



March 1, 2010

DELIVERED

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Ms. Erica Hamilton
Commission Secretary
British Columbia Utilities Commission
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Dear Ms. Hamilton:

Re: Project No. 3698506
Interior to Lower Mainland (ILM) Transmission Project
British Columbia Hydro and Power Authority's (B.C. Hydro)
Final Argument

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Further to our letter and Final Argument dated March 1, 2010, please find enclosed B.C. Hydro's Book of Authorities.

Yours very truly,

LAWSON LUNDELL LLP


for: Keith B. Bergner

/jk
cc. Registered Intervenors

BRITISH COLUMBIA UTILITIES COMMISSION
IN THE MATTER OF THE *UTILITIES COMMISSION ACT*,
R.S.B.C 1996, CHAPTER 473

Regarding the Application by British Columbia Transmission Corporation (“BCTC”)
for a Certificate of Public Convenience and Necessity (“CPCN”)
for the Interior to Lower Mainland (“ILM”) Project

Brief of Authorities of British Columbia Hydro and Power Authority (“BC Hydro”)

March 1, 2010

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Date: 20080612

Docket: A-313-07

Citation: 2008 FCA 212

2008 FCA 212 (CanLII)

CORAM: NOËL J.A.
NADON J.A.
RYER J.A.

BETWEEN:

**The AHOUSAHT INDIAN BAND, The DITIDAHT INDIAN BAND,
The EHATTESAHT INDIAN BAND, The HESQUIAHT INDIAN BAND,
The HUPACASATH INDIAN BAND, The HUU-AY-AHT INDIAN BAND,
The KA:'YU:K'T'H/CHE:K'TLES7ET'H' INDIAN BAND,
The MOHAWCHAHT/MUCHALAHT INDIAN BAND,
The NUCHATLAHT INDIAN BAND, The NUCHATLAHT INDIAN BAND,
The TLA-O-QUI-AHT INDIAN BAND, The TOQUAHT INDIAN BAND,
The TSEHAHT INDIAN BAND, The UCHUCKLESAHT INDIAN BAND
And The UCLUELET INDIAN BAND**

Appellants

and

THE MINISTER OF FISHERIES AND OCEANS

Respondent

Heard at Vancouver, British Columbia, on April 23, 2008.

Judgment delivered at Ottawa, Ontario, on June 12, 2008.

REASONS FOR JUDGMENT BY:

NADON J.A.

CONCURRED IN BY:
CONCURRING REASONS BY:

NOËL J.A.
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REASONS FOR JUDGMENT

NADON J.A.

[1] This is an appeal from a judgment of Mr. Justice Blais of the Federal Court (as he then was) dated May 29, 2007 (2007 FC 567), who dismissed the appellants' application for judicial review of a decision of the Minister of Fisheries and Oceans (the "Minister" or the "respondent") to

implement a three-year plan for the management of the Pacific coast commercial groundfish fisheries (the “Fisheries”) effective April 2006 (the “Pilot Plan”).

[2] Before the Applications Judge, the appellants, fourteen First Nations (the “Nuu-chah-nulth First Nations” or “the appellants”), whose lands are located on the west coast of Vancouver Island, argued that the Minister had failed to uphold the honour of the Crown and to meet his constitutional duty to consult and accommodate them before implementing the Pilot Plan.

[3] In dismissing the appellants’ judicial review application, Blais J. concluded that the Minister had not breached his constitutional duty to consult pursuant to subsection 35(1) of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982 (U.K.)*, 1982, c.11 (the “Constitution”).

THE FACTS

[4] In the Reasons which he gave in support of his decision, Blais J. carefully and thoroughly reviewed the facts relevant to the issues before him. Although the Judge’s summary of the evidence is somewhat lengthy, it is essential to a proper understanding of the issues raised in the appeal. Before reproducing the relevant paragraphs of the Judge’s Reasons, a few words concerning the reasons which led the Minister to introduce the Pilot Plan will be useful.

[5] There are over sixty different species of fish on the Pacific coast, with seven different fleets. Because the nature of the Fisheries is that species intermingle, this leads to what is referred to in the industry as a “bycatch”. In effect, although fishers may be licensed to catch one species of fish, for example halibut, they may well catch a number of other fish, i.e. the bycatch, while attempting to catch halibut. In such a situation,

because fishers can only retain the fish that they are licensed to catch, the non-licensed fish must be returned to the water and, depending on the type of fish so returned, there is a high probability that the fish will die when returned to the water. This is clearly the situation in the case of rock fish.

