would explore economic participation

opportunities with affected Indigenous communities.

So from this, I understand that NextBridge was required, both by Ontario policy and also by the OEB's phase 2 decision, to carry out both the procedural aspects of consultation, but also to pursue economic participation arrangements with affected and interested Indigenous communities. Is that correct?

MS. TIDMARSH: Yes, it is.

MS. STRACHAN: Some questions were already asked by counsel to OEB Staff on the connection between consultation activities and economic participation discussions. And I understand those focused more on whether the costs were separated out. And I have a few questions on not so much whether the costs were separate, but whether these discussions were able to cross-pollinate and inform each other.

So I'm wondering if you can elaborate on whether developments in consultation activities were able to inform the approach that was taken by NextBridge in its economic participation discussions with Indigenous communities.

MS. TIDMARSH: Right. As NextBridge moved through our duty-to-consult obligations as part of what we were delegated by the Crown, we started having more and more conversations with Indigenous communities and the strength of their rights along the length of the line.

So as spoke to communities, a lot more communities who were quite proximate to the line ended up being much more interested in economic participation than others. And so

that's kind of how the -- how it cross-pollinated between consultation and participation.

MS. STRACHAN: Thanks. And I'm going to ask a few questions on the -- specifically in the context of the MNO, but before I do that I just want to ask a few questions on the specific consultation activities that were undertaken with the MNO.

In OEB Staff IR number 41, in NextBridge's response you give an update on the consultation activities that have occurred to date with Indigenous communities, and in that response you refer to both your publicly available environmental assessment and you also provide an update on activities that have continued since the EA was filed in July of 2017.

And so from the consultation log that's included at Appendix 2IX of the environmental assessment, I understand consultation began with the MNO back in late 2013; is that correct?

MS. TIDMARSH: Yes, that's correct.

MS. STRACHAN: And in your response to OEB Staff IR 41 you state that NextBridge received both traditional land use information and also traditional knowledge from the MNO, and the response states that an MNO traditional land use study was received on November 25th, 2016 and that a further secondary study was received in March of 2017; is that correct?

MS. TIDMARSH: Yes, it is.

MS. STRACHAN: And are you able to elaborate on why a

second report was needed after the first one was completed in November of 2016?

MS. TIDMARSH: So, yes, as we moved through the process of the environmental assessments, and then also we received -- consultation is an ongoing flow, and as project parameters improve we also try to make sure that the Indigenous communities are kept up-to-date on how our parameters and our environmental assessment and our construction planning continuously improve, and so we were -- in our discussions with the MNO we determined that as we started to refine our plan and our environmental assessment that it was best if the MNO working together with updated information could provide us a second report.

MS. STRACHAN: And if I take it from this that you're personally familiar with both of the MNO reports that were provided to you.

MS. TIDMARSH: I am, yes.

MS. STRACHAN: And so I would like to read you the disclaimer pages from these two studies, and are you familiar enough with the reports to confirm the content of those disclaimers?

MS. TIDMARSH: I am, yes.

MS. STRACHAN: So the first MNO study is titled "MNO project specific traditional land use study and evaluation criteria NextBridge infrastructures east-west tie transmission project", and could you confirm that the disclaimer page of that report, which is found on page 2, reads as follows, and this is a direct quote:

"Information collected for this study is the sole property of the Métis Nation of Ontario. The information contained within this project's specific study is meant for a single application only for use in the environmental assessment and associated review for the NextBridge infrastructure east-west tie transmission project. Citation, use, or reproduction of the information contained in this report for any other purpose is permissible only with the written consent of the Métis Nation of Ontario."

Are you able to confirm that that is found in the first MNO report?

MS. TIDMARSH: Subject to check I believe it is.

MS. STRACHAN: Thank you.

And the second MNO study is titled "the Métis Nation of Ontario occupied lands report", and it has a similar disclaimer which reads as follows:

"Information collected for the Métis Nation of Ontario occupied lands report for the NextBridge infrastructure LP east-west tie transmission project remains the sole property of the Métis Nation of Ontario. The information contained within this document is meant for a single application only. Citation, use, or reproduction of the information contained in this document for any other purpose is permissible only with the written consent from the Métis Nation of

Ontario."

And can you confirm that that's found in the second MNO report?

MS. TIDMARSH: Subject to check, yes, I believe it is.

MS. STRACHAN: Thank you.

And would you agree that these statements I just read to you make clear that both of these MNO reports are projects specific to NextBridge's east-west tie project?

MS. TIDMARSH: Yes.

MS. STRACHAN: And that these statements that I read to you also make clear that these reports are to be treated by NextBridge and the MNO as confidential?

MS. TIDMARSH: Yes.

MS. STRACHAN: And would these two statements cover not only the reports but also the data that underlies those reports?

MS. TIDMARSH: Yes, it would.

MS. STRACHAN: And so just going back to OEB Staff IR number 41, NextBridge's response states in regard to Indigenous communities specifically that:

"Communities have been offered opportunities to share relevant data with NextBridge through the implementation of information sharing agreements."

And to your knowledge do NextBridge and the MNO have an information sharing agreement or another agreement in place that covers the sharing of these two reports?

MS. TIDMARSH: Yes, we do.

MS. STRACHAN: And I assume you're familiar with that agreement?

MS. TIDMARSH: I am, yes.

MS. STRACHAN: And does this agreement include a commitment by NextBridge to keep the MNO reports and their underlying data confidential?

MS. TIDMARSH: Yes, it does.

MS. STRACHAN: And under the terms of that agreement could NextBridge disclose the MNO reports or their underlying data without the consent of the MNO?

MS. TIDMARSH: No, we can not.

MS. STRACHAN: And also in NextBridge's response to OEB Staff IR 41, NextBridge writes that:

> "The collection of TK and TLU information aided in the identification, mitigation, and/or avoidance of potential adverse effects that may arise from project routing, construction, and operations."

So even though the information and data in the TK and TLU reports are confidential, NextBridge was able to use the MNO studies in its environmental assessment to identify, mitigate, and avoid potential adverse effects; is that correct?

MS. TIDMARSH: It is. We took the information that was provided to us by the MNO that was confidential, and as is common practice in an environmental assessment, we rolled it up and made it anonymous, and were using it in our project planning for our environmental assessment.

MS. STRACHAN: And would NextBridge have been able to engage in this planning and come to the mitigation measures without having access to the MNO's reports and their underlying data?

MS. TIDMARSH: Without having the precise information from the MNO, no, that wouldn't be possible.

MS. STRACHAN: And I would just like to circle back to the link we talked about earlier between consultation activities and economic participation negotiations. And so specifically in the context of the MNO did these reports inform NextBridge's overall approach to economic participation with the MNO?

MS. TIDMARSH: So 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.

MS. STRACHAN: And in NextBridge's leave-to-construct application in Exhibit H it says that negotiations regarding economic participation are ongoing with the MNO. I haven't seen any updated information on that, and so can you confirm that these discussions are still ongoing?

MS. TIDMARSH: They are, yes.

MS. STRACHAN: And so just to summarize then, do I understand that it's taken about four-and-a-half years of consultation and negotiations which began back in late 2013

and are still ongoing to arrive at some kind of economic participation arrangement with the MNO which, as you said, is not finalized, as those negotiations are ongoing?

MS. TIDMARSH: Yes, that's correct.

MS. STRACHAN: So also related to timelines, I'm going to jump to OEB Staff IR number 4 and specifically part B. And in that IR the OEB asks about NextBridge's shift of $1 million in construction costs to the development phase of the project.

And counsel for OEB staff has asked a few questions on this already, and I understand NextBridge has undertaken to provide some additional information about what activities were accomplished during the extended development phase, so it's possible my questions on this could be answered by that undertaking. But I'm going to go ahead and ask them anyways.

Are you able to speak to what additional progress the extended development phase afforded to the consultation and/or economic participation discussions with the MNO specifically?

MS. TIDMARSH: So one of the activities that we determined was essential despite the project delay that we continued that we didn't ramp down was all of our consultation activities and participation negotiations with Indigenous communities, including the MNO.

And so during the extended development phase we continued to work with the MNO on consultation as well as our participation negotiations.

MS. STRACHAN: And in the response to OEB Staff IR 4 NextBridge stated that it was during the extended development phase, you were able to continue to consult, as you said, and that this extended timeline allowed communities to have a more extensive understanding of the potential impacts of the projects on traditional rates, and to date these discussions have indicated there are no significant concerns that would impact project costs and schedule.

So am I correct that it is NextBridge's opinion that this extended timeline allowed it to get to the point where NextBridge believed it has resolved outstanding significant Métis concerns that could impact project costs and schedule?

MS. TIDMARSH: Yes, that's correct.

MS. STRACHAN: I have one more question before I wrap up. Do you think that NextBridge and the MNO could have come to an economic participation arrangement in a significantly shorter timeline, given the consultation activities that were carried out and the evolution of the relationship between MNO and NextBridge?

MS. TIDMARSH: I don't believe that there could have been much of a shorter timeline, considering the ongoing development of the project and the amount of information that was shared between MNO and NextBridge, especially when it came to getting our detailed information from our general contractor.

So during the extended development phase, we continued

ONTARIO ENERGY BOARD

FILE NO.: **EB-2017-0364** **Hydro One Networks Inc.**

Lake Superior Link Project

VOLUME: **Technical Conference**

DATE: **May 16, 2018**

EB-2017-0364

ONTARIO ENERGY BOARD

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

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

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

Hearing held at 2300 Yonge Street,
25th Floor, Toronto, Ontario,
on Wednesday, May 16, 2018,
commencing at 9:32 a.m.

TECHNICAL CONFERENCE

A P P E A R A N C E S

JENNIFER LEA LAWREN MURRAY	Board Counsel
NANCY MARCONI ZORA CRNOJACKI SALEH LAVAEE MICHAEL LYSYCHYN	Board Staff
ROBERT WARREN ROSALIND COOPER CHRISTINE GOULAIS	Hydro One Networks Inc. (HONI)
DAVID STEVENS BRIAN MURPHY KRISTA HUGHES	NextBridge
SHELLEY GRICE*	Association of Major Power Consumers in Ontario (AMPCO)
KATE KEMPTON	Bamkushwada L.P., BLP First Nations
CHIEF PETER COLLINS	Fort Williams First Nation
CHIEF JOHANNA DESMOULIN	Pic Mobert First Nation
CHIEF DUNCAN MICHANO	Biigtigong Nishnaabeg
BILL HENDERSON* CHIEF DAN SAYERS*	Batchewana First Nation of Ojibways
ETIENNE ESQUEGA* MOLLY MacDONALD*	Biinijitiwabik Zaaging Anishnaabek (BZA)
MICHAEL BUONAGURO	Consumers' Council of Canada (CCC)
TAN WAGNER MAIA CHASE AHMED MARIA GLENN ZACHER	Independent Electricity System Operator (IESO)

*appearing by teleconference

A P P E A R A N C E S

MEGAN STRACHAN	Métis Nation of Ontario (MNO)
NICHOLAS ADAMSON SUSAN MORGAN	Ministry of the Environment and Climate Change (MOECC)
RICHARD STEPHENSON	Power Workers' Union (PWU)
MARK RUBENSTEIN	School Energy Coalition (SEC)
MARK GARNER	Vulnerable Energy Consumers' Coalition (VECC)

*appearing by teleconference

UNDERTAKING NO. JT1.16: TO PROVIDE A RESPONSE TO CCC.8 IN THE 1082 PROCEEDING AND AN UPDATED PROJECT SCHEDULE

MS. LEA: Thank you. Counsel for Métis nation -- I'm sorry, I haven't remembered everyone's name.

MS. STRECHAN: That's fine.

MS. LEA: And your name again is?

MS. STRACHAN: Megan Strachan.

MS. LEA: Thank you, of course.

QUESTIONS BY MS. STRACHAN:

MS. STRECHAN: Good afternoon, panel. I just want to touch briefly on NextBridge's understanding of the OEB's filing requirements during the designation process, and also of the Board's phase 2 decision and order. And in particular, I just want to understand broadly how these decisions have guided NextBridge's development of the project, which have brought us to the position today where NextBridge has filed its leave to construct application, and of course where Hydro One has filed a competing application.

So I think Mr. Mayers is likely best placed to answer these questions, so I will direct them to him. But if someone else is better placed, then I would invite them to answer.

And I apologize, I can't actually see the whole panel, but I'll lean forward as far as I can.

So in the Board's phase 1 order for the East-West Tie, I understand there were was two distinct filing criteria

related to First Nation and Métis, and one of these related to consultation and one related to economic participation. Is that correct?

MR. MAYERS: I'm not the expert, but that's my understanding.

MS. STRECHAN: So in order to meet these filing requirements, prospective transmitters needed to address their approach both to First Nations and Métis participation, as well as their approach to First Nations and Métis consultation. Is that your understanding?

MR. MAYERS: Yes.

MS. STRECHAN: So in order to meet these filing requirements specifically related to First Nations and Métis consultation, prospective transmitters needed to file proposed First Nations and Métis consultation plans, and this is set out in section 10.1 of the phase 1 order. And this consultation plan needed to include a list of communities that could be affected by the project, the proponents' approach to engaging with these communities, a description of significant Métis or First Nation issues that could arise, a plan to address these issues, as well as an overview of expected consultation outcomes.

Does that accord with your understanding of the filing requirements?

MR. MAYERS: Again, I'm not the expert, but I do believe you are correct.

MS. STRECHAN: So when the Board was selecting a transmitter in its phase 2 decision, it looked at First

Nation and Métis consultation and First Nation and Métis economic participation as two of the nine criteria that it assessed in making its designation decision. Is that right?

MR. MAYERS: I believe so.

MS. STRECHAN: So from NextBridge's perspective as the transmitter that was designated by the Board in that decision, it was required, because of that designation, to carry out those procedural aspects of consultation and also to pursue economic participation arrangements with affected and interested First Nation and Métis communities. Is that right?

MR. MAYERS: Yes.

MS. STRECHAN: So based on its understanding of these requirements, is it fair to say that NextBridge has reached a negotiated arrangement for Métis economic participation with the Métis Nation of Ontario that's anticipated to be finalized shortly?

MR. MAYERS: That is my understanding.

MS. STRECHAN: And I just have one final clarification. Is it the case that all of the costs of First Nations and Métis consultation, as well as First Nations and Métis economic participation, that all of these costs are included and accounted for in NextBridge's overall figure of $777 million for the project?

MR. MAYERS: Yes.

MS. STRECHAN: Thank you, those are all my questions.

MS. LEA: Thank you. Counsel for MOECC?

ONTARIO ENERGY BOARD

FILE NO.: **EB-2017-0364** **Hydro One Networks Inc.**

Lake Superior Link Project

VOLUME: **Technical Conference**

DATE: **May 17, 2018**

EB-2017-0364

ONTARIO ENERGY BOARD

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

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

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

Hearing held at 2300 Yonge Street,
25th Floor, Toronto, Ontario,
on Thursday, May 17, 2018,
commencing at 9:01 a.m.

TECHNICAL CONFERENCE

A P P E A R A N C E S

JENNIFER LEA LAWREN MURRAY	Board Counsel
NANCY MARCONI ZORA CRNOJACKI SALEH LAVAEE MICHAEL LYSYCHYN	Board Staff
ROBERT WARREN ROSALIND COOPER CHRISTINE GOULAIS	Hydro One Networks Inc. (HONI)
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ETIENNE ESQUEGA* MOLLY MacDONALD* CHIEF MELVIN HARDY	Biinijitiwabik Zaaging Anishnaabek (BZA)
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A P P E A R A N C E S

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MEGAN STRACHAN JASON MADDEN	Métis Nation of Ontario (MNO)
NICHOLAS ADAMSON SUSAN MORGAN	Ministry of the Environment and Climate Change (MOECC)
RICHARD STEPHENSON	Power Workers' Union (PWU)
MARK RUBENSTEIN	School Energy Coalition (SEC)
MARK GARNER	Vulnerable Energy Consumers' Coalition (VECC)

*appearing by teleconference

Margaret Froh

Germaine Conacher

Tracy Campbell

MS. LEA: Thank you, and I think, Mr. Warren, you have some questions for this group.

MR. WARREN: I do not.

MS. LEA: You do not. Do Board Staff have any questions for the Métis Nation of Ontario then?

MS. CRNOJACKI: We do have a few questions --

MS. LEA: You do.

MS. CRNOJACKI: -- for the Métis Nation for --

MS. LEA: Thank you.

MS. CRNOJACKI: -- Ontario.

MS. LEA: Please proceed.

QUESTIONS BY MS. CRNOJACKI:

MS. CRNOJACKI: The MNO evidence, paragraph 21, that indicates that as of May 7th, 2018 there was no consultation with the MNO, the MNO also noted that it had sent a summary of its concerns with respect to the eleventh-hour nature of the LSL and the difficulties it poses for Métis Nation consultation and economic participation in a letter you sent to the Ministry of Energy. The letter is dated March 21st, 2018.

Our first question is: Since May 2018 has the MNO been contacted by Hydro One?

MS. FROH: So good morning.

MS. CRNOJACKI: Good morning.

MS. FROH: Yes, so we haven't had follow-up specific

to the April 30th letter directly with them, other than we initiated contact with Hydro One. We issued a letter to their board of directors on May 14th outlining our concerns and requesting to meet on an urgent basis to discuss those concerns. And since that time we -- which was just earlier this week -- we did receive a preliminary response from a staff member, and I understand that there will be a response, because my letter was directed directly to the Chair of the board and the president and CEO. So we're anticipating a response back from that.

MS. CRNOJACKI: Thank you.

In your view, is there a way for Hydro One to meet its duty to consult if Hydro One's leave-to-construct application is not dismissed by the OEB? And in your opinion, in your estimation, what would be the reasonable time frame for Hydro One to discharge its duty to consult regarding the LSL project?

MS. FROH: I think that it's going to be a challenge in terms of the timelines that I understand are in play with this particular leave. It took us four years to come to the place where we are right now through a very robust engagement process with NextBridge, both in terms of the duty to consult, but also on the economic participation end of things. That has taken a long time, and ultimately consultation is about building relationships.

I have serious concerns about the ability to be able to meet those consultation obligations in light of the timing of this, as well as the fact that the fact that

there is a real concern around what Hydro One -- some of the assumptions that it appears to have made with regard to the impact on Métis Nation of Ontario regional rights-bearing communities, and to that extent that is very much what this letter is about that I referenced earlier.

I don't believe it's in the record, but it does lay out the concerns that we have with regard to consultation and the concerns that we have with the ability to actually follow through on that within the timelines that have been provided.

So that outlined our concerns, but also the concerns about moving forward. And in particular, we have concerns about essentially the assumptions that have been made by Hydro One have poisoned the well, so to speak, in terms of consultation.

If we are going to be moving forward with Hydro One through this process, we're going to be starting from a deficit position. Given that consultation really is about establishing that relationship of trust, that, I think, will pose significant challenges for us in order to do that.

MS. CRNOJACKI: Our final last question today for the MNO. Can you please describe any impact on your communities if the 2020 project in-service date is delayed?

MS. FROH: So for us, this is very much about starting from scratch again.

As I mentioned earlier, it has taken over four years to come to the place where we are with NextBridge, both in

terms of the duty to consult and accommodate, but also in terms of the economic participation.

If we were to have to start that process all over again, we have very serious concerns, A, about the ability to complete it, particularly in the timelines that have been identified. I think that that's next to impossible. But also there is no guarantee that we are going to actually come out the other end with the benefits for communities that we've been successful in -- that we're on the verge of achieving in our discussions with NextBridge.

This will put us back, we believe, at least -- it took us four years to do this work with NextBridge. It's going to take us a very extended period of time to have that kind of deep consultation and engagement with Hydro One.

So that would ultimately be -- the impact is starting from scratch again is a real risk for our communities.

MS. CRNOJACKI: Thank you very much. These are all our questions.

MS. LEA: Thank you. Anyone else with questions for the Métis Nation of Ontario?

Thank you very much for taking the time, both those on the phone and yourself here in the room. I really appreciate it. And thank you, Ms. Strachan.

So the next group is BZA. Mr. Esquega and Ms. MacDonald, I believe you're on the line.

BIINIJITIWABIK ZAAGING ANISHNAABEK - PANEL 1

Chief Melvin Hardy

MR. ESQUEGA: Good morning. It's Etienne Esquega

ONTARIO ENERGY BOARD

FILE NO.:	**EB-2017-0364**	**Hydro One Networks Inc.** **LSL Project Motion by NextBridge.**

VOLUME:	**Motion Hearing**	
DATE:	**June 4, 2018**	
BEFORE:	**Christine Long**	**Presiding Member and Vice-Chair**
	Allison Duff	**Member**
	Rumina Velshi	**Member**

EB-2017-0364

THE ONTARIO ENERGY BOARD

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

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

Hearing held at 2300 Yonge Street,
25th Floor, Toronto, Ontario,
on Monday, June 4, 2018,
commencing at 9:32 a.m.

MOTION HEARING

BEFORE:

CHRISTINE LONG	Presiding Member and Vice-Chair
ALLISON DUFF	Member
RUMINA VELSHI	Member

A P P E A R A N C E S

LAWREN MURRAY	Board Counsel
NANCY MARCONI ZORA CRNOJACKI SALEH LAVAEE MICHAEL LESYCHYN	Board Staff
ROBERT WARREN ROSALIND COOPER	Hydro One Networks Inc. (HONI)
DAVID STEVENS BRIAN MURPHY JENNIFER TIDMARSH	NextBridge
ETIENNE ESQUEGA	Biinijitiwabik Zaaging Anishnaabek (BZA)
MICHAEL BUONAGURO	Consumers' Council of Canada (CCC)
GLENN ZACHER TAM WAGNER AHMED MARIA	Independent Electricity System Operator (IESO)
MEGAN STRACHAN	Métis Nation of Ontario (MNO)
NICHOLAS ADAMSON	Ministry of the Environment and Climate Change (MOECC)
RICHARD STEPHENSON	Power Workers' Union (PWU)
MARK RUBENSTEIN	School Energy Coalition (SEC)
MARK GARNER	Vulnerable Energy Consumers' Coalition (VECC)
ALSO PRESENT:	
CAMERON BURGESS	Northern Lake Superior Métis Community
TRENT DESAULNIERS	Superior-North Shore Métis Council

what the IESO considers? Is it purely supply costs to manage the different date? What other cost categories would you be considering?

MR. ZACHER: So I'm going to answer your question, and then turn to Mr. Murphy and see if I have the answer right.

One of the principal risks is the risk related to drought in the northwest. Because it is highly reliant on hydro resources, that is what gives rise to the risk of a capacity shortfall that would have to be addressed if that risk was to realize itself through replacement energy costs. So that could be purchased from Manitoba; there may be other ways to address that risk.

I believe there would be risks relating to -- sorry, costs relating to the efficiency of scheduling and dispatching the system. It would be more efficient to schedule and dispatch once the project is completed. To the extent that's delayed, there are scheduling and dispatch costs that would arise. I'm told those are the two.

MS. DUFF: And the costs have nothing to do with who would be building that line? Like, they're generic?

MR. ZACHER: That's correct.

MS. DUFF: Thank you.

MS. LONG: Thank you, Mr. Zacher. I now turn to Ms. Strachan.

SUBMISSIONS BY MS. STRACHAN:

MS. STRACHAN: Good morning, Madam Chair and Panel, My name is Megan Strachan and I am counsel to the Métis

Nation of Ontario, or the MNO.

So I am scheduled for an hour and I do have about an hour of comment. So I just wanted to see with the lunch break -- am I just going to go straight through?

MS. LONG: You're going to go straight through. We will probably sit -- well, we'll see how long you go. Probably quarter to one, and then we'll probably break at that point.

MS. STRACHAN: So we did provide a book of authorities on Friday that includes the law and policies I'll be referring to today, and I believe you should have copies of that book.

MS. LONG: We're going to mark that just for identification purposes, Mr. Murray.

MR. MURRAY: Exhibit K1.1.

EXHIBIT NO. K1.2: MS. STRACHAN'S BOOK OF AUTHORITIES

MS. STRACHAN: I will be also be referring throughout to evidence that's been submitted by the parties, including the MNO and transcripts from the technical conference. I won't ask for every reference I make to be put up on the screen, but there are a few maps, in particular, in the MNO's written evidence that I think will be helpful, and when I get there I would ask for them to be projected, if possible.

And before I dive into my submissions, I would like to introduce two MNO elected leaders who have travelled here for this hearing. And so we have in attendance MNO regional counsellor Cameron Burgess, who represents the

northern Lake Superior Métis community, as well as Trent Desaulniers, the president of the Superior North Shore Métis council.

These two gentlemen are sitting back beside Jennifer Lea. So their presence here today should signal to this Board how seriously the MNO takes this process, this project, and this motion in particular.

The MNO supports NextBridge's motion and, in particular, NextBridge's request to dismiss Hydro One's application for leave to construct the LSL.

In my submissions today on behalf of the MNO are grounded in the basic constitutional imperative of the honour of the Crown.

This Board is an agent of the Crown, and as such, must make decisions that are consistent with the Constitution. It must discharge its obligations in a manner that upholds the honour of the Crown and furthers reconciliation with all Indigenous peoples, including the Métis.

For this Board to allow Hydro One's application to continue ignores the years of reliance that the MNO has placed on the commitments made by the Board throughout the designation process for the East-West Tie project. Allowing Hydro One's application to proceed also runs contrary to this Board's statutory mandate to make decisions that further Ontario policy specifically to encourage First Nations and Métis economic participation in energy projects that cross their traditional territories. And in the MNO's eyes, it amounts to a tacit acceptance by

this Board of Hydro One's deeply flawed and discriminatory approach to both Métis consultation and economic participation.

And it's for these reasons that allowing Hydro One's application to proceed cannot be consistent with the Crown's honour.

With that introduction, I'm going to offer a brief roadmap of how my submissions will proceed because I'm going to try to cover a lot of ground in the hour that I have.

So first, I'll provide an introduction of the MNO and its interest in this project. Second, I'd like to point to relevant aspects of Ontario's long-term energy plans which have been incorporated into this Board's process and decisions throughout the designation process. Third, I'm going to discuss how the honour of the Crown applies to this Board, and how it must inform the Board's furtherance of the commitments in the province's long-term energy plans, the Board's statutory mandate, the designation process for the East-West Tie, and the Board's specific decision on this motion.

Fourth, I'm going to look back at Hydro One, who was part of a partnership called EWT LP. I'm look back at their failed application for designation, and describe why Hydro One's proposes LSL project is in fact a worse one than that one that was proposed back in 2012.

Fifth, I will outline why Hydro One cannot use consultation activities, and specifically land use and

traditional knowledge studies that were conducted by the MNO and NextBridge for the LSL. It is the MNO's position that Hydro One will need to conduct new studies with the MNO on the LSL project if it proceeds.

Sixth, I will just touch briefly on why a co-proponent scenario doesn't solve the issues I am going to speak to you about in these submissions.

From the MNO's perspective, having Hydro One construct the part of the line that crosses Pukaskwa Park and NextBridge construct the parts of the line outside the park is not a feasible solution.

This brings me to my first submission, which is just an introduction of the Métis Nation of Ontario and its interest in this proceeding and this project.

The MNO was created in 1993 to represent Ontario Métis and their communities. It has governance structures at the local, regional, and provincial levels, and these structures work together to advance the collective rights and interests of MNO citizens and communities.

This project, whether it's called the East-West Tie or the Lake Superior Link, runs through the heart of the traditional territory of the northern Lake Superior Métis community. This is a regional rights-bearing Métis community that is represented through a regional consultation committee. This committee includes local representation and an elected regional councillor, who is here today, and the local representatives on this committee are from the Thunder Bay Métis Council, the Superior North

Shore Métis Council, the president of whom is here today, and the Greenstone Métis Council. These three Métis community councils were identified by the Crown in its March 2nd, 2018 letter to Hydro One as requiring consultation on the Lake Superior Link project, and that letter can be found in Hydro One's written evidence at attachment 9.

The MNO's written evidence sets out some of the significant recent developments related to the recognition of Métis rights across the province and specifically in the project area. I won't go through all of these today, as they are in the MNO's written evidence, but I do want to highlight a couple of them in particular.

One of these developments is the joint recognition by Ontario and the MNO in August of 2017 of six historic Métis communities in Ontario, in addition to the one identified by the Supreme Court of Canada in the Powley case, and that case is in the MNO book of authorities as tab 17.

One of the communities jointly identified by Ontario and the MNO is the Northern Lake Superior historic Métis community, and a facts sheet on this community is in the MNO's written evidence at appendix E.

The descendants of this historic Métis community are the modern-day citizens of the MNO who still live, work, and exercise their unique Métis way of life and rights on the territory of their ancestors.

And while the Powley case specifically found a Métis right to hunt in Sault Ste. Marie and environs, the Supreme

Court affirmed the trial judge's findings in that case that the Métis living in and around Sault Ste. Marie were part of a larger Great Lakes Métis population. The court wrote at paragraph 21 that:

> "The trial judge found a distinctive Métis community emerged in the Upper Great Lakes region in the mid-17th century."

The Powley decision was released by the Supreme Court in 2003, and in its immediate aftermath the MNO and Ontario came to the table to negotiate a harvesting agreement that accommodates Métis rights in the project area among other areas, and this was precisely what the Supreme Court directed in Powley, and at paragraph 50 the court stated that:

> "In the longer-term a combination of negotiation and judicial settlement will more clearly define the contours of the Métis right to hunt, a right that we recognize as part of the special Aboriginal relationship to the land."

Earlier this year, on April 30th, 2018, the MNO in Canada signed a new harvesting agreement, called the Framework Agreement on Métis Harvesting, which continues to accommodate Métis harvesting rights in the area through which the project will pass. And I would like to draw the Board's attention to the map that's attached to the framework agreement, which is found in the MNO's written evidence in Appendix F, page 15, and if it's possible to pull that map up on the screen I think that would be

helpful.

Perfect. So looking at the Lakehead, Nipigon, and Michipikoten harvesting areas, which are sort of the lighter blue, the brown, and then the dark green that hug the northern shore of Lake Superior, this is the territory of the Northern Lake Superior Métis community, and the project will pass squarely through these harvesting territories where the Métis do have an agreement with Ontario to accommodate their harvesting rights.

And there is also a map in appendix D to the MNO's written evidence that just zooms in on this area and shows where the project is in relation to it. So you can see the project is the yellow, and you can see the purple outline outlines those three harvesting territories together that were on the previous map, so you can clearly see the entirety of this project is contained within those traditional harvesting territories.

This traditional territory, of course, is shared with First Nations, some of whom are also intervenors in this proceeding. These First Nations were signatories to the Robinson Superior treaty and have treaty rights in this area, and also, some of them do assert Aboriginal title, and Métis rights coexist with these treaty rights. The law does not distinguish between the two. Métis rights as Aboriginal rights are not lesser than First Nations treaty rights. The Constitution recognizes and respects these rights equally.

The simple basis for Métis rights and interests in the

project area is that the Northern Lake Superior Métis community was there on the land creating that special Aboriginal relationship to the land, as Powley called it, prior to Canada's expansion into the area, this Métis community's pre-existence as a distinct Aboriginal group using and relying on this land grounds its collectively held Métis rights today.

I would now like to move to my second submission and outline some of the provincial policies that the MNO sees as being critical to this Board's mandate, the designation process for the East-West Tie and this motion today.

The MNO was extensively involved in the provinces' consultations leading up to the 2010 long-term energy plan, and that plan named the East-West Tie as a priority project.

And the MNO viewed this plan as a critical turning point, because the Crown recognized in that plan that both First Nations and Métis should benefit from transmission projects in their traditional territories. Specifically, the 2010 long-term energy plan stated that, and this is a quote which can be found in the MNO's authorities at tab 3, that:

> "Ontario also recognizes that Aboriginal communities have an in 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 partnerships with Aboriginal communities where commercially feasible and where those communities have expressed an interest."

Subsequent long-term energy plans have built on this commitment. The 2013 Long-Term Energy Plan, which is found at tab 4 of the MNO's authorities, states that, and this is a quote from page 69 and 70:

"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 line will, in addition to fulfilling consultation obligations, involve potentially affected First Nation and Métis communities where commercially feasible and where there is an interest."

And similarly, the 2010 long-term energy plan doesn't displace these previous Crown commitments, and excerpts of this plan are included at tab 5 to the MNO's book of authorities.

And the 2017 plan provides that:

"This province will continue the direction established in the 2013 Long-Term Energy Plan and support First Nation and Métis leadership and capacity in Ontario's evolving energy sector."

And it further recognizes that:

"Economic agreements with First Nations and Métis can facilitate unique social benefits for these communities that are not necessarily strictly financial."

And these policies really offer the framework for my next submission, because this Board has to ensure that its decisions further these policies. This is a requirement of its enabling legislation, the Ontario Energy Board Act. That Act sets out that:

"The Board must be guided by the objective of promoting the use and generation of the electricity from renewable energy in a manner that is consistent with the policies of the government of Ontario."

And this is in section 1(1) of the Act. This means that the Board must act in a manner that's consistent with these aforementioned commitments.

In addition to the statutory mandate, some of these commitments were expressly incorporated by this Board in its designation decisions for the East-West Tie project, and so they underlie the decisions the Board has made so far and also the decisions that the Board will make regarding this project, including the decision on this

motion.

I'm going to take a few minutes to look back at how the Board has incorporated these policies into its process on this project so far and also talk about how the MNO has participated in and relied on that process since it began.

In 2011 the Minister of Energy wrote to this Board asking it to design a designation process for the East-West Tie project. This letter is included at tab 1 of the MNO's authorities. The Minister asked that the approach 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.

The Board went on to develop a designation process pursuant to that direction, which is set out in its phase 1 decision and order, which is included as tab 7 in the MNO's authorities.

In that Phase 1 decision, the Board chose nine criteria that it would apply equally to each transmitter who sought the designation, and two of these nine criteria were related to First Nation and Métis. One was specific to consultation, and one was specific to economic participation. This means that about 22 percent, which is almost a quarter of a transmitter's total score in the designation process, was related to First Nations and Métis-specific criteria.

The MNO saw the Board's selection of this criteria, similar to Ontario's 2010 long-term energy plan, as a

turning point. It represented a new direction for transmission projects that could be respectful of Métis rights and interests and could further reconciliation, if it was done right.

The MNO appeared as an intervenor before this Board in both the phase 1 and phase 2 hearings. In phase 2, the MNO focused on ensuring that these two criteria were applied rigorously.

The MNO submitted during the phase 2 hearing that a negative and dangerous precedent could be set if the Board's designation criteria and the long-term energy plan commitments were not fully considered in the Board's phase 2 decision and order.

The MNO was relieved to see that its concerns were addressed in the phase 2 decision and order, as the Board rigorously applied all nine of the criteria and weighed them equally, as it had pledged to do in phase 1. And the Board, in fact, expressly incorporated Ontario's 2010 long-term energy plan into its phase 2 decision and order on page 14, which is included in the MNO's authorities at tab 8.

The MNO understood that the Board, through the phase 2 decision and order, was requiring the designated transmitter to pursue economic participation opportunities with First Nations and Métis who were impacted by the project and interested in such participation. The Board also chose a designated transmitter, which was NextBridge, in part based on its demonstration that it could conduct

successful First Nation and Métis consultations.

And on this basis, the MNO and NextBridge have been in negotiations and have been completion consultations since late 2013.

Before I speak more about those negotiations and consultation activities, I'd like to outline the roles and responsibilities of this Board towards Indigenous people as an agents of the Crown. And this brings me to my third position in that general roadmap that I offered earlier.

Because it is not just the case that this Board is tasked with furthering Ontario energy policy; the Board as an agent of the Crown, as set out in section 4(4) of the OEB Act, and as a Crown agent, it is bound to uphold the honour of the Crown in its implementation of Ontario policy, and in any of its conduct or decisions that impact Indigenous people.

It is also important to note that the OEB Act empowers the Board to consider all questions of law. And we know from the Supreme Court of Canada in the Clyde River case, which is included at tab 10 in the MNO's authorities, that when a regulator has this broad authority, that regulator, quote, has "both the duty and the authority to apply the Constitution", end quote, to the decisions that are before it. This is a quote from paragraph 36 of that decision.

This was put another way by Supreme Court in the Chippewa of the Thames case, included as tab 9 in the MNO's authorities, and that case states at paragraph 36 that:

"The Crown's constitutional obligation does not

disappear when the Crown acts to approve a project through a regulatory body."

It is true that other Crown decision-makers will be involved in aspects of this project's approval; for instance, the Ministry of Environment plays a role in its environmental assessment. But this does not mean that this Board can ignore these constitutional imperatives.

As was said by Supreme Court in Clyde River at tab 10 of the MNO authorities:

"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 by Cabinet."

These cases make clear that any time the Crown is acting through a regulatory body, its actions and conduct in relation to First Nations and Métis people must uphold the honour of the Crown.

I'm going to focus the next part of my submissions on the honour of the Crown, and just said out the basic framework for this important principle.

It is well-settled law that the honour of the Crown is a constitutional principle, and the over-arching goal of the Crown's honour is the reconciliation of pre-existing Indigenous societies with the assertion of Crown sovereignty. This is clearly set out by the Supreme Court in the Manitoba Métis Federation case at paragraphs 68 and 69, which is contained at tab 5 of the MNO's authorities.

It is crucial to remember that the Crown's honour does

not only seek reconciliation with First Nations people. In the Daniels case, which is found at tab 11 of the MNO authorities, the Supreme Court of Canada clearly stated that reconciliation with, quote, "all of Canada's Aboriginal people is Parliament's goal."

The Haida Nation case found at tab 13 tells us that the honour of the Crown is at stake in all of the Crown's dealings with Indigenous people, and that this is a narrow technical duty but must be, quote, "understood generously." And that's found at paragraph 17 of the Haida case.

The recent case of Clyde River, which is at tab 10, in paragraph 41 tells us that the honour of the Crown also attaches to the manner in which the Crown fulfills its obligations to Indigenous people, and the MNO reads that as saying it infuses the process; it is not just about what the end result is. And so when we're looking at the process of this Board, we have to look at it from start to finish and say, as a whole, has this process been fair and has it upheld the honour of the Crown.

The Haida Nation case further tells us at paragraph 53 that while the Crown can delegate procedural aspects of consultation to third parties, the Crown cannot delegate its honour to a private proponent. It rests with the Crown and, in this case, it rests with the Ontario Energy Board. It cannot be delegated to Hydro One, nor can this Board assume that some other Crown actor is going to uphold it.

Keeping this framework in mind, I'm going to discuss how the honour of the Crown is specifically at stake in

this motion, and how it should guide the decision of the Board today.

It is the MNO's submission that the honour of the Crown calls for this Board to uphold the commitments that it made during the designation process, and further the priorities that it identified during that process on which the MNO has relied for the last five years.

As I set out earlier these submissions, the OEB set out nine filing criteria for this project, two of which with were related to First Nation and Métis.

The OEB went out of its way to do this because of the unique location of this project and the Indigenous rights and interests it potentially impacted.

This was a response to the Minister's 2011 letter and to Ontario's 2010 Long-Term Energy Plan, and to the Board's statutory responsibility to implement that plan.

I am going to come back to the honour of the Crown, but I'd like to move on to my fourth submission and look at specifically why EWT LP's bid failed in the designation process, and why Hydro One's proposed project today is not an improvement over that failed application.

The MNO, in its submissions to the Board during phase 2, made clear that EWT's application exhibited a prejudice and discriminatory attitude towards the Métis that could not possibly fulfill the Board's filing criteria. The Board did not award EWT LP a top score in either of the two categories that related to First Nations and Métis people. And in particular, regarding the First

Nations and Métis economic participation criteria, the Board commented that, quote:

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

And this quote is found in the phase 2 order at tab 8 at page 17.

The MNO viewed this is evidence that the Board was taking seriously its commitments to further both First Nations and Métis economic participation in transmission projects that impacted their traditional territories. And as we know, it was NextBridge and not EWT LP that received the designation. It is true that NextBridge also did not receive a top score in the First Nations and Métis economic consultation criteria. But both the MNO and NextBridge understood that Ontario law and policy and the Board's decisions required NextBridge to pursue economic participation with the Métis as well as with First Nations and to carry out procedural aspects of consultation. And NextBridge, during the technical hearing, confirmed that this was its understanding when it received the designation from this Board. That's found in the May 16th transcript on page 92.

And it was based on this understanding and reliance that the MNO and NextBridge entered into negotiations about

economic participation and also entered into consultation, and they have been doing both of these for over four years, since late 2013. And these negotiations haven't been easy, but they have been successful.

The MNO and NextBridge are now in the final stages of a meaningful consultation process about potential impacts to Métis rights and interests, and are also in the final stages of negotiating an economic participation agreement that we anticipate will be finalized very shortly. And as NextBridge stated in its submissions, these have unfolded over almost five years.

It's the MNO's submission that as a Crown decision-maker, because the OEB must fulfil its commitments honourably, that turning its back on the previous progress, directions, and choices in terms of the process it has used to implement Ontario's policies cannot be honourable. The MNO has relied on these as the foundation of its negotiation with NextBridge for the last four-and-a-half years and has concluded agreements and conducted consultation on that basis. Switching in a new proponent at this late stage disregards that reliance and pulls the rug out from underneath years of effort and relationship-building.

And the context and history of the proponent and the application as part of this entire process can't be forgotten and it can't be divorced from the decision that's before the Board today, because Hydro One is not just any proponent. This is a proponent who is unable to be

designated successfully the first time in large part because it did not receive a top score in the First Nations and Métis consultation or First Nation and Métis economic participation and criteria.

And in its application to construct the LSL Hydro One has shown no improvements to its previously unsuccessful approach, and in fact to the MNO it is worse on both fronts.

I will first lay out the flaws in Hydro's approach to economic participation and then address the challenges it will face in discharging the procedural aspects of the duty to consult with the Métis.

Hydro One's designation bid -- and I'm going to say Hydro One, but it really was EWT LP during the designation. Hydro One's designation bid at least had some First Nations equity participation, but in contrast the LSL project has no confirmed Indigenous equity participation. Instead, Hydro One has said it will negotiate that after it receives the leave to construct.