[6] In 2001, the Minister determined that changes in the Fisheries had to be made, failing which significant curtailment thereof would be necessary. The proposed changes were meant to address conservation and protection issues pertaining to endangered and at risk rock fish species, bycatch mortality and to allow the Department of Fisheries and Oceans (“DFO”) to assess stocks by improving the monitoring and catch reporting for all species.

[7] In June 2003, the *Species at Risk Act*, S.C. 2002, c. 29, was enacted, resulting in the classification of Boccaccio rock fish as a threatened species and the identification of 11 other rock fish species as high priority for possible listing as “species at risk” under the Act.

[8] In March 2005, DFO decided that commencing with the 2006 fishing season, 100% electronic monitoring of catch would be required for all commercial groundfish fishing trips. Monitoring was deemed necessary in order to accurately account for all catch by a fishing vessel, be it landed or at sea releases. Through this means, DFO believed that it would have more accurate information to determine whether total allowable catches (“TAC”) within a given commercial groundfish Fishery were being exceeded. With more accurate information, the early closure of the Fisheries became a real prospect once TACs were reached.

[9] As a result, a system of individual quotas (“IQs”) became essential so to avoid the early closure of the Fisheries, which would, it goes without saying, lead to a severe disruption to fishers and communities that depend on the Fisheries. In order to effectively manage commercial fisheries, the support of stakeholders,

including the appellants, was crucial to the success of DFO's management plans. It is in this context that the consultation process with stakeholders took place.

[10] I now reproduce paragraphs 6 to 23 of the Judge's Reasons:

[6] Discussions between DFO and industry associations commenced in March 2003, and resulted in discussion papers being prepared and in the formation of the Commercial Groundfish Integrated Advisory Committee (CGIAC), which had representatives from the commercial fishing industry, including the four major industry associations in groundfish fisheries, as well as the Province of British Columbia and DFO. The CGIAC also included representatives of coastal communities, of the Marine Conservation Caucus, of the Sports Fish Advisory Board and of the B.C. Aboriginal Fisheries Commission (BCAFC). It should be noted that the BCAFC designated someone from the NTC as their representative in 2004 and in 2005. While the designated representative failed to attend the four meetings of the CGIAC in 2004, the BCAFC was represented at the 2005 meetings, first by an NTC commercial fisher and, subsequently, by an employee of the NTC.

[7] The CGIAC created a committee comprised of sixteen of its members, known as the Commercial Industry Caucus (CIC), which prepared the proposal that later became the Pilot Plan. There was no aboriginal representative on this committee.

[8] In March 2005, all hook/line and trap commercial groundfish fisheries licence eligibility holders and vessel owners were informed, in a letter sent by DFO, that mandatory 100 percent at-sea monitoring would be implemented starting in 2006. Also in March 2005, the Commercial Industry Caucus Pilot Integration Proposal (the Reform Proposal) was submitted to the CGIAC and to DFO.

[9] Stakeholder consultation on the Reform Proposal began in June 2005, first with the creation of a website by DFO, providing information on the Reform Proposal and the various policies that led to this proposal, and second, by sending a letter, along with a consultation guide, to all groundfish fisheries licence holders, through which they were invited to send their comments to DFO on the Reform Proposal. Letters and consultation guides were also sent to all British Columbia coastal First Nations, seeking their input. The second stage of the stakeholder consultations took place in October and November 2005, when representatives from DFO travelled to four cities in the province to engage in discussions with stakeholders. The final stage of the consultation process consisted of bilateral discussions with affected First Nations. That being said, the applicants were not included in these planned bilateral discussions as the respondent did not consider their asserted aboriginal rights to be adversely impacted by the Reform Proposal.

[10] The applicants note that the notion of bilateral consultation with the Niu-chah-nulth First Nations was first raised by the applicants in January 2005, and then again at the CGIAC meetings of April 15, 2005 and May 30, 2005.

[11] The first meeting between DFO representatives and representatives of the applicants where the Reform Proposal was to have been discussed was the JTWG meeting that was to have been held in September 2005. However, this meeting was cancelled by the NTC as the head of the NTC Fisheries Department, Dr. Hall, was not available.

[12] The meeting was rescheduled on November 18, 2005, at which time Ms. Trager [Diana Trager, the Regional Resource Management Coordinator for the Groundfish Management Unit], representing DFO, met with NTC officials to discuss various fisheries issues, including the Reform Proposal. A further meeting took place between DFO representatives and representatives of the applicants on November 28, 2005, where Ms. Trager provided a presentation on the Reform Proposal and answered questions.

[13] Another meeting of the JTWG was held on November 29, 2005, but the discussion was limited to the draft consultation protocol proposed by the applicants in a letter dated November 23, 2005, which would allow consultation to proceed on a number of fisheries issues, including the Reform Proposal. There were six stages to this consultation protocol:

1. Identification of policy proposals
2. Explanation and initial discussion of the policy proposals
3. Provision and consideration of further information
4. Nuu-chah-nulth response
5. DFO response
6. Accommodation

[14] The respondent agreed to take the consultation protocol under advisement and, in a letter dated December 20, 2005, Mr. Sprout [Paul Sprout, the Regional Director General for DFO in the Pacific Region] noted that they were still awaiting comments from their colleagues in Ottawa, but that DFO was essentially in agreement with the first five stages of the consultation protocol, and suggested that they should proceed immediately with these stages.

[15] A subsequent meeting was held on January 23, 2006, but discussion was limited to the consultation protocol, since the applicants maintained that they were not prepared to discuss the Reform Proposal until DFO committed to the proposed consultation protocol. At this meeting, Mr. Kadowaki [Ronald Kadowaki, the Lead Director for Pacific Fisheries Reform] advised the applicants' representatives that DFO was essentially in agreement with the first five stages of the consultation protocol, but that the sixth stage would depend on what happened in the first five stages. Additionally, Mr. Kadowaki notes in his affidavit that he stressed the urgency of the groundfish initiative, as one of the major groundfish fisheries would be opening in March 2006, and thus that it was imperative that the consultations be

undertaken on an urgent basis. He also indicated that DFO was not prepared to agree to the timeline proposed in the consultation protocol for this initiative.

[16] Another attempt was made to schedule a meeting for the first week of February 2006 to move on to stage 3 of the consultation protocol, which was rebuked by the applicants, stating again that they were not prepared to engage in substantial consultations until there was an agreement on the consultation protocol. Dr. Hall stated that the preparation of questions for stage 3, while underway, had not been a high priority “pending agreement on the Consultation Protocol and in relation to other higher priority activities in recent weeks”.

[17] In a letter dated February 16, 2006, Mr. Kadowaki wrote that “DFO is in agreement with many aspects of your proposed consultation protocol and we believe that it can provide the basis of a useful and practical framework for consultations”. Mr. Kadowaki also reiterated the urgency of consultations on the Reform Proposal, as implementation was being considered for the 2006 fishing season.

[18] While the applicants submit that, through this letter, DFO agreed to be bound by the consultation protocol, the respondent maintains that there was no such commitment by DFO. The respondent also notes that this letter must be read in light of the previous letter sent by Ms. Trager dated January 16, 2006, where she indicated to the applicants that DFO was considering implementing the Reform Proposal for the 2006 fishing season, and in light of Mr. Kadowaki’s affidavit where he states that it was made clear to the applicants that DFO did not agree with the proposed timeline.

[19] On February 20, 2006, the applicants indicated that they were prepared to move forward with the consultations and proceed with stage 3 of their consultation protocol. As such, they forwarded 102 questions to Ms. Trager.

[20] On February 24, 2006, another meeting was held at which DFO provided draft answers to some of the questions submitted. Responses were later provided by DFO on 94 of the 102 questions in an email sent March 13, 2006.

[21] No further meetings were held after that, but correspondence continued to be exchanged between the parties, including letters from the applicants objecting to the lack of consultation and voicing their opposition to the Reform Proposal. A letter was also sent seeking a meeting with the Minister during his visit to the region in March 2006. While the Minister did not meet with them on that occasion, the respondent notes that there was a meeting between the Minister and the Nuu-chah-nulth First Nations in January 2006.

[22] A series of memoranda to the Minister were sent on February 17, 2006, March 17, 2006, March 31, 2006 and April 5, 2006, in which the concerns expressed by First Nations are clearly noted. In particular, the first memorandum goes into much detail about the opposition from First Nations, including the NTC.

[23] When the final proposal was released in April 2006, it largely reflected the CIC proposal to the CGIAC, although some changes were made, including the implementation of the proposal as a pilot plan for a three-year period, the fact that quota reallocation between licences within a groundfish fishery were to take place on a temporary basis for the current fishing year only, and a commitment by DFO that additional lingcod and dogfish catch history would be made available to First Nations as lingcod and dogfish quotas.