But just as this Board recognized in 2012 that Hydro One was excluding the Métis from equity participation in its bid, Hydro One seems to plan to do so again. Hydro One confirmed at the technical conference that it had made the decision to offer a 35 percent equity to BLP communities before it even notified the MNO that Hydro One was planning the LSL, and this discussion is found in the transcripts from May 17th, on page 143.

And to date, Hydro One has not offered to discuss

equity participation with the MNO and has also been unable to confirm that any further equity may be available for Métis communities beyond the 35 percent it has already pledged to offer to the BLP communities.

And Hydro One's written evidence sends a strong signal to the MNO that it is unlikely Hydro One will come to the table to discuss equity participation with the Métis. And I'd like to read a passage from Hydro One's written evidence, which is found on page 41 of that evidence. And this is a quote:

> "In Hydro One's section 92 application for the LSL Hydro One references achieving agreements with Indigenous communities within 45 days from receipt of OEB approval of its application. This 45-day time frame is in relation to finalizing any terms and conditions that may be agreed upon between Hydro One and the First Nation partners in Bamkushwada Limited Partnership to establish mutually agreeable terms with regards to a limited partnership that will own the Lake Superior Link assets."

There is clearly no mention of negotiating with the Métis about economic participation, and specifically about equity in Hydro One's evidence.

From the MNO's perspective, this is clearly contrary to Ontario policy and the Board's direction in phase 2 that economic participation must be explored with both First Nations and Métis who are potentially impacted by the

project and who have an interest in such participation.

I would now like to discuss consultation. Hydro One's consultation plan is contained in Exhibit H to its leave-to-construct application, and it is only a handful of paragraphs that fail to set out any meaningful plan.

But the lack of a plan, while concerning in and of itself, is actually not the crux of Hydro One's consultation challenges, because no consultation plan can hope to be successful when it has pre-judged the Indigenous rights and interests that are at stake.

Hydro One's correspondence that's in evidence before this Board demonstrates that Hydro One has pre-judged and predetermined Métis rights and interests in the project area.

The MNO received its first correspondence from Hydro One about the LSL on April 30th, 2018. And this letter is found in the MNO's written evidence at Appendix P. When the MNO received this letter, the MNO was not aware that Hydro One had already sent a letter to the BLP communities on February the 16th, one day after it filed for leave to construct.

Hydro One confirmed that when it reached out to BLP communities in February, it did not also reach out to the MNO. And this is found in the transcripts from May 17th, at page 134.

Also unknown to the MNO when they received this letter on April 30th, Hydro One had already determined that the rights, interests, and claims of Métis communities were

inferior to those of the BLP communities, and this is clearly evidenced in the letter from Hydro One vice-president of Indigenous relations, Derrick Chum, to Kate Kempton, who is counsel for the BLP communities, and this letter is dated two weeks before the April 30th letter was sent to the MNO. And this letter is in Hydro One's evidence at attachment 12.

And I'd like to read to you from page 2 of that letter. Mr. Chum of Hydro One writes that:

> "At the same time we will also be engaging with the First Nations and Métis communities that are less directly affected, including the Métis Nation of Ontario. Although the frequency of meetings will be less than with the BLP communities, their input is valuable and informative."

This statement that Métis communities will be less directly affected than other Indigenous communities by the Lake Superior Link project is inaccurate and ill-informed and it disregards the Métis communities that live, use, and rely on the territory through which the project will pass.

And during the technical conference Hydro One confirmed that it sent this letter before it had had any discussion with the MNO about Métis rights, interests, and claims in the project area, and this discussion is found in the May 17th transcript at page 135.

On page 133 of those same transcripts, Hydro One confirmed that it received no information from Ontario

about Métis rights and interests in relation to this project beyond Ontario's identification of three Métis community councils, listed in the March 2nd letter that I mentioned earlier, and so Hydro One's conclusion that Métis communities are less directly affected was uninformed by discussion with the MNO and nor was it informed by information that Hydro One had received from Ontario. This is clearly a conclusion that Hydro One drew on its own unilaterally with no consultation.

And as the MNO's written evidence makes clear, this conclusion about Métis rights is divorced from the reality of advancements in the recognition of these rights over the last 15 years.

And Hydro One did, in fact, confirm at the technical conference that it had some awareness of these major developments but was not familiar with the details of them, and this includes things like the identification of the historic Métis communities and the various harvesting agreements that the MNO has had. And this discussion is in the May 17th transcript at pages 135 and 136.

But despite this general awareness of these developments, Hydro One did not seek any further information from the MNO or from Ontario prior to sending that letter, which stated that, in its opinion, the Métis would be less directly affected by the LSL.

This pre-judgment of Métis rights and interests for the MNO means that Hydro One cannot hope to carry out meaningful consultation with the Métis in the timeline that

it has proposed.

Hydro One explained at the technical conference on May 17th at page 101 that if consultations began on that day, Hydro One would have, at a maximum, 14 months to complete its consultations. From the MNO's perspective, this is a completely unrealistic timeline to discharge the procedural aspects of the duty to consult, for the main reason that Hydro One cannot hope to build a productive relationship with the MNO in this timeframe, and building that relationship is key to discharging the duty.

In the Carrier Sekani decision of the Supreme Court, which is contained at page 18 of the MNO's authorities, the court stated at paragraph 38 that "consultation is concerned with an ethic of ongoing relationships."

MNO president Margaret Froh, in her evidence at the technical conference, echoed this. She stated that consultation with Hydro One would require, quote, "establishing that relationship of trust."

President Froh went on to explain that given the assumptions made by Hydro One about the MNO to date, this relationship is starting from a, quote, "deficit position" and that Hydro One has "poisoned the well" for consultation with the Métis. And that discussion is found in the May 17th transcript at pages 9 and 10.

As we'd already heard from NextBridge, President Froh gave evidence that building a relationship in the timeline proposed by Hydro One will be next to impossible. She set out that it took, quote, "four years to do this work with

NextBridge. It is going to take a very extended period of time to have that kind of deep consultation and engagement with Hydro One. Starting again from scratch is a real risk for our communities."

Not only is Hydro One starting from a deficit to build this relationship with the MNO, it simply has to start again from the beginning for consultation. This is compared to the case of Gitxsan and British Columbia, which is at tab 12 of the MNO's authorities. In that case, a company underwent a change in control and the B.C. court found that this was not a neutral change because it changed the controlling mind of the company, which would have an impact on that company's relationship with the First Nations who were impacted by the forestry licences that were at issue in that case. So there it was the same licences, but the controlling mind of those licences had changed. And that's what is will happen here if Hydro One is switched in. It is not just a neutral switch to switch in a proponent, because you are changing how that company interacts with and engages with Indigenous people.

The court in that case found at paragraph 86 that the duty to consult, quote, "is a continuing duty which must be observed each time the Crown has a dealing with the forestry licence", and quote, that was at issue.

So past consultation on the basis of a different proponent in that case could not fulfill the duty to consult, and it cannot fulfill it in this case.

As the case law and President Froh made clear, Hydro

One and the Crown must start consultation anew, taking into account Hydro One's specific application and actions.

As stated by the Supreme Court of Canada in the Clyde River case, which is stated at tab 9 of the MNO authorities:

> "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."

And that's from paragraph 24 of that case.

It is clear that Hydro One cannot move forward with its schedule unless and until the duty to consult has been discharged, and it is completely unrealistic to expect that it can be fulfilled, in the MNO's opinion, in 14 months. The MNO believes that this will take years.

The MNO's position is that with the Lake Superior Link application, Hydro One is seeking to resurrect an unsuccessful bid that perpetuates an exclusionary and discriminatory attitude towards the Métis. And because of this, Hydro One has demonstrated that it cannot be expected to successfully fulfill procedural aspects of consultation.

And further, the information contained in the record before this Board which I have outlined demonstrates that Hydro One cannot be expected to pursue economic participation opportunities fairly with both First Nations

and Métis communities pursuant to Ontario policy and to this Board's previous direction.

If this Board allows Hydro One's application to move ahead, the Board is sending a signal that First Nations and Métis consultation and First Nations and Métis economic participation are not the priorities that the MNO thought that they were in the designation process.

It tells the Métis that these criteria were important for the project's development, but are not important for its actual construction.

In the MNO's opinion, this is fundamentally inconsistent with this Board's statutorily mandated objectives, and its conduct and decisions made over the last eight years on which the MNO has reasonably relied.

And this is not just a matter of procedural fairness. The Federal Court of Appeal in the Long Plain case, which is found at tab 14 of the MNO authorities, has held that "when Indigenous people are involved, the concepts of honour, reconciliation and fair dealing, all matters of constitutional import, will bear significantly on the level of procedure and process that must be afforded."

And this is found in paragraph 108 of that case.

In this instance, these constitutional imperatives demand that the Board follow its own process, and not in a narrow and technical sense, but rather looking at the overall process and the conduct of the Board to date, and asking whether the way the Board is implementing this process is honourable and in furtherance in of the goals of

reconciliation.

Allowing Hydro One's application to proceed, from the MNO's perspective, cannot further the goal of reconciliation with the Métis.

This brings me to my sixth submission, which is that Hydro One cannot use any of the studies or information about traditional land use and traditional knowledge gathered by the MNO and NextBridge for the East-West Tie project.

In the MNO's evidence, there are some disclaimer pages, as well as a sample traditional knowledge consent form, which are included at appendices O, S, T and U. These documents together make clear that all of the information that the MNO and NextBridge gathered is specific to the East-West Tie project, and is also specific to NextBridge. The relationship that the MNO has build with NextBridge, which is critical to consultation, was necessary for the MNO to be able to conduct these studies and feel document sharing the sensitive information that they contain.

The MNO produced two reports as part of its consultation with NextBridge, and both of these reports contain a very similar disclaimer, and I'm going to read you the one from one of these reports, which is found at appendix O, page 2 of the MNO's written evidence. It states that:

"Information collected for the Métis Nation of Ontario occupied lands report for the NextBridge Infrastructure LP

East-West Tie Transmission Project remains the sole property of the Métis Nation of Ontario. The information contained within this document is meant for a single application only. Citation, use, or reproduction of the information contained in this document for any other purpose is permissible only with the written consent from the Métis Nation of Ontario."

The MNO will not consent to Hydro One's use of these studies for its Lake Superior Link project. The MNO's position is that new studies must be conducted if Hydro One wishes to move forward, and this includes, but is not limited to, the new sections of the line that will be in Pukaskwa Park.

Before I conclude my submissions, I would like to address a question that the Board had posed to NextBridge, which was -- I believe it was Board Staff -- whether it was feasible for NextBridge to construct the parts of the line outside Pukaskwa Park, and for Hydro One to construct the portion of the line that is within the park.

From the MNO's perspective, this does not offer a solution to any of the issues that I've raised in my submissions so far. The Board would still be overturning the MNO's reliance on the process to date, and this would still jeopardize the consultation that the MNO and NextBridge have engaged in to date, as well as the agreements that they've reached. And furthermore, it might allow a proponent to construct part of the line that has demonstrated it is not willing to conduct meaningful

consultation with the Métis because it's predetermined Métis interests, nor have discussions with the Métis about equity participation.

Both of these are directly contrary to Ontario policy, the constitution, and this Board's own directions and mandate.

I am coming to the end of my submissions, and I would like to offer a brief summary of what I've tried to communicate to you on behalf of my client in the last forty-five minutes or so.

At its root, Hydro One has proposed a project that is very similar to its failed designation bid, only with a less detailed consultation plan and even less Indigenous equity participation.

If this was the proposal that was put forward in the designation process I have no doubt it would have scored far lower than Hydro One's initial bid.

For the results of the last almost eight years of process around the East-West Tie to be the proponent who failed the first time can now swoop in at the eleventh hour with a worse proposal than its initial bid is absurd and unprincipled.

Allowing a proponent that has excluded opportunities for Métis from economic participation and has prejudged Métis rights to proceed with an application truly makes a mockery of the MNO's participation in this process so far.

The MNO has remained optimistic through this process that a model was being built by the Board that would have

effects beyond this particular project and that could serve as a model for future transmission projects in the province.

The MNO is looking to the Board today to fulfil its statutory mandate and honour the commitments that the MNO has relied on to date. I have no doubt Hydro One will argue that it's technically permissible for its leave-to-construct application to proceed. Hydro One can advance this argument because Hydro One doesn't have to be concerned with the Crown's honour. This Board cannot take a narrow and technical interpretation of the Crown's honour, which demands that the Board respect the processes it has put in place to date and also the reliance that Indigenous peoples have placed on them.

As the MNO has squarely raised its concerns about the honour of the Crown, the Board must, in its ruling on this motion, turn its mind to these concerns. The Supreme Court of Canada has repeatedly held that written reasons are a sign of respect that foster reconciliation, which is the goal of the honour of the Crown, and this is explained in both the Haida and Clyde River cases, found at tabs 13 and 10 of the MNO authorities, at paragraphs 44 and 41 respectively.

This means that this Board must consider the MNO's legitimate concerns in relation to Hydro One's ability to undertake the procedural aspects of consultation with the Métis in a fair and non-discriminatory manner and also consider how Hydro One's plan is one that excludes Métis

equity participation could be consistent with the Board's previous directions and with Ontario policy bearing in mind that these must be implemented generously and in accordance with the honour of the Crown.

The MNO expects that if Hydro One's application is not dismissed this Board will clearly explain how its decision upholds the honour of the Crown in the overall context of this project and the Board's processes since 2011.

We know from the Manitoba Métis Federation case contained at tab 15 of the MNO authorities that:

> "The unfinished business of reconciliation with the Métis is a matter of national and constitutional import."

And that's found at paragraph 141.

The honour of the Crown is one way that the Crown furthers this unfinished business and reconciliation is advanced or undermined with every Crown decision and interaction with the Métis, no matter how small.

And I'd like to leave you with a quote from the opening paragraph of the Mikisew Cree case, which is found at tab 16 of the MNO's authorities, and in that case the Supreme Court wrote that:

> "The fundamental objective of the modern law of Aboriginal and treaty rights is the reconciliation of Aboriginal peoples and not Aboriginal peoples and their respective claims, interests, and ambition. The management of these relationships takes place in the shadow of a long

history of grievances and misunderstanding. The multitude of smaller grievances created by the indifference of some government officials to Aboriginal peoples' concerns and the lack of respect inherent in that indifference has been as destructive of the process of reconciliation as some of the larger and more explosive controversies, and so it is in this case."

And I sincerely hope that that doesn't become the case here as it was in Mikisew.

These are my submissions on behalf of the MNO, and barring any questions from the Board I thank you for your time.

MS. VELSHI: Thank you. So a couple of issues you have raised. If Hydro One, in, you know, full commitment, on good-faith basis, has already embarked with, continues down the consultation and participation route, what do you think is a reasonable period of time to reach agreement with the MNO?

MS. STRACHAN: I think that's a difficult counterfactual to run, given the state of the relationship between the MNO and Hydro One at this point. It did take NextBridge four years to get to the point that we're at today, and they were not starting from what MNO President Froh called a deficit position. They were starting from a, you know, neutral, new proponent position, so Hydro One really does have a lot of ground to make up to demonstrate that good faith, which the MNO hasn't seen yet, so I -- it

is hard to put an exact time on it, but I do think that 14 months is completely unrealistic and a more realistic expectation would be that it would take at least as long as it took NextBridge.

MS. LONG: Ms. Strachan, can I ask you a question? You have said that the MNO, I guess, is -- agrees with NextBridge that this motion to dismiss should be granted, and I just want to delve a little bit further with you on that. So we've heard all the issues that you've raised.

MS. STRACHAN: Mm-hmm.

MS. LONG: And I guess, I mean, this is a preliminary motion to not allow an application to go forward, so I just want to understand the position a little bit better as to why, going forward, with hearing a leave-to application -- a leave-to-construct application and hearing from Hydro One on what their plan is with respect to potential equity partnership for MNO, or a robust consultation process, getting further information from them and delving deeper into that, which is hard to do in a preliminary procedure motion, what is your view on that and why should that not be something that we should consider?

MS. STRACHAN: Sure, so I think there are a few different pieces that fit into the answer to that question.

Obviously, the decision on this motion is not a final decision, because if this motion is not granted you will still hear the leave-to-construct application, but from the MNO's standpoint this Board has set out a process that the MNO has relied on since the designation process began in

2011, and Hydro One has now sought to kind of at the last minute swoop in and substitute a project which on its face has been, frankly, quite offensive to my clients, the way that things have been handled up to this point, so while Hydro One could bring in, you know, new evidence and submit new evidence, on the face of its leave-to-construct application it's deficient. It is a worse application than it put forward in the designation proceeding. It certainly doesn't comply with those filing criteria, and for the MNO, if the Board allows the application to proceed, it really shows that the Board is not committed to the process or the criteria that it set out in the designation hearing, given that Hydro One's application is so deficient on its face, looking at the evidence that this Board has before it today, and it also introduces significant uncertainty to the MNO. The MNO has been negotiating with NextBridge and consulting with NextBridge for the last four years. It's reaching the end of a consultation process. It's nearly at the point where it has an economic participation agreement with NextBridge, and now if Hydro One's application proceeds all of that work, all of those years of work, is threatened to be thrown out the window, and the rug is going to be completely pulled out from underneath the MNO, and looking at the context of this process as a whole, it is the MNO's position that even allowing Hydro One's application to proceed to the leave-to-construct stage, looking at the information in that application and the process to date and the MNO's reliance on that process,

that allowing it to proceed is not consistent with the honour of the Crown.

MS. LONG: Thank you.

Mr. Murray, I understand there has been a change in the order? Is -- am I correct?

MR. MURRAY: That is correct. Staff will be speaking next. Given the hour, I think it might be better to start after lunch. I don't anticipate being a full 45 minutes. Probably more in the range of half an hour. But --

MS. LONG: I'm in your hands if you want to start now or if you'd like to take our one-hour break now and come back and --

MR. MURRAY: I think it would probably be best to take a break now just so we can go seamlessly through.

MS. LONG: Okay. That's fine. We will do that then and we will take one hour for lunch. Thank you.

--- Luncheon recess at 12:42 p.m.

--- On resuming at 1:45 p.m.

MS. LONG: Before we begin, counsel, are there any preliminary matters that we need to deal with?

MR. MURRAY: Madam Chair, there is one matter. It has come to my attention that in marking the exhibit book for MNO, I may have inadvertently referred to it as K1.1; it is K1.2.

MS. LONG: Thank you. Mr. Murray, we will hear from you.

SUBMISSIONS BY MR. MURRAY:

MR. MURRAY: Thank you. Good afternoon, Madam Chair

ONTARIO ENERGY BOARD

FILE NO.:	**EB-2017-0182** **EB-2017-0194** **EB-2017-0364**	**Upper Canada Transmission Inc. (on behalf of NextBridge Infrastructure) and Hydro One Networks Inc.**

VOLUME:	**2**	
DATE:	**October 3, 2018**	
BEFORE:	**Christine Long**	**Presiding Member**
	Allison Duff	**Member**
	Michael Janigan	**Member**

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

THE 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

Hearing held at 2300 Yonge Street,
25th Floor, Toronto, Ontario,
on Wednesday, October 3, 2018,
commencing at 12:40 p.m.

VOLUME 2

BEFORE:

CHRISTINE LONG	Presiding Member
ALLISON DUFF	Member
MICHAEL JANIGAN	Member

A P P E A R A N C E S

LAWREN MURRAY	Board Counsel
NANCY MARCONI SALAH LAVAEE ZORA CRNOJACKI DAVID MARTINELLO	Board Staff
FRED CASS BRIAN MURPHY	NextBridge Infrastructure
ROBERT WARREN ROSALIND COOPER JANET OH	Hydro One Networks Inc. (HONI)
ELISABETH DeMARCO JONATHAN McGILLIVRAY	Anwaatin Inc.
JESSICA LEDOUX CHIEF PETER COLLINS	Bamkushwada Limited Partnership
ETIENNE ESQUEGA	Biinijitiwabik Zaaging Anishnaabek (BZA)
MICHAEL BUONAGURO	Consumers' Council of Canada (CCC)
VIRGINIA GREER	Long Lake Number 58 First Nation
MEGAN STRACHAN CHIEF COLLINS	Métis Nation of Ontario (MNO)
RICHARD STEPHENSON	Power Workers' Union (PWU)
MARK RUBENSTEIN	School Energy Coalition (SEC)
MARK GARNER	Vulnerable Energy Consumers' Coalition (VECC)

we should have collected all the information from interested Indigenous communities.

MS. STRACHAN: So just to clarify, so for the parks portion it would be mid-summer 2019 you would hope to have all of that information?

MS. CROLL: Early to mid, yes, depending on, again, the timing windows of specific studies, roughly.

MS. STRACHAN: And for areas outside the park, so that would be part of your final individual EA if you do need to complete one, you would need some lead time before that submission to incorporate these studies. So if you're aiming for the end of March to do your final EA, you would need two weeks or a month, or how long do you think you would need to incorporate traditional knowledge information?

MS. CROLL: I think it depends on the extent of the information. I don't think I can really give you a hard time line on that.

MS. STRACHAN: I guess I am just trying to understand how much time there is between now and when you submit your final EA for communities to be able to do these studies and give them to you.

MS. CROLL: I mean, we are working with communities now and trying to gather as much information and understand which communities want to be engaged, and much of that is done for the study areas outside the park, as we identified within the park there are some delays due to getting agreements in place with and fully consulting some

Indigenous communities.

MS. STRACHAN: Okay. So I guess we can just say it would need to be sometime before the end of March.

MS. CROLL: Yes, we expect that for the provincial EA document, because, really, it's Parks Canada that's most interested in the park piece, because they have jurisdiction over the park, we would want the studies outside the park to be finalized for March 8th for the provincial process, but we do have a bit more time for Parks Canada.

So, again, the final approval date from Parks Canada that we hope for is August 15th, so we would expect they would need several weeks to review a final document, knowing we submitted a draft document earlier in the year.

So it would be that additional information for seasonal studies that we would be adding, or potentially they could grant approval contingent on completing those studies. It's hard to say what Parks Canada would do. But ideally we would have that information before submitting a final document to Parks Canada.

MS. STRACHAN: Thank you.

I'd like to move on and turn to tab 9 of the MNO compendium. And this is Hydro One's response to OEB Staff IR 11. And I'd like to go to page 5 of this document. And in the second paragraph -- I won't read it out to you, but beginning at line 6, it says that Hydro One had anticipated that the Ministry of Energy would identify the six BLP communities as requiring deeper consultation. And I am

ONTARIO ENERGY BOARD

FILE NO.:	**EB-2017-0182** **EB-2017-0194** **EB-2017-0364**	**Upper Canada Transmission Inc. (on behalf of NextBridge Infrastructure) and Hydro One Networks Inc.**

VOLUME:	**3**	
DATE:	**October 4, 2018**	
BEFORE:	**Christine Long**	**Presiding Member**
	Allison Duff	**Member**
	Michael Janigan	**Member**

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

THE ONTARIO ENERGY BOARD

Upper Canada Transmission Inc. (on behalf of NextBridge Infrastructure)
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- and -

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

Hearing held at 2300 Yonge Street,
25th Floor, Toronto, Ontario,
on Thursday, October 4, 2018,
commencing at 9:43 a.m.

VOLUME 3

BEFORE:

CHRISTINE LONG	Presiding Member
ALLISON DUFF	Member
MICHAEL JANIGAN	Member

A P P E A R A N C E S

LAWREN MURRAY	Board Counsel
NANCY MARCONI SALAH LAVAEE ZORA CRNOJACKI DAVID MARTINELLO	Board Staff
FRED CASS BRIAN MURPHY	NextBridge Infrastructure
ROBERT WARREN ROSALIND COOPER JANET OH	Hydro One Networks Inc. (HONI)
ELISABETH DeMARCO JONATHAN McGILLIVRAY	Anwaatin Inc.
BILL HENDERSON	Batchewana First Nation
JESSICA LEDOUX CHIEF PETER COLLINS	Bamkushwada Limited Partnership (BLP)
ETIENNE ESQUEGA	Biinijitiwabik Zaaging Anishnaabek (BZA)
MICHAEL BUONAGURO	Consumers' Council of Canada (CCC)
VIRGINIA GREER	Long Lake Number 58 First Nation
MEGAN STRACHAN CHIEF COLLINS	Métis Nation of Ontario (MNO)
RICHARD STEPHENSON	Power Workers' Union (PWU)
MARK RUBENSTEIN	School Energy Coalition (SEC)
MARK GARNER	Vulnerable Energy Consumers' Coalition (VECC)

* appearing by teleconference

HONI? How do you expect to do this in such a short time frame?

MS. GOULAIS: So I think Hydro One does have experience negotiating these types of agreements with communities, particularly on the Bruce-to-Milton project. So we do have experience negotiating these agreements, particularly on the equity partnership in the time frames that we have identified, so we are confident we can do it within those time frames based on our experience.

MR. SPENCER: And just slightly -- just because it did take five years doesn't mean that it needed to take five years. So we would be approaching this certainly with an eye to doing it in a shorter period of time, and as Ms. Goulais alludes to, our experience and we believe our approach would allow us to do so.

MS. LEDOUX: Thank you.

So moving on. When exactly are you planning on beginning construction? I think I got a little bit -- I was looking at your Exhibit B, tab 11, schedule 1, and this table outlines -- it's July 2019 as the beginning of construction, but I am guessing this has been changed by reference to your updates two days ago. Am I right?

MR. SPENCER: If I may? So updated information has been provided through interrogatory responses.

So the most efficient places to look, I would suggest, would be Exhibit I, tab 1, schedule 5. And if you are interested in more specificity around the EA timeline, in Exhibit I, tab 1, schedule 14, attachment 1 -- which we

spent some time perhaps the day before yesterday reviewing.

So in answer to your direct question around when would we be planning to start construction, we are looking at this fall, which, in recognition of the reality that on the September 24th evidence that NextBridge filed in response to a Staff interrogatory, they are forecasting to have their individual EA approved around February 2015 -- sorry, February 2019. After which point we would continue to pursue the declaration order, which would allow us to start construction somewhere in the period of September to October 2019.

MS. LEDOUX: Okay, thank you. So I would now ask you to go to tab 2 of BLP's compendium, especially to the answer to -- so it is on page 2. It is the answer to the question (d).

It says at the end of this paragraph:

> "Hydro One remains committed to reaching agreeable terms in principle within 45 days following OEB approval. Given the date of OEB approval is undefined, Hydro One cannot answer the question as to whether or not the status of equity participation discussions or agreements will impact the construction schedule."

So the record so far is a bit contradictory, and this is a bit unclear. So I just want to make sure we understood you clearly.

So if leave to construct is granted, will HONI refrain from beginning construction until DTCA constitutional

[Witness panel confers.]

MS. LEDOUX: So you found the right excerpt?

MS. GOULAIS: We are just having a quick consult here. We will respond to your question in a minute.

MS. LEDOUX: Thank you.

MS. GOULAIS: So to answer your question, the September 4th date you have referenced here with Biigtigong Nishnaabeg. So we signed the capacity funding agreement with Biigtigong in August, August 15th, specifically. So we would have had ongoing discussions with Biigtigong about some of this work.

The notification referenced here would have been to provide communities with sort of an update on what was going on, but the conversations with Biigtigong would have happened prior, given that we have an agreement with them and keep them informed on what's going on.

MS. LEDOUX: So is it right that some First Nations expressed concerns with the short delays HONI was imposing? Has any First Nations to your knowledge expressed that they felt rushed by your process and that they were unable to fully participate with such tight deadlines?

MS. GOULAIS: We have had some communities express concern around tight timelines.

Our timelines are short, and we all understand that communities may not have the capacity to do the work that we are asking them within a short period of time, which is why we have the capacity funding agreements, why we have gone in and met with communities, walked through some of

the information, help them understand what it is, because we --

So to answer your question is yes, we have heard communities' concerns around timelines and we are trying to work with them, both from a capacity perspective as well as a -- we'll come out and work with you directly and walk you through the material and documents, so that you understand it and again, as a part of the terms of reference process, understanding what those concerns are and being able to respond to them.

MS. LEDOUX: So just to make this clear, how does HONI expect First Nations to meaningfully participate on such short notice?

I understand from your answer that you will provide economic funding, capacity funding. But will HONI also provide time for meaningful participation?

MS. GOULAIS: So there are again -- hopefully, I am paraphrasing Ms. Croll's testimony over the last couple of days accurately -- there are ways in which all impacted stakeholders, including Indigenous communities, can seek formal extensions on reviewing terms of reference documents, for example, if they are concerned with the timelines.

As Ms. Croll provided an update yesterday, three of the communities have asked for those timelines by the Ministry of the Environment to allow, via the terms of reference process, for more time.

So there is more time being provided to communities

MS. LONG: I'm having a little difficulty. Maybe, can you just move your mic up maybe just a little bit? Thank you.

MS. STRACHAN: Hopefully that is better.

So the reference for my first question is found at MNO compendium tab 1, and this is an answer to an undertaking that Hydro One provided.

MS. GOULAIS: I'm sorry, Ms. Strachan, I can't hear you.

MS. STRACHAN: Okay. I am going to skooch forward as far as I can. Is that better?

MS. GOULAIS: Yes, thank you.

MS. STRACHAN: Okay. So looking at the response to this undertaking, about halfway down that page, starting at line 18, it states:

> "Once engaged on the project, Hydro One would consider accommodation measures such as, and without being limited to, equity participation with Indigenous communities as identified by the Crown."

And so is my reading of this correct that it is Hydro One's position that Métis and First Nations' economic participation is required as an accommodation measure related to the duty to consult?

MS. GOULAIS: So economic participation is a form of accommodation, yes.

MS. STRACHAN: And is that the only reason why Hydro One would enter into economic participation agreements? Or

is there some other driver for these agreements other than accommodation?

MS. GOULAIS: So the long-term energy plan and the provincial government encourage proponents to consider economic participation on major new transmission development as far as Hydro One is concerned. So that is one of the reasons why we are considering this.

Hydro One also values the importance of providing economic participation to communities that are impacted by our projects and making sure that they are offered and benefiting from long-term sustainable benefits.

So those are some of the reasons why, mainly it is a recommendation from the provincial government to consider those opportunities. It is a part of consultation. And it is -- Hydro One values and understands the importance of ensuring economic participation and long-term sustainable benefits to communities.

We have provided -- I'm sorry, we have a history of doing that, for example, on Bruce-to-Milton, and the Saugeen Ojibway Bruce-to-Milton partnership is an example of where we have been able to achieve that successfully.

So those are the reasons why we are pursuing economic participation for Indigenous communities on this project.

MS. STRACHAN: Thank you. That was a really helpful clarification. I just didn't see anything in your materials that referenced the Ontario policy, so I wanted to know if that was part of your thinking, so thank you for that.

And so I understand that -- and I won't take you to the reference, because I think this is very uncontroversial, but I can if you would like me to.

I understand that there were three community councils represented by the MNO identified by the Crown as requiring consultation. Is that correct?

MS. GOULAIS: I am going to double-check my reference, but I have it right here in front of me. That's correct.

MS. STRACHAN: Thank you. So when I read that in conjunction with the earlier statement from the undertaking, which said that Hydro One would consider accommodation measures with communities identified by the Crown, and including potentially equity, and three MNO community councils were identified by the Crown, I put those together and I think, well, it is possible Hydro One would explore equity with the Métis Nation of Ontario, but I don't see that reflected in other parts of your application, so I would just like a clear yes or no answer.

Are you going to explore equity participation opportunities with the Métis Nation of Ontario?

MS. GOULAIS: No.

MS. STRACHAN: Thank you.

I would like to move now to tab 2 of the MNO compendium. And near the bottom of that first page, and this starts at line 31, it says:

> "We have engaged in discussions with the Métis and will first need to understand their expectations in terms of procurement and other

contract benefits."

So I understand that the package of economic participation that Hydro One might explore with the MNO is around procurement and other contractual benefits. Is that correct?

MS. GOULAIS: That's correct. Consistent with the economic participation your client has with NextBridge.

MS. STRACHAN: And will you be finalizing this prior to your anticipated leave-to-construct date?

MS. GOULAIS: So we have been advised by the Métis Nation of Ontario's counsel to not engage in accommodation discussions, given the Métis Nation of Ontario is precluded from having those discussions because of exclusivity agreements that they have with NextBridge.

So we are not having those discussions at the advice of the Métis Nation of Ontario's counsel.

MS. STRACHAN: And would you have preferred to have negotiated these agreements prior to leave to construct if that option had been open to you?

MS. GOULAIS: We would have preferred to undertake these discussions with the Métis Nation of Ontario if we had the opportunity, absolutely.

MS. STRACHAN: And I didn't see it in the materials when you referenced the e-mail from counsel. I didn't see a date attached to that. Are you able to clarify on what date you received that?

MS. GOULAIS: It was not in a piece of correspondence. It was at a meeting we had with the president of the Métis

It is Exhibit JT2.19, attachment 3, which is, in summary, the presentation to our board of directors and obviously we had a lot of work and lead-up to this.

But if one looks at the bottom of -- it is item 15 in the presentation to the board, slide 15. It speaks specifically to First Nations and Métis considerations.

And the first -- I will just wait for it to come up on the screen, please.

So the first section here specifically around the First Nations of Métis considerations -- I will just read It:

> "Welcome partnerships. Hydro One Networks will file the leave to construct with the OEB indicating that we welcome First Nations partnerships, but are precluded from discussing specifics of the transmission line and benefits with First Nations communities," and my apologies, that should read First Nation and Métis communities, "due to exclusivity agreements with NextBridge."

So the date on this is December 8th and certainly the lead-up to a board presentation on this project, we would have become aware of it in advance of that date.

So we were not specifically made aware through -- until we had correspondence from we believe it to be BLP's counsel in the spring time, which Ms. Goulais alluded to. But at this point, we had an understanding and we adhered to the request not to discuss economic participation due to

the exclusivity agreements with NextBridge.

MS. STRACHAN: Thank you, that is helpful. I did actually have some questions on that timeline, so I am going to -- just give me a moment while I jump to them now, because you have taken me to that topic.

So my understanding then is that you were generally aware that BLP or some First Nations had an exclusivity agreement. But you mentioned earlier that it wasn't until August 23rd of 2018. So this is some months after December of 2017 is when you were first made aware that the MNO actual had one.

So I am wondering, in all of those intervening months, did you ask the MNO if they could discuss economic participation with you?

MS. GOULAIS: Sorry, I think Mr. Spencer said we were generally aware that there were exclusivity agreements with some First Nations and potentially the MNO with NextBridge.

That was a question, I believe -- I will have to check -- that was raised at the hearing in May, and I believe it was an undertaking given to NextBridge to indicate who they in fact had exclusivity agreements with and what, if they were willing to share, those exclusivity agreements indicated.

I have to go and check what that undertaking was, but I do remember that was a conversation that happened at the technical hearing.

So in May, we were fully aware that there were very likely exclusivity agreements with -- well, we knew the BLP

and we were generally aware that there were -- we were going to be notified that there were exclusivity agreements with the Métis.

We were formally notified and advised by counsel on August 23rd, MNO's counsel, on August 23rd at that meeting. But we also received several letters from the Métis Nation of Ontario in May and, in those letters, it was also indicated that the Métis Nation of Ontario was currently negotiating an economic participation agreement with NextBridge and pursuing that path, which precluded them from having similar discussions with Hydro One.

MS. STRACHAN: Sorry, I would like to correct that, because there is a letter on the record from the MNO to you on May 16th that makes it very clear that the MNO did not have an exclusivity agreement with NextBridge at that time, and had not had one.

And so my question to you, which you didn't answer, is whether or not Hydro One ever asked the MNO if they had an exclusivity agreement with NextBridge that would preclude them from discussing economic opportunities with Hydro One.

MS. GOULAIS: We did not specifically ask that question in any correspondence.

As I mentioned, the correspondence the Métis Nation of Ontario would have received would have been similar to all Indigenous communities with regards to a willingness to meet and talk about our project, and have discussions about forms of economic participation on this project.

MS. STRACHAN: Okay. So you did not inquire

specifically?

MS. GOULAIS: I don't have written correspondence that specifically asks that question.

MS. STRACHAN: Thank you. And so I would like to do a brief thought experiment. Had Hydro One known, as it could have, that the MNO was not under any kind of exclusivity arrangement with NextBridge back in December of 2017 or January of 2018 -- so prior to Hydro One's filing of its leave to construct -- had you known that, would you have considered pursuing equity with the MNO at that time rather than with BLP, given that BLP was not able to talk to you?

MS. GOULAIS: So we did not pursue any economic participation discussions of any form before submitting our leave to construct application, which was in February of 2018.

MS. STRACHAN: But in that leave to construct application, you proposed this equity arrangement with BLP only, this 34 percent equity with BLP --

MS. GOULAIS: Correct.

MS. STRACHAN: -- knowing that BLP couldn't talk to you about that arrangement. So I am just wondering why Hydro One would have taken that approach when there were other Indigenous communities that were free to partner with you at that time.

MS. GOULAIS: So I am just going to go and find my -- we have a letter from the Bamkushwada Limited Partnership indicating that they are precluded from having those discussions with us, and I need to check the date on that.

MS. STRACHAN: I think I might be able to clear that up, if you go to tab 7 of the MNO compendium, and attachment 1 to this response is a briefing note from January of 2018. And specifically on page 5 of that briefing note -- oh, we just went past it, just at the top of this page it says -- there it is.

At the top of this page on the first paragraph, it says:

> "Hydro One has not undertaken exchanges with Bamkushwada, nor with Supercom given the alleged exclusivity agreements with NextBridge."

So that makes it fairly clear that in January of 2018, Hydro One was aware of these exclusivity agreements, and that is prior to the filing of your leave to construct application.

So I just thought that might clear up the timeline.

MR. SPENCER: Just to clear it up, at this point it is an alleged exclusivity agreement. We were not specifically informed but...

MS. STRACHAN: Okay, thank you for that clarification.

So my question is, given this likely exclusivity arrangement, that would mean that BLP could not talk to you while NextBridge's application was still proceeding. Did Hydro One at that time consider partnering with an Indigenous community that was actually free to form a partnership, such as the MNO?

MS. GOULAIS: So the rationale for considering equity with the Bamkushwada Limited Partnership communities was --

it was consistent with what we had included in our application through the designation proceeding where we had a partnership, Hydro One had a partnership with those communities where those communities would own a third of the -- they would own a third of the project.

It is also consistent with the proposed economic -- sorry, the proposed equity model that NextBridge was pursuing.

So the rationale for -- and then the third piece is, given that the Bamkushwada Limited Partnership communities have identified themselves as the most directly impacted, that was the rationale for considering a path forward with equity with those communities.

The exclusivity agreement issue was something that we, of course, had to consider. But the three main reasons why we pursued that path, which I have explained, were why we were going do down that path and understanding that those exclusivity agreements, although we didn't understand what were in them, we have never seen them, we still wanted to pursue that path with those Bamkushwada Limited Partnership communities.

MS. STRACHAN: I would like to go to tab 10 of the MNO compendium. This is an excerpt from one of the technical conferences, and if we can just scroll to the testimony.

So this was -- actually, Ms. Goulais and I were discussing the tax benefits of partnering with a First Nation and the benefits to ratepayers of that.

And so you didn't mention that in your response, as to

why BLP was a preferred partner, but I did understand from your evidence at that hearing and in other places in Hydro One's application that part of the reason why you wanted to form an equity partnership with a First Nation specifically was because of these tax benefits. Is that correct?

MS. GOULAIS: No. The tax benefit is an added bonus, I guess you can say, for the ratepayers. It is not a decision-making factor, in terms of who we approach from an equity participation perspective.

As I mentioned earlier, the long-term energy plan and the government's recommendations around, involving Indigenous communities to economically benefit from projects is, again, a part of the rationale for doing this.

The tax benefit, which was a question I got asked at the hearing, at the technical hearing in May, is essentially something that we're familiar with, given our experience on the B2M partnership where the tax benefit is something that ratepayers can benefit from, although I would say it is almost like an added bonus.

It is not something that -- it's not a decision-making factor into whether or not we offer equity to a certain community versus another. It is an added bonus that I was asked about and gave an answer to at the hearing in May.

MS. STRACHAN: Okay. And in that same transcript excerpt on page 1 -- oh, I think it might be -- yes, it is on the page that's in front of you right now. At line 2 it says:

"First Nations are tax-exempt. My understanding

is that the Métis are not."

And I just wanted to just clarify that very quickly, although -- are you aware that the Métis Nation of Ontario acts through a not-for-profit corporation?

MS. GOULAIS: I was not aware, but I am, given the letter that the Métis Nation of Ontario sent to Hydro One.

MS. STRACHAN: Is that the July 25th, 2018 letter?

MS. GOULAIS: I have it with me. One second. I would have to check the date on the letter, but there was a letter Hydro One received from the Métis Nation of Ontario that clearly outlined the Métis Nation of Ontario's potential tax benefit.

MS. STRACHAN: Okay. And I had trouble finding that letter in the record. I tried to find it this morning. So if it is in the record, I would really appreciate it if you could direct me to where it is.

MS. GOULAIS: We don't believe it was filed in the record. It was a letter that had come while the technical hearing was taking place, either the -- I can't remember. I will have to find it. I've got it somewhere. Either the day before, during, or shortly after the technical hearing that letter was received. So I am -- I will have to find the date for you. I don't believe it is in the record, but I will find the date for you of the letter.

MS. STRACHAN: Okay. Well, I was looking for it specifically in NextBridge IR 33. You were asked to file copies of all correspondence for, Indigenous communities as expressed -- had expressed concerns, and so I thought that

this letter would have been part of that response, and I couldn't find it, so --

MS. GOULAIS: Sorry, what IR was it?

MS. STRACHAN: This was a NextBridge IR 33 to Hydro One.

MS. GOULAIS: Which part?

MS. STRACHAN: I would have to pull it up to check which sub-part it was.

MR. SPENCER: Oh, part (b).

MS. STRACHAN: That is the same answer to the IR where you have the long chart that has the log of all of the correspondence, and I didn't see it in that log either, but there was a lot in there, so I may have missed it.

MS. LONG: Are you saying, Ms. Strachan, that you would like to see this record on the record?

MS. STRACHAN: I would like to see it on the record, and then I don't have to continue asking questions about this. I would just think that it would fall under --

MR. WARREN: Madam Chair, if it would assist my friend, when we find the letter we are happy to put it on the record.

MS. STRACHAN: Great, thank you.

MS. LONG: Let's do that.

MS. STRACHAN: I'll move on.

MS. LONG: Can we mark that as an undertaking just so I don't lose track?

MR. MURRAY: We will mark it as Undertaking J3.1.

UNDERTAKING NO. J3.1: TO PROVIDE THE LETTER REQUESTED

BY MS. STRACHAN.

MS. LONG: Thank you.

MS. STRACHAN: Okay. I would like to go back to tab 2 of the MNO compendium. And near the bottom of that page, near the bottom of that page it says, starting at line 33, that:

> "Hydro One anticipates that benefits to the MNO will be equal to or superior to those offered by NextBridge."

And my question about that is, how can you be certain that you will be able to offer equivalent or superior benefits?

MS. GOULAIS: So based on the NextBridge response to an interrogatory indicating that the economic participation agreement they had in place with the Métis Nation of Ontario is in relationship to contracting opportunities on this project, Hydro One and its construction partner, SNC-Lavalin, are committed to working with the Métis Nation of Ontario to explore those potential benefits and looking to maximize those for the Métis Nation of Ontario. That is what this is referring to here.

Sorry, that is my answer.

MS. STRACHAN: Thank you. And are you willing to propose that as a condition on your leave-to-construct approval, that you have reached an agreement that is equivalent to or superior to the one that MNO has with NextBridge? Just yes or no.

MS. GOULAIS: As a condition to our leave-to-construct

application?

MS. STRACHAN: Yes.

MS. GOULAIS: No.

MS. STRACHAN: Thank you.

And I would like to go now to tab 4 of the MNO compendium. And here I have included an excerpt from the May 7th technical conference, and specifically on page 130 of that excerpt. And here is NextBridge's witness, starting at line -- about line 13 and 14. It explains that through consultations with the MNO, NextBridge ended up consulting with two additional MNO community councils, and that those two extra communities ended up becoming part of the economic participation discussions.

So these two community councils are not listed on the Crown's consultation list, and I know Hydro One has indicated that it will consult with them.

And I am wondering, is Hydro One going to include those additional communities in its economic participation negotiations and in an agreement about economic participation?

MS. GOULAIS: Yes. In fact, we met with all of those communities on September 21st and had some discussions around the project itself and, again, the accommodation discussions were not something that we were allowed to have at that point, but those two additional councils that you are referring to, since we received notification from the Métis Nation of Ontario that those communities require consultation on this project, we have since included them

construction cost estimate, or our development phase estimate.

MS. STRACHAN: Okay. So those costs aren't set out anywhere?

MR. SPENCER: And we are not seeking recovery on those costs.

MS. STRACHAN: Sure, okay. Okay, I am almost done. I would like to just touch on something that Ms. Goulais said earlier, which was that -- and I believe this is what you said, is that accommodation follows consultation usually. Is that correct?

MS. GOULAIS: It is an important part of consultation, yes.

MS. STRACHAN: And accommodation can have an economic aspect, I think you've said.

MS. GOULAIS: It is one -- economic participation is one form of accommodation, yes.

MS. STRACHAN: And is it fair to say that economic participation would follow on a spectrum, so a higher form of economic participation as required to accommodate might be something like equity, but there would be a spectrum of economic options?

MS. GOULAIS: I think that is fair, yes.

MS. STRACHAN: So I just want to connect the dots, and you can just let me know if I have any of this incorrect.

So accommodation flows from consultation, as you said, and so often my understanding is that the duty to accommodate doesn't arise at least until after a

consultation has partially taken place, because it is consultation which reveals impacts on rates that might require accommodation. But in the case of the BLP First Nations, Hydro One had already determined before it filed its leave to construct that BLP alone was going to be offered this highest form of accommodation in the form of equity. I didn't get any of that information wrong?

MS. GOULAIS: So just to clarify, there was a significant amount of consultation undertaken with the BLP communities prior to the 2013 designation application.

MS. STRACHAN: But no other --

MS. GOULAIS: Consultation --

MS. STRACHAN: Had been consulted with at that point?

MS. LONG: Sorry, one at a time, please.

MS. STRACHAN: Sorry, I just don't want to keep going over -- I know you have already spoken about why you chose BLP, and I think that is all --

MS. GOULAIS: Well, I was just making clarification, because you said there should be consultation to understand the impacts before accommodation -- a decision about accommodation is made. So I am providing some context and history that there was a significant amount of consultation with the BLP communities leading up to the 2013 proceeding that provided Hydro One at that time with some indication of what the impacts were and so that we had an understanding of what those impacts were and why an equity participation accommodation measure was something that we were considering.

So I would not agree that consultation with those communities just never existed and we sort of just came up with this idea on our own. It was based on a historical relationship and consultation that took place before.

MS. STRACHAN: But there had been no consultation with any other potentially affected communities at that point.

MS. GOULAIS: Specifically in relation to this project, that's right.

MS. STRACHAN: Okay, thank you. I'm sorry, I am very, very close.

MS. LONG: You have about two minutes. I'm sorry, I do have to keep people to the schedule or we're never going to make it through today.

MS. STRACHAN: Sure. I completely understand.

I just have two more things to touch on, and yesterday -- and this is -- we can go to the reference, but I don't think we need to unless you would like to -- yesterday in cross-examination from NextBridge you said repeatedly that reaching an agreement with BLP about equity was a critical assumption to be able to complete the project. I think that is fair.

And does Hydro One consider reaching an economic participation agreement with the MNO to also be a critical assumption to be able to complete the project?

MS. GOULAIS: So that was not an assumption referenced in our leave-to-construct application, which you just referenced. The assumption was specifically to the BLP communities.

did not answer my question.

MS. LONG: Well, I am not sure. Your question to the witness, as I understand it, is based on this paragraph, if the Métis Nation appeals an EA assessment and appeals the decision of this Panel. I am not so sure how she answers the question not knowing what the timing is.

I mean, I am assuming that there would be a delay. I don't know how -- unless you are able to quantify -- a delay could be years. I think that is probably what comes out of your decision whether or not Hydro One has contemplated what a delay of -- I don't want to make the question up here.

So, I mean, if this is indicating that it will be years of delay, I don't know how the witnesses answer that question other than: Have you considered what would happen if there were -- if there was a delay based on a court challenge of a couple of years? I mean, I think that is a fairer question, because I think it is very hard for a lay witness to, you know -- I don't even know how long an EA challenge would take or a challenge of our decision if it was at the Divisional Court, I don't know how long that would take, so that is a hard question for her to answer.

MS. STRACHAN: I understand, and I suppose Hydro One has presented sort of extensive risk matrix charts, and some of them dealt with concerns from Indigenous communities, and there is percentage ratings and projected delays, and I guess I was wondering if Hydro One had considered specifically a court challenge in its risk

matrix anywhere and if they could point me to that. And perhaps they haven't, and perhaps there's reasons why they can't, and that is fine. But I was wondering if it was represented anywhere in the risk assessments that they've undertaken.

MS. LONG: I think that's a better question. I think that is a question that you can answer.

MR. SPENCER: We have not considered that a credible risk. You are speaking to the consequence dimension of risk, and Ms. Goulais was speaking to the likelihood dimension.

So through the -- what appears to be an improving relationship since this letter was sent, certainly the likelihood of this occurrence, from our perspective on this panel, has been substantially reduced and it's not a credible scenario that we would put into a risk methodology matrix to come up with an impact on this particular project.

MS. STRACHAN: Okay, thank you, that is helpful. Those are my questions. Thank you.

MS. LONG: Okay. Mr. Esquaga?

CROSS-EXAMINATION BY MR. ESQUAGA:

MR. ESQUEGA: Hello. I would like to start off my questions concerning the current relations with Biinijitiwabik Zaaging Anishnaabek, who is my client.

MS. LONG: I am sorry to interrupt you, Mr. Esquega. You have a compendium of documents, do you?

MR. ESQUEGA: That's correct, I do.

opportunity to present that question and obtain an answer.

MS. LONG: Okay. But, I mean, I guess to the extent you can answer that question, I think the witness was able to answer that question, and we have spent a bit of time on this now.

So you have other questions beyond this, I am assuming?

MR. ESQUEGA: Absolutely, yes.

MS. LONG: Okay. So are you able to answer that question at this point?

MS. GOULAIS: So I think I have answered the question about, the answer is consistent with what is in the interrogatory that 34 percent currently -- the 34 percent equity interest is currently for BLP.

MR. ESQUEGA: So is there an opportunity for BZA to get equity in this project yet?

MS. GOULAIS: There is an opportunity to have discussions with BZA about project impacts and forms of accommodation, including economic participation.

MR. ESQUEGA: Which may include equity?

MS. GOULAIS: I don't know.

MR. ESQUEGA: Surely if the answer was no you would say that here today?

MS. GOULAIS: So the answer is, we need to understand, through the consultation process, what the impacts are and what forms of accommodation are appropriate, and as we have discussed today, there are several forms of economic participation that -- and from what the chief's affidavit

referred to the compendium pages, not your schedule page.

MS. GOULAIS: Okay.

MR. ESQUEGA: But clearly here from my perspective that is what you are proposing. You are proposing a conditional leave to construct on your ability to negotiate the necessary agreements with Indigenous communities upon approval of this application.

[Witness panel confers]

MS. GOULAIS: So I think to answer the question we have -- I think I have clarified this 45-day reference several times. And the sentence that you are reading:

> "As part of this application Hydro One is requesting to receive a minimum of 45 days to negotiate any necessary agreements with Indigenous communities upon approval of this application."

So that, again, that 45-day time frame is specific to reaching agreeable terms on a commercial partnership. That is what this is about.

MR. ESQUEGA: So is it your position now that what you are saying in your briefing note from January of 2013 to your Board and what is noted in this paragraph are two different things? Because when you read your briefing note and your answers to my questions just previously with respect to that, you acknowledge that this would be a conditional bid in that briefing note to your Board as one of the options.

MR. SPENCER: So our intention was to present one

possible consideration for the Energy Board's review, and they will ultimately decide what the appropriate conditions may be.

We certainly remain committed to establishing this commercial -- the terms of this commercial partnership on a relatively short period. We have thrown a time period here of 45 days out, and I think certainly a lot of the discussion lies ahead of us around what that economic participation might look like, and previous reiteration that with some communities at least we are precluded and excluded from having those conversations right now.

So we look forward to the opportunity, when we can fully discuss not being bound by any contractual obligations they are currently under with other parties. I acknowledge that is not the case in your client's circumstance, but from a generalities perspective, we feel that now is not the right time for us to discuss economic participation.

MS. LONG: So Mr. Spencer, can you clarify for the record, are you seeking this as a condition of our approval in this leave to construct? yes or no?

MR. SPENCER: We are not specifically seeking it. It is at the Panel's discretion on what the conditions would be. But we are not specifically --

MS. LONG: It is not a claim in your order that the order would be conditional upon this?

MR. SPENCER: No, it is a suggestion, not a claim.

MS. LONG: Okay, thank you.

MR. ESQUEGA: So you are throwing BLP under the bus right now and suggesting that because they say that they're the most directly affected then all of the other communities are not?

MS. GOULAIS: No. I am providing you with the evidence that we have, indicating communities that have classified themselves as most directly impacted. I don't think the statement of me throwing anybody under the bus is appropriate, but I would say that the evidence that the BLP communities have submitted in all of their affidavits and all of their evidence to date, that is the language that they have used, which from a consultation and accommodation perspective signals to us that they -- those impacts are impacts that we need to explore with those communities.

MR. ESQUEGA: But your obligation pursuant to your procedural duty delegated by the Ministry of Energy is to determine that.

MS. GOULAIS: So our obligation through the delegation of consultation from the Ministry is to consult with all communities, which we have been doing.

MR. ESQUEGA: But you have only been doing that for a short while, and as you mentioned today with respect to my client specifically you are still quite a ways away from fulfilling that duty.

MS. GOULAIS: We filed our leave-to-construct application in February, and we have undertaken consultation post-February. So we are seven months into our consultation.

MR. ESQUEGA: Thank you. I have no further questions.

MS. LONG: Thank you, Mr. Esquega.

We are going to take our lunch break now, and I would like to come back at quarter to, because we may have a procedural issue that we would like to discuss prior to continuing. Thank you.

--- Luncheon recess taken at 12:53 p.m.

--- On resuming at 1:50 p.m.

MS. LONG: Please be seated. I had alluded to a procedural matter just before the break, but I think that we will deal with that later on this afternoon and proceed with the cross-examination of this panel.

I understand -- Mr. Henderson, are you on the line?

MR. HENDERSON: I am.

MS. LONG: Yes. It is your turn to ask questions of the panel.

CROSS-EXAMINATION BY MR. HENDERSON:

MR. HENDERSON: Thank you. Good afternoon, my name is Bill Henderson and I am counsel for the Batchewana First Nation.

I would like to start by thanking the Board for the opportunity to participate by way of conference call, and especially to express my appreciation to the Board Staff for moving quickly to fix the few glitches we have had over the past few days.

My first question relates to the consultation with Batchewana First Nation. Is it correct to say that Hydro One has established contact and had meetings with the

are not at a stage with Batchewana First Nation where we have explored forms of accommodation.

MR. HENDERSON: I understand that, and my question was not whether you are at a point to commit to that or whether it will happen.

My question is: Is the possibility, the bare possibility of equity participation by Batchewana First Nation off the table at this point?

MS. GOULAIS: Again, I think we would like to first understand the impacts and the proposed accommodation measures before providing an accurate answer to that question.

MR. HENDERSON: Well, I am not getting any kind of an answer at all.

Are you suggesting that when you have the further information of the type you describe, that the possibility of equity participation will be explored, or could be explored?

MS. GOULAIS: So again, Mr. Henderson, my answer is the same. We need to be able to have the opportunity to have those discussions with Batchewana specifically, understand what the impacts are, how to mitigate them, what the appropriate forms of accommodation are.

Should Batchewana indicate that equity is an appropriate form of accommodation and want to have a discussion with Hydro One about that, we would be open to having a discussion.

But I cannot say here today that equity is something

that Hydro One would entertain with Batchewana given I don't understand what the justification for accommodation of that nature is.

MR. HENDERSON: All right. I think that is as much of an answer as I can get and it is probably enough, thank you.

My next question goes to one of the issues addressed by the Chair earlier, and that is cost. For a First Nation to participate in equity participation and to purchase that participation, would that not reduce the cost? Would that capital infusion not reduce the overall cost of the project to Hydro One?

MS. LONG: You can't see it, Mr. Henderson, but the panel is just conferring.

MR. SPENCER: Good morning, Mr. Henderson, this is Andrew Spencer from Hydro One.

MR. HENDERSON: Yes.

MR. SPENCER: If we understand your question correctly, I think the answer is, in the scenario where there is equity participation with Indigenous communities -- and for discussion purposes, they were contribute 34 percent of the ownership of the line -- they would also be asked to contribute the representative equity commensurate with that.

So clarification that it doesn't change the total cost of the project to construct. However, if there was a higher percentage of capital coming from the Indigenous partners in the form of equity, then you are correct in

number under the circumstances that you provided, in the context of the --

MR. SPENCER: I wouldn't characterize it that way per se. I think the 642 is still the appropriate number that we have built up based on all the work to get to this point.

However, we would be alleviating any additional prudency review aside from the section 92 process we're going through now on anything between that 642 and the not-to-exceed price of 683.

MR. BUONAGURO: Thank you. I want to whip through some other stuff, and I am tiptoeing through other people's crosses, so it's going to be a little bit spotty, but bear with me, although this first part I don't think has been addressed directly. And I think it is fairly simple, actually.

I am just looking -- I don't think we have to turn it up. I am looking at the act, the section 96(2) criteria that the Board is looking at in this case, and I think the Board actually mentioned them at the outset of the hearing. And I'm going to go through them backwards and just get some confirmation, I think, from you with respect to those --

MR. SPENCER: I will do my best.

MR. BUONAGURO: Right. So the number 2 criteria -- I will read it in full:

> "Where applicable and in a manner consistent with the policies of the government of Ontario the

promotion of the use of renewable sources..."

In isolation it is sort of a segmented sentence, but essentially that is one of the criteria that can be applied to the project.

My understanding, and confirm it if you could, you are not suggesting that Hydro One's proposal with respect to the promotion of the use of renewable energy sources is any different than the NextBridge proposal?

MR. SPENCER: I really don't think it is.

The project need is defined within the context of the LTEP, and the OSC I think addresses that, so the Hydro One project is no different.

MR. BUONAGURO: Thank you. Going backwards, the number 1, which sets out what I call the other three criteria, price, reliability and quality of electricity service, with respect to quality of electricity service, I think again, and if you could confirm it, there is no difference between the Hydro One proposal and the NextBridge proposal with respect to quality of service once either of the lines, as opposed to both at the same time, are in service. The quality of service should be the same?

MR. SPENCER: At a macro level, you are correct and I agree, the subtlety being we have updated our pricing to account for spatial separation of the new facilities and the aforementioned T1M 115 kV line.

And in the scenario where NextBridge has not currently planned to relocate those facilities, or at least fund the relocation of those facilities, there is a slight

ONTARIO ENERGY BOARD

FILE NO.:	**EB-2017-0182** **EB-2017-0194** **EB-2017-0364**	**Upper Canada Transmission Inc. (on behalf of NextBridge Infrastructure) and Hydro One Networks Inc.**

VOLUME:	**4**	
DATE:	**October 9, 2018**	
BEFORE:	**Christine Long**	**Presiding Member**
	Allison Duff	**Member**
	Michael Janigan	**Member**

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

THE 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

Hearing held at 2300 Yonge Street,
25th Floor, Toronto, Ontario,
on Tuesday, October 9, 2018,
commencing at 9:36 a.m.

VOLUME 4

BEFORE:

CHRISTINE LONG	Presiding Member
ALLISON DUFF	Member
MICHAEL JANIGAN	Member

A P P E A R A N C E S

LAWREN MURRAY	Board Counsel
NANCY MARCONI SALAH LAVAEE ZORA CRNOJACKI DAVID MARTINELLO	Board Staff
FRED CASS BRIAN MURPHY	NextBridge Infrastructure
ROBERT WARREN ROSALIND COOPER	Hydro One Networks Inc. (HONI)
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ETIENNE ESQUEGA	Biinijitiwabik Zaaging Anishnaabek (BZA)
MICHAEL BUONAGURO	Consumers' Council of Canada (CCC)
GLENN ZACHER TAM WAGNER	Independent Electricity System Operator (IESO)
VIRGINIA GREER	Long Lake Number 58 First Nation
MEGAN STRACHAN*	Métis Nation of Ontario (MNO)
RICHARD STEPHENSON	Power Workers' Union (PWU)
MARK RUBENSTEIN	School Energy Coalition (SEC)
MARK GARNER	Vulnerable Energy Consumers' Coalition (VECC)

* appearing by teleconference

CROSS-EXAMINATION BY MS. STRACHAN:

MS. STRACHAN: Perfect. Great. So I only have one question for Ms. Tidmarsh, and it is a follow-up to NextBridge's response to MNO information request number 1, which was in our compendium at the final tab, I believe.

As I only have one question, I don't know if you need to pull it up, but I can give you a moment if you would like to do that.

MS. LONG: Ms. Tidmarsh --

MS. TIDMARSH: Sorry, I'm fine with that if everyone else is. I'm fine with not bringing it up, that's fine.

MS. LONG: All right.

MS. STRACHAN: Okay, perfect.

So in that information request response NextBridge states that since the May 7th, 2018 technical conference NextBridge has signed an Economic Participation Agreement with the Métis Nation of Ontario. And I was just wondering if you could confirm with me on what date that Economic Participation Agreement was executed.

MS. TIDMARSH: Yes. We signed an agreement with the Métis Nation of Ontario this summer, and so in June of this year.

MS. STRACHAN: So June 2018?

MS. TIDMARSH: It is, yes.

MS. STRACHAN: Perfect. Thank you. Those are all of my questions.

MS. LONG: Okay, thank you, Ms. Strachan.

Ms. Greer, I believe you are next.

CANADA

A Consolidation of

THE CONSTITUTION ACTS 1867 to 1982

DEPARTMENT OF JUSTICE
CANADA

Consolidated as of January 1, 2013

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ISBN: 978-0-660-67458-2

CITATION

Citation

34. This Part may be cited as the *Canadian Charter of Rights and Freedoms*.

PART II

RIGHTS OF THE ABORIGINAL PEOPLES OF CANADA

Recognition of existing aboriginal and treaty rights

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

Definition of "aboriginal peoples of Canada"

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

Land claims agreements

(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

Aboriginal and treaty rights are guaranteed equally to both sexes

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons. **(96)**

Commitment to participation in constitutional conference

35.1 The government of Canada and the provincial governments are committed to the principle that, before any amendment is made to Class 24 of section 91 of the "*Constitution Act, 1867*", to section 25 of this Act or to this Part,

(*a*) a constitutional conference that includes in its agenda an item relating to the proposed amendment, composed of the Prime Minister of Canada and the first ministers of the provinces, will be convened by the Prime Minister of Canada; and

(*b*) the Prime Minister of Canada will invite representatives of the aboriginal peoples of Canada to participate in the discussions on that item. **(97)**

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(96) Subsections 35(3) and (4) were added by the *Constitution Amendment Proclamation, 1983* (*see* SI/84-102).

(97) Section 35.1 was added by the *Constitution Amendment Proclamation, 1983* (*see* SI/84-102).

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.

CONTENTS

PART I
GENERAL

Board objectives, electricity

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

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

1.1 To promote the education of consumers.

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

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

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

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

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

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

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

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

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

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

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

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

Board objectives, gas

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

1. To facilitate competition in the sale of gas to users.

2. To protect the interests of consumers with respect to prices and the reliability and quality of gas service.

3. To facilitate rational expansion of transmission and distribution systems.

4. To facilitate rational development and safe operation of gas storage.

5. To promote energy conservation and energy efficiency in accordance with the policies of the Government of Ontario, including having regard to the consumer's economic circumstances.

5.1 To facilitate the maintenance of a financially viable gas industry for the transmission, distribution and storage of gas.

6. To promote communication within the gas industry and the education of consumers. 1998, c. 15, Sched. B, s. 2; 2002, c. 23, s. 4 (2); 2003, c. 3, s. 3; 2004, c. 23, Sched. B, s. 2; 2009, c. 12, Sched. D, s. 2.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Transfer of authority or licence

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

Same

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

Board's powers, general

Power to determine law and fact

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

Order

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

Reference

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

Additional powers and duties

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

Exception

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

Jurisdiction exclusive

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

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

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

Powers, procedures applicable to all matters

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

Conditions of orders

23 (1) The Board in making an order may impose such conditions as it considers proper, and an order may be general or particular in its application. 1998, c. 15, Sched. B, s. 23.

(2) REPEALED: 2003, c. 3, s. 22.

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

2002, c. 1, Sched. B, s. 4 - 27/06/2002

2003, c. 3, s. 22 - 01/08/2003

Written reasons to be made available

24 All written reasons of the Board shall be kept by the secretary and be made available to any person upon payment of the required fee. 1998, c. 15, Sched. B, s. 24; 2003, c. 3, s. 23.

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

2003, c. 3, s. 23 - 01/08/2003

Obedience to orders of Board a good defence

25 An order of the Board is a good and sufficient defence to any proceeding brought or taken against any person in so far as the act or omission that is the subject of the proceeding is in accordance with the order. 1998, c. 15, Sched. B, s. 25.

Assessment

26 (1) Subject to the regulations, the Board's management committee may assess those persons or classes of persons prescribed by regulation with respect to all expenses incurred and expenditures made by the Board in the exercise of any powers or duties under this or any other Act. 1998, c. 15, Sched. B, s. 26 (1) ; 2003, c. 3, s. 24.

Obligation to pay assessment

(2) Every person assessed under subsection (1) shall pay the amount assessed. 1998, c. 15, Sched. B, s. 26 (2).

Order to pay assessment

(3) If a person fails to pay an assessment made under subsection (1), the Board may, without a hearing, order that person to pay the assessment. 1998, c. 15, Sched. B, s. 26 (3).

Failure to pay

(4) If a licensee fails to pay an assessment in accordance with the order, the Board, without a hearing, may suspend or cancel that person's licence. 1998, c. 15, Sched. B, s. 26 (4).

Payment of full amount

(5) The Board may reinstate the licence of a person whose licence was suspended or cancelled under subsection (4) if the person pays all amounts owing under this section. 1998, c. 15, Sched. B, s. 26 (5).

Regulations

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

(a) prescribing persons or classes of persons liable to pay an assessment under subsection (1);

(b) prescribing the frequency of the assessments;

(c) respecting the manner in which an assessment under this section is carried out;

(d) prescribing the amount of the assessment or the method of calculating the amount;

(e) prescribing the proportion of the assessment for which each person or class of persons is liable or a method of determining the proportion;

(f) prescribing such other matters relating to the carrying out of an assessment as the Lieutenant Governor in Council considers appropriate. 1998, c. 15, Sched. B, s. 26 (6).

Scope

(7) A regulation under this section may be general or particular in its application. 1998, c. 15, Sched. B, s. 26 (7).

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

PART VI
TRANSMISSION AND DISTRIBUTION LINES

Definitions, Part VI

89 In this Part,

"electricity distribution line" means a line, transformers, plant or equipment used for conveying electricity at voltages of 50 kilovolts or less; ("ligne de distribution d'électricité")

"electricity transmission line" means a line, transformers, plant or equipment used for conveying electricity at voltages higher than 50 kilovolts; ("ligne de transport d'électricité")

"hydrocarbon line" means a pipe line carrying any hydrocarbon, other than a pipe line within an oil refinery, oil or petroleum storage depot, chemical processing plant or pipe line terminal or station; ("ligne pour hydrocarbures")

"interconnection" means the plant, equipment and apparatus linking adjacent transmission or distribution systems as defined in Part V; ("interconnexion")

"work" means a hydrocarbon line, electricity distribution line, electricity transmission line, interconnection or station. ("ouvrage") 1998, c. 15, Sched. B, s. 89; 2003, c. 3, s. 62.

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

2003, c. 3, s. 62 (1-3) - 01/08/2003

Leave to construct hydrocarbon line

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

(a) the proposed hydrocarbon line is more than 20 kilometres in length;

(b) the proposed hydrocarbon line is projected to cost more than the amount prescribed by the regulations;

(c) any part of the proposed hydrocarbon line,

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

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

(d) criteria prescribed by the regulations are met. 2003, c. 3, s. 63 (1).

Exception

(2) Subsection (1) does not apply to the relocation or reconstruction of a hydrocarbon line unless the size of the line is changed or unless the acquisition of additional land or authority to use additional land is necessary. 1998, c. 15, Sched. B, s. 90 (2); 2003, c. 3, s. 63 (2).

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

2003, c. 3, s. 63 (1, 2) - 01/08/2003

Application for leave to construct hydrocarbon line or station

91 Any person may, before constructing a hydrocarbon line to which section 90 does not apply or a station, apply to the Board for an order granting leave to construct the hydrocarbon line or station. 2003, c. 3, s. 64.

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

2003, c. 3, s. 64 - 01/08/2003

Leave to construct, etc., electricity transmission or distribution line

92 (1) No person shall construct, expand or reinforce an electricity transmission line or an electricity distribution line or make an interconnection without first obtaining from the Board an order granting leave to construct, expand or reinforce such line or interconnection. 1998, c. 15, Sched. B, s. 92 (1).

Exception

(2) Subsection (1) does not apply to the relocation or reconstruction of an existing electricity transmission line or electricity distribution line or interconnection where no expansion or reinforcement is involved unless the acquisition of additional land or authority to use additional land is necessary. 1998, c. 15, Sched. B, s. 92 (2).

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.

Chippewas of the Thames First Nation v. Enbridge Pipelines Inc., [2017] 1 S.C.R. 1099

Supreme Court Reports

Supreme Court of Canada

Present: McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ.

Heard: November 30, 2016;

Judgment: July 26, 2017.

File No.: 36776.

[2017] 1 S.C.R. 1099 | *[2017] 1 R.C.S. 1099* | *[2017] S.C.J. No. 41* | *[2017] A.C.S. no 41* | *2017 SCC 41*

Chippewas of the Thames First Nation Appellant; v. Enbridge Pipelines Inc., National Energy Board and Attorney General of Canada Respondents, and Attorney General of Ontario, Attorney General of Saskatchewan, Nunavut Wildlife Management Board, Suncor Energy Marketing Inc., Mohawk Council of Kahnawà: ke, Mississaugas of the New Credit First Nation and Chiefs of Ontario Interveners

(66 paras.)

Appeal From:

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Case Summary

Catchwords:

Constitutional law — Aboriginal rights — Treaty rights — Crown — Duty to consult — Decision by federal independent regulatory agency which could impact Aboriginal and treaty rights — Pipeline crossing traditional territory of First Nation — National Energy Board approving modification of pipeline — Whether Board's contemplated decision on project's approval amounted to Crown conduct triggering duty to consult — Whether Crown consultation can be conducted through regulatory process — Role of regulatory tribunal when Crown not a party to regulatory process — Scope of duty to consult — Whether there was adequate notice to First Nation that Crown was relying on Board's process to fulfill its duty to consult — Whether Crown's consultation obligation fulfilled — Whether Board's written reasons were sufficient [page1100] to satisfy Crown's obligation — National Energy Board Act, R.S.C. 1985, c. N-7, s. 58.

Summary:

The National Energy Board (NEB), a federal administrative tribunal and regulatory agency, was the final decision maker on an application by Enbridge Pipelines Inc. for a modification to a pipeline that would reverse the flow of part of the pipeline, increase its capacity, and enable it to carry heavy crude. The NEB issued notice to Indigenous groups, including the Chippewas of the Thames First Nation (Chippewas), informing them of the project, the NEB's role, and the NEB's upcoming hearing process. The Chippewas were granted funding to participate in the process, and they filed evidence and delivered oral argument delineating their concerns that the project would increase the risk of pipeline ruptures and spills, which could adversely impact their use of the land. The NEB approved the project, and was satisfied that potentially affected Indigenous groups had received adequate information and had the opportunity to share their views. The NEB also found that potential project impacts on the rights and interests of Aboriginal groups would likely be minimal and would be appropriately

mitigated. A majority of the Federal Court of Appeal dismissed the Chippewas' appeal.

Held: The appeal should be dismissed.

When an independent regulatory agency such as the NEB is tasked with a decision that could impact Aboriginal or treaty rights, the NEB's decision would itself be Crown conduct that implicates the Crown's duty to consult. As a statutory body with the delegated executive responsibility to make a decision that could adversely affect Aboriginal and treaty rights, the NEB acted on behalf of the Crown in approving Enbridge's application. Because the authorized work could potentially adversely affect the Chippewas' asserted Aboriginal and treaty rights, the Crown had an obligation to consult.

The Crown may rely on steps taken by an administrative body to fulfill its duty to consult so long as the [page1101] agency possesses the statutory powers to do what the duty to consult requires in the particular circumstances, and so long as it is made clear to the affected Indigenous group that the Crown is so relying. However, if the agency's statutory powers are insufficient in the circumstances or if the agency does not provide adequate consultation and accommodation, the Crown must provide further avenues for meaningful consultation and accommodation prior to project approval. Otherwise, a regulatory decision made on the basis of inadequate consultation will not satisfy constitutional standards and should be quashed.

A regulatory tribunal's ability to assess the Crown's duty to consult does not depend on whether the government participated in the hearing process. The Crown's constitutional obligation does not disappear when the Crown acts to approve a project through a regulatory body such as the NEB. It must be discharged before the government proceeds with approval of a project that could adversely affect Aboriginal or treaty rights. As the final decision maker on certain projects, the NEB is obliged to consider whether the Crown's consultation was adequate if the concern is raised before it. The responsibility to ensure the honour of the Crown is upheld remains with the Crown. However, administrative decision makers have both the obligation to decide necessary questions of law and an obligation to make decisions within the contours of the state's constitutional obligations.

The duty to consult is not the vehicle to address historical grievances. The subject of the consultation is the impact on the claimed rights of the current decision under consideration. Even taking the strength of the Chippewas' claim and the seriousness of the potential impact on the claimed rights at their highest, the consultation undertaken in this case was manifestly adequate. Potentially affected Indigenous groups were given early notice of the NEB's hearing and were invited to participate in the process. The Chippewas accepted the invitation and appeared before the NEB. They were aware that the NEB was the final decision maker. Moreover, they understood that no other Crown entity was involved in the process for the purposes of carrying out consultation. The circumstances of this case made it sufficiently clear to the Chippewas that the NEB process was intended to constitute Crown consultation and accommodation. Notwithstanding the Crown's failure to provide timely notice that it intended to [page1102] rely on the NEB's process to fulfill its duty to consult, its consultation obligation was met.

The NEB's statutory powers under s. 58 of the *National Energy Board Act* were capable of satisfying the Crown's constitutional obligations in this case. Furthermore, the process undertaken by the NEB in this case was sufficient to satisfy the Crown's duty to consult. First, the NEB provided the Chippewas with an adequate opportunity to participate in the decision-making process. Second, the NEB sufficiently assessed the potential impacts on the rights of Indigenous groups and found that the risk of negative consequences was minimal and could be mitigated. Third, in order to mitigate potential risks, the NEB provided appropriate accommodation through the imposition of conditions on Enbridge.

Finally, where affected Indigenous peoples have squarely raised concerns about Crown consultation, the NEB must usually provide written reasons. What is necessary is an indication that the NEB took the asserted Aboriginal and treaty rights and interests into consideration and accommodated them where appropriate. In this case, the NEB's written reasons are sufficient to satisfy the Crown's obligation. Unlike the NEB's reasons in the companion case *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, *2017 SCC 40*, *[2017] 1 S.C.R. 1069*, the discussion of Aboriginal consultation was not subsumed within an environmental assessment. The NEB reviewed the written and oral evidence of numerous Indigenous groups and identified, in writing, the rights and interests at stake. It assessed the risks that the project posed to those rights and interests and concluded that the risks were minimal. Nonetheless, it provided written and binding conditions of accommodation to adequately address any negative impacts on the asserted rights from the approval and completion of the project.

tribunals may be empowered with both the power to carry out the Crown's duty to consult and the ability to adjudicate on the sufficiency of consultation (para. 58).

C. *The Role of a Regulatory Tribunal When the Crown Is Not a Party*

35 At the Federal Court of Appeal, the majority and dissenting judges disagreed over whether the NEB was empowered to decide whether the Crown's consultation was adequate in the absence of the Crown participating in the NEB process as a party. The disagreement stems from differing interpretations of *Carrier Sekani* and whether it overruled *Standing Buffalo Dakota First Nation v. Enbridge Pipelines Inc.*, *2009 FCA 308*, *[2010] 4 F.C.R. 500*. In *Standing Buffalo*, the Federal Court of Appeal held that the NEB was not required to consider whether the Crown's duty to consult had been discharged before approving a s. 52 pipeline application when the Crown did not formally participate in the NEB's hearing process. The majority in this case held that the principle from *Standing Buffalo* applied here. Because the Crown (meaning, presumably, a relevant federal ministry or department) had not participated in the NEB's hearing process, the majority reasoned that the NEB was under no obligation to consider whether the Crown's duty to consult had been discharged before it approved Enbridge's s. 58 application (para. 59). In dissent, Rennie J.A. [page1116] reasoned that *Standing Buffalo* had been overtaken by this Court's decision in *Carrier Sekani*. Even in the absence of the Crown's participation as a party before the NEB, he held that the NEB was *required* to consider the Crown's duty to consult before approving Enbridge's application (para. 112).

36 We agree with Rennie J.A. that a regulatory tribunal's ability to assess the Crown's duty to consult does not depend on whether the government participated in the NEB's hearing process. If the Crown's duty to consult has been triggered, a decision maker may only proceed to approve a project if Crown consultation is adequate. The Crown's constitutional obligation does not disappear when the Crown acts to approve a project through a regulatory body such as the NEB. It must be discharged before the government proceeds with approval of a project that could adversely affect Aboriginal or treaty rights (*Tsilhqot'in Nation v. British Columbia*, *2014 SCC 44*, *[2014] 2 S.C.R. 257*, at para. 78).

37 As the final decision maker on certain projects, the NEB is obliged to consider whether the Crown's consultation with respect to a project was adequate if the concern is raised before it (*Clyde River*, at para. 36). The responsibility to ensure the honour of the Crown is upheld remains with the Crown (*Clyde River*, at para. 22). However, administrative decision makers have both the obligation to decide necessary questions of law raised before them and an obligation to make their decisions within the contours of the state's constitutional obligations (*R. v. Conway*, *2010 SCC 22*, *[2010] 1 S.C.R. 765*, at para. 77).

[page1117]

D. *Scope of the Duty to Consult*

38 The degree of consultation required depends on the strength of the Aboriginal claim, and the seriousness of the potential impact on the right (*Haida*, at paras. 39 and 43-45).

39 Relying on *Carrier Sekani*, the Attorney General of Canada asserts that the duty to consult in this case "is limited to the [p]roject" and "does not arise in relation to claims for past infringement such as the construction of a pipeline under the Thames River in 1976" (R.F., vol. I, at para. 80).

40 While the Chippewas of the Thames identify new impacts associated with the s. 58 application that trigger the duty to consult and delimit its scope, they also note that "[t]he potential adverse impacts to [the asserted] Aboriginal rights and title resulting from approval of Enbridge's application for modifications to Line 9 are cumulative and serious and could even be catastrophic in the event of a pipeline spill" (A.F., at para. 57). Similarly, the Mississaugas of the New Credit First Nation, an intervener, argued in the hearing that, because s. 58 is frequently applied to discrete pipeline expansion and redevelopment projects, there are no high-level strategic discussions or consultations about the broader impact of pipelines on the First Nations in southern Ontario.

41 The duty to consult is not triggered by historical impacts. It is not the vehicle to address historical grievances. In *Carrier Sekani*, this Court explained that the Crown is required to consult on "adverse impacts flowing from the specific Crown

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.

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.

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Gitxaala Nation v. Canada, [2016] 4 F.C.R. 418

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.

Nos. A-437-14, A-56-14, A-59-14, A-63-14,

A-64-14, A-67-14, A-439-

14, A-440-14, A-442-14, A-443-14,

A-445-14, A-446-14, A-447-14, A-

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

[2016] 4 F.C.R. 418 | *[2016] 4 R.C.F. 418* | *[2016] F.C.J. No. 705* | *[2016] A.C.F. no 705* | *2016 FCA 187*

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.

Canadian Environmental Assessment Act, S.C. 1992, c. 37 (rep. by S.C. 2012, c. 19, s. 66), ss. 2 "designated project", 30, 37.

Canadian Environmental Assessment Act, 2012, S.C. 2012, c. 19, **s. 52**, ss. 2 "designated project", 5, 19, 29, 30, 31, 53.

Constitution Act, 1867, 30 & 31 Vict., c. 3 (U.K.) (as am. by *Canada Act 1982, 1982, c. 11 (U.K.)*, Schedule to the *Constitution Act, 1982*, Item 1) [R.S.C., 1985, Appendix II, No. 5], ss. 9, 10, 13.

Constitution Act, 1982, Schedule B, *Canada Act, 1982, 1982, c. 11 (U.K.)* [R.S.C., 1985, Appendix II, No. 44], s. 35(1).

Federal Courts Rules, SOR/98-106, r. 81.

Interpretation Act, R.S.C., 1985, c. I-21, s. 31(2).

Jobs, Growth and Long-term Prosperity Act, S.C. 2012, c. 19.

National Energy Board Act, R.S.C., 1985, c. N-7, ss. 2 "Minister", 33 to 40, 52, 53, 54, Part IV (58.5-72), 75, 77, 84, 87 to 103.

Order in Council P.C. 2014-809. *Order -- Certificates of Public Convenience and Necessity OC-060 and OC-061 to Northern Gateway Pipelines Inc. for the Northern Gateway Pipelines Project*, (2014) C. Gaz. I, 1645.

(6) *The Governor in Council's decision was reasonable under administrative law principles*

156 In our view, for the foregoing reasons and based on the record before the Governor in Council, we are not persuaded that the Governor in Council's decision was unreasonable on the basis of administrative law principles.

157 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. To rule otherwise would be to second-guess the Governor in Council's appreciation of the facts, its choice of policy, its access to scientific expertise and its evaluation and weighing of competing public interest considerations, matters very much outside of the ken of the courts.

158 This conclusion, however, does not end the analysis.

159 Before us, all parties accepted that Canada owes a duty of consultation to Aboriginal peoples concerning the Project. All parties accepted that if that duty were not fulfilled, the Order in Council cannot stand. In our view, these concessions are appropriate.

160 Section 54 of the *National Energy Board Act* does not refer to the duty to consult. However, in 2012, when Parliament enacted section 54 in its current form, the duty to consult was well established in our law. As all parties before us recognized, it is inconceivable that section 54 could operate in a manner that ousts the duty to consult. Very express language would be required to bring about that effect. And if that express language were present in section 54, tenable arguments could be made that section 54 is inconsistent with the recognition and affirmation of Aboriginal rights under subsection 35(1) of the *Constitution Act, 1982* [Schedule B, *Canada Act 1982, 1982, c. 11 (U.K.)* [R.S.C., 1985, Appendix II, [page492] No. 44]] and, thus, invalid. A number of the First Nations before us were prepared, if necessary, to assert those arguments and they filed notices of constitutional question to that effect.

161 It is a well-recognized principle of statutory interpretation that statutory provisions that are capable of multiple meanings should be interpreted in a manner that preserves their constitutionality: *Eldridge v. British Columbia (Attorney General)*, *[1997] 3 S.C.R. 624*, at paragraph 32; *R. v. Clarke*, *2014 SCC 28*, *[2014] 1 S.C.R. 612*, at paragraphs 14 and 15. Parliament is presumed to wish its legislation to be valid and have force; it does not intend to legislate provisions that are invalid and of no force.

162 Further, it is a well-recognized principle of statutory interpretation that interpretations that lead to absurd or inequitable results should be avoided: *Ontario v. Canadian Pacific Ltd.*, *[1995] 2 S.C.R. 1031*, at paragraph 65.

163 Section 54 of the *National Energy Board Act* and the associated sections constituting the legislative scheme we have described above can be interpreted in such a way as to respect Canada's duty to consult and to remain valid. We interpret these sections in that way.