THE DECISION OF THE FEDERAL COURT

[11] After setting out the issues before him, namely, the scope of the Minister's duty to consult with the appellants, whether the steps taken by the Minister were sufficient to meet his duty to consult and what appropriate remedy the Court should order, if necessary, the Judge turned to the Supreme Court's decision in *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, for guidance with respect to the relevant principles. Specifically, he referred to paragraphs 16, 20, 27 and 35 of *Haida, supra*, where the Supreme Court held that (i) in defining rights guaranteed under section 35 of the Constitution, the Crown must act honourably and, in so doing, must consult and, where appropriate, accommodate Aboriginal peoples; and that (ii) a duty to consult will arise when the Crown has knowledge, real or constructive, of the existence of an Aboriginal right that might be affected by the Crown's conduct.

[12] The Judge then proceeded to determine the nature of the Aboriginal right at issue, which he found to be a right to fish commercially. This led him to note that although the Minister did not dispute the fact that he had knowledge of the appellants' claim to a right to fish commercially, he did not concede that the conduct contemplated under the Pilot Plan would affect the appellants' right in question.

[13] With regard to the appellants' contention that their food, social and ceremonial rights ("FSC rights") were also at issue, the Judge found that since no adverse impacts on these rights had been shown by the appellants, it followed that the Minister did not have a duty to consult in regard thereto.

[14] The Judge then turned his attention to the scope of the Minister's duty to consult insofar as the appellants' right to fish commercially was concerned and sought to determine where that duty was located on the spectrum discussed in *Haida, supra*. He began his analysis with the proposition that determining the Aboriginal right which gave rise to the duty to consult was a necessary precondition to the determination of the scope and content of that duty and, in support of that proposition, he referred to paragraphs 43 to 45 of *Haida, supra*. As I have already indicated, the Judge found the right at issue to be the right to fish commercially.

[15] The Judge then reviewed the arguments put forward by both sides with regard to the scope of the Minister's duty in the light of the evidence and of a number of Supreme Court decisions, namely: *Haida, supra*; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388; *R. v. Nikal*, [1996] 1 S.C.R. 1013; and *R. v. Gladstone*, [1996] 2 S.C.R. 723. This led him to the conclusion that any infringement or adverse effects on the appellants' right to fish commercially would be limited and that, as a result, the Minister's duty to consult was located at the lower end of the spectrum. At paragraph 46 of his Reasons, the Judge stated his conclusion in the following terms:

[46] Having carefully considered the submissions from both parties in light of the applicable jurisprudence, I am satisfied that any infringements or adverse effects on the rights of the applicants to fish commercially resulting from the Pilot Plan would be limited, particularly in light of the fact that the respondent was pursuing a compelling and substantial objective of conservation of the resource in question for the benefit of all Canadians, including the applicants. As such, it is my conclusion that the duty to consult and accommodate the interests of the applicants would have been located on the lower end of the spectrum.

[16] The Judge then went on to examine whether the steps taken by the Minister were sufficient to meet his duty to consult. First, he addressed the period during which the Reform Proposal was being developed. In his view, bilateral consultations were not warranted during that period of time because the respondent's duty to consult was located at the lower end of the spectrum, so that the appellants' involvement in the multilateral process through the CGIAC was such that the Minister was not required to take additional steps to consult with the appellants.

[17] Second, the Judge addressed the period of time commencing once the Reform Proposal was submitted to the Minister. He found that while the appellants had only received a formal copy of the Reform Proposal in June 2005, they had been aware since January 2005 of the general direction that was being pursued by reason of the participation of their representative in the CGIAC. The Judge noted that once the Reform Proposal was submitted, DFO began a process of stakeholder consultations in which the appellants were invited to participate by way of completion of a written questionnaire seeking their comments and of stakeholder meetings. The Judge further noted that the appellants were well aware of the key proposal contained in the Reform Proposal, i.e. the imposition of IQs which were a fact of life in most commercial groundfish fisheries since 1997 and to which they were, as a matter of principle, opposed. The Judge continued by observing that although the

Minister did not, at the outset, intend to conduct bilateral consultations with the appellants, believing that multilateral consultations were sufficient to meet their concerns, he eventually did engage in bilateral consultations with the appellants. The Judge then noted that the appellants' main complaint was that the bilateral consultations had not been completed before the Minister made the decision to implement the Pilot Plan and that, in their opinion, the failure to complete these consultations resulted from the fact that DFO was delinquent in commencing the consultations, thus leaving insufficient time to complete them.