164 Under section 52 of the *National Energy Board Act*, the National Energy Board, or here the Joint Review Panel, submits its report to a coordinating minister who brings the report before the Governor in Council, along with any other memoranda or information. There is nothing that prevents that coordinating minister, or any other minister who is assigned responsibility for the matter, from bringing to the Governor in Council information necessary for it to satisfy itself that the duty to consult has been fulfilled, to recommend that further conditions be added to any certificate for the project issued under section 54 to accommodate Aboriginal peoples or to ask the National Energy Board to [page493] redetermine the matter and consider making further conditions under section 53.

165 Here, subsection 31(2) of the *Interpretation Act*, R.S.C., 1985, c. I-21 is relevant. It provides that where a statute gives to a public official the power to do a thing, all powers necessary to allow that person to do the thing are also given. Subsection

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

Applied: Delgamuukw v. British Columbia, *[1997] 3 S.C.R. 1010*; referred to: RJR -- MacDonald Inc. v. Canada (Attorney General), *[1994] 1 S.C.R. 311*; R. v. Van der Peet, *[1996] 2 S.C.R. 507*; R. v. Badger, *[1996] 1 S.C.R. 771*; R. v. Marshall, *[1999] 3 S.C.R. 456*; Wewaykum Indian Band v. Canada, *[2002] 4 S.C.R. 245*, *2002 SCC 79*; R. v. Sparrow, *[1990] 1 S.C.R. 1075*; R. v. Nikal, *[1996] 1 S.C.R. 1013*; R. v. Gladstone, *[1996] 2 S.C.R. 723*; [page515] Cardinal v. Director of Kent Institution, *[1985] 2 S.C.R. 643*; Baker v. Canada (Minister of Citizenship and Immigration), *[1999] 2 S.C.R. 817*;

appropriate, accommodate cannot be discharged by delegation to Weyerhaeuser. Nor does Weyerhaeuser owe any independent duty to consult with or accommodate the Haida people's concerns, although the possibility remains that it could become liable for assumed obligations. It follows that I would dismiss the Crown's appeal and allow the appeal of Weyerhaeuser.

11 This case is the first of its kind to reach this Court. Our task is the modest one of establishing a general framework for the duty to consult and accommodate, where indicated, before Aboriginal title or rights claims have been decided. As this framework is applied, courts, in the age-old tradition of the common law, will be called on to fill in the details of the duty to consult and accommodate.

II. Analysis

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

12 It is argued that the Haida's proper remedy is to apply for an interlocutory injunction against the government and Weyerhaeuser, and that therefore it is unnecessary to consider a duty to consult or accommodate. In *RJR -- MacDonald Inc. v. Canada (Attorney General)*, *[1994] 1 S.C.R. 311*, the requirements for obtaining an interlocutory injunction were reviewed. The plaintiff must establish: (1) a serious issue to be tried; (2) that irreparable harm will be [page521] suffered if the injunction is not granted; and (3) that the balance of convenience favours the injunction.

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

14 Interlocutory injunctions may offer only partial imperfect relief. First, as mentioned, they may not capture the full obligation on the government alleged by the Haida. Second, they typically represent an all-or-nothing solution. Either the project goes ahead or it halts. By contrast, the alleged duty to consult and accommodate by its very nature entails balancing of Aboriginal and other interests and thus lies closer to the aim of reconciliation at the heart of Crown-Aboriginal relations, as set out in *R. v. Van der Peet*, *[1996] 2 S.C.R. 507*, at para. 31, and *Delgamuukw v. British Columbia*, *[1997] 3 S.C.R. 1010*, at para. 186. Third, the balance of convenience test tips the scales in favour of protecting jobs and government revenues, with the result that Aboriginal interests tend to "lose" outright pending a final determination of the issue, instead of being balanced appropriately against conflicting concerns: J. J. L. Hunter, "Advancing Aboriginal Title Claims after *Delgamuukw*: The Role of the Injunction" (June 2000). Fourth, interlocutory injunctions are designed as a stop-gap remedy pending litigation of the underlying issue. Aboriginal claims litigation can be very complex and require years and even decades to resolve in the courts. An interlocutory injunction over such a long period of time might work unnecessary prejudice and may diminish incentives on the part of the successful party to compromise. While Aboriginal claims can be and are pursued through litigation, negotiation is a preferable way of reconciling state [page522] and Aboriginal interests. For all these reasons, interlocutory injunctions may fail to adequately take account of Aboriginal interests prior to their final determination.

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

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

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

17 The historical roots of the principle of the honour of the Crown suggest that it must be understood generously in order to

reflect the underlying realities from which it stems. In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act [page523] honourably. Nothing less is required if we are to achieve "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown": *Delgamuukw*, *supra*, at para. 186, quoting *Van der Peet*, *supra*, at para. 31.

18 The honour of the Crown gives rise to different duties in different circumstances. Where the Crown has assumed discretionary control over specific Aboriginal interests, the honour of the Crown gives rise to a fiduciary duty: *Wewaykum Indian Band v. Canada*, *[2002] 4 S.C.R. 245*, *2002 SCC 79*, at para. 79. The content of the fiduciary duty may vary to take into account the Crown's other, broader obligations. However, the duty's fulfilment requires that the Crown act with reference to the Aboriginal group's best interest in exercising discretionary control over the specific Aboriginal interest at stake. As explained in *Wewaykum*, at para. 81, the term "fiduciary duty" does not connote a universal trust relationship encompassing all aspects of the relationship between the Crown and Aboriginal peoples:

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

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

19 The honour of the Crown also infuses the processes of treaty making and treaty interpretation. In making and applying treaties, the Crown must act with honour and integrity, avoiding even the appearance of "sharp dealing" (*Badger*, at para. 41). Thus in *Marshall*, *supra*, at para. 4, the majority of this Court supported its interpretation of a treaty by [page524] stating that "nothing less would uphold the honour and integrity of the Crown in its dealings with the Mi'kmaq people to secure their peace and friendship ...".

20 Where treaties remain to be concluded, the honour of the Crown requires negotiations leading to a just settlement of Aboriginal claims: *R. v. Sparrow*, *[1990] 1 S.C.R. 1075*, at pp. 1105-6. Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty, and to define Aboriginal rights guaranteed by s. 35 of the *Constitution Act, 1982*. Section 35 represents a promise of rights recognition, and "[i]t is always assumed that the Crown intends to fulfil its promises" (*Badger*, *supra*, at para. 41). This promise is realized and sovereignty claims reconciled through the process of honourable negotiation. It is a corollary of s. 35 that the Crown act honourably in defining the rights it guarantees and in reconciling them with other rights and interests. This, in turn, implies a duty to consult and, if appropriate, accommodate.

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

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

[page525]

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

24 The Court's seminal decision in *Delgamuukw*, *supra*, at para. 168, in the context of a claim for title to land and resources, confirmed and expanded on the duty to consult, suggesting the content of the duty varied with the circumstances: from a

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

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

[page526]

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

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

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

28 The government argues that it is under no duty to consult and accommodate prior to final determination of the scope and content of the right. Prior to proof of the right, it is argued, there exists only [page527] a broad, common law "duty of fairness", based on the general rule that an administrative decision that affects the "rights, privileges or interests of an individual" triggers application of the duty of fairness: *Cardinal v. Director of Kent Institution*, *[1985] 2 S.C.R. 643*, at p. 653; *Baker v. Canada (Minister of Citizenship and Immigration)*, *[1999] 2 S.C.R. 817*, at para. 20. The government asserts that, beyond general administrative law obligations, a duty to consult and accommodate arises only where the government has taken on the obligation of protecting a specific Aboriginal interest or is seeking to limit an established Aboriginal interest. In the result, the government submits that there is no legal duty to consult and accommodate Haida interests at this stage, although it concedes there may be "sound practical and policy reasons" to do so.

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

30 As for policy, the government points to practical difficulties in the enforcement of a duty to consult or accommodate unproven claims. If the duty to consult varies with the circumstances from a "mere" duty to notify and listen at one end of the spectrum to a requirement of Aboriginal consent at the other end, how, the government asks, are the parties to agree which level is appropriate in the face of contested claims and rights? And if they cannot agree, how are courts or tribunals to determine this? The [page528] government also suggests that it is impractical and unfair to require consultation before final claims determination because this amounts to giving a remedy before issues of infringement and justification are decided.

31 The government's arguments do not withstand scrutiny. Neither the authorities nor practical considerations support the view that a duty to consult and, if appropriate, accommodate arises only upon final determination of the scope and content of the right.

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

33 To limit reconciliation to the post-proof sphere risks treating reconciliation as a distant legalistic goal, devoid of the "meaningful content" mandated by the "solemn commitment" made by the Crown in recognizing and affirming Aboriginal rights and [page529] title: *Sparrow, supra*, at p. 1108. It also risks unfortunate consequences. When the distant goal of proof is finally reached, the Aboriginal peoples may find their land and resources changed and denuded. This is not reconciliation. Nor is it honourable.

34 The existence of a legal duty to consult prior to proof of claims is necessary to understand the language of cases like *Sparrow*, *Nikal*, and *Gladstone*, *supra*, where confirmation of the right and justification of an alleged infringement were litigated at the same time. For example, the reference in *Sparrow* to Crown behaviour in determining if any infringements were justified, is to behaviour before determination of the right. This negates the contention that a proven right is the trigger for a legal duty to consult and if appropriate accommodate even in the context of justification.

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

36 This leaves the practical argument. It is said that before claims are resolved, the Crown cannot know that the rights exist, and hence can have no duty to consult or accommodate. This difficulty should not be denied or minimized. As I stated (dissenting) in *Marshall, supra*, at para. 112, one cannot "meaningfully discuss accommodation or justification of a right unless one has some idea of the core of that right and its modern scope". However, it will [page530] frequently be possible to reach an idea of the asserted rights and of their strength sufficient to trigger an obligation to consult and accommodate, short of final judicial determination or settlement. To facilitate this determination, claimants should outline their claims with clarity, focussing on the scope and nature of the Aboriginal rights they assert and on the alleged infringements. This is what happened here, where the chambers judge made a preliminary evidence-based assessment of the strength of the Haida claims to the lands and resources of Haida Gwaii, particularly Block 6.

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

38 I conclude that consultation and accommodation before final claims resolution, while challenging, is not impossible, and indeed is an essential corollary to the honourable process of reconciliation that s. 35 demands. It preserves the Aboriginal interest [page531] pending claims resolution and fosters a relationship between the parties that makes possible negotiations, the

preferred process for achieving ultimate reconciliation: see S. Lawrence and P. Macklem, "From Consultation to Reconciliation: Aboriginal Rights and the Crown's Duty to Consult" (2000), 79 *Can. Bar Rev.* 252, at p. 262. Precisely what is required of the government may vary with the strength of the claim and the circumstances. But at a minimum, it must be consistent with the honour of the Crown.

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

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

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

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

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

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

43 Against this background, I turn to the kind of duties that may arise in different situations. In this respect, the concept of a spectrum may be helpful, not to suggest watertight legal compartments but rather to indicate what the honour of the Crown may require in particular circumstances. At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty [page533] on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice. "'[C]onsultation' in its least technical definition is talking together for mutual understanding": T. Isaac and A. Knox, "The Crown's Duty to Consult Aboriginal People" *(2003), 41 Alta. L. Rev. 49*, at p. 61.

44 At the other end of the spectrum lie cases where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required. While precise requirements will vary with the circumstances, the consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal

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

45 Between these two extremes of the spectrum just described, will lie other situations. Every case must be approached individually. Each must also be approached flexibly, since the level of consultation required may change as the process goes on and new information comes to light. The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake. Pending settlement, the Crown is bound by its honour to balance societal and Aboriginal interests in making decisions that may affect Aboriginal claims. The Crown [page534] may be required to make decisions in the face of disagreement as to the adequacy of its response to Aboriginal concerns. Balance and compromise will then be necessary.

46 Meaningful consultation may oblige the Crown to make changes to its proposed action based on information obtained through consultations. The New Zealand Ministry of Justice's *Guide for Consultation with Maori* (1997) provides insight (at pp. 21 and 31):

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

47 When the consultation process suggests amendment of Crown policy, we arrive at the stage of accommodation. Thus the effect of good faith consultation may be to reveal a duty to accommodate. Where a strong *prima facie* case exists for the claim, [page535] and the consequences of the government's proposed decision may adversely affect it in a significant way, addressing the Aboriginal concerns may require taking steps to avoid irreparable harm or to minimize the effects of infringement, pending final resolution of the underlying claim. Accommodation is achieved through consultation, as this Court recognized in *R. v. Marshall*, *[1999] 3 S.C.R. 533*, at para. 22: "... the process of accommodation of the treaty right may best be resolved by consultation and negotiation".

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

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

50 The Court's decisions confirm this vision of accommodation. The Court in *Sparrow* raised [page536] the concept of accommodation, stressing the need to balance competing societal interests with Aboriginal and treaty rights. In *R. v. Sioui*, *[1990] 1 S.C.R. 1025*, at p. 1072, the Court stated that the Crown bears the burden of proving that its occupancy of lands "cannot be accommodated to reasonable exercise of the Hurons' rights". And in *R. v. Côté*, *[1996] 3 S.C.R. 139*, at para. 81, the Court spoke of whether restrictions on Aboriginal rights "can be accommodated with the Crown's special fiduciary relationship with First Nations". Balance and compromise are inherent in the notion of reconciliation. Where accommodation is required in making decisions that may adversely affect as yet unproven Aboriginal rights and title claims, the Crown must balance Aboriginal concerns reasonably with the potential impact of the decision on the asserted right or title and with other societal interests.

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

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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

Hydro One Networks Inc. (Re), 2008 LNONOEB 9

Ontario Energy Board Decisions

Ontario Energy Board

Panel: Pamela Nowina, Presiding Member and Vice-Chair; Cynthia Chaplin, Member; Ken Quesnelle, Member

Decision: September 15, 2008.

No. EB-2007-0050

2008 LNONOEB 9

IN THE MATTER OF the Ontario Energy Board Act, 1998, S.O. 1998, c. 15 (Schedule B) (the "Act"); AND IN THE MATTER OF an Application by Hydro One Networks Inc. pursuant to section 92 of the Act, for an Order or Orders granting leave to construct a transmission reinforcement project between the Bruce Nuclear Generating Station and Milton Switching Station, all in the Province of Ontario.

(278 paras.)

DECISION AND ORDER

7.3 Board Findings

The Board's Jurisdiction to Consider Aboriginal Consultation Issues

246 It is agreed by all parties that Aboriginal consultation is required for the project as a whole. Where the parties disagree is with respect to the scope of the Board's assessment of the consultation. The issue presented by the parties was not whether the Board itself had an obligation or duty to consult but whether the Board had a duty to determine whether the Crown had engaged in adequate consultation. The Board's role, in this case, is to assess whether or not adequate consultation has taken place prior to granting an approval.

247 The Board is not aware of any cases in which a tribunal has been found to be responsible for either conducting Aboriginal consultation, or for making a determination as to whether or not Aboriginal consultation has been sufficient. Neither is the Board aware of any cases stating that a tribunal does not have these responsibilities. It appears that this issue has yet to be addressed by a Canadian court.

248 In the absence of definitive guidance from the courts, the Board must analyze the statutes and precedents that do exist and come to a reasoned conclusion.

249 *Paul* holds that tribunals that have the authority to determine questions of law have the jurisdiction to deal with constitutional issues. The Board accepts that it has the authority and duty to consider questions of law on matters within its jurisdiction.

250 Parties suggested that the Board should not approve the application because the consultation in the EA process is incomplete and/or inadequate, and that the leave to construct should only be granted when the Board determines that the consultation as a whole is complete and has been adequate. The Board does not agree with either proposition.

251 Although the Board has the authority to determine questions of law, the EA process is beyond the Board's jurisdiction and therefore the Board does not have the authority to determine whether the Aboriginal consultation in that process has been sufficient. The Board cannot assume authority over matters that are clearly within the legislated jurisdiction of the EA process. In addition, parties argued that the Board should consider the requirement for Aboriginal consultation related to the development of generation. The Board disagrees. The matter before us is the approval to construct transmission facilities. It does not include the approval of plans for, or development of, generation facilities. Therefore, it is not within the Board's jurisdiction, in this case, to consider the adverse impacts on Aboriginal peoples requiring consultation related to the development of generation.

252 Regardless of the issue of jurisdiction, the consultation surrounding this project as a whole is clearly not complete. The issue for the Board, therefore, is whether a leave to construct may be granted in the absence of a complete consultation.

253 Some parties suggest that the Board may not grant a leave to construct until the consultation for the project as a whole is complete. The Board does not think this is necessary. In a general sense this would be impractical and in this specific case it is unnecessary because the Board's leave to construct order is conditioned on completion of the EA process and the EA process will be dealing with the consultation issues raised in direct relation to this project.

254 There is only one Crown. The requirement is that the Crown ensure that Aboriginal consultation takes place for all aspects of the project. It is not necessary that each Crown actor that is involved with an approval for the project take on the responsibility to ensure that consultation for the entire project has been completed; such an approach would be unworkable. It would lead to confusion and uncertainty and the potential for duplication and inconsistency. It would also potentially lead to a circular situation in which each Crown actor finds itself unable to render a final finding on consultation because it is awaiting the completion of other processes. The *Paul* case directly addresses this practicality issue:

> *Practical considerations will generally not suffice to rebut the presumption that arises from authority to decide questions of law.*

> *This is not to say, however, that practical considerations cannot be taken into consideration in determining what is the most appropriate way of handling a particular dispute where more than one option is available.*

255 The *Paul* case predates the *Haida* case; however in the Board's view this principle applies equally in the consultation context. As a practical matter it is unworkable to have to separate Crown actors considering identical Aboriginal consultation issues for the same project. In fulfilling its responsibility to assess the adequacy of consultation, the Board must necessarily take responsibility for the aspects of the consultation that relate to the matter before it, but should do so with a recognition of any other forum in which consultation issues related to the project are being addressed as well.

The Evidence

256 Based on the evidence and argument before it, the Board is unable to identify any adverse affect on an Aboriginal or treaty right that would occur as a result of the Board's granting a leave to construct. Nor has any party identified any such issue on which there has been a failure or refusal to consult.

257 Neither SON nor MNO called a witness in this proceeding to address issues relating to Aboriginal consultation. MNO did file a number of documents which provided information about the MÚtis People. Several documents reference the asserted MÚtis Aboriginal right to harvest and other land related issues. For example, in a letter to HONI regarding MÚtis consultation on the Bruce-Milton transmission line, the MNO wrote:

> *The Crown has never undertaken a MÚtis traditional land use study and has never provided support to the MNO to undertake such a study in order to identify MÚtis land use, harvesting practices, sacred places, MÚtis cemeteries, etc. in the region. As such, the MNO is very concerned that MÚtis harvesting practices or use of land in the region has not been considered in the development of the Project.*[54]

258 MNO also filed a map showing MÚtis traditional harvesting territories (which include the Bruce peninsula)[55].

259 In its pre-filed evidence, Hydro One filed minutes from a number of meetings between itself and SON. Counsel for SON questioned Hydro One's witnesses regarding the consultation activities it had undertaken with SON. Both the minutes from the meetings and the responses under cross examination from Hydro One witnesses reveal that SON had raised a number of concerns about the proposed project. Specific reference is made to, amongst other things, archaeological issues, biological issues, and issues relating to how the project fits in with the overall generation and transmission plans for the Bruce area. There are references to "local benefit" or economic issues, but the main thrust of the concerns relate to what can best be described as environmental or land related issues.

260 All of the evidence is that the consultation issues relate to the EA process and generation planning decisions. Generation planning is beyond the scope of the project and is the subject of other ongoing consultations. The Memorandum of Understanding between the Ministry of Energy and Hydro One[56] clearly sets out the Crown's acknowledgement of its duty to consult and establishes those areas where Hydro One will undertake some aspects of that consultation for this project. The EA process is a key component.

The Environmental Assessment Process

261 In addition to the Board's approval, Hydro One must complete the EA in order to commence building the project. The EA is conducted under the aegis of the Minister of the Environment, and the EA is not complete until it is approved by the Minister. The terms of reference ("TOR") for the EA were filed with the Board in this proceeding. The TOR includes a section relating to Aboriginal consultation. Section 8.4 of the TOR, entitled "Aboriginal Communities and Groups Engagement/ Consultation Plan", provides an overview of Hydro One's plan to ensure proper consultation and possibly accommodation takes place. The TOR states:

> *Hydro One is committed to working closely with the Crown to ensure that the duty to consult Aboriginal communities and groups is fulfilled. Hydro One's process for Aboriginal communities and groups is designed to provide information on the project to the Aboriginal communities and groups in a timely manner and to respond to and*

> *address issues, concerns or questions raised by the aboriginal communities and groups in a clear and transparent manner throughout the completion of the regulatory approval processes (e.g., the EA process).*[57]

262 In addition to section 8.4, there are numerous additional references to the consultation activities that Hydro One plans to undertake as part of the EA process. Under the heading "Traditional/Aboriginal Land Use", for example, it states:

> *Based on consultation with the Aboriginal communities and groups, the EA will document concerns and issues raised. The EA will also describe how Hydro One proposes to address these concerns. The EA document will describe Aboriginal communities and groups, their traditional uses of the land, and their established and asserted claims.*

263 The EA process, which must be approved by the Minister of the Environment, is specifically charged with addressing Aboriginal consultation issues relating to the Project through its TOR. The Board disagrees with SON'S contention that the environmental assessment process is not an appropriate mechanism for making a determination regarding the Crown's consultation obligations. The duty to consult and, if necessary accommodate, is a duty owed by the Crown to Aboriginal peoples. The Crown must satisfy itself that consultation has been adequate. A determination regarding the adequacy of consultation which is made by a Minister of the Crown after having considered the record of consultation conducted as part of an Environmental Assessment is an entirely appropriate and logical means by which the Crown can assure itself that consultation has been adequate. As the Crown will be making the decision to grant the EA, and given the Crown's broad duty to ensure adequate consultation, it is reasonable to expect the Minister to consider the Crown consultations that have gone on in areas beyond the project, namely generation planning.

264 The Board's leave to construct order is conditioned on the granting of all other necessary approvals and permits. Specifically, the Board's order is conditional on successful completion of the EA process. In this way, the Board has satisfied itself that the process of assessment of the duty to consult (including the duty to accommodate where appropriate) will be completed prior to the commencement of the project and in a practical and workable manner.

The Board's Proposed Aboriginal Consultation Policy

265 Both MNO and SON made reference to the Board's draft Aboriginal Consultation Policy ("ACP").

266 The Board issued the draft ACP for comment on June 18, 2007. A variety of stakeholders, including several Aboriginal groups, made submissions to the Board on the draft policy. Every Aboriginal group that made substantive comments on the draft, including MNO, was opposed to the ACP as drafted and asked that the Board not adopt it. To date, the Board has not adopted the ACP, and it currently has no formal policy with regard to Aboriginal consultation.

267 The Board has recognized that whatever consultation responsibilities it has exist irrespective of the existence of a formal consultation policy. For that reason it has considered Aboriginal consultation issues on a case by case basis as proceedings have come before the Board. In one case cited by MNO, which was released in October 2007, the Board made reference to its proposed ACP. This decision clearly identified the ACP as "proposed" as opposed to final, and should not be taken to mean that the Board has in fact adopted an ACP. In fact, the MNO appears to have recognized that the ACP was still only a draft in a letter to Hydro One dated November 27, 2007:

> *...the Ontario Energy Board has recently issued a draft Aboriginal Consultation Policy that requires all proponents to provide information in their future applications to the Board on how the Aboriginal communities who may be affected by the projects being proposed by proponents have been consulted.*[58]

8. PRICE IMPACTS

268 Section 96(2) of the OEB Act states that the Board shall only consider the interests of consumer's with respect to prices and the reliability and quality of electricity service when it considers whether the construction of an electricity transmission line is in the public interest. With respect to the cost estimate and rate impact, Hydro One maintained that the $635 million cost estimate was confirmed throughout hearing and that the resulting 9-10% increase in the Transmission Network Pool Rate and

0.45% increase in total electricity bill to a typical residential customer was acceptable. Hydro One noted that the estimated impact for a typical residential customer is $0.50/month.

269 Mr. Barlow questioned the accuracy of the project budget and suggested that Hydro One should be responsible for any cost overruns.

8.1 Board Findings

270 The Board concludes that based on the estimates provided, the rate impact is acceptable. The Board notes, however, that Hydro One is at risk for any cost increases and that any cost overruns will be subject to a prudence review at a subsequent rate application.

9. CONDITIONS OF APPROVAL

271 Board staff prepared a set of standard conditions of approval. Hydro One indicated that it did not have any concerns with the conditions as proposed.

272 The Fallis Group submitted that if an Order is granted it should also be conditional on the issuance of a Development permit under the Niagara Escarpment Planning and Development Act.

273 Hydro One responded that a specific condition related to the Niagara Escarpment Planning and Development Act is not required as it is already covered in the general condition proposed by Board staff regarding other permits and approvals.

274 Board staff and a number of intervenors proposed conditions related to the uncertainty of the generation forecast. In its reply, Hydro One maintained that to "impose conditions in response to which Hydro One has not had the opportunity to provide evidence, would violate the principles of natural justice and fairness" (p.2).

9.1 Board Findings

275 The Board has determined that the forecast of wind generation is reasonable and contains very little risk. The Board has also determined that the proposed project is the preferred option from an economic point of view, regardless of whether Bruce B is retired or refurbished or replaced. Therefore, while the Board does not agree with Hydro One's submission that imposing conditions without providing the applicant an opportunity to provide related evidence violates the principles of natural justice and fairness, conditions related to the generation forecast are unnecessary in this case.

10. COST DECISION AND ORDER

276 The board will issue its decision and order on cost awards shortly.

277 THE BOARD ORDERS THAT:

278 Leave to construct the transmission reinforcement project between the Bruce Nuclear Generating Station and Milton Switching Station is hereby granted to Hydro One Networks Inc. subject to the Conditions of Approval attached as Appendix "C" to this Order. The transmission reinforcement project includes making certain modifications at the Milton, Bruce A and Bruce B transmission stations to accommodate the new transmission lines.

DATED at Toronto, September 15, 2008

ONTARIO ENERGY BOARD

Original Signed By

Pamela Nowina

Ka'a'Gee Tu First Nation v. Canada (Attorney General), [2007] F.C.J. No. 1006

Federal Court Judgments

Federal Court

Vancouver, British Columbia

Blanchard J.

Heard: January 23, 2007.

Judgment: July 20, 2007.

Docket T-1379-05

[2007] F.C.J. No. 1006 | *2007 FC 763* | *30 C.E.L.R. (3d) 166* | *[2007] 4 C.N.L.R. 102* | *315 F.T.R. 178* | *162 A.C.W.S. (3d) 522* | *2007 CarswellNat 2067*

Between Chief Lloyd Chicot suing on his own behalf and on behalf of all members of the Ka'a'Gee Tu First Nation and the Ka'a'Gee Tu First Nation, Applicants, and The Attorney General of Canada and Paramount Resources Ltd. Respondents

(134 paras.)

Case Summary

Aboriginal law — Aboriginal rights — Infringement — Application by a First Nation for judicial review of a decision of the federal Crown that approved recommendations for an oil and gas project that affected their rights allowed — Crown breached its duty to consult with the First Nation before it approved the project — It did so by modifying the recommendations without consulting with the First Nation and by approving those recommendations — As a remedy Crown was to engage in meaningful consultation with the First Nation.

Administrative law — Judicial review and statutory appeal — Standard of review — Correctness — Reasonableness — Remedies — Application by a First Nation for judicial review of a decision of the federal Crown that approved recommendations for an oil and gas project that affected their rights allowed — Some aspects of the decision were reviewable on a standard of reasonableness and others were reviewable on a standard of correctness — Crown breached its duty to consult with the First Nation before it approved the project — It did so by modifying the recommendations without consulting with the First Nation and by approving those recommendations — As a remedy — Crown was to engage in meaningful consultation with the First Nation.

Natural resources law — Oil and gas — Aboriginal rights — Application by a First Nation for judicial review of a decision of the federal Crown that approved recommendations for an oil and gas project that affected their rights allowed — Crown breached its duty to consult with the First Nation before it approved the project — It did so by modifying the recommendations without consulting with the First Nation and by approving those recommendations — As a remedy Crown was to engage in meaningful consultation with the First Nation.

Application by the Ka'a'Gee Tu First Nation for judicial review of a decision of the federal Crown -- Crown approved recommendations for a project that involved extensive oil and gas development in the Northwest Territories -- Project was located in land over which the First Nation claimed Aboriginal and treaty rights -- First Nation claimed that the project negatively impacted their established treaty rights and their asserted Aboriginal rights -- Crown breached its duty to consult and to accommodate before it approved the project -- HELD: Application allowed -- Crown breached its duty to consult with the First Nation before it decided to approve the project -- Parties were to engage in a process of meaningful consultation with the view of taking into account the First Nation's concerns and, if necessary, to accommodate those

concerns -- Standard of review of government decisions which were challenged on the basis of allegations that the government failed to consult and accommodate depended on the question involved -- Question of whether the regulatory process at issue and its implementation discharged the Crown's duty to consult and accommodate was to be examined on the standard of reasonableness -- Questions that concerned the existence and content of the duty were to be reviewed on the standard of reasonableness -- Duty to consult and accommodate was founded on the honour of the Crown -- It required that the Crown, acting honourably, participate in the processes of negotiation with a view to effecting reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake -- Crown failed to set aside reserve lands as it was required to do so by a treaty -- Fact that the First Nation had this land claim elevated the content of the Crown's duty to consult -- Project would have a significant and lasting effect on the land over which the First Nation asserted Aboriginal title -- It would also have a significant impact on the First Nation's broad harvesting rights to hunt, trap and fish -- First Nation's right's imposed a greater duty on the Crown to consult -- Duty in these circumstances required the First Nation to participate in the decision-making process -- First Nation had many opportunities to express their concerns in writing or at public meetings -- They were also involved in the approval process -- Problem in this case was that the Crown decided to modify the recommendations for approval of the project without consulting with the First Nation -- Some of the recommendations were of particular importance to the First Nation -- Crown unilaterally changed what had been, up to that point, a meaningful process of consultation and by so doing it breached its duty to the First Nation -- It had a duty to consult with respect to the modifications it sought to make to the recommendations for approval of the project.

Counsel

Louise Mandell, Timothy Howard/Cheryl Sharvit for the Applicant.

Donna Tomljanovic for the Respondent Attorney General.

Everett Bunnell, Jung Lee for the Respondent Paramount.

Vickie Giannacopoulos, Ronald M. Kruhlak for the Respondent Mackenzie Valley.

REASONS FOR ORDER AND ORDER

INDEX

Paragraph

the conduct contemplated by the Crown would adversely affect the harvesting rights of the Applicants in order to determine the content of the Crown's duty to consult. Here, however, there is also an asserted claim to Aboriginal title which may have a bearing on the Crown's duty. It is therefore necessary before turning to consider the seriousness of the potential adverse effect upon the right or title claimed to consider the strength of the Applicants' asserted claim.

102 Here, the Applicants assert that their Aboriginal rights were never surrendered by Treaty 11. Contrary to INAC's expressed understanding of the Crown's duty to consult articulated in response to IR 1.2.31, which I reproduced at paragraph 66, above, *Haida* teaches that the Aboriginal group need not prove that an asserted right exists before the obligation is triggered. While there is no dispute as to the existence of the Applicants' harvesting rights, the parties disagree about whether Treaty 11 extinguished Aboriginal title. The Applicants understand Treaty 11 to be a peace and friendship treaty and contend that the Aboriginal signatories to the Treaty did not, thereby, intend to surrender Aboriginal title. The Crown construes Treaty 11 as an extinguishment agreement which essentially provides for the cession and surrender of the described lands subject to "the right to pursue their usual vocations of hunting, trapping and fishing." The Crown acknowledges that it did not fulfill the reserve creation obligation of that Treaty. The Applicants contend that the Deh Cho did not allow reserve lands to be set aside for them pursuant to the Treaty because they did not want to submit to the Crown's interpretation of the Treaty.

103 Since 1998, the issue of Aboriginal title, "the land question" has been subject to the "Deh Cho Process" whereby the Crown in right of Canada, the Deh Cho First Nations, and the Government of the NWT have agreed to seek a negotiated resolution to the land question. The Process has led to a negotiated Framework Agreement signed in 2001. Two subsequent agreements were negotiated: an Interim Resource Development Agreement and an Interim Measures Agreement. The latter agreement established the *Deh Cho Land Use Planning Committee*, which contemplates a collaborative approach in land use planning of the Deh Cho territory, which includes the Cameron Hills area.

104 The Respondent contends that the land claims process was entered into on a without prejudice basis and should therefore have no bearing on the determination of the strength of the Applicants' asserted claim. I disagree. While not a determinative factor, the Crown's participation in the land claims process is a factor that may inform the Court in assessing the strength of the Applicants' asserted claim.

105 The evidence establishes that a significant component of Treaty 11, the Crown's obligation to set aside reserve lands, was not fulfilled. This is not disputed by the parties to these proceedings. The eventual legal impact of the Crown's failure to fulfill its Treaty obligation on the Applicants' asserted Aboriginal title remains to be determined on a more fulsome record at trial. For the purposes of this application, I think it appropriate to consider these underlying circumstances to the land title issues which flow from Treaty 11 as material factors in assessing the strength of the Applicants' asserted claim.

106 The Crown's obligation under Treaty 11, to set aside reserve lands, is arguably a fundamental aspect of the Treaty. Here, the Crown failed to set aside reserve lands for the exclusive use of the Aboriginal community as required under the terms of the Treaty. The question then is what effect, if any, does the Crown's breach of its Treaty obligation have on the Applicants' asserted claim of Aboriginal title? In my view, the question, at a minimum, raises a serious issue to be debated. Further, the Crown's acceptance of the comprehensive land claims process with the view of seeking a negotiated resolution to the land question, and resulting agreements, lend further support to the Applicants' argument that their asserted claim is meritorious. The above factors must be balanced against the language in the Treaty, which in the Respondent's submission clearly supports an agreement to relinquish Aboriginal title in the lands at issue.

107 It is not for the Court, in the conduct of a judicial review application, to decide the Applicants' asserted claim. Such questions are best left to be dealt with in the context of a trial where the ethnographic, historical, and traditional evidence is comprehensively reviewed and considered. In the circumstances of this case, while it is difficult to quantify the strength of the Applicants' asserted claim, I am nevertheless satisfied that the claim raises a reasonably arguable case. This determination is based on a review of the record before me, the nature of the asserted claim, the language of Treaty 11, the Crown's breach of its Treaty obligation and the Crown's commitment to the comprehensive land claims process. In the circumstances, these factors serve to elevate the content of the Crown's duty to consult from what would otherwise have been the case had the content of the duty been based exclusively on the interpretation of the Treaty rights in play.

Long Plain First Nation v. Canada (Attorney General), [2015] F.C.J. No. 961

Federal Court Judgments

Federal Court of Appeal

Winnipeg, Manitoba

Pelletier, Dawson and Stratas JJ.A.

Heard: January 13, 2014.

Judgment: August 14, 2015.

Docket: A-34-13

[2015] F.C.J. No. 961 | *[2015] A.C.F. no 961* | *2015 FCA 177* | *388 D.L.R. (4th) 209* | *2015 CarswellNat 3463* | *256 A.C.W.S. (3d) 502* | *[2015] 4 C.N.L.R. 14* | *475 N.R. 142* | *476 N.R. 233*

Between Her Majesty the Queen, represented by the Attorney General of Canada, The Hon. Chuck Strahl in his capacity as Minister of Indian Affairs and Northern Development, The Hon. Vic Toews in his capacity as President of Treasury Board, The Hon. Peter MacKay in his capacity as Minister of National Defence, The Hon. Lawrence Cannon in his capacity as Minister Responsible for Canada Lands Company, Appellants, and Long Plain First Nation, Peguis First Nation, Roseau River Anishinabe First Nation, Sagkeeng First Nation, Sandy Bay Ojibway First Nation, Swan Lake First Nation, Collectively being Signatories to Treaty No. 1 and known as "Treaty One First Nations", Respondents

(164 paras.)

Case Summary

Aboriginal law — Aboriginal status and rights — Duties of the Crown — Fair dealing and reconciliation — Consultation and accommodation — Appeal by Crown from order setting aside Crown's transfer of property to non-agent Crown corporation allowed in part and cross-appeal by two first nations from finding that Crown did not owe them duty to consult dismissed — Property lay within first nation territory, to which first nations were successors — Respondent first nations claimed to have right to purchase property in priority to other potential purchasers — No evidence that two first nations had any land claim — Canada breached duty to consult with four other first nations as it did not provide timely information — Remedy inappropriate.

Aboriginal law — Communities and governance — Duties of the Crown — Fair dealing and reconciliation — Consultation and accommodation — Appeal by Crown from order setting aside Crown's transfer of property to non-agent Crown corporation allowed in part and cross-appeal by two first nations from finding that Crown did not owe them duty to consult dismissed — Property lay within first nation territory, to which first nations were successors — Respondent first nations claimed to have right to purchase property in priority to other potential purchasers — No evidence that two first nations had any land claim — Canada breached duty to consult with four other first nations as it did not provide timely information — Remedy inappropriate.

Aboriginal law — Aboriginal lands — Duties of the Crown — Fair dealing and reconciliation — Consultation and accommodation — Appeal by Crown from order setting aside Crown's transfer of property to non-agent Crown corporation allowed in part and cross-appeal by two first nations from finding that Crown did not owe them duty to consult dismissed — Property lay within first nation territory, to which first nations were successors — Respondent first nations claimed to have right to purchase property in priority to other potential purchasers — No evidence that two first nations had any land claim — Canada breached duty to consult with four other first nations as it did not provide timely information — Remedy inappropriate.

Appeal by the Federal Crown from an order setting aside its transfer of property to a non-agent Crown corporation and cross-appeal by two first nations from finding that Crown did not owe them a duty to consult. In November 2007, the Crown sold a property in Winnipeg, known as the Kapyong Operational Barracks, to the Canada Lands Company Limited, a non-agent Crown corporation, for the purpose of disposal by that corporation. The property, which was used for military purposes, lay within territory that was dealt with in a treaty that was entered into in 1871 between the Crown and certain aboriginal bands located within that territory. The respondents, several first nations, were successors to the treaty signatories. They made various claims as to their interest in the property, including that they had the right to purchase the property in priority to other potential purchasers. The Crown took the position that the interests of the first nations in the property did not take priority as the property had been classified as strategic. The Crown elected to sell the property to the Canada Lands Company. The first nations applied for judicial review seeking a declaration that the Crown breached its duty to consult and restraining the sale. The federal court allowed the application with respect to four of the first nations. It found that the Crown had a duty to consult with them about the sale and it failed to consult meaningfully within the scope of that duty. The court dismissed the applications of two of the first nations finding that there was insufficient evidence to support their claims.

HELD: Appeal allowed in part and cross-appeal dismissed.

With respect to the two first nations whose application was dismissed, there was no evidence that they had a land claim or any unfulfilled per capita reserve land entitlement. The Crown conceded that it had a duty to consult. Given the treaty and the agreements between Canada and the other four first nations, the duty to consult went beyond the minimal level of consultation. The Crown must be in close and meaningful communication with those four fist nation, given them relevant information in a timely way, respond to relevant questions, consider carefully their fully-informed concerns, representations and proposals and, in the end, advise as to the ultimate course of action it would adopt and why. The Crown failed to fulfil its duty to consult as it did not provide timely notice of the possibility of the availability of the property or provide information about the property. The restraining order could not be sustained. There was on reason to believe the Crown, now aware of its obligations, would not govern itself accordingly. The supervision order was inappropriate as it was not requested and it was unnecessary as the Crown had not refused its responsibilities, but rather was unsure of them.

Statutes, Regulations and Rules Cited:

Constitution Act, 1930, s. 11

Appeal From:

Appeal from a judgment of the Honourable Mr. Justice Hughes dated December 20, 2012, No. T-139-08.

Counsel

Jeff Dodgson, Dayna Anderson, for the Appellants.

Harley Schachter, Kaitlyn Lewis, for the Respondents, Long Plain First Nation and Roseau River Anishinabe First Nation.

Jeffrey R.W. Rath, for the Respondent, Peguis First Nation.

Royal Proclamation of 1763 (reproduced in R.S.C. 1985, App. II, No. 1), the British Crown pledged its honour to the protection of Aboriginal peoples from exploitation by non-Aboriginal peoples. Repeatedly, this idea has been held to pervade this area of law: see, e.g., *R. v. Taylor* (1981), 34 O.R. (2d) 360, 62 C.C.C. (2d) 227 (Ont. C.A.), leave to appeal refused, [1981] S.C.C.A. No. 377 [1981] 2 S.C.R. xi; *R. v. Sparrow*, [1990] 1 S.C.R. 1075, 70 D.L.R. (4th) 385; *R. v. Nikal*, [1996] 1 S.C.R. 1013, 133 D.L.R. (4th) 658; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, 153 D.L.R. (4th) 193; *R. v. Badger*, [1996] 1 S.C.R. 771, 133 D.L.R. (4th) 324; *R. v. Marshall*, [1999] 3 S.C.R. 456, 177 D.L.R. (4th) 513; *Mikisew Cree First Nation*, above. Indeed, today the honour of the Crown has been confirmed as a constitutional principle: *Beckman*, above at paragraph 42. The honour of the Crown "is always at stake in its dealings with Aboriginal peoples" and "is not a mere incantation, but rather a core precept that finds its application in concrete practices": *Haida Nation*, above at paragraphs 16-19.

106 Because the concepts of honour, reconciliation and fair dealing are relevant, "[t]he history of dealings between the Crown and a particular First Nation" are also relevant: *Mikisew Cree First Nation*, above at paragraph 63.

107 To date, the Supreme Court has developed the law concerning the scope and nature of the duty to consult as a special body of law, divorced from normal administrative law principles. To me, however, administrative law remains relevant and the special body of law developed by the Supreme Court is consistent with it. It may be useful in cases like the present to think of the duty to consult within the rubric of administrative law. After all, the matter before us is an administrative law matter--an appeal of an application for judicial review brought to challenge the Treasury Board's November 23, 2007 discretionary decision to sell the Barracks property to the Canada Lands Company.

108 As a general matter, where the legal and practical interests of a party may be affected by a discretionary decision, the decision-maker must afford procedural fairness: see, *e.g.*, *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643, 24 D.L.R. (4th) 44. A higher level of procedures is often accorded where the legal and practical interests are higher: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193 at paragraph 25. Where the decision-maker has undertaken that certain procedures will be followed, for example in an agreement, the decision-maker will be held to them: *Baker* at paragraph 26. And where Aboriginal peoples are concerned, the concepts of honour, reconciliation and fair dealing--matters of constitutional import--may bear upon the matter, sometimes significantly, affecting the level of procedures to be afforded.

109 In this case, Canada, the owner of the Barracks property, seeks to divest itself of that property. In doing so, it has a discretion concerning how to go about that. To the four respondents, this is unique and important land: see paragraph 30, above. And the concepts of honour, reconciliation and fair dealing are very much in play in this case.

110 On this last-mentioned point, I note that in lieu of full satisfaction of the four respondents' unfulfilled right to receive lands under the per capita provision of Treaty No. 1--which is now impossible--the four respondents now have rights under the treaty land entitlement agreements concerning lands that may come available. As land buying opportunities arise over time, the four respondents may be able to acquire lands, presently unascertained, in substitution for the lands promised under the unsatisfied per capita provision of Treaty No. 1. The treaty land entitlement agreements work to facilitate the realization of those opportunities.

111 It is true that, putting aside arguments that might be made in a future case on the basis of specific wording in some of the agreements, the four respondents do not have rights to demand specific conveyances of particular lands in Manitoba that become available. However, the purpose of the agreements is clear: over time, the four respondents will acquire as yet unascertained lands in Manitoba to fulfil the unmet promise of Treaty No. 1. By signing the treaty land entitlement agreements, Canada has committed to that purpose.

112 In this case, the Barracks property owned by Canada has become available for disposition. To the extent that each of the First Nations' treaty land entitlement agreement applies to the Barracks property, Canada is no ordinary vendor. Canada's exercise of discretion concerning how to go about the sale of the Barracks property must be guided by the treaty land entitlement agreements it has signed, its commitment to the purpose of those agreements, and the concepts of honour, reconciliation and fair dealing. In this case, honour, reconciliation and fair dealing--often expressed as the obligation to avoid sharp dealing--are particularly important because of Canada's broken promise in Treaty No. 1. The agreements, designed to

Manitoba Metis Federation Inc. v. Canada (Attorney General), [2013] 1 S.C.R. 623

Supreme Court Reports

Supreme Court of Canada

Present: McLachlin C.J. and LeBel, Deschamps,* Fish, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

Heard: December 13, 2011;

Judgment: March 8, 2013.

File No.: 33880.

[2013] 1 S.C.R. 623 | *[2013] 1 R.C.S. 623* | *[2013] S.C.J. No. 14* | *[2013] A.C.S. no 14* | *2013 SCC 14*

Manitoba Metis Federation Inc., Yvon Dumont, Billy Jo De La Ronde, Roy Chartrand, Ron Erickson, Claire Riddle, Jack Fleming, Jack McPherson, Don Roulette, Edgar Bruce Jr., Freda Lundmark, Miles Allarie, Celia Klassen, Alma Belhumeur, Stan Guiboche, Jeanne Perrault, Marie Banks Ducharme and Earl Henderson, Appellants; v. Attorney General of Canada and Attorney General of Manitoba, Respondents, and Attorney General for Saskatchewan, Attorney General of Alberta, Métis National Council, Métis Nation of Alberta, Métis Nation of Ontario, Treaty One First Nations and Assembly of First Nations, Interveners.

(303 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Case Summary

Subsequent History:

* Editor's Note: Deschamps J. took no part in the judgment.

Catchwords:

Aboriginal law — Métis — Crown law — Honour of the Crown — Canadian government agreeing in 1870 to grant Métis children shares of 1.4 million acres of land and to recognize existing Métis landholdings — Promises set out in ss. 31 and 32 of the Manitoba Act, 1870, a constitutional document — Errors and delays interfering with division and granting of land among eligible [page624] recipients — Whether Canada failing to comply with the honour of the Crown in the implementation of ss. 31 and 32 of the Manitoba Act, 1870.

Aboriginal law — Métis — Fiduciary duty — Canadian government agreeing in 1870 to grant Métis children shares of 1.4 million acres of land and to recognize existing Métis landholdings — Promises set out in ss. 31 and 32 of the Manitoba Act, 1870, a constitutional document — Errors and delays interfering with division and granting of land among eligible recipients — Whether Canada in breach of fiduciary duty to Métis.

Limitation of actions — Declaration — Appellants seeking declaration in the courts that Canada breached obligations to implement promises made to the Métis people in the Manitoba Act, 1870 — Whether statute of limitations can

prevent courts from issuing declarations on the constitutionality of Crown conduct — Whether claim for declaration barred by laches.

Civil procedure — Parties — Standing — Public interest standing — Manitoba Act, 1870, providing for individual land entitlements — Whether federation advancing collective claim on behalf of Métis people should be granted public interest standing.

Summary:

After Confederation, the first government of Canada embarked on a policy aimed at bringing the western territories within the boundaries of Canada, and opening them up to settlement. Canada became the titular owner of Rupert's Land and the Red River Settlement; however, the French-speaking Roman Catholic Métis, the dominant demographic group in the Red River Settlement, viewed with alarm the prospect of Canadian control leading to a wave of English-speaking Protestant settlers that would threaten their traditional way of life. In the face of armed resistance, Canada had little choice but to adopt a diplomatic approach. The Red River settlers agreed to become part of Canada, and Canada agreed to grant 1.4 million acres of land to the Métis children (subsequently set out in s. 31 of the *Manitoba Act*) and to recognize existing landholdings (subsequently set out in s. 32 of the *Manitoba Act*). The Canadian government began the process of implementing s. 31 in early [page625] 1871. The land was set aside, but a series of errors and delays interfered with dividing the land among the eligible recipients. Initially, problems arose from errors in determining who had a right to a share of the land promised. As a result, two successive allotments were abandoned; the third and final allotment was not completed until 1880. The lands were distributed randomly to the eligible Métis children living within each parish.

While the allotment process lagged, speculators began acquiring the Métis children's yet-to-be granted interests in the s. 31 lands, aided by a range of legal devices. During the 1870s and 1880s, Manitoba passed five statutes, now long spent and repealed, dealing with the technical requirements to transfer interests in s. 31 lands. Initially, Manitoba moved to curb speculation and improvident sales of the children's interests, but in 1877, it changed course, allowing sales of s. 31 entitlements.

Eventually, it became apparent that the number of eligible Métis children had been underestimated. Rather than starting a fourth allotment, the Canadian government provided that remaining eligible children would be issued with scrip redeemable for land. The scrip was based on 1879 land prices; however, when the scrip was delivered in 1885, land prices had increased so that the excluded children could not acquire the same amount of land granted to other children. In the decades that followed, the position of the Métis in the Red River Settlement deteriorated. White settlers soon constituted a majority in the territory and the Métis community began to unravel.

The Métis sought a declaration that (1) in implementing the *Manitoba Act*, the federal Crown breached fiduciary obligations owed to the Métis; (2) the federal Crown failed to implement the *Manitoba Act* in a manner consistent with the honour of the Crown; and (3) certain legislation passed by Manitoba affecting the implementation of the *Manitoba Act* was *ultra vires*. The trial judge dismissed the claim for a declaration on the ground that ss. 31 and 32 of the *Manitoba Act* gave rise to neither a fiduciary duty nor a duty based on the honour of the Crown. He also found that the challenged Manitoba [page626] statutes were constitutional, and, in any event, the claim was barred by limitations and the doctrine of laches. Finally, he found that the Manitoba Metis Federation Inc. ("MMF") should not be granted standing in the action, since the individual plaintiffs were capable of bringing the claims forward. A five-member panel of the Manitoba Court of Appeal dismissed the appeal.

Held (Rothstein and Moldaver JJ. dissenting): The appeal should be allowed in part. The federal Crown failed to implement the land grant provision set out in s. 31 of the *Manitoba Act, 1870* in accordance with the honour of the Crown.

Per McLachlin C.J. and LeBel, Fish, Abella, Cromwell and Karakatsanis JJ.: The MMF should be granted standing. The action advanced is a collective claim for declaratory relief for the purposes of reconciling the descendants of the Métis people of the Red River Valley and Canada. It merits allowing the body representing the collective Métis interest to come before the court.

The obligations enshrined in ss. 31 and 32 of the *Manitoba Act* did not impose a fiduciary duty on the government. In the Aboriginal context, a fiduciary duty may arise in two ways. First, it may arise as a result of the Crown assuming

discretionary control over specific Aboriginal interests. Where the Crown administers lands or property in which Aboriginal peoples have an interest, such a duty may arise if there is (1) a specific or cognizable Aboriginal interest, and (2) a Crown undertaking of discretionary control over that interest. The interest must be a communal Aboriginal interest in land that is integral to the nature of the Métis distinctive community and their relationship to the land. It must be predicated on historic use and occupation, and cannot be established by treaty or by legislation. Second, and more generally, a fiduciary duty may arise if there is (1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary; (2) a defined person or class of persons vulnerable to a fiduciary's control; and (3) a legal or substantial practical interest of the beneficiary that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control.

[page627]

Although the Crown undertook discretionary control of the administration of the land grants under ss. 31 and 32 of the *Manitoba Act*, the Métis are Aboriginal, and they had an interest in the land, the first test for fiduciary duty is not made out because neither the words of s. 31 nor the evidence establish a pre-existing communal Aboriginal interest held by the Métis. Their interests in land arose from their personal history, not their shared distinct Métis identity. Nor was a fiduciary duty established on the basis of an undertaking by the Crown. While s. 31 shows an intention to benefit the Métis children, it does not demonstrate an undertaking to act in their best interests, in priority to other legitimate concerns. Indeed, the discretion conferred by s. 31 to determine "such mode and on such conditions as to settlement and otherwise" belies a duty of loyalty and an intention to act in the best interests of the beneficiary, forsaking all other interests. Section 32 simply confirmed the continuance of different categories of landholdings in existence shortly before or at the creation of the new province. It did not constitute an undertaking on the part of the Crown to act as a fiduciary in settling the titles of the Métis landholders.

However, the Métis are entitled to a declaration that the federal Crown failed to act with diligence in implementing the land grant provision set out in s. 31 of the *Manitoba Act*, in accordance with the honour of the Crown. The ultimate purpose of the honour of the Crown is the reconciliation of pre-existing Aboriginal societies with the assertion of Canadian sovereignty. Where this is at stake, it requires the Crown to act honourably in its dealings with the Aboriginal peoples in question. This flows from the guarantee of Aboriginal rights in s. 35(1) of the Constitution. The honour of the Crown is engaged by an explicit obligation to an Aboriginal group enshrined in the Constitution. The Constitution is not a mere statute; it is the very document by which the Crown asserted its sovereignty in the face of prior Aboriginal occupation. An explicit obligation to an Aboriginal group in the Constitution engages the honour of the Crown.

The honour of the Crown speaks to *how* obligations that attract it must be fulfilled, so the duties that flow from it vary with the situation. In the context of the implementation of a constitutional obligation to an Aboriginal people, the honour of the Crown requires that [page628] the Crown: (1) take a broad purposive approach to the interpretation of the promise; and (2) act diligently to fulfill it. The question is whether, viewing the Crown's conduct as a whole in the context of the case, it acted with diligence to pursue the fulfillment of the purposes of the obligation. The duty to act diligently is a narrow and circumscribed duty. Not every mistake or negligent act in implementing a constitutional obligation to an Aboriginal people brings dishonour to the Crown, and there is no guarantee that the purposes of the promise will be achieved. However, a persistent pattern of errors and indifference that substantially frustrates the purposes of a solemn promise may amount to a betrayal of the Crown's duty to act honourably in fulfilling its promise.

Section 31 of the *Manitoba Act* is a solemn constitutional obligation to the Métis people of Manitoba, an Aboriginal people, and it engaged the honour of the Crown. Its immediate purpose was to give the Métis children a head start over the expected influx of settlers from the east. Its broader purpose was to reconcile the Métis' Aboriginal interests in the Manitoba territory with the assertion of Crown sovereignty over the area that was to become the province of Manitoba. By contrast, s. 32 was a benefit made generally available to all settlers and did not engage the honour of the Crown.

Although the honour of the Crown obliged the government to act with diligence to fulfill s. 31, it acted with persistent inattention and failed to act diligently to achieve the purposes of the s. 31 grant. This was not a matter of occasional negligence, but of repeated mistakes and inaction that persisted for more than a decade, substantially defeating a purpose of s. 31. This was inconsistent with the behaviour demanded by the honour of the Crown: a government sincerely intent on fulfilling the duty that its honour demanded could and should have done better.

None of the government's other failures -- failing to prevent Métis from selling their land to speculators, issuing scrip in place of land, and failing to cluster family allotments -- were in themselves inconsistent with the honour of the Crown. That said, the impact of these measures was exacerbated by the delay inconsistent with [page629] the honour of the Crown: it increased improvident sales to speculators; it meant that when the children received scrip, they obtained significantly less

than the 240 acres provided to those who took part in the initial distribution, because the price of land had increased in the interim; and it made it more difficult for Métis to trade grants amongst themselves to achieve contiguous parcels.

It is unnecessary to consider the constitutionality of the implementing statutes because they are moot.

The Métis claim based on the honour of the Crown is not barred by the law of limitations. Although claims for personal remedies flowing from unconstitutional statutes may be time-barred, the Métis seek no personal relief and make no claim for damages or for land. Just as limitations acts cannot prevent the courts from issuing declarations on the constitutionality of legislation, limitations acts cannot prevent the courts from issuing a declaration on the constitutionality of the Crown's conduct. So long as the constitutional grievance at issue here remains outstanding, the goals of reconciliation and constitutional harmony remain unachieved. In addition, many of the policy rationales underlying limitations statutes do not apply in an Aboriginal context. A declaration is a narrow remedy and, in some cases, may be the only way to give effect to the honour of the Crown.

Nor is the claim barred by the equitable doctrine of laches. Given the context of this case, including the historical injustices suffered by the Métis, the imbalance in power that followed Crown sovereignty, and the negative consequences following delays in allocating the land grants, delay on the part of the appellants cannot, by itself, be interpreted as some clear act which amounts to acquiescence or waiver. It is rather unrealistic to suggest that the Métis sat on their rights before the courts were prepared to recognize those rights. Furthermore, Canada has not changed its position as a result of the delay. This suffices to find that the claim is not barred by laches. However, it is difficult to see how a court, in its role as guardian of the Constitution, could apply an equitable doctrine to defeat a claim for a declaration that a Constitutional provision has not been fulfilled as required by the honour of the Crown.

[page630]

Per Rothstein and Moldaver JJ. (dissenting): There is agreement with the majority that there was no fiduciary duty here, that no valid claims arise from s. 32 of the *Manitoba Act*, that any claims that might have arisen from the now repealed Manitoba legislation on the land grants are moot, that the random allocation of land grants was an acceptable means for Canada to implement the s. 31 land grants, and that the MMF has standing to bring these claims. However, the majority proposes a new common law constitutional obligation derived from the honour of the Crown. The courts below did not consider this issue and the parties did not argue it before this Court. This is an unpredictable expansion of the scope of the duties engaged under the honour of the Crown. The claim based on the honour of the Crown is also barred by both limitations periods and laches.

While a duty of diligent fulfillment may well prove to be an appropriate expansion of Crown obligations, and while a faster process would most certainly have been better, the duty crafted by the majority creates an unclear rule that is unconstrained by laches or limitation periods and immune from legislative redress, making the extent and consequences of the Crown's new obligations impossible to predict. It is not clear when an obligation rises to the "solemn" level that triggers the duty, what types of legal documents will give rise to solemn obligations, whether an obligation with a treaty-like character imposes higher obligations than other constitutional provisions, and whether it is sufficient for the obligation to be owed to an Aboriginal group. The idea that how the government is obliged to perform a constitutional obligation depends on how closely it resembles a treaty should be rejected. It would be a significant expansion of Crown liability to permit a claimant to seek relief so long as the promise was made to an Aboriginal group, without proof of an Aboriginal interest sufficient to ground a fiduciary duty, and based on actions that would not constitute a breach of fiduciary duty.

Even if the honour of the Crown was engaged and required the diligent implementation of s. 31, and even if this duty was not fulfilled, any claims arising from such a cause of action have long been barred by statutes of limitations and the equitable doctrine of laches. [page631] Limitations and laches cannot fulfill their purposes if they are not universally applicable. Limitations periods apply to the government as they do to all other litigants both generally and in the area of Aboriginal claims. This benefits the legal system by creating certainty and predictability, and serves to protect society at large by ensuring that claims against the Crown are made in a timely fashion so that the Crown is able to defend itself adequately.

Limitations periods have existed in Manitoba continuously since 1870, and, since 1931, Manitoba limitations legislation has provided a six-year limitation period for all causes of action, whether the cause of action arose before or after the legislation came into force. Manitoba has a 30-year ultimate limitation period. The Crown is entitled to the benefit of those limitations periods. The policy rationales underlying limitations periods do not support the creation of an exemption from those periods

in this case. Manitoba legislation does not contain an exception from limitations periods for declaratory judgments and no such exception should be judicially created. In this case, the risk that a declaratory judgment will lead to additional remedies is fully realized: the Métis plan to use the declaration in extra-judicial negotiations with the Crown, so the declaration exposes the Crown to an obligation long after the time when the limitations period expired.

Moreover, this Court has never recognized a general exception from limitations for constitutionally derived claims. Rather, it has consistently held that limitations periods apply to factual claims with constitutional elements. While limitations periods do not apply to prevent a court from declaring a statute unconstitutional, the Métis' claim about unconstitutional statutes is moot. The remaining declaration sought concerns factual issues and alleged breaches of obligations which have always been subject to limitation periods. In suggesting that the goal of reconciliation must be given priority in the Aboriginal context, it appears that the majority has departed from the principle that the same policy rationales that support limitations generally should apply to Aboriginal claims.

These claims are also subject to laches. Laches can be used to defend against equitable claims that have [page632] not been brought in a sufficiently timely manner, and as breaches of fiduciary duty can be subject to laches, it would be fundamentally inconsistent to permit certain claims based on the honour of the Crown to escape the imputation of laches. Both branches of laches are satisfied: the Métis have knowingly delayed their claim by over a hundred years and in so doing have acquiesced to the circumstances and invited the government to rely on that, rendering the prosecution of this action unreasonable. As to acquiescence, the trial judge found that the Métis had the required knowledge in the 1870s, and that finding has not been shown to be an error. The suggestion that it is "unrealistic" to expect someone to have enforced their claim before the courts were prepared to recognize those rights is fundamentally at odds with the common law approach to changes in the law. Delay in making the grants cannot be both the wrong alleged and the reason the Crown cannot access the defence of laches: laches are always invoked as a defence by a party alleged to have wronged the plaintiff. If assessing conscionability is reduced to determining if the plaintiff has proven the allegations, the defence of laches is rendered illusory. The imbalance in power between the Métis and the government did not undermine their knowledge, capacity or freedom to the extent required to prevent a finding of acquiescence. The inference that delays in the land grants caused the vulnerability of the Métis was neither made by the trial judge nor supported by the record. In any event, laches are imputed against vulnerable people just as limitations periods are applied against them.

As to reliance, had the claim been brought promptly, the unexplained delays referred to as evidence for the Crown acting dishonourably may well have been accounted for, or the government might have been able to take steps to satisfy the Métis community.

Finally, while not doing so explicitly, the majority departs from the factual findings of the trial judge, absent a finding of palpable and overriding error, in two main areas: (1) the extent of the delay in distributing the land, and (2) the effect of that delay on the Métis. Manifestly, the trial judge made findings of delay. Nonetheless these findings and the evidence do not reveal a pattern of inattention, a lack of diligence, or that the purposes of the land grant were frustrated. That alone would nullify any claim the Métis might have based on a breach of duty [page633] derived from the honour of the Crown, assuming that any such duty exists.

Cases Cited

By McLachlin C.J. and Karakatsanis J.

Applied: *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 2 S.C.R. 524; *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261; *R. v. Powley*, 2003 SCC 43, [2003] 2 S.C.R. 207; **referred to:** *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236; *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574; *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511; *Wewaykum Indian Band v. Canada*, 2002 SCC 79, [2002] 4 S.C.R. 245; *Guerin v. The Queen*, [1984] 2 S.C.R. 335; *R. v. Blais*, 2003 SCC 44, [2003] 2 S.C.R. 236; *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103; *Taku River Tlingit First Nation v. British*

(*Elder Advocates*, at para. 36)

61 The first question is whether an undertaking has been established. In order to elevate the Crown's obligations to a fiduciary level, the power retained by the Crown must be coupled with an undertaking of loyalty to act in the beneficiaries' best interests in the nature of a private law duty: *Guerin*, at pp. 383-84. In addition, "[t]he party asserting the duty must be able to point to a forsaking by the alleged fiduciary of the interests of all others in favour of those of the beneficiary, in relation to the specific legal interest at stake": *Elder Advocates*, at para. 31.

62 While s. 31 shows an intention to benefit the Métis children, it does not demonstrate an undertaking to act in their best interests, in priority to other legitimate concerns, such as ensuring land was available for the construction of the railway and opening Manitoba for broader settlement. Indeed, the discretion conferred by s. 31 to determine "such mode and on such conditions as to settlement and otherwise" belies a duty of loyalty and an intention to act in the best interests of the beneficiary, forsaking all other interests.

63 Nor did s. 32 constitute an undertaking on the part of the Crown to act as a fiduciary in settling the titles of the Métis landholders. It confirmed the continuance of different categories of landholdings in existence shortly before or at the creation of the new province (C.A., at paras. 673 and 717), and applied to all landholders (C.A., at para. 717; see also paras. 674 and 677).

[page658]

(4) Conclusion on Fiduciary Duty

64 We conclude that Canada did not owe a fiduciary duty to the Métis in implementing ss. 31 and 32 of the *Manitoba Act*.

C. *Did Canada Fail to Comply With the Honour of the Crown in the Implementation of Sections 31 and 32 of the Manitoba Act?*

(1) The Principle of the Honour of the Crown

65 The appellants argue that Canada breached a duty owed to the Métis based on the honour of the Crown. The phrase "honour of the Crown" refers to the principle that servants of the Crown must conduct themselves with honour when acting on behalf of the sovereign.

66 The honour of the Crown arises "from the Crown's assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people": *Haida Nation*, at para. 32. In Aboriginal law, the honour of the Crown goes back to the *Royal Proclamation* of 1763, which made reference to "the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection": see *Beckman v. Little Salmon/Carmacks First Nation*, *2010 SCC 53*, *[2010] 3 S.C.R. 103*, at para. 42. This "Protection", though, did not arise from a paternalistic desire to protect the Aboriginal peoples; rather, it was a recognition of their strength. Nor is the honour of the Crown a paternalistic concept. The comments of Brian Slattery with respect to fiduciary duty resonate here:

> The sources of the general fiduciary duty do not lie, then, in a paternalistic concern to protect a "weaker" or "primitive" people, as has sometimes been suggested, but rather in the necessity of persuading native peoples, at a time when they still had considerable military capacities, [page659] that their rights would be better protected by reliance on the Crown than by self-help.

("Understanding Aboriginal Rights" (1987), 66 *Can. Bar Rev.* 727, at p. 753)

The ultimate purpose of the honour of the Crown is the reconciliation of pre-existing Aboriginal societies with the assertion of Crown sovereignty. As stated in *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, *2004 SCC 74*, *[2004] 3 S.C.R. 550*, at para. 24:

Mikisew Cree First Nation v. Canada (Governor General in Council), [2018] S.C.J. No. 40

Supreme Court of Canada Judgments

Supreme Court of Canada

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe and Martin JJ.

Heard: January 15, 2018;

Judgment: October 11, 2018.

File No.: 37441.

[2018] S.C.J. No. 40 | *[2018] A.C.S. no 40* | *2018 SCC 40*

Chief Steve Courtoreille on behalf of himself and the members of the Mikisew Cree First Nation, Appellant; v. Governor General in Council, Minister of Aboriginal Affairs and Northern Development, Minister of Finance, Minister of the Environment, Minister of Fisheries and Oceans, Minister of Transport and Minister of Natural Resources, Respondents, and Attorney General of Quebec, Attorney General of New Brunswick, Attorney General of British Columbia, Attorney General of Saskatchewan, Attorney General of Alberta, Champagne and Aishihik First Nations, Kwanlin Dün First Nation, Little Salmon Carmacks First Nation, First Nation of Na-Cho Nyak Dun, Teslin Tlingit Council, First Nations of the Maa-nulth Treaty Society, Assembly of First Nations, Grand Council of the Crees (Eeyou Istchee), Cree Nation Government, Manitoba Metis Federation Inc., Advocates for the Rule of Law, Federation of Sovereign Indigenous Nations and Gitanyow Hereditary Chiefs, Interveners

(172 paras.)

Appeal From:

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Case Summary

Aboriginal law — Aboriginal status and rights — Duties of the Crown — Fair dealing and reconciliation — Consultation and accommodation — Practice and procedure — Courts — Jurisdiction — Appeal by Mikisew Cree First Nation from Federal Court of Appeal judgment setting aside declaration that they were entitled to notice and opportunity to make submissions about omnibus bills affecting Aboriginal and environmental rights dismissed — To date, duty to consult had only been applied to executive conduct and conduct taken on behalf of the executive — Duty to consult was not only means to give effect to Crown's honour when Aboriginal or treaty rights could be adversely affected by legislation — Duty to consult doctrine did not apply to legislature, and Federal Court was not validly seized of judicial review application.

Government law — Crown — Federal parliament — Parliamentary procedure and practice — Crown privilege — Parliamentary privilege — Appeal by Mikisew Cree First Nation from Federal Court of Appeal judgment setting aside declaration that they were entitled to notice and opportunity to make submissions about omnibus bills affecting Aboriginal and environmental rights dismissed - To date, duty to consult had only been applied to executive conduct and conduct taken on behalf of the executive — Duty to consult was not only means to give effect to Crown's honour when Aboriginal or treaty rights could be adversely affected by legislation — Duty to consult doctrine did not apply to legislature, and Federal Court was not validly seized of judicial review application.

Appeal by Mikisew Cree First Nation (Mikisew) from a judgment of the Federal Court of Appeal setting aside a declaration by the Federal Court. The Mikisew were descendants of an Aboriginal group that ceded a large amount of land to the Crown in exchange for certain guarantees, including the right to hunt, trap, and fish. They were not consulted in the process leading to the enactment of two omnibus bills that had significant effects on Canada's environmental protection regime, including the Canadian Environmental Assessment Act and the Fisheries Act. The Mikisew brought an application for judicial review under the Federal Courts Act (Act) seeking various declarations and orders concerning the Minister of Aboriginal Affairs and Northern Development's, Minister of Finance's and other Ministers' duty to consult them. The Federal Court determined that the proceedings were not precluded by s. 2(2) of the Act and granted a declaration finding that the Mikisew were entitled to notice and an opportunity to make submissions about the omnibus bills affecting their rights. The Federal Court of Appeal allowed the appeal and held that policy development was immune from judicial review according to the principles of parliamentary sovereignty, separation of powers, and parliamentary privilege. The question in this appeal was whether the honour of the Crown gave rise to a justiciable duty to consult when Ministers developed legislation that could adversely affect the Mikisew's treaty rights.

HELD: Appeal dismissed.

The Federal Court lacked jurisdiction over the Mikisew's claim under either ss. 17, 18 or 18.1 of the Act. The Act did not allow for judicial review of parliamentary activities as Cabinet and Ministers did not act as a federal board, commission or other tribunal when developing legislation. The jurisprudence made clear that the duty to consult was best understood as a valuable adjunct to the honour of the Crown. However, to date, the duty to consult had only been applied to executive conduct and conduct taken on behalf of the executive. Applying the duty to consult doctrine during the law-making process would lead to significant judicial incursion into the workings of the legislature. The Mikisew acknowledged that it could be appropriate, in future litigation, for courts to consider granting ancillary relief requiring further consultation on the challenged legislation, a stay of further implementation of the challenged legislation, or judicial supervision. The Mikisew's proposed approach would be difficult to apply where Ministers pursued both executive conduct and parliamentary conduct in the Cabinet decision-making process. The duty to consult was not the only means to give effect to the honour of the Crown when Aboriginal or treaty rights could be adversely affected by legislation. Declaratory relief could be an appropriate remedy, for example. The duty to consult doctrine did not apply to the legislature, and the Federal Court was not validly seized of the application.

Statutes, Regulations and Rules Cited:

Act of Settlement (Eng.), 12 & 13 Will 3, c.á2,

Bill of Rights (Eng.), 1 Will. & Mar., sess.á2, c.á2,

Canadian Bill of Rights, *S.C. 1960, c. 44* [reproduced ináR.S.C. 1985,áApp. III],

Canadian Charter of Rights and Freedoms,

Canadian Environmental Assessment Act, 2012, S.C. 2012, c.á19, s. 52

Canadian Environmental Assessment Act, S.C. 1992, c.á37,

Constitution Act, 1867, preamble, PartáIV, s.á17, s. 48, s. 49, s. 54, s. 55

Constitution Act, 1982, s. 35, s. 52

Director), *2004 SCC 74*, *[2004] 3 S.C.R. 550*, at para. 24). This endeavour of reconciliation is a first principle of Aboriginal law.

23 The honour of the Crown is always at stake in its dealings with Aboriginal peoples (*R. v. Badger*, *[1996] 1 S.C.R. 771*, at para. 41; *Manitoba Metis*, at paras. 68-72). As it emerges from the Crown's assertion of sovereignty, it binds the Crown *qua* sovereign. Indeed, it has been found to apply when the Crown acts either through legislation or executive conduct (see *R. v. Sparrow*, *[1990] 1 S.C.R. 1075*, at pp. 1110 and 1114; *R. v. Van der Peet*, *[1996] 2 S.C.R. 507*, at para. 231, per McLachlin J., as she then was, dissenting; *Haida Nation*; *Manitoba Metis*, at para. 69).

24 As this Court stated in *Haida Nation*, the honour of the Crown "is not a mere incantation, but rather a core precept that finds its application in concrete practices" and "gives rise to different duties in different circumstances" (paras. 16 and 18). When engaged, it imposes "a heavy obligation" on the Crown (*Manitoba Metis*, at para. 68). Indeed, because of the close relationship between the honour of the Crown and s. 35, the honour of the Crown has been described as a "constitutional principle" (*Beckman v. Little Salmon/Carmacks First Nation*, *2010 SCC 53*, *[2010] 3 S.C.R. 103*, at para. 42). That said, this Court has made clear that the duties that flow from the honour of the Crown will vary with the situations in which it is engaged (*Manitoba Metis*, at para. 74). Determining what constitutes honourable dealing, and what specific obligations are imposed by the honour of the Crown, depends heavily on the circumstances (*Haida Nation*, at para. 38; *Taku River*, at para. 25; *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, *2010 SCC 43*, *[2010] 2 S.C.R. 650*, at paras. 36-37).

25 The duty to consult is one such obligation. In instances where the Crown contemplates executive action that may adversely affect s. 35 rights, the honour of the Crown has been found to give rise to a justiciable duty to consult (see e.g. *Haida Nation*, *Taku River*, *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, *2005 SCC 69*, *[2005] 3 S.C.R. 388*, and *Little Salmon*). This obligation has also been applied in the context of statutory decision-makers that -- while not part of the executive - - act on behalf of the Crown (*Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, *2017 SCC 40*, *[2017] 1 S.C.R. 1069*, at para. 29). These cases demonstrate that, in certain circumstances, Crown conduct may not constitute an "infringement" of established s. 35 rights; however, acting unilaterally in a way that may adversely affect such rights does not reflect well on the honour of the Crown and may thus warrant intervention on judicial review.

26 The duty to consult jurisprudence makes clear that the duty to consult is best understood as a "valuable adjunct" to the honour of the Crown (*Little Salmon*, at para. 44). The duty to consult ensures that the Crown acts honourably by preventing it from acting unilaterally in ways that undermine s. 35 rights. This promotes reconciliation between the Crown and Aboriginal peoples first, by providing procedural protections to s. 35 rights, and second, by encouraging negotiation and just settlements as an alternative to the cost, delay and acrimony of litigating s. 35 infringement claims (*Clyde River*, at para. 1; *Haida Nation*, at paras. 14 and 32; *Mikisew Cree*, at para. 63).

27 The duty to consult has been recognized in a variety of contexts. For example, in *Haida Nation*, this Court recognized a duty to consult when the Crown contemplated the replacement and transfer of tree farm licences that had the potential to affect asserted but unproven Aboriginal rights. In *Mikisew Cree*, the Court recognized that the contemplation of "taking up" lands under Treaty No. 8 could adversely affect the Mikisew's rights under the treaty and thus required consultation. Crown conduct need not have an immediate impact on lands and resources to trigger the duty to consult. This Court has recognized that "high-level management decisions or structural changes to [a] resource's management" may also trigger a consultative duty (*Carrier Sekani*, at para. 47; see also para. 44). However, to date, the duty to consult has only been applied to executive conduct and conduct taken on behalf of the executive.

28 The Mikisew's treaty rights are protected under s. 35 of the *Constitution Act, 1982*, and the Crown's dealings with those rights engage the honour of the Crown. Here, the Mikisew argue that their hunting, trapping, and fishing rights under Treaty No. 8 may be adversely affected by the Crown's conduct. This Court has repeatedly found that the honour of the Crown governs treaty making and implementation, and requires the Crown to act in a way that accomplishes the intended purposes of treaties and solemn promises it makes to Aboriginal peoples (*Manitoba Metis*, at paras. 73 and 75; *Mikisew Cree*, at para. 51; *R. v. Marshall*, *[1999] 3 S.C.R. 456*, at para. 44; *Badger*, at paras. 41 and 47). Treaty agreements are sacred; it is always assumed that the Crown intends to fulfill its promises. No appearance of "sharp dealing" will be permitted (*Badger*, at para. 41).

29 However, the question in this appeal is whether the honour of the Crown gives rise to a justiciable duty to consult when ministers develop legislation that could adversely affect the Mikisew's treaty rights. When confronted with a novel case like this, the Court must determine whether the duty to consult is the appropriate means to uphold the honour of the Crown. This Court has explicitly left open the question of whether the law-making process is "Crown conduct" that triggers the duty to consult (*Carrier Sekani*, at para. 44; *Clyde River*, at para. 28). I turn to analyzing this issue now.

C. *The Duty to Consult During the Law-Making Process*

30 The Mikisew submit that the development of policy by ministers leading to the formulation and introduction of a bill that may affect s. 35 rights triggers the duty to consult. In their view, ministers act in an executive capacity, not a parliamentary capacity, when developing legislation. Thus, concluding that legislative development triggers the duty to consult does not offend the separation of powers or parliamentary privilege. Further, concluding otherwise would leave some claimants whose s. 35 rights are affected by legislation without an effective remedy. Indeed, legislation may abolish Crown oversight of or involvement in resource development and thereby remove Crown conduct that would trigger the duty to consult. Additionally, requiring claimants to proceed by way of a s. 35 infringement claim to vindicate their rights places an onerous burden on them.

31 The respondents submit that the development of legislation by ministers is legislative action that does not trigger the duty to consult, as this would be inconsistent with parliamentary sovereignty and the separation of powers. These principles dictate that courts cannot supervise the law-making process. The respondents ground their argument on the premise that ministers act in a parliamentary capacity, not an executive capacity, when developing legislation. Furthermore, they suggest that, while the duty to consult is not triggered by legislative action, this does not leave claimants without an effective remedy. Once legislation has passed, it can be challenged under the *Sparrow* framework if it infringes s. 35 rights. Additionally, decisions made *under* the new or amended legislation may trigger the duty to consult.

32 For the reasons that follow, I conclude that the law-making process -- that is, the development, passage, and enactment of legislation -- does not trigger the duty to consult. The separation of powers and parliamentary sovereignty dictate that courts should forebear from intervening in the law-making process. Therefore, the duty to consult doctrine is ill-suited for legislative action.

33 The Mikisew ask us to recognize that the duty to consult applies to ministers in the development of legislation. There is no doubt overlap between executive and legislative functions in Canada; Cabinet, for instance, is "a combining committee -- a *hyphen* which joins, a *buckle* which fastens, the legislative part of the state to the executive part of the state" (*Reference re Canada Assistance Plan (B.C.), [1991] 2 S.C.R. 525*, at p. 559, quoting W. Bagehot, *The English Constitution* (1872), at p. 14 (emphasis in original)). I do not accept, however, the Mikisew's submission that ministers act in an executive capacity when they develop legislation. The legislative development at issue was not conducted pursuant to any statutory authority; rather, it was an exercise of legislative powers derived from Part IV of the *Constitution Act, 1867*. As the majority of the Court of Appeal noted, the departmental statutes relied on by the Mikisew to show that the Ministers acted in an executive capacity when developing legislation do not "refer even implicitly to ... the development of legislation for introduction into Parliament" (C.A. reasons, at para. 28; *Department of Indian Affairs and Northern Development Act*, *R.S.C. 1985, c. I-6*; *Department of the Environment Act*, *R.S.C. 1985, c. E-10*; *Department of Fisheries and Oceans Act*, *R.S.C. 1985, c. F-15*; *Department of Transport Act*, *R.S.C. 1985, c. T-18*; *Department of Natural Resources Act*, *S.C. 1994, c. 41*; *Financial Administration Act*, *R.S.C. 1985, c. F-11*).

34 The development of legislation by ministers is part of the law-making process, and this process is generally protected from judicial oversight. Further, this Court's jurisprudence makes clear that, if Cabinet is restrained from introducing legislation, then this effectively restrains Parliament (*Canada Assistance Plan*, at p. 560). This Court has emphasized the importance of safeguarding the law-making process from judicial supervision on numerous occasions. In *Reference re Resolution to amend the Constitution*, *[1981] 1 S.C.R. 753*, a majority of the Court stated that "[c]ourts come into the picture when legislation is enacted and not before" (p. 785). In *Canada Assistance Plan*, the Court underscored that "[t]he formulation and introduction of a bill are part of the legislative process with which the courts will not meddle" (p. 559).

and parliamentary conduct in the Cabinet decision-making process. In the long chain of events contributing to the development of legislation, disentangling what steps the duty to consult applies to (because they are executive) and what actions are immune (because they are parliamentary) would be an enormously difficult task.

41 For these reasons, the duty to consult doctrine is ill-suited to be applied directly to the law-making process.

42 That said, parliamentary sovereignty and the separation of powers are not the only constitutional principles relevant to this appeal. The duty to consult was recognized to help protect the constitutional rights enshrined in s. 35 and uphold the honour of the Crown -- itself a constitutional principle (*Little Salmon*, at para. 42).

43 The Mikisew argue that if the duty to consult does not apply to the legislative process, Aboriginal or treaty rights will be subject to inconsistent protection. When the executive or a statutory decision-maker takes action that may affect asserted or established s. 35 rights, the honour of the Crown imposes a duty to consult. As noted above, this prevents the Crown from acting unilaterally in a way that could erode s. 35 rights and promotes the ongoing process of reconciliation. In contrast, if the state takes the *same action* through legislative means, the Aboriginal communities whose rights are potentially affected may be left without effective recourse. If such legislation *infringes* s. 35 rights, it may be declared of no force and effect pursuant to s. 52 of the *Constitution Act, 1982* (see *Sparrow*). However, if the effects of the legislation do not rise to the level of infringement, or if the rights are merely asserted (and not established), an Aboriginal group will not be able to successfully challenge the constitutional validity of the legislation through a *Sparrow* claim. Further, there may be situations where legislation effectively removes future consultation obligations by removing Crown decision-making that would otherwise have triggered the duty to consult.

44 I accept that these are valid concerns. It is of little import to Aboriginal peoples whether it is the executive or Parliament which acts in a way that may adversely affect their rights. The relationship of Aboriginal peoples "with the Crown or sovereign has never depended on the particular representatives of the Crown involved" (*Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, *2018 SCC 4*, at para. 130, quoting *Mitchell v. Peguis Indian Band*, *[1990] 2 S.C.R. 85*, at p. 109, per Dickson C.J.). As noted above, the honour of the Crown binds the Crown *qua* sovereign. Indeed, permitting the Crown to do by one means that which it cannot do by another would undermine the endeavour of reconciliation, which animates Aboriginal law. The principle of reconciliation and not rigid formalism should drive the development of Aboriginal law.

45 Given these concerns, it is worth noting that the duty to consult is not the only means to give effect to the honour of the Crown when Aboriginal or treaty rights may be adversely affected by legislation. Other doctrines may be developed to ensure the consistent protection of s. 35 rights and to give full effect to the honour of the Crown through review of enacted legislation.

46 For example, it may not be consistent with s. 35 to legislate in a way that effectively removes future Crown conduct which would otherwise trigger the duty to consult. I note that, in *Ross River Dena Council v. Yukon*, *2012 YKCA 14*, *358 D.L.R. (4th) 100*, the Yukon Court of Appeal held that "[s]tatutory regimes that do not allow for consultation and fail to provide any other equally effective means to acknowledge and accommodate Aboriginal claims are defective and cannot be allowed to subsist" (para. 37; see also *Constitution Act, 1982*, s. 52(1)).

47 Other forms of recourse may also be available. For example, declaratory relief may be appropriate in a case where legislation is enacted that is not consistent with the Crown's duty of honourable dealing toward Aboriginal peoples (see *Manitoba Metis*, at paras. 69 and 143). A declaration is available without a cause of action (*ibid*, at para. 143). Further, as this Court has previously held, declaratory relief may be an appropriate remedy even in situations where other forms of relief would be inconsistent with the separation of powers (see *Canada (Prime Minister) v. Khadr*, *2010 SCC 3*, *[2010] 1 S.C.R. 44*, at para. 2).

48 To be clear, legislation cannot be challenged on the basis that the legislature failed to fulfill the duty to consult. The duty to consult doctrine does not apply to the legislature. However, if other forms of recourse are available, the extent of any consultation may well be a relevant consideration, as it was in *Sparrow*, when assessing whether the enactment is consistent with constitutional principles. In *Sparrow*, this Court held that, when there has been a *prima facie* infringement of a s. 35 right, the "first consideration" in determining whether the legislation or action can be justified is the honour of the Crown (p. 1114).