[18] After pointing out that the Minister took the position that the failure to complete the bilateral consultations was the result of the appellants refusal to engage in meaningful discussions of the substantial issues arising from the Reform Proposal, the Judge indicated that although there could be no doubt that DFO should have begun the bilateral consultation process earlier than it did, i.e. in November 2005, he expressed the view that DFO "could not do everything at once" (paragraph 59). He also indicated that the appellants were partly responsible for the delays which had occurred during the course of the bilateral consultations.

[19] At paragraphs 64 to 66 of his Reasons , the Judge summarized his view of the matter and expressed his conclusion to the effect that the Minister had not breached his duty to consult the appellants in implementing the Pilot Plan prior to completion of the bilateral discussions:

[64] To sum up, a representative of the applicants was designated by the BCAFC to attend meetings of the CGIAC, thus allowing the applicants to be kept informed, however indirectly, of the work being done by the CIC on the Reform Proposal. Once DFO was ready to proceed with stakeholder consultations, the applicants were sent a letter explaining the situation, as well as a copy of the Reform Proposal and a written questionnaire allowing them to submit comments to the Minister. The applicants also participated in one of the

stakeholder meetings held in November 2005. Two bilateral meetings were also held with the applicants in November 2005, at which the Reform Proposal was discussed. The applicants then submitted to the respondent a proposed consultation protocol, and refused to discuss substantive issues for the next two and a half months, insisting that the Minister first agree to this protocol before proceeding any further. Once the consultation process resumed in February, the applicants forwarded over one hundred questions to DFO, many of which the respondent insists were not clearly connected to any aboriginal interest that would give rise to the duty to consult. Nonetheless, DFO endeavoured to provide as many answers as possible within a very short timeframe. Meanwhile, a series of memoranda to the Minister were prepared in respect of the Reform Proposal, which outlined the opposition from First Nations, including the applicants. Finally, when the Pilot Plan was adopted, it contained some important changes meant to address concerns of stakeholders, notably the fact that it was now to be a three-year pilot project. There was also a specific commitment to First Nations that additional lingcod and dogfish catch history would be made available to them as lingcod and dogfish quotas. That measure, according to the respondent, was meant to address concerns raised by the NTC and other First Nations regarding quota and non-target species, as well as to address any additional costs incurred by the applicants as a result of the implementation of the Pilot Plan. As such, it is clear that a measure was introduced in the Pilot Plan to accommodate the potential adverse effects of the Reform Proposal identified by the applicants.

[65] While it is conceded by the respondent that bilateral consultations with the applicants had not concluded prior to a decision being made by the Minister on the Pilot Plan, I agree with the respondent that the applicants were provided with sufficient opportunities to participate in the process to satisfy the duty of the Minister to consult in this case, and that some of the delays that prevented the consultations from concluding prior to the decision being made were caused by the applicants.

[66] Given the multilateral consultations that were held by DFO in which the applicants took part, given the conservation issues at stake, given the potential impact on groundfish fisheries of the introduction of the 100 per cent monitoring of all catch for the 2006 fishing season without the implementation of transferable IQs, and given that the plan was introduced as a three-year pilot only, I am satisfied that the Minister's decision to proceed without waiting for bilateral consultations with the applicants to conclude was justified, and did not constitute a failure to abide by his duty to consult with the applicants.

[Emphasis added]

SUBMISSIONS OF THE PARTIES

A. Appellants' Submissions

[20] The appellants submit that since the implementation of the Pilot Plan “might” adversely affect their Aboriginal rights, i.e. commercial and FSC rights, it triggered the respondent’s duty to consult. They argue that the respondent’s rejection of consultations with respect to impacts other than on their commercial right to fish was an error of law that is reviewable on a correctness standard and that Blais J. erred in law by failing to apply this standard when reviewing the respondent’s determination. The appellants also say that the Judge made a patently unreasonable finding when he found that they were not concerned about the effects of the Pilot Plan upon their FSC rights.