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.

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The government's approach, rather than advancing the process of reconciliation between the Crown and the Treaty 8 First Nations, undermined it. [para. 4]

When the Crown exercises its Treaty 8 right to "take up" land, its duty to act honourably dictates the content of the process. The question in each case is to determine the degree to which conduct contemplated by the Crown would adversely affect the rights of the aboriginal peoples to hunt, fish and trap so as to trigger the duty to consult. Accordingly, where the court is dealing with a proposed "taking up", it is not correct to move directly to a *Sparrow* justification analysis even if the proposed measure, if implemented, would infringe a First Nation treaty right. The Court must first consider the process and whether it is compatible with the honour of the Crown. [paras. 33-34] [para. 59]

The Crown, while it has a treaty right to "take up" surrendered lands, is nevertheless under the obligation to inform itself on the impact its project will have on the exercise by the Mikisew of their treaty hunting, fishing and trapping rights and to communicate its findings to the Mikisew. The Crown must then attempt to deal with the Mikisew in good faith and with the intention of substantially addressing their concerns. The duty to consult is triggered at a low threshold, but adverse impact is a matter of degree, as is the extent of the content of the Crown's duty. Under Treaty 8, the First Nation treaty rights to hunt, fish and trap are therefore limited not only by geographical limits and specific forms of government regulation, but also by the Crown's right to take up lands under the treaty, subject to its duty to consult and, if appropriate, to accommodate the concerns of the First Nation affected. [paras. 55-56]

Here, the duty to consult is triggered. The impacts of the proposed road were clear, established, and demonstrably adverse to the continued exercise of the Mikisew hunting and trapping rights over the lands in question. Contrary to the Crown's argument, the duty to consult was not discharged in 1899 by the pre-treaty negotiations. [paras. 54-55]

However, given that the Crown is proposing to build a fairly minor winter road on surrendered lands where the Mikisew treaty rights are expressly subject to the [page391] "taking up" limitation, the content of the Crown's duty of consultation in this case lies at the lower end of the spectrum. The Crown is required to provide notice to the Mikisew and to engage directly with them. This engagement should include the provision of information about the project, addressing what the Crown knew to be the Mikisew's interests and what the Crown anticipated might be the potential adverse impact on those interests. The Crown must also solicit and listen carefully to the Mikisew's concerns, and attempt to minimize adverse impacts on its treaty rights. [para. 64]

The Crown did not discharge its obligations when it unilaterally declared the road re-alignment would be shifted from the reserve itself to a track along its boundary. It failed to demonstrate an intention of substantially addressing aboriginal concerns through a meaningful process of consultation. [paras. 64-67]

The Attorney General of Alberta did not overstep the proper role of an intervener when he raised before the Federal Court of Appeal a fresh argument on the central issue of whether the Minister's approval of the winter road infringed Treaty 8. It is always open to an intervener to put forward any legal argument in support of what it submits is the correct legal conclusion on an issue properly before the court provided that in doing so its legal argument does not require additional facts not proven in evidence at trial, or raise an argument that is otherwise unfair to one of the parties. [para. 40]

Cases Cited

Considered: *R. v. Badger*, [1996] 1 S.C.R. 771; *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550, 2004 SCC 74; **distinguished:** *R. v. Sparrow*, [1990] 1 S.C.R. 1075; **referred to:** *R. v. Sioui*, [1990] 1 S.C.R. 1025; *R. v. Marshall*, [1999] 3 S.C.R. 456; *R. v. Marshall*, [2005] 2. S.C.R. 220, 2005 SCC 43; *Halfway River First Nation v. British Columbia (Ministry of Forests)* (1999), 178 D.L.R. (4th) 666, 1999 BCCA 470; *R. v. Morgentaler*, [1993] 1 S.C.R. 462; *Lamb v. Kincaid* (1907), 38 S.C.R. 516; *Athey v. Leonati*, [1996] 3 S.C.R. 458; *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, [2002] 1 S.C.R. 678, 2002 SCC 19; *Province of Ontario v. Dominion of [page392] Canada* (1895), 25 S.C.R. 434; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245, 2002 SCC 79; *McInerney v. MacDonald*, [1992] 2 S.C.R. 138; *R. v. Smith*, [1935] 2 W.W.R. 433.

Statutes and Regulations Cited

Constitution Act, 1982, s. 35.

Natural Resources Transfer Agreement, 1930 (Alberta) (Schedule of *Constitution Act, 1930*, R.S.C. 1985, App. II, No. 26), para. 10.

Wood Buffalo National Park Game Regulations, SOR/78-830, s. 36(5).

Treaties and Proclamations

Royal Proclamation (1763), R.S.C. 1985, App. II, No. 1.

Treaty No. 8 (1899).

Authors Cited

Mair, Charles. *Through the Mackenzie Basin: A Narrative of the Athabasca and Peace River Treaty Expedition of 1899*. Toronto: William Briggs, 1908.

Report of Commissioners for Treaty No. 8, in *Treaty No. 8 made June 21, 1899 and Adhesions, Reports, etc.*, reprinted from 1899 edition. Ottawa: Queen's Printer, 1966.

History and Disposition:

APPEAL from a judgment of the Federal Court of Appeal (Rothstein, Sexton and Sharlow JJ.A.), [2004] 3 F.C.R. 436, (2004), 236 D.L.R. (4th) 648, 317 N.R. 258, [2004] 2 C.N.L.R. 74, [2004] F.C.J. No. 277 (QL), 2004 FCA 66, reversing a

judgment of Hansen J. *(2001), 214 F.T.R. 48*, *[2002] 1 C.N.L.R. 169*, *[2001] F.C.J. No. 1877* (QL), *2001 FCT 1426*. Appeal allowed.

Counsel

Jeffrey R. W. Rath and Allisun Taylor Rana, for the appellant.

Cheryl J. Tobias and Mark R. Kindrachuk, Q.C., for the respondent Sheila Copps, Minister of Canadian Heritage.

No one appeared for the respondent the Thebacha Road Society.

P. Mitch McAdam, for the intervener the Attorney General for Saskatchewan.

Robert J. Normey and Angela J. Brown, for the intervener the Attorney General of Alberta.

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James D. Jodouin and Gary L. Bainbridge, for the intervener the Big Island Lake Cree Nation.

C. Allan Donovan and Bram Rogachevsky, for the intervener the Lesser Slave Lake Indian Regional Council.

Robert C. Freedman and Dominique Nouvet, for the intervener the Treaty 8 First Nations of Alberta.

E. Jack Woodward and Jay Nelson, for the intervener the Treaty 8 Tribal Association.

Thomas R. Berger, Q.C., and Gary A. Nelson, for the intervener the Blueberry River First Nations.

Jack R. London, Q.C., and Bryan P. Schwartz, for the intervener the Assembly of First Nations.

The judgment of the Court was delivered by

BINNIE J.

1 The fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions. The management of these relationships takes place in the shadow of a long history of grievances and misunderstanding. The multitude of smaller grievances created by the indifference of some government officials to aboriginal people's concerns, and the lack of respect inherent in that indifference has been as destructive of the process of reconciliation as some of the larger and more explosive controversies. And so it is in this case.

2 Treaty 8 is one of the most important of the post-Confederation treaties. Made in 1899, the First Nations who lived in the area surrendered to the Crown 840,000 square kilometres of what is now northern Alberta, northeastern British Columbia, northwestern Saskatchewan and the southern portion of the Northwest Territories. Some idea of the size of this surrender is given by the fact that it dwarfs France (543,998 square kilometres), [page394] exceeds the size of Manitoba (650,087 square kilometres), Saskatchewan (651,900 square kilometres) and Alberta (661,185 square kilometres) and approaches the size of British Columbia (948,596 square kilometres). In exchange for this surrender, the First Nations were promised reserves and

para. 41 of her factum that "[i]n many if not all cases the government will not be able to appreciate the effect a proposed taking up will have on the Indians' exercise of hunting, fishing and trapping rights without consultation".

50 The Attorney General of Alberta denies that a duty of consultation can be an implied term of Treaty 8. He argues:

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> Given that a consultation obligation would mean that the Crown would be required to engage in meaningful consultations with any and all affected Indians, being nomadic individuals scattered across a vast expanse of land, every time it wished to utilize an individual plot of land or change the use of the plot, such a requirement would not be within the range of possibilities of the common intention of the parties.

The parties *did* in fact contemplate a difficult period of transition and sought to soften its impact as much as possible, and any administrative inconvenience incidental to managing the process was rejected as a defence in *Haida Nation* and *Taku River*. There is no need to repeat here what was said in those cases about the overarching objective of reconciliation rather than confrontation.

(d) *Honour of the Crown*

51 The duty to consult is grounded in the honour of the Crown, and it is not necessary for present purposes to invoke fiduciary duties. The honour of the Crown is itself a fundamental concept governing treaty interpretation and application that was referred to by Gwynne J. of this Court *as a treaty obligation* as far back as 1895, four years before Treaty 8 was concluded: *Province of Ontario v. Dominion of Canada* *(1895), 25 S.C.R. 434*, at pp. 511-12 *per* Gwynne J. (dissenting). While he was in the minority in his view that the treaty obligation to pay Indian annuities imposed a trust on provincial lands, nothing was said by the majority in that case to doubt that the honour of the Crown was pledged to the fulfilment of its obligations to the Indians. This had been the Crown's policy as far back as the *Royal Proclamation* of 1763, and is manifest in the promises recorded in the report of the Commissioners. The honour of the Crown exists as a source of obligation independently of treaties as well, of course. In *Sparrow*, *Delgamuukw v. British Columbia* *[1997] 3 S.C.R. 1010*, *Haida Nation* and *Taku River*, the "honour of the Crown" was invoked as a central principle in resolving aboriginal claims to consultation despite the absence of any treaty.

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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.

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

M.A. Morellato and J.M. Spencer: Counsel for the Appellant

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) and Taku River Tlingit First Nation v. British Columbia (Project Assessment Director), in both of which the scope of the duty to consult and accommodate was the central issue.

> can assess these matters, and if they cannot agree, tribunals and courts can assist. Difficulties associated with the absence of proof and definition of claims are addressed by assigning appropriate content to the duty, not by denying the existence of a duty.
>
> I conclude that consultation and accommodation before final claims resolution, while challenging, is not impossible, and indeed is an essential corollary to the honourable process of reconciliation that s. 35 demands. It preserves the Aboriginal interest pending claims resolution and fosters a relationship between the parties that makes possible negotiations, the preferred process for achieving ultimate reconciliation .... Precisely what is required of the government may vary with the strength of the claim and the circumstances. But at a minimum, it must be consistent with the honour of the Crown.

93 McLachlin C.J. continued to elaborate at paras. 43-44 on what consultation would be required with aboriginal groups. At one end of the spectrum, where the aboriginal group's title claim is weak, the aboriginal right limited, or the potential for infringement minor, all that is required is that the Crown give notice to the band of its plans, 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 meaningful process of accommodation consistent with what the honour of the Crown requires in the Crown's dealings with First Nations people as most recently mandated by the Supreme Court of Canada in Haida Nation v. British Columbia (Minister of Forests), *2004 SCC 73*. I also agree with the form of order Mr. Justice Hall proposes for the disposition of the appeal.

104 However, I do not wish to be taken to endorse what my colleague suggests may be appropriate forms of interim accommodation in this case. The disposition of the appeal does not require that any comment be made in that regard and, in my respectful view, what my colleague says in paragraphs 98-100 of his judgment might better be put to one side for now.

105 There is little in the decided cases from which assistance can be drawn with respect to the measure of interim accommodation that may be required in the circumstances that prevail in this case. Where, as here, no aboriginal title has been finally established, there my well be questions about whether and to what extent economic compensation or other forms of what might be said to be non-reversible accommodation are necessary or appropriate. Given the disposition of the appeal, I consider these and other related questions that were not directly addressed in argument before us are now best left entirely to the parties unfettered by judicial commentary.

LOWRY J.A.

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Pavao v. Ontario (Ministry of the Environment and Climate Change), [2016] O.J. No. 4932

Ontario Judgments

Ontario Superior Court of Justice

Divisional Court - Toronto, Ontario

J.A. Thorburn J.

Heard: September 21, 2016.

Judgment: September 26, 2016.

Divisional Court File Nos.: 430/16 and 434/16

[2016] O.J. No. 4932 | 2016 ONSC 6040 | 270 A.C.W.S. (3d) 689 | 5 C.E.L.R. (4th) 43 | 2016 CarswellOnt 14846

RE: Elaine Pavao, Applicant, and Ministry of the Environment and Climate Change, FRWN LP and NR Capital General Partnership, Respondents

(51 paras.)

Counsel

Arkadi Bouchelev, for the Landlord/ Respondent.

Geoff Hall and Kate Findlay, for the Respondent.

Philip Tunley for the Ontario Energy Board.

No one appearing for the Ministry of the Environment and Climate Change.

ENDORSEMENT

J.A. THORBURN J.

BACKGROUND

1 The Applicant, Elaine Pavao lives with her family on a rural property in the Niagara Region. She seeks a stay of two proceedings pending judicial review of the first proceeding and appeal in the second proceeding.

2 On May 7, 2013, the Niagara Region Wind Corporation filed an application to construct a transmission line in Haldimand County and the Niagara Region. The transmission line would carry power generated from a Niagara Region Wind Farm to the provincial electricity grid.

3 On July 3, 2014, the Respondents FRWN LP and NR Capital General Partnership (the "Partnership") obtained approval from

Pavao v. Ontario (Ministry of the Environment and Climate Change), [2016] O.J. No. 4932

1. The Renewable Energy Approval Amendment Proceeding: Ms. Pavao's right to procedural fairness was denied. She was never made aware of her right to require a hearing and in fact, was advised there was nothing she could do. She was thereby denied her right to procedural fairness and was unable to raise her issues relating to human health and the natural environment as envisaged in EPA section 145.2.1 (2).
2. The OEB Proceeding: Ms. Pavao claims she should have been granted a reasonable time to make submissions and retain counsel to voice her concerns to the OEB. Moreover, she is an "owner of land affected" within the meaning of section 97 of the OEB Act and the OEB was required to approve an offer from the Partnership to her which they did not.

26 Ms. Pavao submits these are serious issues to be tried. She also claims she will suffer irreparable harm because the proximity to the transmission lines to her family home will cause her family irreparable physical and financial harm and will irreparably harm the environment.

27 She had several miscarriages and claims a doctor at Brantford General Hospital told her that a lot of sudden infant deaths had occurred along the transmission line corridor near her former home. Moreover, she says her son's coroner (whose name was not provided) told her that her son suffered from Genetic Cardiac Channelopothy.

28 She claims she has invested approximately $200,000 into renovating the property and her property value will decrease as a result of its proximity to the transmission line. She says her home insurance has been cancelled for that reason (although there is no documentation from the insurer to suggest this is why her home insurance will be cancelled effective October 3, 2016.).

29 Lastly she claims the construction will damage the wetlands and a colony of endangered brown bats that live in the forest on her property.

ANALYSIS AND CONCLUSION

30 There are two proceedings that address issues related to the transmission line: the first is the Renewal Energy Approval hearing to which issues involving health and the environment may be brought, and the second is the OEB hearing to which concerns regarding consumer price, reliability and quality of the electrical service can be brought.

Renewable Energy Approval amendment

31 Ms. Pavao had a right to a hearing before the Environmental Review Tribunal in respect of the Renewable Energy Approval amendment. The public notice did not contain any reference to this right. It did refer to an internet site where there is reference to that right on page 2. There is a 15 day timeline within which to request a hearing.

32 Ms. Pavao did not receive reasonable notice of her right. Had she received such notice, she could have raised her concerns about health, the financial implications and the environmental concerns regarding the transmission lines. On the contrary, she claims she was told by a Partnership representative there was nothing she could do. She did not have a reasonable opportunity to exercise her right to a hearing.

33 Her right to procedural fairness was denied. This is a serious issue.

34 However, she has failed to demonstrate irreparable harm for the purposes of these motions as she provided no evidence before this court to corroborate her assertion that she and her family would experience harm to human health, finances, or the environment.

35 By contrast, the Partnership provided information from Health Canada which states that there is no evidence of transmission lines of 60Hz such as these cause adverse health effects. In addition, Dr. Robert Myers, a cardiologist at Sunnybrook Health Sciences Centre opined that in his view, "There is no documented medical evidence to substantiate Ms. Pavao's claims that low frequency EMF has any impact on cardiac electrophysiology as suggested by her claim that her 8

month old son was affected by EMF from transmission line and that her (sic) and her family are at greater risk by virtue of a claimed cardiac condition."

36 As such, Ms. Pavao's request to stay the Renewable Energy Approval amendment pending judicial review is denied.

37 Ms. Pavao will however have the opportunity to pursue her Application for judicial review and to provide the evidence relevant to her Application for judicial review.

The OEB Decision

38 Ms. Pavao also seeks to stay the Decision and Order of the OEB pending the hearing of her Appeal.

39 Although Ms. Pavao did not participate in the first hearing she did participate in the second hearing before the OEB.

40 Upon becoming aware that Ms. Pavao expressed an interest in the hearing, the OEB ordered the Partnership to provide Ms. Pavao and two other landowners the opportunity to file written submissions as to whether they would be materially adversely affected by the proposed change. They were given ten days to do so and Ms. Pavao did so without the benefit of counsel. The Appellant's submissions were considered by the OEB in rendering its decision.

41 The concerns she articulated were about health risks, adverse impact on her property value and damage to the environment. She does not suggest there are other concerns. None of the issues she raises are concerns the OEB can consider in accordance with section 96(2) of the OEB Act.

42 Moreover, she is not an "owner of land affected" within the meaning of section 97 of the Act so there is no offer by the Partnership to be tendered to the OEB. The OEB's *Filing Requirements for Electricity Transmission Applications* provides that an "owner of land affected" means a landowner of property upon, over or under which transmission facilities are intended to be constructed. Counsel provided no legal authority to suggest another interpretation.

43 Where an expert tribunal such as the OEB interprets its home statute, that interpretation is entitled to deference.

44 For these reasons, I find the OEB's interpretation of the words "owner of land affected" to be reasonable.

45 Because the OEB Order has no jurisdiction to hear her concerns and she is not an owner of land affected within the meaning of the Act, there is no serious issue to be tried such that a stay of proceeding should be granted pending the hearing of the Appeal in this matter. For the reasons set out at paragraphs 34 and 35 above, I also find that for the purposes of this motion, Ms. Pavao has not satisfied the requirement to show irreparable harm.

Costs

46 The Applicant did not name the OEB as a Respondent, but the Board has a statutory right to respond and it did. (See s. 33(3) of the *OEB Act and Ontario (Energy Board) v. Ontario Power Generation Inc.*, *2015 SCC 44* at paras. 52, 57 and 59).

47 The OEB seeks no costs.

48 The Partnership seeks costs in the amount of $25,000. The Applicant's Bill of Costs was $14,500.

49 In my view there should be no costs of these motions notwithstanding that the Partnership was successful in defending these two motions. While the Applicant has not satisfied the requirement to show irreparable harm, she did establish that the Partnership failed to afford her timely and reasonable notice of her right to require a hearing and offered no explanation for its failure to inform her of this important right.

50 She has not been afforded the opportunity to participate in a hearing to address her health and environmental concerns that are within the jurisdiction of the Environmental Review Tribunal.

Conclusion

51 For these reasons the motion to stay pending judicial review and the motion to stay pending appeal are both dismissed without costs. The Application for judicial review is to be expedited.

J.A. THORBURN J.

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R. v. Badger, [1996] 1 S.C.R. 771

Supreme Court Reports

Supreme Court of Canada

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory and Iacobucci JJ.

1995: May 1, 2 / 1996: April 3.

File No.: 23603.

[1996] 1 S.C.R. 771 | *[1996] 1 R.C.S. 771* | *[1996] S.C.J. No. 39* | *[1996] A.C.S. no 39*

Wayne Clarence Badger, appellant; v. Her Majesty The Queen, respondent. And between Leroy Steven Kiyawasew, appellant; v. Her Majesty The Queen, respondent. And between Ernest Clarence Ominayak, appellant; v. Her Majesty The Queen, respondent, and The Attorney General of Canada, the Attorney General of Manitoba, the Attorney General for Saskatchewan, the Federation of Saskatchewan Indian Nations, the Lesser Slave Lake Indian Regional Council, the Treaty 7 Tribal Council, the Confederacy of Treaty Six First Nations, the Assembly of First Nations and the Assembly of Manitoba Chiefs, interveners.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Case Summary

Indians — Treaty rights — Hunting on privately owned land in tract ceded by treaty — Violations of Wildlife Act — Whether status Indians have right to hunt for food on privately owned land lying within tract ceded by treaty — Whether hunting rights extinguished or modified by Natural Resources Transfer Agreement — Whether licensing and game limitations apply to status Indians — Constitution Act, 1982, s. 35(1) — Treaty No. 8 (1899) — Natural Resources Transfer Agreement (Constitution Act, 1930, Schedule 2), para. 12 — Alta. Reg. 50/87, ss. 2(2), 25 — Alta. Reg. 95/87, s. 7.

The appellants were status Indians (under Treaty No. 8) who had been hunting for food on privately owned lands falling within the tracts surrendered by the Treaty. Each was charged with an offence under the Wildlife Act (the Act). Their trials and appeals proceeded together. The appellant Badger, who was hunting on scrub land near a run-down but occupied house, was charged with shooting a moose outside the permitted hunting season contrary to s. 27(1) of the Act. The appellant Kiyawasew, who had been hunting on a posted, snow-covered field that had been harvested that fall, and the appellant Ominayak, who had been hunting on uncleared muskeg, both had shot moose and were charged, under s. 26(1) of the Act, with hunting without a licence. All were all convicted in the Provincial Court. They unsuccessfully appealed their summary convictions, first to the Court of Queen's Bench and then to the Court of Appeal, challenging the constitutionality of the Act in so far as it might affect them as Crees with status under Treaty No. 8. The constitutional question raised: (1) whether status Indians under Treaty No. 8 have the right to hunt for food on privately owned land which lies within the territory surrendered under that Treaty; (2) whether not the hunting rights set out in Treaty No. 8 have been extinguished or modified by para. 12 of the Natural Resources Transfer Agreement, 1930 (NRTA); and, (3) the extent, if any, ss. 26(1) (requiring a hunting licence) and 27(1) (establishing hunting seasons) of the Act applied to the appellants.

Held: The appeals of Wayne Clarence Badger and Leroy Steven Kiyawasew should be dismissed. The appeal of Ernest Clarence Ominayak should be allowed and a new trial directed so that the issue of the justification of the infringement created by s. 26(1) of the Wildlife Act and any regulations passed pursuant to that section may be addressed.

Per La Forest, L'Heureux-Dubé, Gonthier, Cory and Iacobucci JJ.: Treaty No. 8 guaranteed the Indians the "right to pursue their usual vocations of hunting, trapping and fishing" subject to two limitations, a geographic limitation and the right of government to make regulations for conservation purposes.

Certain principles apply in interpreting a treaty. First, a treaty represents an exchange of solemn promises between the

Crown and the various Indian nations. Second, the honour of the Crown is always at stake; the Crown must be assumed to intend to fulfil its promises. No appearance of "sharp dealing" will be sanctioned. Third, any ambiguities or doubtful expressions must be resolved in favour of the Indians and any limitations restricting the rights of Indians under treaties must be narrowly construed. Finally, the onus of establishing strict proof of extinguishment of a treaty or aboriginal right lies upon the Crown.

The NRTA did not extinguish and replace the Treaty No. 8 right to hunt for food. Paragraph 12 of the NRTA clearly intended to extinguish the treaty protection of the right to hunt commercially but the right to hunt for food continued to be protected and, indeed, was expanded. Treaty rights, absent direct conflict with the NRTA, were not modified. The Treaty right to hunt for food accordingly continues in force and effect.

Three preliminary observations were made regarding the NRTA. First, the "right of access" in the NRTA does not refer to a general right of access but, rather, is limited to a right of access for the purposes of hunting. Second, the extent of the treaty right to hunt on privately owned land may well differ from one treaty to another, given differences in wording. Finally, the applicable interpretative principles must be applied. The words must be interpreted as they would naturally have been understood by the Indians at the time of signing.

The geographical limitation on the existing hunting right should be based upon a concept of visible, incompatible land use. This approach is consistent with the oral promises made to the Indians at the time the Treaty was signed, with the oral history of the Treaty No. 8 Indians, with earlier case law and with the provisions of the Act itself. It is neither unduly vague nor unworkable. Land use must be considered on a case-by-case basis, however, because the approach focuses upon the use being made of the land.

The appeals of Messrs. Badger and Kiyawasew must be dismissed. The land was being visibly used. Since they did not have a right of access to these particular tracts of land, their treaty right to hunt for food did not extend there. The limitations on hunting set out in the Act accordingly did not infringe upon their existing right and were properly applied. The geographical limitations upon the Treaty right to hunt for food did not affect Mr. Ominayak who was hunting on land not being put to any visible use.

The Indians would have understood that, by the terms of the Treaty, the government would be permitted to pass regulations with respect to conservation given the existence of conservation laws existing prior to signing the Treaty. The provincial government's regulatory authority under the Treaty and the NRTA (which transferred regulatory authority for conservation purposes to the provincial authorities) did not extend beyond the realm of conservation. The constitutional provisions of s. 12 of NRTA authorizing provincial regulations made it unnecessary to consider s. 88 of the Indian Act which provided that provincial laws of general application applied to Indians provided that those laws were not in conflict with aboriginal or treaty rights.

The public safety regulations, which formed the first step of a two-step licensing scheme, did not infringe any aboriginal or treaty rights. These regulations required all hunters to take gun safety courses and pass hunting competency tests and accordingly protected all hunters, including Indians. Reasonable regulations aimed at ensuring safety do not infringe aboriginal or treaty rights to hunt for food.

The second step of the licensing scheme, the conservation component, constituted a prima facie infringement. Under the Treaty, no limitation as to method, timing and extent of Indian hunting can be imposed. The present licensing scheme, however, imposes conditions on the face of the licence as to hunting method, the kind and numbers of game, the season and the permissible hunting area. These limitations are in direct conflict with the treaty right. Moreover, no provisions currently exist for "hunting for food" licences.

Any infringement of the rights guaranteed under the Treaty or the NRTA must be justified using the Sparrow test. This analysis provides a reasonable, flexible and current method of assessing the justifiability of conservation regulations and enactments. It must first be asked if there was a valid legislative objective, and if so, the analysis proceeds to a consideration of the special trust relationship and the responsibility of the government vis-à-vis the aboriginal people. Further questions might deal with whether the infringement was as little as was necessary to effect the objective, whether compensation was fair, and whether the aboriginal group was consulted with respect to the conservation measures.

The government led no evidence with respect to justification. The Court could not find justification in the absence of such evidence.

Per Lamer C.J. and Sopinka J.: The treaty rights were restated, merged and consolidated in the NRTA and so their preservation was assured by being placed in a constitutional instrument. The sole source for a claim involving the right to hunt for food is, therefore, the NRTA. The Treaty may be relied on for the purpose of assisting in the interpretation of the NRTA but it has no other legal significance.

Two key interpretative principles apply to treaties. First, any ambiguity in the treaty will be resolved in favour of the Indians. Second, treaties should be interpreted in a manner that maintains the integrity of the Crown, particularly the Crown's fiduciary obligation toward aboriginal peoples. These interpretative principles apply equally to the rights protected by the NRTA.

The rights of Indians pursuant to either the Treaty or the NRTA would, at the time either was agreed to, be understood to be subject to governmental regulation for conservation purposes. The rights protected by the NRTA are not constitutional rights of an absolute nature precluding any governmental regulation.

Section 35(1) of the Constitution Act, 1982 should not be the standard against which governmental regulation permitted by the NRTA, and the extent of the protection of the appellants' rights in the face of such regulation, should be assessed. Section 35(1) cannot provide constitutional protection to rights already constitutionally protected; nor does it apply to another constitutional provision.

In the absence of a mechanism in the NRTA, the Court must develop a test through which the province's right to legislate with respect to conservation can be balanced against the Indians' right to hunt for food. The Sparrow test, developed in the context of s. 35(1), protects aboriginal rights while also permitting governments to legislate for legitimate purposes where the legislation is a justifiable infringement on those protected rights. This test applies equally well to the regulatory authority granted to the provinces under para. 12 of the NRTA. In applying the Sparrow criteria here, it is important to bear in mind that what is being justified is the exercise of a power granted to the provinces which is made subject to the right to hunt for food.

Cases Cited

By Cory J.

Applied: R. v. Sparrow, *[1990] 1 S.C.R. 1075*; considered: R. v. Horse, *[1988] 1 S.C.R. 187*; Myran v. The Queen, *[1976] 2 S.C.R. 137*; R. v. Mousseau, *[1980] 2 S.C.R. 89*; R. v. Bartleman *(1984), 55 B.C.L.R. 78*; referred to: R. v. Horseman, *[1990] 1 S.C.R. 901*; R. v. Cardinal *(1977), 36 C.C.C. (2d) 369*; R. v. Ominayak *(1990), 108 A.R. 239*; R. v. Sioui, *[1990] 1 S.C.R. 1025*; Simon v. The Queen, *[1985] 2 S.C.R. 387*; R. v. Taylor *(1981), 34 O.R. (2d) 360*; Nowegijick v. The Queen, *[1983] 1 S.C.R. 29*; Mitchell v. Peguis Indian Band, *[1990] 2 S.C.R. 85*; Calder v. Attorney-General of British Columbia, *[1973] S.C.R. 313*; Frank v. The Queen, *[1978] 1 S.C.R. 95*; R. v. Wesley, *[1932] 2 W.W.R. 337*; Prince v. The Queen, *[1964] S.C.R. 81*; Cardinal v. Attorney General of Alberta, *[1974] S.C.R. 695*; R. v. Sutherland, *[1980] 2 S.C.R. 451*; R. v. Smith, *[1935] 2 W.W.R. 433*; R. v. Mirasty, *[1942] 1 W.W.R. 343*; R. v. Strongquill, *[1953] 8 W.W.R. (N.S.) 247*; Moosehunter v. The Queen, *[1981] 1 S.C.R. 282*; Kruger v. The Queen, *[1978] 1 S.C.R. 104*; R. v. Sikyea, *[1964] 2 C.C.C. 325*, aff'd *[1964] S.C.R. 642*; Guerin v. The Queen, *[1984] 2 S.C.R. 335*; R. v. Eninew *(1984), 12 C.C.C. (3d) 365*; R. v. Agawa *(1988), 65 O.R. (2d) 505*; R. v. Napoleon, *[1986] 1 C.N.L.R. 86*; R. v. Fox, *[1994] 3 C.N.L.R. 132*.

By Sopinka J.

Applied: R. v. Sparrow, *[1990] 1 S.C.R. 1075*; followed: Frank v. The Queen, *[1978] 1 S.C.R. 95*; referred to: R. v. Sutherland, *[1980] 2 S.C.R. 451*; Moosehunter v. The Queen, *[1981] 1 S.C.R. 282*; R. v. Horseman, *[1990] 1 S.C.R. 901*; Reference Re Bill 30, An Act to Amend the Education Act (Ont.), *[1987] 1 S.C.R. 1148*.

specific forms of government regulation. Second, consideration must then be given to the question of whether the existing right to hunt for food can be exercised on privately owned land. Third, it is necessary to determine whether the impugned sections of the provincial Wildlife Act come within the specific types of regulation which have, since 1899, limited and defined the scope of the right to hunt for food. If they do, those sections do not infringe upon an existing treaty right and will be constitutional. If not, the sections may constitute an infringement of the Treaty rights guaranteed by Treaty No. 8, as modified by the NRTA. In this case the impugned provisions should be considered in accordance with the principles set out in R. v. Sparrow, *[1990] 1 S.C.R. 1075*, to determine whether they constitute a prima facie infringement of the Treaty rights as modified, and if so, whether the infringement can be justified.

38 It is now appropriate to consider the source of the existing right to hunt for food.

The Existing Right to Hunt for Food

The Hunting Right Provided by Treaty No. 8

39 Treaty No. 8 is one of eleven numbered treaties concluded between the federal government and various Indian bands between 1871 and 1923. Their objective was to facilitate the settlement of the West. Treaty No. 8, made on June 21, 1899, involved the surrender of vast tracts of land in what is now northern Alberta, northeastern British Columbia, northwestern Saskatchewan and part of the Northwest Territories. In exchange for the land, the Crown made a number of commitments, for example, to provide the bands with reserves, education, annuities, farm equipment, ammunition, and relief in times of famine or pestilence. However, it is clear that for the Indians the guarantee that hunting, fishing and trapping rights would continue was the essential element which led to their signing the treaties. The report of the Commissioners who negotiated Treaty No. 8 on behalf of the government underscored the importance to the Indians of the right to hunt, fish and trap. The Commissioners wrote:

> There was expressed at every point the fear that the making of the treaty would be followed by the curtailment of the hunting and fishing privileges. . . .
>
> We pointed out . . . that the same means of earning a livelihood would continue after the treaty as existed before it, and that the Indians would be expected to make use of them. . . .
>
> Our chief difficulty was the apprehension that the hunting and fishing privileges were to be curtailed. The provision in the treaty under which ammunition and twine is to be furnished went far in the direction of quieting the fears of the Indians, for they admitted that it would be unreasonable to furnish the means of hunting and fishing if laws were to be enacted which would make hunting and fishing so restricted as to render it impossible to make a livelihood by such pursuits. But over and above the provision, we had to solemnly assure them that only such laws as to hunting and fishing as were in the interest of the Indians and were found necessary in order to protect the fish and fur-bearing animals would be made, and that they would be as free to hunt and fish after the treaty as they would be if they never entered into it. [Emphasis added.]

40 Treaty No. 8, then, guaranteed that the Indians "shall have the right to pursue their usual vocations of hunting, trapping and fishing". The Treaty, however, imposed two limitations on the right to hunt. First, there was a geographic limitation. The right to hunt could be exercised "throughout the tract surrendered . . . saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes".

Second, the right could be limited by government regulations passed for conservation purposes.

Impact of Paragraph 12 of the NRTA

Principles of Interpretation

41 At the outset, it may be helpful to once again set out some of the applicable principles of interpretation. First, it must be remembered that a treaty represents an exchange of solemn promises between the Crown and the various Indian nations. It is an agreement whose nature is sacred. See R. v. Sioui, *[1990] 1 S.C.R. 1025*, at p. 1063; Simon v. The Queen, *[1985] 2 S.C.R. 387*, at p. 401. Second, the honour of the Crown is always at stake in its dealing with Indian people. Interpretations of treaties and

statutory provisions which have an impact upon treaty or aboriginal rights must be approached in a manner which maintains the integrity of the Crown. It is always assumed that the Crown intends to fulfil its promises. No appearance of "sharp dealing" will be sanctioned. See Sparrow, supra, at pp. 1107-8 and 1114; R. v. Taylor *(1981), 34 O.R. (2d) 360* (Ont. C.A.), at p. 367. Third, any ambiguities or doubtful expressions in the wording of the treaty or document must be resolved in favour of the Indians. A corollary to this principle is that any limitations which restrict the rights of Indians under treaties must be narrowly construed. See Nowegijick v. The Queen, *[1983] 1 S.C.R. 29*, at p. 36; Simon, supra, at p. 402; Sioui, supra, at p. 1035; and Mitchell v. Peguis Indian Band, *[1990] 2 S.C.R. 85*, at pp. 142-43. Fourth, the onus of proving that a treaty or aboriginal right has been extinguished lies upon the Crown. There must be "strict proof of the fact of extinguishment" and evidence of a clear and plain intention on the part of the government to extinguish treaty rights. See Simon, supra, at p. 406; Sioui, supra, at p. 1061; Calder v. Attorney-General of British Columbia, *[1973] S.C.R. 313*, at p. 404.

42 These principles of interpretation must now be applied to this case.

Interpreting the NRTA

43 The issue at this stage is whether the NRTA extinguished and replaced the Treaty No. 8 right to hunt for food. It is my conclusion that it did not.

44 For ease of reference, para. 12 of the NRTA provides:

> 12. In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.

45 It has been held that the NRTA had the clear intention of both limiting and expanding the treaty right to hunt. In Frank v. The Queen, *[1978] 1 S.C.R. 95*, consideration was given to the differences between Treaty No. 6 (which, for this purpose, has a hunting rights clause similar to that in Treaty No. 8) and para. 12 of the NRTA. Dickson J., as he then was, held at p. 100:

> The essential differences, for present purposes, between the Treaty and the Agreement are (i) under the former the hunting rights were at large while under the latter the right is limited to hunting for food and (ii) under the former the rights were limited to about one-third of the Province of Alberta, while under the latter they extend to the entire province.

And at p. 101, he stated:

> The Appellate Division . . . held that para. 12 of the Natural Resources Transfer Agreements of Alberta and Saskatchewan did two things: (i) it enlarged the areas in which Alberta and Saskatchewan Indians could respectively hunt and fish for food; (ii) it limited their rights to hunt and fish otherwise than for food by making those rights subject to provincial game laws. I would agree that such is the effect of para. 12.

To the same effect, see R. v. Wesley, *[1932] 2 W.W.R. 337* (Alta. S.C. App. Div.), at p. 344, as adopted in Prince v. The Queen, *[1964] S.C.R. 81*, at p. 84.

46 This Court most recently considered the effect the NRTA had upon treaty rights in Horseman, supra. There, it was held that para. 12 of the NRTA evidenced a clear intention to extinguish the treaty protection of the right to hunt commercially. However, it was emphasized that the right to hunt for food continued to be protected and had in fact been expanded by the NRTA. At page 933, this appears:

> Although the Agreement did take away the right to hunt commercially, the nature of the right to hunt for food was substantially enlarged. The geographical areas in which the Indian people could hunt was widely extended. Further, the means employed by them in hunting for their food was placed beyond the reach of provincial governments. For

R. v. Powley, [2003] 2 S.C.R. 207

Supreme Court Reports

Supreme Court of Canada

Present: McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel and Deschamps JJ.

Heard: March 17, 2003;

Judgment: September 19, 2003.

File No.: 28533.

[2003] 2 S.C.R. 207 | *[2003] 2 R.C.S. 207* | *[2003] S.C.J. No. 43* | *[2003] A.C.S. no 43* | *2003 SCC 43*

Her Majesty The Queen, appellant/respondent on cross-appeal; v. Steve Powley and Roddy Charles Powley, respondents/appellants on cross-appeal, and Attorney General of Canada, Attorney General of Quebec, Attorney General of New Brunswick, Attorney General of Manitoba, Attorney General of British Columbia, Attorney General for Saskatchewan, Attorney General of Alberta, Attorney General of Newfoundland and Labrador, Labrador Métis Nation, a body corporate, Congress of Aboriginal Peoples, Métis National Council ("MNC"), Métis Nation of Ontario ("MNO"), B.C. Fisheries Survival Coalition, Aboriginal Legal Services of Toronto Inc. ("ALST"), Ontario Métis and Aboriginal Association ("OMAA"), Ontario Federation of Anglers and Hunters ("OFAH"), Métis Chief Roy E. J. DeLaRonde, on behalf of the Red Sky Métis Independent Nation, and North Slave Métis Alliance, interveners.

(55 paras.)

Case Summary

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Catchwords:

Constitutional law — Aboriginal rights — Métis — Two members of a Métis community near Sault Ste. [page208] Marie charged with hunting contrary to provincial statute — Whether members of this Métis community have constitutional aboriginal right to hunt for food in environs of Sault Ste. Marie — If so, whether infringement justifiable — Constitution Act, 1982, s. 35 — Game and Fish Act, R.S.O. 1990, c. G.1, ss. 46, 47(1).

Summary:

The respondents, who are members of a Métis community near Sault Ste. Marie, were acquitted of unlawfully hunting a moose without a hunting licence and with knowingly possessing game hunted in contravention of ss. 46 and 47(1) of Ontario's *Game and Fish Act*. The trial judge found that the members of the Métis community in and around Sault Ste. Marie have, under s. 35(1) of the *Constitution Act, 1982*, an aboriginal right to hunt for food that is infringed without justification by the Ontario hunting legislation. The Superior Court of Justice and the Court of Appeal upheld the acquittals.

Held: The appeal and cross-appeal should be dismissed.

The term "Métis" in s. 35 of the *Constitution Act, 1982* does not encompass all individuals with mixed Indian and European heritage; rather, it refers to distinctive peoples who, in addition to their mixed ancestry, developed their own customs, and recognizable group identity separate from their Indian or Inuit and European forebears. A Métis community is a group of Métis with a distinctive collective identity, living together in the same geographical area and sharing a common way of life.

The purpose of s. 35 is to protect practices that were historically important features of these distinctive communities and that persist in the present day as integral elements of their Métis culture. In applying the *Van der Peet* test to determine the Métis' s. 35 entitlements, the pre-contact aspect of the test must be adjusted to take into account the post-contact ethnogenesis and evolution of the Métis. A pre-control test establishing when Europeans achieved political and legal control in an area and focusing on the period after a particular Métis community arose and before it came under the control of European laws and customs is necessary to accommodate this history.

[page209]

Aboriginal rights are communal, grounded in the existence of a historic and present community, and exercisable by virtue of an individual's ancestrally based membership in the present community. The aboriginal right claimed in this case is the right to hunt for food in the environs of Sault Ste. Marie. To support a site-specific aboriginal rights claim, an identifiable Métis community with some degree of continuity and stability must be established through evidence of shared customs, traditions, and collective identity, as well as demographic evidence. The trial judge's findings of a historic Métis community and of a contemporary Métis community in and around Sault Ste. Marie are supported by the record and must be upheld.

The verification of a claimant's membership in the relevant contemporary community is crucial, since individuals are only entitled to exercise Métis aboriginal rights by virtue of their ancestral connection to and current membership in a Métis community. Self-identification, ancestral connection, and community acceptance are factors which define Métis identity for the purpose of claiming Métis rights under s. 35. Absent formal identification, courts will have to ascertain Métis identity on a case-by-case basis taking into account the value of community self-definition, the need for the process of identification to be objectively verifiable and the purpose of the constitutional guarantee. Here, the trial judge correctly found that the respondents are members of the Métis community that arose and still exists in and around Sault Ste. Marie. Residency on a reserve for a period of time by the respondents' ancestors did not, in the circumstances of this case, negate their Métis identity. An individual decision by a Métis person's ancestors to take treaty benefits does not necessarily extinguish that person's claim to Métis rights, absent collective adhesion by the Métis community to the treaty.

The view that Métis rights must find their origin in the pre-contact practices of their aboriginal ancestors must be rejected. This view in effect would deny to Métis their full status as distinctive rights-bearing peoples whose own integral practices are entitled to constitutional protection under s. 35(1). The historical record fully supports the trial judge's finding that the period just prior to 1850 is the appropriate date for finding effective European control in the Sault Ste. Marie area. The evidence also [page210] supports his finding that hunting for food was integral to the Métis way of life at Sault Ste. Marie in the period just prior to 1850. This practice has been continuous to the present.

Ontario's lack of recognition of any Métis right to hunt for food and the application of the challenged provisions infringes the Métis aboriginal right and conservation concerns did not justify the infringement. Even if the moose population in that part of Ontario were under threat, the Métis would still be entitled to a priority allocation to satisfy their subsistence needs. Further, the difficulty of identifying members of the Métis community should not be exaggerated so as to defeat constitutional rights. In the immediate future, the hunting rights of the Métis should track those of the Ojibway in terms of restrictions for conservation purposes and priority allocations. In the longer term, a combination of negotiation and judicial settlement will more clearly define the contours of the Métis right to hunt.

While the Court of Appeal had jurisdiction to issue a stay of its decision, which has now expired, no compelling reason existed for issuing an additional stay.

Cases Cited

Applied: R. v. Van der Peet, *[1996] 2 S.C.R. 507*; referred to: R. v. Sparrow, *[1990] 1 S.C.R. 1075*; Reference re Manitoba Language Rights, *[1985] 1 S.C.R. 721*.

Statutes and Regulations Cited

16 The emphasis on prior occupation as the primary justification for the special protection accorded aboriginal rights led the majority in *Van der Peet* to endorse a pre-contact test for identifying which customs, practices or traditions were integral to a particular aboriginal culture, and therefore entitled to constitutional protection. However, the majority recognized that the pre-contact test might prove inadequate to capture the range of Métis customs, [page218] practices or traditions that are entitled to protection, since Métis cultures by definition post-date European contact. For this reason, Lamer C.J. explicitly reserved the question of how to define Métis aboriginal rights for another day. He wrote at para. 67:

> [T]he history of the Métis, and the reasons underlying their inclusion in the protection given by s. 35, are quite distinct from those of other aboriginal peoples in Canada. As such, the manner in which the aboriginal rights of other aboriginal peoples are defined is not necessarily determinative of the manner in which the aboriginal rights of the Métis are defined. At the time when this Court is presented with a Métis claim under s. 35 it will then, with the benefit of the arguments of counsel, a factual context and a specific Métis claim, be able to explore the question of the purposes underlying s. 35's protection of the aboriginal rights of Métis people, and answer the question of the kinds of claims which fall within s. 35(1)'s scope when the claimants are Métis. The fact that, for other aboriginal peoples, the protection granted by s. 35 goes to the practices, customs and traditions of aboriginal peoples prior to contact, is not necessarily relevant to the answer which will be given to that question.

17 As indicated above, the inclusion of the Métis in s. 35 is not traceable to their pre-contact occupation of Canadian territory. The purpose of s. 35 as it relates to the Métis is therefore different from that which relates to the Indians or the Inuit. The constitutionally significant feature of the Métis is their special status as peoples that emerged between first contact and the effective imposition of European control. The inclusion of the Métis in s. 35 represents Canada's commitment to recognize and value the distinctive Métis cultures, which grew up in areas not yet open to colonization, and which the framers of the *Constitution Act, 1982* recognized can only survive if the Métis are protected along with other aboriginal communities.

[page219]

18 With this in mind, we proceed to the issue of the correct test to determine the entitlements of the Métis under s. 35 of the *Constitution Act, 1982*. The appropriate test must then be applied to the findings of fact of the trial judge. We accept *Van der Peet* as the template for this discussion. However, we modify the pre-contact focus of the *Van der Peet* test when the claimants are Métis to account for the important differences between Indian and Métis claims. Section 35 requires that we recognize and protect those customs and traditions that were historically important features of Métis communities prior to the time of effective European control, and that persist in the present day. This modification is required to account for the unique post-contact emergence of Métis communities, and the post-contact foundation of their aboriginal rights.

(1) Characterization of the Right

19 The first step is to characterize the right being claimed: *Van der Peet, supra*, at para. 76. Aboriginal hunting rights, including Métis rights, are contextual and site-specific. The respondents shot a bull moose near Old Goulais Bay Road, in the environs of Sault Ste. Marie, within the traditional hunting grounds of that Métis community. They made a point of documenting that the moose was intended to provide meat for the winter. The trial judge determined that they were hunting for food, and there is no reason to overturn this finding. The right being claimed can therefore be characterized as the right to hunt for food in the environs of Sault Ste. Marie.

20 We agree with the trial judge that the periodic scarcity of moose does not in itself undermine the respondents' claim. The relevant right is not to hunt moose but to hunt for food in the designated territory.

[page220]

(2) Identification of the Historic Rights-Bearing Community

21 The trial judge found that a distinctive Métis community emerged in the Upper Great Lakes region in the mid-17th century,

and peaked around 1850. We find no reviewable error in the trial judge's findings on this matter, which were confirmed by the Court of Appeal. The record indicates the following: In the mid-17th century, the Jesuits established a mission at Sainte-Marie-du-Sault, in an area characterized by heavy competition among fur traders. In 1750, the French established a fixed trading post on the south bank of the Saint Mary's River. The Sault Ste. Marie post attracted settlement by Métis -- the children of unions between European traders and Indian women, and their descendants (A. J. Ray, "An Economic History of the Robinson Treaties Area Before 1860" (1998) ("Ray Report"), at p. 17). According to Dr. Ray, by the early 19th century, "[t]he settlement at Sault Ste. Marie was one of the oldest and most important [Métis settlements] in the upper lakes area" (Ray Report, at p. 47). The Hudson Bay Company operated the Sault Ste. Marie's post primarily as a depot from 1821 onwards (Ray Report, at p. 51). Although Dr. Ray characterized the Company's records for this post as "scanty" (Ray Report, at p. 51), he was able to piece together a portrait of the community from existing records, including the 1824-25 and 1827-28 post journals of HBC Chief Factor Bethune, and the 1846 report of a government surveyor, Alexander Vidal (Ray Report, at pp. 52-53).

22 Dr. Ray's report indicates that the individuals named in the post journals "were overwhelmingly Métis", and that Vidal's report "provide[s] a crude indication of the rate of growth of the community and highlights the continuing dominance of Métis in it" (Ray Report, at p. 53). Dr. Victor P. Lytwyn characterized the Vidal report and accompanying map as "clear evidence of a distinct and cohesive Métis community at Sault Ste. Marie" (V. P. Lytwyn, [page221] "Historical Report on the Métis Community at Sault Ste. Marie" (1998) ("Lytwyn Report"), at p. 2) while Dr. Ray elaborated: "By the time of Vidal's visit to the Sault Ste. Marie area, the people of mixed ancestry living there had developed a distinctive sense of identity and Indians and Whites recognized them as being a separate people" (Ray Report, at p. 56).

23 In addition to demographic evidence, proof of shared customs, traditions, and a collective identity is required to demonstrate the existence of a Métis community that can support a claim to site-specific aboriginal rights. We recognize that different groups of Métis have often lacked political structures and have experienced shifts in their members' self-identification. However, the existence of an identifiable Métis community must be demonstrated with some degree of continuity and stability in order to support a site-specific aboriginal rights claim. Here, we find no basis for overturning the trial judge's finding of a historic Métis community at Sault Ste. Marie. This finding is supported by the record and must be upheld.

(3) Identification of the Contemporary Rights-Bearing Community

24 Aboriginal rights are communal rights: They must be grounded in the existence of a historic and present community, and they may only be exercised by virtue of an individual's ancestrally based membership in the present community. The trial judge found that a Métis community has persisted in and around Sault Ste. Marie despite its decrease in visibility after the signing of the Robinson-Huron Treaty in 1850. While we take note of the trial judge's determination that the Sault Ste. Marie Métis community was to a large extent an "invisible entity" (*[1999] 1 C.N.L.R. 153*, at para. 80) from the [page222] mid-19th century to the 1970s, we do not take this to mean that the community ceased to exist or disappeared entirely.

25 Dr. Lytwyn describes the continued existence of a Métis community in and around Sault Ste. Marie despite the displacement of many of the community's members in the aftermath of the 1850 treaties:

> [T]he Métis continued to live in the Sault Ste. Marie region. Some drifted into the Indian Reserves which had been set apart by the 1850 Treaty. Others lived in areas outside of the town, or in back concessions. The Métis continued to live in much the same manner as they had in the past -- fishing, hunting, trapping and harvesting other resources for their livelihood.
>
> (Lytwyn Report, at p. 31 (emphasis added); see also J. Morrison, "The Robinson Treaties of 1850: A Case Study", at p. 201.)

26 The advent of European control over this area thus interfered with, but did not eliminate, the Sault Ste. Marie Métis community and its traditional practices, as evidenced by census data from the 1860s through the 1890s. Dr. Lytwyn concluded from this census data that "[a]lthough the Métis lost much of their traditional land base at Sault Ste. Marie, they continued to live in the region and gain their livelihood from the resources of the land and waters" (Lytwyn Report, at p. 32). He also noted a tendency for underreporting and lack of information about the Métis during this period because of their "removal to the

Marie. The Métis engaged in these activities for generations and, on the eve of the 1850 treaties, hunting, fishing, trapping and gathering were integral activities to the Métis community at Sault Ste. Marie.

44 This evidence supports the trial judge's finding that hunting for food was integral to the Métis way of life at Sault Ste. Marie in the period just prior to 1850.

(7) Establishment of Continuity Between the Historic Practice and the Contemporary Right Asserted

45 Although s. 35 protects "existing" rights, it is more than a mere codification of the common law. Section 35 reflects a new promise: a constitutional commitment to protecting practices that were historically important features of particular aboriginal communities. A certain margin of flexibility might be required to ensure that aboriginal practices can evolve and develop over time, but it is not necessary to define or to rely on that margin in this case. Hunting for food was an important feature of the Sault Ste. Marie Métis community, and the practice has been continuous to the present. Steve and Roddy Powley claim a Métis aboriginal right to hunt for food. The right claimed by the Powleys [page231] falls squarely within the bounds of the historical practice grounding the right.

(8) Determination of Whether or Not the Right Was Extinguished

46 The doctrine of extinguishment applies equally to Métis and to First Nations claims. There is no evidence of extinguishment here, as determined by the trial judge. The Crown's argument for extinguishment is based largely on the Robinson-Huron Treaty of 1850, from which the Métis as a group were explicitly excluded.

(9) If There Is a Right, Determination of Whether There Is an Infringement

47 Ontario currently does not recognize any Métis right to hunt for food, or any "special access rights to natural resources" for the Métis whatsoever (appellant's record, at p. 1029). This lack of recognition, and the consequent application of the challenged provisions to the Powleys, infringe their aboriginal right to hunt for food as a continuation of the protected historical practices of the Sault Ste. Marie Métis community.

(10) Determination of Whether the Infringement Is Justified

48 The main justification advanced by the appellant is that of conservation. Although conservation is clearly a very important concern, we agree with the trial judge that the record here does not support this justification. If the moose population in this part of Ontario were under threat, and there was no evidence that it is, the Métis would still be entitled to a priority allocation to satisfy their subsistence needs in accordance with the criteria set out in *R. v. Sparrow*, *[1990] 1 S.C.R. 1075*. While preventative measures might be required for conservation purposes in the future, we have not been presented with evidence to support such measures here. The Ontario authorities can make out a case for [page232] regulation of the aboriginal right to hunt moose for food if and when the need arises. On the available evidence and given the current licensing system, Ontario's blanket denial of any Métis right to hunt for food cannot be justified.

49 The appellant advances a subsidiary argument for justification based on the alleged difficulty of identifying who is Métis. As discussed, the Métis identity of a particular claimant should be determined on proof of self-identification, ancestral connection, and community acceptance. The development of a more systematic method of identifying Métis rights-holders for the purpose of enforcing hunting regulations is an urgent priority. That said, the difficulty of identifying members of the Métis community must not be exaggerated as a basis for defeating their rights under the Constitution of Canada.

50 While our finding of a Métis right to hunt for food is not species-specific, the evidence on justification related primarily to the Ontario moose population. The justification of other hunting regulations will require adducing evidence relating to the particular species affected. In the immediate future, the hunting rights of the Métis should track those of the Ojibway in terms of restrictions for conservation purposes and priority allocations where threatened species may be involved. In the longer term, a combination of negotiation and judicial settlement will more clearly define the contours of the Métis right to hunt, a right that

we recognize as part of the special aboriginal relationship to the land.

B. *The Request for a Stay*

51 With respect to the cross-appeal, we affirm that the Court of Appeal had jurisdiction to issue a stay of its decision in these circumstances. This power should continue to be used only in exceptional [page233] situations in which a court of general jurisdiction deems that giving immediate effect to an order will undermine the very purpose of that order or otherwise threaten the rule of law: *Reference re Manitoba Language Rights*, *[1985] 1 S.C.R. 721*. We note that the Powleys' acquittal would have remained valid notwithstanding the stay. It was, however, within the Court of Appeal's discretion to suspend the application of its ruling to other members of the Métis community in order to foster cooperative solutions and ensure that the resource in question was not depleted in the interim, thereby negating the value of the right.

52 The initial stay expired on February 23, 2002, and more than a year has passed since that time. The Court of Appeal's decision has been the law of Ontario in the interim, and chaos does not appear to have ensued. We see no compelling reason to issue an additional stay. We also note that it is particularly important to have a clear justification for a stay where the effect of that stay would be to suspend the recognition of a right that provides a defence to a criminal charge, as it would here.

III. Conclusion

53 Members of the Métis community in and around Sault Ste. Marie have an aboriginal right to hunt for food under s. 35(1). This is determined by their fulfillment of the requirements set out in *Van der Peet*, modified to fit the distinctive purpose of s. 35 in protecting the Métis.

54 The appeal is dismissed with costs to the respondents. The cross-appeal is dismissed.

55 The constitutional question is answered as follows:

> Are ss. 46 and 47(1) of the *Game and Fish Act*, R.S.O. 1990, c. G.1, as they read on October 22, 1993, of no force or effect with respect to the respondents, being [page234] Métis, in the circumstances of this case, by reason of their aboriginal rights under s. 35 of the *Constitution Act, 1982*?
>
> Answer: Yes.

APPENDIX

Relevant Constitutional and Statutory Provisions

> *Game and Fish Act*, R.S.O. 1990, c. G.1, ss. 46 and 47(1)
>
> **46.** No person shall knowingly possess any game hunted in contravention of this Act or the regulations.
>
> **47.** (1) Except under the authority of a licence and during such times and on such terms and conditions and in such parts of Ontario as are prescribed in the regulations, no person shall hunt black bear, polar bear, caribou, deer, elk or moose.
>
> *Constitution Act, 1982*
>
> **35.** (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

Solicitors

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.

Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council, [2010] 2 S.C.R. 650

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

Administrative Tribunals Act, S.B.C. 2004, c. 45, ss. 1, 44(1), 58.

Constitution Act, 1867, s. 91(12).

Constitution Act, 1982, ss. 24, 35, 52.

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.

prevent any one from effectively dealing with consultation arising from particular government actions, the government might effectively be able to avoid its duty to consult.

63 As the B.C. Court of Appeal rightly found, the duty to consult with Aboriginal groups, triggered when government decisions have the potential to adversely affect Aboriginal interests, is a constitutional duty invoking the honour of the Crown. It must be met. If the tribunal structure set up by the legislature is incapable of dealing with a decision's potential adverse impacts on Aboriginal interests, then the Aboriginal peoples affected must seek appropriate remedies in the courts: *Haida Nation*, at para. 51.

64 Before leaving the role of tribunals in relation to consultation, it may be useful to review the standard of review that courts should apply in addressing the decisions of tribunals. The starting point is *Haida Nation*, at para. 61:

> The existence or extent of the duty to consult or accommodate is a legal question in the sense that it defines a legal duty. However, it is typically premised on an assessment of the facts. It follows that a degree of deference to the findings of fact of the initial adjudicator may be appropriate... . Absent error on legal issues, the tribunal may be in a better position to evaluate the issue than the reviewing court, and some degree of [page681] deference may be required. In such a case, the standard of review is likely to be reasonableness. To the extent that the issue is one of pure law, and can be isolated from the issues of fact, the standard is correctness. However, where the two are inextricably entwined, the standard will likely be reasonableness ....

65 It is therefore clear that some deference is appropriate on matters of mixed fact and law, invoking the standard of reasonableness. This, of course, does not displace the need to take express legislative intention into account in determining the appropriate standard of review on particular issues: *Canada (Citizenship and Immigration) v. Khosa*, *2009 SCC 12*, *[2009] 1 S.C.R. 339*. It follows that it is necessary in this case to consider the provisions of the *Administrative Tribunals Act* and the *Utilities Commission Act* in determining the appropriate standard of review, as will be discussed more fully below.

C. *The Commission's Jurisdiction to Consider Consultation*

66 Having considered the law governing when a duty to consult arises and the role of tribunals in relation to the duty to consult, I return to the questions at issue on appeal.

67 The first question is whether consideration of the duty to consult was within the mandate of the Commission. This being an issue of jurisdiction, the standard of review at common law is correctness. The relevant statutes, discussed earlier, do not displace that standard. I therefore agree with the Court of Appeal that the Commission did not err in concluding that it had the power to consider the issue of consultation.

68 As discussed above, issues of consultation between the Crown and Aboriginal groups arise from s. 35 of the *Constitution Act, 1982*. They therefore have a constitutional dimension. The question is whether the Commission possessed the power to [page682] consider such an issue. As discussed, above, tribunals are confined to the powers conferred on them by the legislature: *Conway*. We must therefore ask whether the *Utilities Commission Act* conferred on the Commission the power to consider the issue of consultation, grounded as it is in the Constitution.

69 It is common ground that the *Utilities Commission Act* empowers the Commission to decide questions of law in the course of determining whether the 2007 EPA is in the public interest. The power to decide questions of law implies a power to decide constitutional issues that are properly before it, absent a clear demonstration that the legislature intended to exclude such jurisdiction from the tribunal's power (*Conway*, at para. 81; *Paul v. British Columbia (Forest Appeals Commission)*, *2003 SCC 55*, *[2003] 2 S.C.R. 585*, at para. 39). "[S]pecialized tribunals with both the expertise and authority to decide questions of law are in the best position to hear and decide constitutional questions related to their statutory mandates": *Conway*, at para. 6.

70 Beyond its general power to consider questions of law, the factors the Commission is required to consider under s. 71 of the *Utilities Commission Act*, while focused mainly on economic issues, are broad enough to include the issue of Crown consultation with Aboriginal groups. At the time, s. 71(2)(e) required the Commission to consider "any other factor that the

commission considers relevant to the public interest". The constitutional dimension of the duty to consult gives rise to a special public interest, surpassing the dominantly economic focus of the consultation under the *Utilities Commission Act*. As Donald J.A. asked, "How can a contract formed by a Crown agent in breach of a constitutional duty be in the public interest?" (para. 42).

71 This conclusion is not altered by the *Administrative Tribunals Act*, which provides that a tribunal does not have jurisdiction over [page683] constitutional matters. Section 2(4) of the *Utilities Commission Act* makes certain sections of the *Administrative Tribunals Act* applicable to the Commission. This includes s. 44(1) which provides that "[t]he tribunal does not have jurisdiction over constitutional questions." However, "constitutional question" is defined narrowly in s. 1 of the *Administrative Tribunals Act* as "any question that requires notice to be given under section 8 of the *Constitutional Question Act*". Notice is required only for challenges to the constitutional validity or constitutional applicability of any law, or are application for a constitutional remedy.

72 The application to the Commission by the CSTC for a rescoping order to address consultation issues does not fall within this definition. It is not a challenge to the constitutional validity or applicability of a law, nor a claim for a constitutional remedy under s. 24 of the *Charter* or s. 52 of the *Constitution Act, 1982*. In broad terms, consultation under s. 35 of the *Constitution Act, 1982* is a constitutional question: *Paul*, para. 38. However, the provisions of the *Administrative Tribunals Act* and the *Constitutional Question Act* do not indicate a clear intention on the part of the legislature to exclude from the Commission's jurisdiction the duty to consider whether the Crown has discharged its duty to consult with holders of relevant Aboriginal interests. It follows that, in applying the test articulated in *Paul* and *Conway*, the Commission has the constitutional jurisdiction to consider the adequacy of Crown consultation in relation to matters properly before it.

73 For these reasons, I conclude that the Commission had the power to consider whether adequate consultation with concerned Aboriginal peoples had taken place.

74 While the *Utilities Commission Act* conferred on the Commission the power to consider whether adequate consultation had taken place, [page684] its language did not extend to empowering the Commission to engage in consultations in order to discharge the Crown's constitutional obligation to consult. As discussed above, legislatures may delegate the Crown's duty to consult to tribunals. However, the Legislature did not do so in the case of the Commission. Consultation itself is not a question of law, but a distinct constitutional process requiring powers to effect compromise and do whatever is necessary to achieve reconciliation of divergent Crown and Aboriginal interests. The Commission's power to consider questions of law and matters relevant to the public interest does not empower it to itself engage in consultation with Aboriginal groups.

75 As the Court of Appeal rightly found, the duty to consult with Aboriginal groups, triggered when government decisions have the potential to adversely affect Aboriginal interests, is a constitutional duty invoking the honour of the Crown. It must be met. If the tribunal structure set up by the Legislature is incapable of dealing with a decision's potential adverse impacts on Aboriginal interests, then the Aboriginal peoples affected must seek appropriate remedies in the courts: *Haida Nation*, at para. 51.

D. *The Commission's Reconsideration Decision*

76 The Commission correctly accepted that it had the power to consider the adequacy of consultation with Aboriginal groups. The reason it decided it would not consider this issue was not for want of power, but because it concluded that the consultation issue could not arise, given its finding that the 2007 EPA would not adversely affect any Aboriginal interest.

77 As reviewed earlier in these reasons, the Commission held a hearing into the issue of whether the main hearing should be rescoped to permit exploration of the consultation issue. The evidence at this hearing was directed to the issue [page685] of whether approval of the 2007 EPA would have any adverse impact on the interests of the CSTC First Nations. The Commission considered both the impact of the 2007 EPA on river levels (physical impact) and on the management and control of the resource. The Commission concluded that the 2007 EPA would not have any adverse physical impact on the Nechako River and its fishery. It also concluded that the 2007 EPA did not "transfer or change control of licenses or authorization", negating adverse impacts from management or control changes. The Commission held that an underlying infringement (i.e. failure to

Ross River Dena Council v. Yukon, [2011] Y.J. No. 130

British Columbia and Yukon Judgments

Yukon Territory Supreme Court

R.S. Veale J.

November 15, 2011.

S.C. No. 10-A0148

Registry: Whitehorse

[2011] Y.J. No. 130 | *2011 YKSC 84* | *343 D.L.R. (4th) 545* | *210 A.C.W.S. (3d) 287* | *[2012] 2 C.N.L.R. 341*

Between Ross River Dena Council, Plaintiff, and Government of Yukon, Defendant, and Yukon Chamber of Mines, Intervenor

(82 paras.)

Case Summary

Aboriginal law — Treaties and agreements — Agreements — Land claim agreements — Application by First Nation for declaration respondent government had duty to consult prior to recording mineral claims within Ross River area allowed in part — Applicant credibly asserted claims to land but had not yet established title — Quartz mining claims operated under free entry system — Recorder was required to record claims that conformed with Quartz Mining Act — Recording claim perfected claimant's exploration rights, so was Crown conduct/decision — Recording allowed exploration that could adversely impact land — Declaration made that duty to consult was engaged when claim recorded and required notifying applicant — Declaration suspended one year.

Aboriginal law — Aboriginal lands — Duties of Crown — Fair dealing and reconciliation — Consultation and accommodation — Application by First Nation for declaration respondent government had duty to consult prior to recording mineral claims within Ross River area allowed in part — Applicant credibly asserted claims to land but had not yet established title — Quartz mining claims operated under free entry system — Recorder was required to record claims that conformed with Quartz Mining Act — Recording claim perfected claimant's exploration rights, so was Crown conduct/decision — Recording allowed exploration that could adversely impact land — Declaration made that duty to consult was engaged when claim recorded and required notifying applicant — Declaration suspended one year.

Natural resources law — Mines and minerals — Exploration — Phases — Early exploration — Claim staking — Rights — Exclusive right to explore and right to lease the claim — Constitutional powers and ownership — Dispositions from Crown — Free entry — Title — Registration of title — Recorder's office — Application by First Nation for declaration respondent government had duty to consult prior to recording mineral claims within Ross River area allowed in part — Applicant credibly asserted claims to land but had not yet established title — Quartz mining claims operated under free entry system — Recorder was required to record claims that conformed with Quartz Mining Act — Recording claim perfected claimant's exploration rights, so was Crown conduct/decision — Recording allowed exploration that could adversely impact land — Declaration made that duty to consult was engaged when claim recorded and required notifying applicant — Declaration suspended one year.

Application by First Nation for a declaration that the respondent government had a duty to consult prior to recording a grant of quartz mineral claims within the Red River Area. There were several agreements in place between the parties concerning the land area in question, but no final agreement had been reached. Quartz claim staking had exploded in the Yukon and there were 8,633 active mineral claims within the area in question. After the Canadian government transferred management

of land and waters to the respondent in 2003, the respondent began recording the location of quartz mineral claims. Quartz mineral claim staking operated under a free entry system so that anyone could prospect for claims on territorial lands. The Quartz Mining Act set out the requirements for recording a mineral claim. Claims could be indefinitely renewed, though only a small portion ever proceeded to development. Once a claim was recorded, claimants could engage in Class 1 exploration programs without notifying the respondent, so the applicant would also not be notified. Claimants were required to obtain permits for Class 2, 3 and 4 exploration programs, prior to which an assessment would be held for which the applicant was notified. The respondent maintained its duty to consult arose prior to issuing a Class 2 or higher permit. The applicant argued the duty arose prior to recording a claim.

HELD: Application allowed in part.

The agreements between the parties did not amount to an acknowledgement that the applicant had established Aboriginal title over the land in question, but the applicant had credibly asserted a claim. Under the Act, the Mining Recorder did not have the discretion to refuse to record a claim if the requirements were met. However, the mere lack of discretion did not eliminate the respondent's duty to consult. While recording a claim was non-discretionary, it perfected the claimant's right to carry out exploration. Thus, recording a claim was Crown conduct, or a decision, and triggered the duty to consult. Class 1 exploration programs permitted some construction, clearing and trenching, so the applicant's hunting, trapping and fishing rights could clearly be adversely affected. The effects of Class 1 exploration programs could not be fully mitigated by remediation regulations. The duty to consult could be achieved in the non-onerous manner of sending the applicant monthly reports. As the issue was ongoing, a declaration was made that the respondent's duty to consult was triggered after the claim was recorded and required it to notify the applicant by providing monthly reports. The declaration was suspended for one year to allow the respondent time to change its procedures.

Statutes, Regulations and Rules Cited:

Constitution Act, 1982, R.S.C. 1985, App. II, No. 44, Schedule B,

Forestry Revitalization Act, *SBC 2003, CHAPTER 17*,

Quartz Mining Act, *S.Y. 2003, c. 14, s. 2*, s. 12, s. 18, s. 41, s. 49, s. 70, s. 78(1)(a), s. 80(1), s. 130

Quartz Mining Land Use Regulation, OIC 2003/64,

Rules of Court, Rule 5(21), Rule 19

Yukon Act, *S.C. 2002, c. 7*,

Yukon Environmental and Socio-economic Assessment Act, *S.C. 2003, c. 7, s. 74*(2)

Yukon Quartz Mining Act, R.S.C. 1985, c. Y-4, s. 130

Counsel

Stephen Walsh: Counsel for Ross River Dena Council.

Penelope Gawn and Laurie Henderson: Counsel for Government of Yukon.

selective as possible. The first part of the test requires Crown knowledge of a potential claim or right. *Rio Tinto* says the following:

> (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 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.

44 The Government of Yukon agrees that it has knowledge of the assertion of an aboriginal right or claim by Ross River Dena Council in the Ross River Area. However, the Government of Yukon denies that any of the agreements it has made should be interpreted as an express acknowledgment that Ross River Dena Council has established aboriginal rights, title and interests in and to the Ross River Area. The Government of Yukon considers such claims to be assertions rather than actual recognition of aboriginal rights or title.

45 In contrast, counsel for Ross River Dena Council submits that the Kaska agreements explicitly acknowledge title, and, per *Delgamuukw v. British Columbia*, *[1997] 3 S.C.R. 1010*, this title "encompasses the right to exclusive use and occupation of the land." Ross River Dena Council submits that any mineral claim will impact its exclusive use and occupation.

46 In my view, the agreements do not amount to an acknowledgement that Ross River Dena Council has established aboriginal title to the full Ross River Area in the sense of exclusive use and occupation, although clearly the Government of Yukon has recognized that claims to aboriginal rights and title are extant and not yet defined. The fact that negotiations have been taking place for many years supports the view that the claims to aboriginal rights and title are credibly asserted but not established. It does not make sense to conflate the words in the agreements so that an acknowledgement of rights and title within the Ross River Area is an acknowledgement of aboriginal title to the whole area. I have no doubt that Ross River Dena Council asserts such a claim and as counsel indicates, the Kaska Tribal Council (representing Ross River Dena Council among others) has an outstanding court action in the Federal Court of Canada in this regard. But the nature, extent and scope of the asserted aboriginal rights have not been established. I conclude that the acknowledgements by the Government of Yukon in the three agreements are in the context of an assertion rather than an acceptance of an established aboriginal title to the Ross River Area. However, the Ross River Dena Council claim is not tenuous but in the category of a strong case sufficiently credible to meet the threshold required by the first element of the test for the duty to consult.

47 I should add at this point that the claim of Ross River Dena Council for special costs based on the alleged resiling of the Government of Yukon from its acknowledgement of aboriginal rights and title is denied. The Government of Yukon acknowledges the asserted claim of Ross River Dena Council to the Ross River area and indeed acknowledges that the first part of the test for the duty to consult has been established.

48 *Rio Tinto* discusses the second part of the duty to consult test starting at para. 42:

> (2) Crown Conduct or Decision
>
> [42] Second, for a duty to consult to arise, there must be Crown conduct or a Crown decision that engages a potential Aboriginal right. What is required is conduct that may adversely impact on the claim or right in question.

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 a timely

the SKDB and NBDB's claims to Aboriginal rights before turning to consider the seriousness of the potential adverse effect upon the rights claimed.

128 A court's assessment of the duty to consult and accommodate prior to proof of an Aboriginal right does not amount to a prior determination of the Aboriginal claim on its merits; rather, courts are able to "differentiat[e] between tenuous claims, claims possessing a strong *prima facie* case, and established claims", even in the absence of a complete ethno-historical evidentiary record: *Haida Nation*, above at paras. 37 and 66.

129 Indeed, in *Beckman v. Little Salmon/Carmacks First Nation*, *2010 SCC 53*, *[2010] 3 S.C.R. 103* at para. 47, Justice Binnie confirmed that an application for judicial review was an appropriate procedure through which to assess the scope and adequacy of consultation. In both *Haida Nation* and *Little Salmon*, lower courts assessed the *prima facie* strength of Aboriginal claims based upon affidavit evidence.

130 In the *Cook* case relied upon by the Crown, the Court was faced with conflicting affidavits, and the applicants were unable to articulate a precise infringement of their interests. Contrary to what the Minister suggests, the Court in *Cook* did not decline to assess the strength of the claims, concluding instead that on the basis of the evidentiary record before it, the applicants had established only a "credible claim": see para. 151.

131 The SKDB and the NBDB assert that in entering into Treaty 11, they did not surrender their Aboriginal rights with respect to the disputed lands, whereas I understand the Crown to argue that these Aboriginal rights were extinguished by the Treaty. The Crown acknowledges, however, that it never fulfilled a significant component of Treaty 11, namely its obligation to set aside reserve lands for the benefit of the First Nations.

132 The legal consequences of the Crown's failure to fulfill a fundamental commitment in the Treaty in relation to the SKDB and NBDB's asserted Aboriginal title remain to be determined on a more complete record through the land claims process. However, it is appropriate for the purposes of this application to consider these underlying circumstances as material factors in assessing the strength of the applicants' asserted Aboriginal claims: see *Ka'a'Gee Tu First Nation*, above at para. 105.

133 Moreover, Canada has, since 1998, been involved in negotiations with the SKDB and NBDB regarding their claims to Aboriginal title through the Dehcho process. While not a determinative factor, the Crown's participation in the land claims process is a factor that may inform the Court in assessing the strength of the SKDB and NBDB's asserted claims: see *Ka'a'Gee Tu First Nation*, above at para. 104.

134 Through the Dehcho process, the SKDB and NBDB have provided Canada with considerable evidence in support of their historical claims to the lands in the overlap area, including, amongst other things, traditional use studies, traditional place name maps, and reports of archaeological studies. I do not understand the ADKFN to have provided Canada with similar evidence as of yet. We do know that as of March 15, 2010, the ADKFN had not yet completed their traditional land use study. In any event, there is little evidence regarding the strength of the ADKFN's competing claims in the record before me.

135 The SKDB and NBDB also rely on a statement made during the cross-examination of Janet Pound, a Chief Land Negotiator at the Department of Indian Affairs and Northern Development, as an admission regarding the strength of their Aboriginal claims. Counsel to the SKDB and NBDB asked Ms. Pound: "Now, is it agreed that Canada accepts the claims of Sambaa K'E and Nahanni Butte regarding overlap, that they are substantial claims and they are with merit?" to which Ms. Pound responded "I think so".

136 In fairness, regard must be had to the entirety of Ms. Pound's answer. She went on to state: "I think any time the Aboriginal groups are asserting something, they are their assertions, right? We have got to respect their assertions. We don't always - everything you do in agreements doesn't necessarily always match with that they are asserting, but obviously we're respecting the assertions that are made." I agree with Canada that when Ms. Pound's answer is read in its entirety, it is not an admission that the SKDB and NBDB's Aboriginal claims are meritorious.

137 While it is not easy to quantify the strength of the SKDB and NBDB's claims to Aboriginal title at this stage of the process, I am nevertheless satisfied that the claims raise a reasonably strong *prima facie* case. This finding is based upon a

review of the record, the nature of the asserted claims, the language of Treaty 11, the Crown's breach of one of its fundamental obligations under Treaty 11, the paucity of evidence with respect to the strength of the ADKFN's claims to the disputed territory, and the Crown's commitment to the comprehensive land claims process.

138 I note that my conclusion in this regard with respect to the potential significance of the Crown's breach of its obligations under Treaty 11 is consistent with the finding of this Court in relation to the Aboriginal rights asserted in another Treaty 11 case: see *Ka'a'Gee Tu First Nation*, above at para. 107.

139 The fact that the SKDB and NBDB have established a reasonably strong *prima facie* case based upon their asserted Aboriginal rights to the land in question serves to elevate the content of the Crown's duty to consult from what would otherwise have been the case had the duty been based exclusively on the SKDB and NBDB's claims to Treaty rights to hunt, fish and trap.

140 With this understanding of the strength of the SKDB and NBDB's Aboriginal and Treaty claims, I will next consider the seriousness of the potential infringement that the ADKFN negotiations and an eventual agreement in principle may have for these claims.

b) The Seriousness of the Potential Infringement of the Asserted Aboriginal and Treaty Rights

141 There is no dispute that the negotiation of the ADKFN Framework Agreement has triggered a duty on the part of Canada to consult with the SKDB and NBDB. The issue is the extent and depth of the consultations that are required at this stage of the process.

142 Canada submits that we cannot know at this stage of the process what impact its negotiations with the ADKFN will have for the SKDB and NBDB, with the result that it is impossible to assess the seriousness of the potential infringement of the SKDB and NBDB's asserted Aboriginal and Treaty rights. The result of this is that Canada's duty to consult with the SKDB and NBDB at this point is at the lower end of the consultation spectrum and is limited to notice, disclosure or discussion.

143 Canada points out that an agreement in principle is not a binding "decision". It does not grant any rights to the signatories, nor does it take away rights from other non-signatory First Nations. According to Canada, an agreement in principle is "merely an interim negotiating position subject to change".

144 Consequently, Canada says that it would be premature for it to engage in deep consultation with the SKDB and NBDB at this stage of the process. Because it will not be possible to know the particulars of the contemplated Crown conduct and the seriousness of any impact on the rights of the SKDB and NBDB until such time as Canada has entered into an agreement in principle with the ADKFN, consultation with the SKDB and NBDB should not take place until then.

145 I note, however, that Canada's position as to when consultation with the SKDB and NBDB should occur has not been consistent, and that previous representations made by Canada in this regard do not appear to have been respected.

146 It will be recalled that in her December 21, 2009 letter to counsel for the SKDB and NBDB, the Senior Assistant Deputy Minister for Policy and Strategic Direction advised the SKDB and NBDB it would be premature for Canada to enter into consultations with them *until the outcome of the overlap discussions between the ADKFN and the SKDB and NBDB was known*. It would have been entirely reasonable for the SKDB and NBDB to understand this statement to mean that Canada would consult with them once the outcome of the overlap negotiations was known.

147 By June of 2010, Canada was aware that the overlap discussions had failed. It did not, however, initiate any form of consultation with the SKDB and NBDB at that time. Instead, Canada's position as to when consultation with the SKDB and NBDB should take place seemed to change after the overlap negotiations broke down. This change in position is reflected in the Minister's October 25, 2010 letter, which advised the SKDB and NBDB that consultation would now not occur until *after* Canada reached an agreement in principle with the ADKFN.

148 Canada's position at the hearing of this application was generally consistent with the position taken by the Minister in his October 25, 2010 letter: that is, that consultation should take place after the signing of an agreement in principle with the

consistent with the honour of the Crown and the principles articulated by the Supreme Court of Canada in *Haida Nation* and *Taku River*.

213 The SKDB and NBDB are entitled to their costs of this matter. I am not persuaded that the circumstances of this case justify an award of solicitor and client costs. As agreed by the parties, the SKDB and NBDB's costs are fixed in the amount of $15,000.

JUDGMENT

THIS COURT DECLARES, ORDERS AND ADJUDGES that:

1. Canada has breached its duty to consult with the SKDB and NBDB;
2. This application for judicial review is allowed and the October 25, 2010 decision by the Minister of Indian Affairs and Northern Development postponing consultation with the SKDB and NBDB until after the conclusion of an agreement in principle between Canada and the ADKFN is set aside;
3. Canada shall engage in immediate and substantive discussions directly with the SKDB and NBDB with respect to the subjects of the land claim with ADKFN that would affect or potentially affect the asserted Aboriginal and Treaty rights of the SKDB and NBDB, including the determination of lands and resources forming the settlement area or settlement lands of ADKFN's land claim, the use of such lands and resources, and the regulation or management of such lands and resources;
4. Canada is prohibited from entering into an agreement in principle with the ADKFN in relation to its pending land claim until such time as the consultations with the SKDB and NBDB referred to in the paragraph 3 of this Order have been carried out;
5. Upon the conclusion of an agreement in principle with the ADKFN, Canada shall engage in deep, meaningful and adequate consultation with the SKDB and NBDB in order to develop workable accommodation measures to address their concerns about the determination of lands and resources forming the settlement area or settlement lands of ADKFN's land claim, and the regulation or management of such lands and resources. This process is to be conducted with the aim of reconciling outstanding differences between the parties, in a manner that is consistent with the honour of the Crown and the principles articulated by the Supreme Court of Canada in *Haida Nation* and *Taku River*; and
6. The SKDB and NBDB shall have their costs of this matter, fixed in the amount of $15,000.

MACTAVISH J.

End of Document

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).

Judicial Review Procedure Act, *R.S.B.C. 1996, c. 241*.

Mine Development Assessment Act, S.B.C. 1990, c. 55.

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, at para. 168. The obligation to consult does not arise only upon proof of an Aboriginal claim, in order to justify infringement. That understanding of consultation would deny the significance of the historical roots of the honour of the Crown, and deprive it of its role in the reconciliation process. Although determining the required extent of consultation and accommodation before a final settlement is challenging, it is essential to the process mandated by s. 35(1). The duty to consult arises when a Crown actor has knowledge, real or constructive, of the potential existence of Aboriginal rights or title and contemplates conduct that might adversely affect them. This in turn may lead to a duty to change government plans or policy to accommodate Aboriginal concerns. Responsiveness is a key [page565] requirement of both consultation and accommodation.

26 The federal government announced a comprehensive land claims policy in 1981, under which Aboriginal land claims were to be negotiated. The TRTFN submitted its land claim to the Minister of Indian Affairs in 1983. The claim was accepted for negotiation in 1984, based on the TRTFN's traditional use and occupancy of the land. No negotiation ever took place under the federal policy; however, the TRTFN later began negotiation of its land claim under the treaty process established by the B.C. Treaty Commission in 1993. As of 1999, the TRTFN had signed a Protocol Agreement and a Framework Agreement, and was working towards an Agreement in Principle. The Province clearly had knowledge of the TRTFN's title and rights claims.

27 When Redfern applied for project approval, in its efforts to reopen the Tulsequah Chief Mine, it was apparent that the decision could adversely affect the TRTFN's asserted rights and title. The TRTFN claim Aboriginal title over a large portion of northwestern British Columbia, including the territory covered by the access road considered during the approval process. It also claims Aboriginal hunting, fishing, gathering, and other traditional land use activity rights which stood to be affected by a road through an area in which these rights are exercised. The contemplated decision thus had the potential to impact adversely the rights and title asserted by the TRTFN.

[page566]

28 The Province was aware of the claims, and contemplated a decision with the potential to affect the TRTFN's asserted rights and title negatively. It follows that the honour of the Crown required it to consult and if indicated accommodate the TRTFN in making the decision whether to grant project approval to Redfern, and on what terms.

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 1995, when they opted out of the process, wishing instead to address the issue through treaty talks and development of a land use policy.