[21] With respect to the scope of the duty to consult, the appellants say that Blais J. erred in law in limiting the duty to consult to their commercial right to fish and in finding that the duty fell at the lower end of the spectrum. On the basis of *R. v. Sparrow*, [1990] 1 S.C.R. 1075 and *R. v. Gladstone*, [1996] 2 S.C.R. 723, the appellants submit that whether the respondent’s action was justified depends on the degree of consultations rather than on whether the objective of the action was conservation. Furthermore, they submit that the Judge erred in law in failing to look at each aspect of the Pilot Plan in determining whether it was justified and point to the fact that the transferable IQs found in the Pilot Plan did not have conservation as their main objective.

[22] The appellants also submit that Blais J. erred in determining that the respondent had met his duty to consult because he incorrectly determined the scope of consultations required. Further, the appellants submit that the multilateral stakeholder consultations, the nature of the Pilot Plan, the

accommodation made by the respondent and their behaviour did not and cannot serve to eliminate their right to be meaningfully consulted.

[23] With respect to the issue of multilateral consultations, the appellants assert that the Judge erred in finding that these consultations were sufficient to satisfy the respondent's duty to consult. In their view, such consultations were not sufficient, even if the scope of the duty to consult is at the lower end of the spectrum.

[24] The appellants further argue that it was wrong for the Judge to consider the urgency of implementing the Pilot Plan and the fact that that plan was a three-year pilot project only in determining whether the Minister had met his duty to consult and accommodate. In their view, the duty to consult depends on the strength of the claim at issue and the degree of infringement, and as a result, even if the Pilot Plan was a pilot project, serious impacts on their rights could still result from implementation of the Pilot Plan. With respect to the accommodation made by the respondent, the appellants say that lingcod and dogfish allocations in favour of First Nations were unilateral measures that cannot satisfy the respondent's duty to consult.

[25] Finally, the appellants submit that the Judge erred in finding that their conduct somehow lessened their right to be consulted. They say that they should not be blamed for the fact that they consistently requested bilateral consultations in accordance with the proposed framework set out in *Haida, supra*.

B. Respondent's Submissions

[26] The respondent submits that Blais J. was correct in finding that any adverse impacts on the appellants' rights were limited and that the duty to consult pertained only to the appellants' commercial right to fish. With respect to the appellants' FSC rights, the respondent argues that the Pilot Plan does not impact these rights, as any allocations for such rights were to be made before any allocations were made to the commercial sector. Hence, the respondent submits that the Judge was correct in concluding that the appellants' FSC rights would not be impacted by the implementation of the Pilot Plan because there was no "meaningful impact" on these rights. Furthermore, the respondent submits that any impact on the treaty process does not trigger a duty to consult.

[27] With respect to the scope of the duty to consult, the respondent submits that the Judge correctly determined that that duty lies at the lower end of the spectrum, since the adverse impacts on the appellants' commercial right to fish were limited. Indeed, according to the respondent, it was not shown that there would be any alteration of the Fisheries or high risk of non-compensable damages resulting from the Pilot Plan. The respondent says that the appellants incorrectly submit that the Judge based his finding with respect to the scope of the duty on the fact that a commercial right was at issue and that any impact was justified because the goal of the Pilot Plan was conservation. Rather, the Judge based his finding on the fact that the only alleged right impacted was a commercial right and that the impacts on this right would be limited, because of, amongst other things, the conservation aspect of the Pilot Plan.

[28] While the respondent admits that the consultations did not conclude to the satisfaction of the appellants before the Minister made his decision, he submits that Blais J. correctly concluded that there was no breach of the duty to consult, pointing out that there was no requirement that the consultations conclude to the satisfaction of the First Nations and that the reason why the consultations had not concluded was due in part to the appellants' conduct. The respondent further submits that the appellants' position on IQs had crystallized by the time of the bilateral meetings in February 2006 and according to *Taku, supra*, consultations can terminate at this point. The respondent also submits that the urgency of making a decision in light of conservation concerns was also a factor to be considered in determining the Minister's duty to consult.

[29] The respondent argues that, in the end, the Judge rightly concluded that the appellants' participation in the multilateral process coupled with the fact that any duty to consult was at the lower end of the spectrum was sufficient to satisfy any duty to consult while the Reform Proposal was being developed. However, the appellants' participation was only one factor, along with others, that led to the conclusion that the Minister had satisfied his duty to consult.

[30] On the issue of accommodation, the respondent submits that for most of the period at issue, the appellants did not consult with the Minister's officials and opportunities to discuss accommodation were limited. Moreover, although DFO attempted to consult with the appellants about making extra quota available as a means to accommodate them, the appellants were no longer interested in consulting with DFO after they were advised that the Minister would be implementing the Pilot Plan in April 2006.