35 The Final Project Report Specifications ("Specifications") detail a number of meetings between the TRTFN, review agency staff and company representatives in TRTFN communities prior to February 1996: Southin J.A., at para. 41. Redfern and TRTFN met directly several times between June 1993 and February 1995 to discuss Redfern's exploration activities and TRTFN's concerns and information requirements. Redfern also contracted an independent consultant to conduct [page569] archaeological and ethnographic studies with input from the TRTFN to identify possible effects of the proposed project on the TRTFN's traditional way of life: Southin J.A., at para. 41. The Specifications document TRTFN's written and oral requirements for information from Redfern concerning effects on wildlife, fisheries, terrain sensitivity, and the impact of the proposed access road, of barging and of mine development activities: Southin J.A., at para. 41.

36 The TRTFN declined to participate in the Road Access Subcommittee until January 26, 1998. The Environmental Assessment Office appreciated the dilemma faced by the TRTFN, which wished to have its concerns addressed on a broader scale than that which is provided for under the Act. The TRTFN was informed that not all of its concerns could be dealt with at the certification stage or through the environmental assessment process, and assistance was provided to it in liaising with relevant decision makers and politicians.

37 With financial assistance the TRTFN participated in many Project Committee meetings. Its concerns with the level of information provided by Redfern about impacts on Aboriginal land use led the Environmental Assessment Office to commission a study on traditional land use by an expert approved by the TRTFN, under the auspices of an Aboriginal study steering group. When the first Staples Report failed to allay the TRTFN's concerns, the Environmental Assessment Office commissioned an addendum. The TRTFN notes that the Staples Addendum Report was not specifically referred to in the Recommendations Report eventually submitted to the Ministers. However, it did form part of Redfern's Project Report.

38 While acknowledging its participation in the consultation process, the TRTFN argues that the rapid conclusion to the assessment deprived it of meaningful consultation. After more than three years, [page570] numerous studies and meetings, and

Tsilhqot'in Nation v. British Columbia, [2014] 2 S.C.R. 257

Supreme Court Reports

Supreme Court of Canada

Present: McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

Heard: November 7, 2013;

Judgment: June 26, 2014.

File No.: 34986.

[2014] 2 S.C.R. 257 | *[2014] 2 R.C.S. 257* | *[2014] S.C.J. No. 44* | *[2014] A.C.S. no 44* | *2014 SCC 44*

Roger William, on his own behalf, on behalf of all other members of the Xeni Gwet'in First Nations Government and on behalf of all other members of the Tsilhqot'in Nation, Appellant; v. Her Majesty The Queen in Right of the Province of British Columbia, Regional Manager of the Cariboo Forest Region and Attorney General of Canada, Respondents, and Attorney General of Quebec, Attorney General of Manitoba, Attorney General for Saskatchewan, Attorney General of Alberta, Te'mexw Treaty Association, Business Council of British Columbia, Council of Forest Industries, Coast Forest Products Association, Mining Association of British Columbia, Association for Mineral Exploration British Columbia, Assembly of First Nations, Gitanyow Hereditary Chiefs of Gwass Hlaam, Gamlaxyeltxw, Malii, Gwinuu, Haizimsque, Watakhayetsxw, Luuxhon and Wii'litswx, on their own behalf and on behalf of all Gitanyow, Hul'qumi'num Treaty Group, Council of the Haida Nation, Office of the Wet'suwet'en Chiefs, Indigenous Bar Association in Canada, First Nations Summit, Tsawout First Nation, Tsartlip First Nation, Snuneymuxw First Nation, Kwakiutl First Nation, Coalition of Union of [page258] British Columbia Indian Chiefs, Okanagan Nation Alliance, Shuswap Nation Tribal Council and their member communities, Okanagan, Adams Lake, Neskonlith and Splatsin Indian Bands, Amnesty International, Canadian Friends Service Committee, Gitxaala Nation, Chilko Resorts and Community Association and Council of Canadians, Interveners.

(153 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Case Summary

Catchwords:

Aboriginal law — Aboriginal title — Land claims — Elements of test for establishing Aboriginal title to land — Rights and limitations conferred by Aboriginal title — Duties owed by Crown before and after Aboriginal title to land established — Province issuing commercial logging licence in area regarded by semi-nomadic First Nation as traditional territory — First Nation claiming Aboriginal title to land — Whether test for Aboriginal title requiring proof of regular and exclusive occupation or evidence of intensive and site-specific occupation — Whether trial judge erred in finding Aboriginal title established — Whether Crown breached procedural duties to consult and accommodate before issuing logging licences — Whether Crown incursions on Aboriginal interest justified under s. 35 Constitution Act, 1982 framework — Forest Act, R.S.B.C. 1995, c. 157 — Constitution Act, 1982, s. 35.

Catchwords:

Aboriginal law — Aboriginal title — Land claims — Provincial laws of general application — Constitutional [page259] constraints on provincial regulation of Aboriginal title land — Division of powers — Doctrine of interjurisdictional immunity — Infringement and justification framework under s. 35 Constitution Act, 1982 — Province issuing

commercial logging licence in area regarded by semi-nomadic First Nation as traditional territory — First Nation claiming Aboriginal title to land — Whether provincial laws of general application apply to Aboriginal title land — Whether Forest Act on its face applies to Aboriginal title land — Whether application of Forest Act ousted by operation of Constitution — Whether doctrine of interjurisdictional immunity should be applied to lands held under Aboriginal title — Forest Act, R.S.B.C. 1995, c. 157 — Constitution Act, 1982, s. 35.

Summary:

For centuries the Tsilhqot'in Nation, a semi-nomadic grouping of six bands sharing common culture and history, have lived in a remote valley bounded by rivers and mountains in central British Columbia. It is one of hundreds of indigenous groups in B.C. with unresolved land claims. In 1983, B.C. granted a commercial logging licence on land considered by the Tsilhqot'in to be part of their traditional territory. The band objected and sought a declaration prohibiting commercial logging on the land. Talks with the Province reached an impasse and the original land claim was amended to include a claim for Aboriginal title to the land at issue on behalf of all Tsilhqot'in people. The federal and provincial governments opposed the title claim.

The Supreme Court of British Columbia held that occupation was established for the purpose of proving title by showing regular and exclusive use of sites or territory within the claim area, as well as to a small area outside that area. Applying a narrower test based on site-specific occupation requiring proof that the Aboriginal group's ancestors intensively used a definite tract of land with reasonably defined boundaries at the time of European sovereignty, the British Columbia Court of Appeal held that the Tsilhqot'in claim to title had not been established.

[page260]

Held: The appeal should be allowed and a declaration of Aboriginal title over the area requested should be granted. A declaration that British Columbia breached its duty to consult owed to the Tsilhqot'in Nation should also be granted.

The trial judge was correct in finding that the Tsilhqot'in had established Aboriginal title to the claim area at issue. The claimant group, here the Tsilhqot'in, bears the onus of establishing Aboriginal title. The task is to identify how pre-sovereignty rights and interests can properly find expression in modern common law terms. Aboriginal title flows from occupation in the sense of regular and exclusive use of land. To ground Aboriginal title "occupation" must be sufficient, continuous (where present occupation is relied on) and exclusive. In determining what constitutes sufficient occupation, which lies at the heart of this appeal, one looks to the Aboriginal culture and practices, and compares them in a culturally sensitive way with what was required at common law to establish title on the basis of occupation. Occupation sufficient to ground Aboriginal title is not confined to specific sites of settlement but extends to tracts of land that were regularly used for hunting, fishing or otherwise exploiting resources and over which the group exercised effective control at the time of assertion of European sovereignty.

In finding that Aboriginal title had been established in this case, the trial judge identified the correct legal test and applied it appropriately to the evidence. While the population was small, he found evidence that the parts of the land to which he found title were regularly used by the Tsilhqot'in, which supports the conclusion of sufficient occupation. The geographic proximity between sites for which evidence of recent occupation was tendered and those for which direct evidence of historic occupation existed also supports an inference of continuous occupation. And from the evidence that prior to the assertion of sovereignty the Tsilhqot'in repelled other people from their land and demanded permission from outsiders who wished to pass over it, he concluded that the Tsilhqot'in treated the land as exclusively theirs. The Province's criticisms of the trial judge's findings on the facts are primarily rooted in the erroneous thesis that only specific, intensively occupied areas can support Aboriginal title. Moreover, it was the trial judge's task to sort out conflicting evidence and make findings of fact. [page261] The presence of conflicting evidence does not demonstrate palpable and overriding error. The Province has not established that the conclusions of the trial judge are unsupported by the evidence or otherwise in error. Nor has it established his conclusions were arbitrary or insufficiently precise. Absent demonstrated error, his findings should not be disturbed.

The nature of Aboriginal title is that it confers on the group that holds it the exclusive right to decide how the land is used and the right to benefit from those uses, subject to the restriction that the uses must be consistent with the group nature of the interest and the enjoyment of the land by future generations. Prior to establishment of title, the Crown is required to consult

in good faith with any Aboriginal groups asserting title to the land about proposed uses of the land and, if appropriate, accommodate the interests of such claimant groups. The level of consultation and accommodation required varies with the strength of the Aboriginal group's claim to the land and the seriousness of the potentially adverse effect upon the interest claimed.

Where Aboriginal title has been established, the Crown must not only comply with its procedural duties, but must also justify any incursions on Aboriginal title lands by ensuring that the proposed government action is substantively consistent with the requirements of s. 35 of the *Constitution Act, 1982*. This requires demonstrating both a compelling and substantial governmental objective and that the government action is consistent with the fiduciary duty owed by the Crown to the Aboriginal group. This means the government must act in a way that respects the fact that Aboriginal title is a group interest that inheres in present and future generations, and the duty infuses an obligation of proportionality into the justification process: the incursion must be necessary to achieve the government's goal (rational connection); the government must go no further than necessary to achieve it (minimal impairment); and the benefits that may be expected to flow from that goal must not be outweighed by adverse effects on the Aboriginal interest (proportionality of impact). Allegations of infringement or failure to adequately consult can be avoided by obtaining the consent of the interested Aboriginal group. This s. 35 [page262] framework permits a principled reconciliation of Aboriginal rights with the interests of all Canadians.

The alleged breach in this case arises from the issuance by the Province of licences affecting the land in 1983 and onwards, before title was declared. The honour of the Crown required that the Province consult the Tsilhqot'in on uses of the lands and accommodate their interests. The Province did neither and therefore breached its duty owed to the Tsilhqot'in.

While unnecessary for the disposition of the appeal, the issue of whether the *Forest Act* applies to Aboriginal title land is of pressing importance and is therefore addressed. As a starting point, subject to the constitutional constraints of s. 35 of the *Constitution Act, 1982* and the division of powers in the *Constitution Act, 1867*, provincial laws of general application apply to land held under Aboriginal title. As a matter of statutory construction, the *Forest Act* on its face applied to the land in question at the time the licences were issued. The British Columbia legislature clearly intended and proceeded on the basis that lands under claim remain "Crown land" for the purposes of the *Forest Act* at least until Aboriginal title is recognized. Now that title has been established, however, the timber on it no longer falls within the definition of "Crown timber" and the *Forest Act* no longer applies. It remains open to the legislature to amend the Act to cover lands over which Aboriginal title has been established, provided it observes applicable constitutional restraints.

This raises the question of whether provincial forestry legislation that on its face purports to apply to Aboriginal title lands, such as the *Forest Act*, is ousted by the s. 35 framework or by the limits on provincial power under the *Constitution Act, 1867*. Under s. 35, a right will be infringed by legislation if the limitation is unreasonable, imposes undue hardship, or denies the holders of the right their preferred means of exercising the right. General regulatory legislation, such as legislation aimed at managing the forests in a way that deals with pest invasions or prevents forest fires, will often pass this test and [page263] no infringement will result. However, the issuance of timber licences on Aboriginal title land is a direct transfer of Aboriginal property rights to a third party and will plainly be a meaningful diminution in the Aboriginal group's ownership right amounting to an infringement that must be justified in cases where it is done without Aboriginal consent.

Finally, for purposes of determining the validity of provincial legislative incursions on lands held under Aboriginal title, the framework under s. 35 displaces the doctrine of interjurisdictional immunity. There is no role left for the application of the doctrine of interjurisdictional immunity and the idea that Aboriginal rights are at the core of the federal power over "Indians" under s. 91(24) of the *Constitution Act, 1867*. The doctrine of interjurisdictional immunity is directed to ensuring that the two levels of government are able to operate without interference in their core areas of exclusive jurisdiction. This goal is not implicated in cases such as this. Aboriginal rights are a limit on both federal and provincial jurisdiction. The problem in cases such as this is not competing provincial and federal power, but rather tension between the right of the Aboriginal title holders to use their land as they choose and the province which seeks to regulate it, like all other land in the province. Interjurisdictional immunity -- premised on a notion that regulatory environments can be divided into watertight jurisdictional compartments -- is often at odds with modern reality. Increasingly, as our society becomes more complex, effective regulation requires cooperation between interlocking federal and provincial schemes. Interjurisdictional immunity may thwart such productive cooperation.

In the result, provincial regulation of general application, including the *Forest Act*, will apply to exercises of Aboriginal rights such as Aboriginal title land, subject to the s. 35 infringement and justification framework. This carefully calibrated test attempts to reconcile general legislation with Aboriginal rights in a sensitive way as required by s. 35 of the *Constitution*

Act, 1982 and is fairer and more practical from a policy perspective than the blanket inapplicability imposed by the doctrine of interjurisdictional immunity. The result is a balance that [page264] preserves the Aboriginal right while permitting effective regulation of forests by the province. In this case, however, the Province's land use planning and forestry authorizations under the *Forest Act* were inconsistent with its duties owed to the Tsilhqot'in people.

Cases Cited

Applied: *R. v. Sparrow*, *[1990] 1 S.C.R. 1075*; *Delgamuukw v. British Columbia*, *[1997] 3 S.C.R. 1010*; *Haida Nation v. British Columbia (Minister of Forests)*, *2004 SCC 73*, *[2004] 3 S.C.R. 511*; **distinguished:** *R. v. Morris*, *2006 SCC 59*, *[2006] 2 S.C.R. 915*; **referred to:** *Calder v. Attorney-General of British Columbia*, *[1973] S.C.R. 313*; *Guerin v. The Queen*, *[1984] 2 S.C.R. 335*; *R. v. Gladstone*, *[1996] 2 S.C.R. 723*; *Western Australia v. Ward* (2002), 213 C.L.R. 1; *R. v. Van der Peet*, *[1996] 2 S.C.R. 507*; *R. v. Marshall*, *2003 NSCA 105*, *218 N.S.R. (2d) 78*; *R. v. Marshall*, *2005 SCC 43*, *[2005] 2 S.C.R. 220*; *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, *2010 SCC 43*, *[2010] 2 S.C.R. 650*; *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, *2010 SCC 39*, *[2010] 2 S.C.R. 536*; *R. v. Marshall*, *[1999] 3 S.C.R. 533*; *Canadian Western Bank v. Alberta*, *2007 SCC 22*, *[2007] 2 S.C.R. 3*; *Marine Services International Ltd. v. Ryan Estate*, *2013 SCC 44*, *[2013] 3 S.C.R. 53*; *Canada (Attorney General) v. PHS Community Services Society*, *2011 SCC 44*, *[2011] 3 S.C.R. 134*.

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1982. The usual remedies that lie for breach of interests in land are available, adapted as may be necessary to reflect the special nature of Aboriginal title and the fiduciary obligation owed by the Crown to the holders of Aboriginal title.

91 The practical result may be a spectrum of duties applicable over time in a particular case. At the claims stage, prior to establishment of Aboriginal title, the Crown owes a good faith duty to consult with the group concerned and, if appropriate, accommodate its interests. As the claim strength increases, the required level of consultation and accommodation correspondingly increases. Where a claim is particularly strong - for example, shortly before a court declaration of title - appropriate care must be taken to preserve the Aboriginal interest pending final resolution of the claim. Finally, once title is established, the Crown cannot proceed with development of title land not consented to by the title-holding group unless it has discharged its duty to consult and the development is justified pursuant to s. 35 of the *Constitution Act, 1982*.

[page300]

92 Once title is established, it may be necessary for the Crown to reassess prior conduct in light of the new reality in order to faithfully discharge its fiduciary duty to the title-holding group going forward. For example, if the Crown begins a project without consent prior to Aboriginal title being established, it may be required to cancel the project upon establishment of the title if continuation of the project would be unjustifiably infringing. Similarly, if legislation was validly enacted before title was established, such legislation may be rendered inapplicable going forward to the extent that it unjustifiably infringes Aboriginal title.

E. *What Duties Were Owed by the Crown at the Time of the Government Action?*

93 Prior to the declaration of Aboriginal title, the Province had a duty to consult and accommodate the claimed Tsilhqot'in interest in the land. As the Tsilhqot'in had a strong *prima facie* claim to the land at the time of the impugned government action and the intrusion was significant, the duty to consult owed by the Crown fell at the high end of the spectrum described in *Haida* and required significant consultation and accommodation in order to preserve the Tsilhqot'in interest.

94 With the declaration of title, the Tsilhqot'in have now established Aboriginal title to the portion of the lands designated by the trial judge with the exception as set out in para. 9 of these reasons. This gives them the right to determine, subject to the inherent limits of group title held for future generations, the uses to which the land is put and to enjoy its economic fruits. As we have seen, this is not merely a right of first refusal with respect to Crown land management or usage plans. Rather, it is the right to proactively use and manage the land.

[page301]

VII. Breach of the Duty to Consult

95 The alleged breach in this case arises from the issuance by the Province of licences permitting third parties to conduct forestry activity and construct related infrastructure on the land in 1983 and onwards, before title was declared. During this time, the Tsilhqot'in held an interest in the land that was not yet legally recognized. The honour of the Crown required that the Province consult them on uses of the lands and accommodate their interests. The Province did neither and breached its duty owed to the Tsilhqot'in.

96 The Crown's duty to consult was breached when Crown officials engaged in the planning process for the removal of timber. The inclusion of timber on Aboriginal title land in a timber supply area, the approval of cut blocks on Aboriginal title land in a forest development plan, and the allocation of cutting permits all occurred without any meaningful consultation with the Tsilhqot'in.

97 I add this. Governments and individuals proposing to use or exploit land, whether before or after a declaration of Aboriginal title, can avoid a charge of infringement or failure to adequately consult by obtaining the consent of the interested Aboriginal group.

Union Gas Ltd. (Re), 2011 LNONOEB 201

Ontario Energy Board Decisions

Ontario Energy Board

Panel: Marika Hare, Presiding Member; Paula Conboy, Member

Decision: July 25, 2011.

Nos. EB-2011-0040, EB-2011-0041, EB-2011-0042

2011 LNONOEB 201

IN THE MATTER OF the Ontario Energy Board Act, 1998, S.O. 1998, c. l5, Schedule B, and in particular, Section 90 thereof; AND IN THE MATTER OF an Application by Union Gas Limited for an Order granting leave to construct a natural gas pipeline and ancillary facilities in the Township of Ear Falls and the Municipality of Red Lake, both in the District of Kenora; AND IN THE MATTER OF the Municipal Franchises Act, R.S.O. 1990, c. M.55, as amended; and in particular Sections 8 and 9 thereof; AND IN THE MATTER OF an Application by Union Gas Limited for an Order approving the terms and conditions upon which the Corporation of the Municipality of Red Lake is, by Bylaw, to grant to Union Gas Limited the right to construct and operate works; to supply gas to the inhabitants of the said municipality; and the period for which such rights are to be granted; AND IN THE MATTER OF an Application by Union Gas Limited for an Order directing and declaring that the assent of the municipal electors of the Municipality of Red Lake to the by-law is not necessary; AND IN THE MATTER OF an Application by Union Gas Limited for a Certificate of Public Convenience and Necessity to construct works to supply gas to the inhabitants of the Municipality of Red Lake.

(131 paras.)

DECISION WITH RESPECT TO PRELIMINARY QUESTIONS AND FINAL DECISION AND ORDERS

I. Background

Applications

1 Union Gas Limited ("Union") filed applications with the Ontario Energy Board (the "Board") on February 8, 2011 relating to proposed natural gas facilities and services in the Red Lake area. The applications were filed together and consist of requests for leave to construct a natural gas pipeline (the "Pipeline Project"), a Municipal Franchise Agreement ("MFA") for the Municipality of Red Lake ("Red Lake") and a Certificate of Public Convenience and Necessity ("CPCN") for Red Lake. Construction of the proposed Pipeline Project is divided into two phases: the first phase would run from an existing gas pipeline north of Ear Falls to the intersection of Highway 105/125, where it would serve various existing mine sites (collectively known as the "Red Lake Gold Mines") operated by Goldcorp Inc. ("Goldcorp"). Phase I is approximately 58 km in length consisting of 8 inch and 4 inch diameter pipelines.

2 Phase 2 would involve the extension of the pipeline constructed in Phase 1 to provide natural gas service to the residents and businesses of several nearby communities. Phase 2 is approximately 46 km in length. The CPCN and the MFA are required to allow Union to provide natural gas service to the communities that will be connected to Phase 2 of the Pipeline Project. Union is prepared to commence construction of Phase 1 immediately. Phase 2, however, would be contingent on additional funding from either the local communities or some other entity.

3 The Pipeline Project will be constructed almost entirely on existing road allowances or on privately owned land. The Board has assigned to the leave to construct application file number EB-2011-0040; the MFA application file number EB-2011-0041; and the CPCN application file number EB-2011-0042.

20 The Board is the sole approval authority for the Pipeline Project as a whole. The Board's power to approve the leave to construct application is found in section 96(1) of the Act: "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." A variety of other permits are required from a number of other Crown actors. However, most of these permits are required for discrete elements of the construction (for example, water crossings), and only the Board is charged with considering whether the entire Pipeline Project is in the public interest. The Board is therefore of the view that it is in the best position to consider the issue of Crown consultation with respect to the Pipeline Project as a whole.

Should the Board conduct consultation itself?

21 In its letter to the Board dated May 30, 2011, the Grand Council stated: "To be clear, we are in no way suggesting that the Board itself has a duty to consult with the Grand Council." (Emphasis in original). In their letters seeking intervenor status, neither LSFN nor WFN suggested that it was the Board itself that should conduct independent consultation.

22 As this issue did not appear to be in dispute, the Board did not seek submissions on this issue in Procedural Order No. 2. This issue was raised in oral submissions by WFN, however, so the Board will address it.

23 Board staff's pre-filed submission contained a short section expressing the view that the Board did not have authority to undertake direct consultation itself, and noted that this point did not appear to be challenged by any party. Board staff quoted the Rio Tinto decision:

> A tribunal has only those powers that are expressly or implicitly conferred on it by statute. In order for a tribunal to have the power to enter into interim resource consultations with a First Nation, pending the final settlement of claims, the tribunal must be expressly or impliedly authorized to do so. **The power to engage in consultation itself, as distinct from the jurisdiction to determine whether a duty to consult exists, cannot be inferred from the mere power to consider questions of law.** Consultation itself is not a question of law; it is a distinct and often complex constitutional process and, in certain circumstances, a right involving facts, law, policy, and compromise. The tribunal seeking to engage in consultation itself must therefore possess remedial powers necessary to do what it is asked to do in connection with consultation.[4]

24 In its oral submissions, however, WFN argued that the Board may indeed be responsible for conducting consultation itself (WFN did not pre-file any submissions). WFN submitted that the Board may indeed have the remedial powers necessary "to do what it is asked to do in connection with consultation." Specifically, WFN pointed to the Board's powers to approve leave to construct applications (section 96(1) of the Act) and the Board's general power to set conditions to its orders (section 23(1) of the Act). WFN further stated that the *Quebec (Attorney General) v. Canada (National Energy Board)* case[5] ("Quebec"), which had been cited by Board staff, had been superseded by Rio Tinto. WFN also observed that there is no prohibition in the Act against the Board conducting consultation directly.

25 The Board does not accept that it has an independent mandate to conduct direct consultation itself with Aboriginal groups whose Aboriginal or treaty rights may be adversely impacted by a project subject to Board approval. As discussed below, however, there is significant flexibility in the manner in which the duty to consult can be discharged, and the Board does find that its ordinary hearing processes (including the Environmental Guidelines and Report as described below) can serve to ensure that the duty to consult has been satisfied.

26 The Board is a quasi-judicial tribunal that owes a duty of fairness to all parties. As the Supreme Court observed in the Quebec case:

> The appellants' argument is that the fiduciary duty owed to aboriginal peoples by the Crown ... extends to the Board, as an agent of government and creation of Parliament, in the exercise of delegated powers. ...

> The courts must be careful not to compromise the independence of quasi-judicial tribunals and decision making agencies by imposing on them fiduciary obligations which require that their decisions be made in accordance with a fiduciary duty. Counsel for the appellants conceded in oral argument that it could not be said that such a duty should apply to the courts, as a creation of government, in the exercise of their judicial function. In my view, the considerations which apply in evaluating whether such an obligation is impressed on the process by which the Board decides whether to grant a licence for export differ little from those applying to the courts. The function of the Board in this regard is quasi-judicial. While the characterization may not carry with it all the procedural and other requirements identical to those applicable to a court, it is inherently inconsistent with the imposition of a relationship of utmost good faith between the Board and a party appearing before it.[6]

27 Although the case law with respect to section 35 rights has evolved since 1994, nothing in Rio Tinto or any other decision alters this finding, and absent clear instruction through its statute, the Board is not prepared to stray from its traditional role as a quasi-judicial tribunal that hears from parties and makes determinations and orders through the hearing process.

28 The Board does not accept WFN's submission that its broad general power to attach conditions to its orders qualifies as "remedial powers" as contemplated by the Supreme Court in Rio Tinto. The Supreme Court discussed the nature of the statutory grant of authority necessary to confer the power to actually conduct independent consultations at paragraph 74:

> While the *Utilities Commission Act* conferred on the Commission the power to consider whether adequate consultation had taken place, its language did not extend to empowering the Commission to engage in consultations in order to discharge the Crown's constitutional obligation to consult. As discussed above, legislatures may delegate the Crown's duty to consult to tribunals. However, the Legislature did not do so in the case of the Commission. Consultation itself is not a question of law, but a distinct constitutional process requiring powers to effect compromise and do whatever is necessary to achieve reconciliation of divergent Crown and Aboriginal interests. The Commission's power to consider questions of law and matters relevant to the public interest does not empower it to itself engage in consultation with Aboriginal groups.

29 It appears, therefore, that the Supreme Court contemplated something more direct than a simple general power to impose conditions. The Board finds that the statute does not provide the Board with the power to undertake direct one-on-one consultations with Aboriginal groups in the manner that a Crown ministry might. However, as discussed in further detail below, the Board does find that its application process (including the environmental review set out in the Board's Environmental Guidelines for the Location, Construction and Operation of Hydrocarbon Pipelines and Facilities in Ontario (6th Edition, 2011)) ("Environmental Guidelines") can serve to ensure that the duty to consult has been properly addressed. There is significant flexibility regarding the manner in which the duty to consult can be discharged, and consultation need not necessarily be one--on-one discussions between (for example) a Crown ministry and a First Nation.

What is the "Crown conduct" where the proponent is a private body seeking an approval from a quasi-judicial tribunal?

30 The issue before the Board is a complex one that has not been directly addressed by the Supreme Court. The duty to consult is triggered where the Crown contemplates conduct which has the potential to adversely impact Aboriginal or treaty rights. The proponent of the Pipeline Project is Union, a private corporation. Conduct by Union is not "Crown conduct". Although a variety of Crown ministries have some level of involvement with the Pipeline Project, none have any approval authority for the Pipeline Project as a whole. It is the Board that has approval authority over the Pipeline Project; however as discussed above the Board is not empowered to conduct consultations with Aboriginal groups itself.

31 Although the recent Rio Tinto decision is helpful in clarifying the role of tribunals with respect to the duty to consult, in that case the proponent was a Crown actor, and there was no dispute that the proponent itself was responsible for actually conducting the consultation. In Rio Tinto, the "Crown conduct" in question was clear and not disputed: "BC Hydro's [i.e. the proponent, and not the tribunal] proposal to enter into an agreement to purchase electricity from Alcan is clearly proposed Crown conduct. BC Hydro is a Crown corporation. It acts in place of the Crown. No one seriously argues that the 2007 EPA does not represent a proposed action of the Province of British Columbia."[7] Under such circumstances, the Court held that the role of the tribunal was to assess whether the Crown conduct in question (i.e. BC Hydro's actions) had a potential adverse impact on Aboriginal or treaty rights, and if so what accommodation might be appropriate.

32 The question of what (if any) Crown conduct is contemplated where the proponent itself is not the Crown is not addressed in Rio Tinto. This is a distinguishing factor from the case currently before the Board. The Crown conduct being contemplated in Rio Tinto was different from any Crown conduct being contemplated in this case. The tribunal's role in that case was to assess whether the duty to consult had been triggered, and if so if it had been adequately discharged. In the current case the specific party or parties responsible for conducting any required consultation is not as clear.

33 All parties agree that Union is not the Crown. Union's conduct in planning and proposing (and ultimately, if approved, constructing) the Pipeline Project therefore does not trigger the duty to consult on its own. Several parties took the position, however, that the Board's decision itself is the conduct contemplated by the Crown[8].

34 The Board is unable to accept this argument. The Board's responsibilities as a quasi-judicial tribunal and the absence of clear empowering language in the statute prevent it from conducting consultation itself. The duty is triggered by the activities and approvals required by other Crown actors that have some oversight responsibility for this project, as discussed in further detail below. As counsel for LSFN observed, it is difficult to accept that more than 100 kilometers of pipeline could be built almost entirely on Crown land (albeit road allowance) without some manner of Crown conduct being involved. The Board's role, as described in Rio Tinto, is to assess the adequacy of the Crown's consultation efforts. As the approval authority for the Pipeline Project as a whole, the Board accepts that it must be satisfied that there has been an adequate process of consultation (and possibly accommodation) for the Pipeline Project as a whole.

35 The question that remains is by what means should the Board assess the adequacy of consultation through the current process. It was suggested by the participating Aboriginal groups that the Board should await the outcome of certain Crown consultations that may be occurring (or will be occurring) outside the Board's process -- for example with respect to certain permits that will be required to build the pipeline. Once those consultations are complete, the Board could review the evidence and make a determination on the adequacy of these consultation efforts. Union and Goldcorp argued that the Board's existing process, in particular the environmental review process, already ensures that the duty to consult as it pertains to the Pipeline Project itself is satisfied, and that awaiting the results of any other outside process is unnecessary.

36 The Board finds that its existing process is the appropriate forum to address all Pipeline Project issues concerning the duty to consult. As explained below, the Board finds that it does not have to await the completion of any additional Crown consultation activities that may be occurring outside of the Board's process.

Case law relating to the duty to consult

37 The courts have long recognized that the duty to consult can be met through a wide variety of processes. In Haida, the Supreme Court observed that there is no one size fits all approach that would be appropriate in every situation. The Supreme Court held that: "The content of the duty to consult and accommodate varies with the circumstances. Precisely what duties arise in different situations will be defined as the case law in this emerging area develops. In general terms, however, it may be asserted that the scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed."[9] Discussing instances where a claim to Aboriginal or treaty rights is relatively strong, and potential infringements relatively high, the Court observed: "While precise requirements will vary with the circumstances, the consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision. This list is neither exhaustive, nor mandatory for every case."[10]

38 In discussing the standard of review courts should employ in considering appeals relating to the Crown's consultation efforts, the Court made further findings regarding the types of process that can be used to discharge the duty to consult:

> The process itself would likely fall to be examined on a standard of reasonableness. Perfect satisfaction is not required; **the question is whether the regulatory scheme or government action "viewed as a whole, accommodates the collective aboriginal rights in question**: Gladstone at. Para. 170. What is required is not perfection, but reasonableness. As stated in Nikal, at para. 110, "in ... information and consultation the concept of

different types of processes may serve. Considered together the cases present a road map for how the duty to consult can be addressed in the current circumstances.

48 Haida, Taku and Little Salmon all show that there is significant flexibility with respect to how the duty to consult can be discharged. A tailor-made, stand alone process is not always required to discharge the duty to consult, and pre-existing processes can often serve this function (for example, the environmental assessment process in Taku). In some cases, the Crown may not even have to accept that it is actually conducting consultation (Little Salmon).

49 Although not formally binding on Ontario tribunals, the Board is also persuaded by much of the reasoning in the Brokenhead and Standing Buffalo decisions. Both deal with situations very similar to the situation before the Board: a private proponent seeking approval from a quasi judicial tribunal to construct a natural gas pipeline.[24] . None of the Supreme Court cases deal directly with this situation. None of the Supreme Court cases conflict with Brokenhead or Standing Buffalo; indeed in the Board's view they are perfectly consistent. Although there was ultimately a private proponent behind the applications in both Haida and Taku, in those cases the Crown actor responsible for granting the approval and the Crown actor responsible for conducting the consultation were one and the same. In Rio Tinto, the proponent itself was a Crown actor. As described in further detail above, the Board finds this to be a key distinguishing feature.

The Duty to Consult and the Board's Process

50 As discussed above, the Board has found that it cannot be responsible for conducting consultation with Aboriginal groups -- the Act does not create such a role and Board's responsibilities to other parties prevent such an approach. Similarly, and as described in further detail below, the Board is not convinced that the appropriate course is for it (and the Applicant) to await some form of separate consultations from some other Crown actors to occur, and then conduct a Haida type analysis to determine if those consultations were sufficient. Instead, it is the Board's view that the procedural elements of the duty to consult have been effectively delegated to Union through the Ontario Pipeline Coordinating Committee and the Environmental Guidelines, and that the Board is in a position to determine whether consultation efforts have been adequate.

51 The Board's Environmental Guidelines apply to all natural gas leave to construct applications. The Environmental Guidelines describe the environmental assessment process for constructing hydrocarbon pipelines and facilities and provide comprehensive guidance on how proponents are to assess and mitigate the potential environmental impacts associated with proposed projects. Unlike electricity transmission and distribution projects, for natural gas pipelines no separate Environmental Assessment under Ontario's *Environmental Assessment Act* is required, and the Board is responsible for environmental matters relating to the Pipeline Project. Applicants are required to prepare and file an Environmental Report to demonstrate that all the requirements of the Environmental Guidelines have been met.

52 The Environmental Guidelines were originally developed in the 1970s, and are currently in their 6th edition. The Environmental Guidelines were developed by the Board in conjunction with the Ontario Pipeline Coordinating Committee ("OPCC"). The purpose of the OPCC is described in the Environmental Guidelines as follows:

> The purpose of the OPCC is to coordinate the Ontario government agencies review of facilities projects in Ontario requiring approval from the Board or the NEB, with the goal of minimizing negative impacts. In effect, the OPCC provides a single contact for identifying provincial concerns related to transmission and storage proposals. The OPCC is chaired by a Board staff member and currently includes representation from the following ministries and agencies: Technical Standards and Safety Authority ("TSSA"), Ministry of Environment ("MOE"), Ministry of Agriculture, Food and Rural Affairs ("OMAFRA"), Ministry of Tourism and Culture ("MTC"), Ministry of Municipal Affairs and Housing ("MMAH"), Ministry of Natural Resources ("MNR"), Ministry of Transportation ("MTO") (the "OPCC representatives"). In addition to the OPCC representatives, affected regional and local municipalities, and conservation authorities are involved in the OPCC review.
>
> The Guidelines have been developed in consultation with representatives of the OPCC. Therefore, the Guidelines are consistent with the mandates of the above ministries and agencies.[25]

to the potential infringement of any Aboriginal or treaty rights. Although they did not avail themselves of these opportunities, that is not a failing of the process that has been established by the Environmental Guidelines.[28]

63 In Taku, it was held that an existing environmental assessment process, which specifically set out a scheme with respect to Aboriginal consultation, was a suitable vehicle for discharging the duty to consult. The Board finds that the same reasoning applies in this case: the Environmental Guidelines (which serve as the environmental assessment in this case) set out explicit requirements with respect to Aboriginal consultation. To the extent that an Aboriginal group believes that there are outstanding potential impacts to Aboriginal or treaty rights that are not appropriately identified or addressed by the Environmental Report, they are free to respond to the Board's notice and bring these concerns to the Board through the ordinary hearing process. The Board is well placed to assess the adequacy of the consultation, and where appropriate, accommodation.

64 In addition to the Board's approval, Union requires various permits from various Crown ministries to build the pipeline. Although the relevant approval authorities may undertake some level of consultation with Aboriginal groups in respect of those permits, the Board finds that it is not its role to assess whether any consultation for individual permits is adequate. The Board has approval authority for the Pipeline Project as a whole. The permits required by Union relate to discrete portions or elements of the Pipeline Project. These permits are required from a number of different ministries, none of whom have authority over the Pipeline Project as a whole. In addition, the Board has no actual authority over these permits (although it is a standard condition to all leave to construct approvals that all necessary permits be obtained prior to the commencement of construction). Although the Board recognizes that the facts situations are not identical, the Supreme Court discussed this issue in Haida. It concluded that the duty to consult is best addressed at a strategic planning level as opposed to the permitting stage. The Board finds that the same logic applies in the current case, and that the process outlined by the Environmental Guidelines is a better forum for addressing the duty to consult for the Pipeline Project as a whole than any process that may be associated with the granting of various individual permits. Any Board review of the permitting process would represent, as stated in Brokenhead: "a repetitive and essentially pointless exercise. Except to the extent that Aboriginal concerns cannot be dealt with, the appropriate place to deal with project-related matters is before the [tribunal] and not in a collateral discussion with either the GIC or some arguably relevant Ministry."[29]

Land Claims

65 The Board accepts that there are some issues with respect to Aboriginal or treaty rights that cannot be properly addressed through the Board's process. Aboriginal land claims, for example, fall outside the Board's jurisdiction. In Brokenhead, the court came to the same conclusion:

> [The NEB's] regulatory processes appear not to be designed, however, to address the larger issues of unresolved land claims. As already noted in these reasons, the NEB and the corporate respondents have acknowledged that obvious limitation. ... It follows from this that the NEB process may not be a substitute for the Crown's duty to consult where a project under review directly affects an area of unallocated land which is the subject of a land claim or which is being used by Aboriginal peoples for traditional purposes.[30]

66 Rio Tinto is also clear that a tribunal's ability to consider duty to consult issues is limited by its jurisdiction. At paragraph 69 of the decision, the Supreme Court observed: "The power to decide questions of law implies a power to decide constitutional issues **that are properly before it** ..." (Emphasis added). The Supreme Court then cited the Conway case with approval: "specialized tribunals with both the expertise and authority to decide questions of law are in the best position to hear and decide constitutional questions related to their statutory mandates."[31] The Board does not, of course, have any power to resolve any land claims. LSFN has advised the Board that it is in the process of filing a specific claim with the federal government relating to lands near Bruce Lake, though it did not yet know if the proposed Project would cross any of those lands.[32] Any concerns with respect to the resolution of underlying land claims cannot lie properly before the Board.

> **B. Question 2 -** To the extent that there are duty to consult issues associated with the project, what is the scope of the Board's power to review them? In particular, should the Board's review be limited to potential impacts arising directly from the proposed natural gas pipeline itself (over which it has approval authority), or indirect impacts such as potential expansions to the mine or the town that may be enabled by the pipeline (over which it has no approval authority)?

NATIVE LAW

JACK WOODWARD, Q.C

Volume 1

CARSWELL®

A cataloguing record for this publication is available from Library and Archives Canada

ISBN 0-459-33271-6 (looseleaf). — ISBN 0-459-33211-2 (bound). —
ISBN 0-459-33751-3 (pbk.)

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in consultation processes, we can expect the courts to consider this issue further in due course.[260]

[No paras. **5§2240–5§2260.**]

6. Duty to Accommodate in Detail

5§2270 Crown must propose accommodation in some, but not all situations. While the Crown always has a duty to initiate consultation with aboriginal groups whose rights might be affected by a proposed decision or course of action, whether it will also need to accommodate any s. 35 rights will depend on the strength of the aboriginal rights claim and the severity of the potential infringement.

5§2280 Range of possible measures to accommodate. If the right at issue is proven or reasonably asserted, and the proposed decision or course of action has a real potential to negatively affect the right, the Crown should probably be looking to accommodate the right (subject, in the case of a modern treaty right, to any relevant treaty terms that limit or exclude the duty to accommodate and that are consistent with the honour of the Crown.)[260.1] However, even at that point, the appropriate nature and level of accommodation will vary significantly from case to case. The following are some general types of accommodations that may be reasonable in the circumstances:

- Measures designed to mitigate the environmental impacts of a project (and, by extension, the impact on s. 35 rights), such as the rerouting of a proposed road, authorizing construction for time periods when there will be reduced impacts on wildlife, reducing the size of a project, creating wildlife corridors, adopting wildlife habitat restoration measures, or developing a plan to rehabilitate a threatened species.[260.2]

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260 Crown funding of a consultation process may also help the Crown establish that it engaged in meaningful consultation and help it overcome an aboriginal group's claim that the Crown breached that duty: *Suing v. Canada (Attorney General)*, 2012 FC 297, 2012 CarswellNat 635 (F.C.) at para. 112.

260.1 In *Little Salmon/Carmacks First Nation v. Yukon (Director, Agriculture Branch, Department of Energy, Mines & Resources)*, 2010 SCC 53, 2010 CarswellYukon 140 (S.C.C.) [intervenors included the Kwanlin Dün First Nation, and Tlicho Government], the Supreme Court of Canada held that the Crown did not have a duty to accommodate the First Nation prior to granting a piece of Crown land that was used by First Nation members for harvesting activities. A number of factors led the Court to this conclusion, and two of these related to the terms of the First Nation's modern treaty: (1) the First Nation had surrendered the land at issue in its modern treaty; and (2) the parties had chosen not to include treaty provisions requiring consultation for the particular Crown decision at issue in that case (see para. 57, per Binnie J.).

260.2 The British Columbia Supreme Court ordered the Crown to develop, in consultation with the West Moberly First Nations, a plan to rehabilitate a threatened caribou herd: *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2010 BCSC 359, 2010 CarswellBC 651, [2010] 2 C.N.L.R. 354 (B.C. S.C.). However, the British Columbia Court of Appeal overturned this particular order, holding that the proper remedy was further consultation, without

- 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].