[31] In the event that this Court finds that the Minister breached his duty to consult and to accommodate the appellants, the respondent submits that the Court should exercise its discretion and not quash the Pilot Plan. Rather, the Minister proposes other remedies such as a declaration of the need for further consultation between the parties, directions as to the scope, content and schedule of the consultations and providing leave to the parties to seek further directions.

ISSUES

[32] The appeal raises the following issues:

1. Did the Judge err in finding that the right at issue was the appellants' right to fish commercially?
2. Did the Judge err in finding that the scope of the Minister's duty to consult lies at the lower end of the spectrum?
3. Did the Judge err in finding that the Minister met his duty to consult and accommodate?

ANALYSIS

A. Standard of review

[33] The learned Judge did not determine what standard of review applied to the Minister's decision to introduce the Pilot Plan. In *Haida, supra*, the Supreme Court offered the following guidance with respect to the standard of review applicable to a decision of the Crown which gave rise to a duty to consult:

61 On questions of law, a decision-maker must generally be correct: for example, *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585, 2003 SCC 55. On questions of fact or mixed fact and law, on the other hand, a reviewing body may owe a degree of deference to the decision-maker. The existence or extent of the duty to consult or

accommodate is a legal question in the sense that it defines a legal duty. However, it is typically premised on an assessment of the facts. It follows that a degree of deference to the findings of fact of the initial adjudicator may be appropriate. The need for deference and its degree will depend on the nature of the question the tribunal was addressing and the extent to which the facts were within the expertise of the tribunal: *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20; *Paul, supra*. Absent error on legal issues, the tribunal may be in a better position to evaluate the issue than the reviewing court, and some degree of deference may be required. In such a case, the standard of review is likely to be reasonableness. To the extent that the issue is one of pure law, and can be isolated from the issues of fact, the standard is correctness. However, where the two are inextricably entwined, the standard will likely be reasonableness: *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748.

62 The process itself would likely fall to be examined on a standard of reasonableness. Perfect satisfaction is not required; the question is whether the regulatory scheme or government action "viewed as a whole, accommodates the collective aboriginal right in question": *Gladstone, supra*, at para. 170. What is required is not perfection, but reasonableness. As stated in *Nikal, supra*, at para. 110, "in ... information and consultation the concept of reasonableness must come into play... . So long as every reasonable effort is made to inform and to consult, such efforts would suffice." The government is required to make reasonable efforts to inform and consult. This suffices to discharge the duty.

63 Should the government misconceive the seriousness of the claim or impact of the infringement, this question of law would likely be judged by correctness. Where the government is correct on these matters and acts on the appropriate standard, the decision will be set aside only if the government's process is unreasonable. The focus, as discussed above, is not on the outcome, but on the process of consultation and accommodation.

[Emphasis added]

[34] Thus, in my view, the determination of the existence and extent of the duty to consult or accommodate is a question of law and, hence, reviewable on a standard of correctness. However, when the Crown has correctly determined that question, its decision will be set aside only if the process of consultation and accommodation is unreasonable. In my view, the Supreme Court's recent decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9, does not change the standard of review applicable in this case.

B. Existence of the Duty to Consult or Accommodate

[35] The Crown’s duty to consult and accommodate, as explained in *Haida, supra*, 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” (*Haida, supra*, para. 35) (See also: *Halfway River First Nation v. British Columbia (Ministry of Forests)*, [1997] 4 C.N.L.R. 45 (B.C.S.C.), at p. 71). As a corollary to this proposition is the one that the duty to consult is triggered at a low threshold (see *Mikisew, supra*, at para. 55).

[36] In the present matter, the Minister does not dispute the fact that he had knowledge of the appellants’ claimed Aboriginal rights. However, the Minister does not concede that the appellants have a strong claim and, in support of that view, relies on the Supreme Court’s decision in *R. v. NTC Smokehouse*, [1996] 2 S.C.R. 672, where the Supreme Court held that two of the appellant First Nations did not have commercial rights to sell fish.

[37] The appellants say that rights other than their right to fish commercially might be affected by the implementation of the Pilot Plan. Firstly, with respect to the potential impact on treaty settlements and socioeconomic impacts on First Nation communities, I agree entirely with the Applications Judge that since treaty settlements constitute a discrete process, such impact would not trigger a duty to consult. With respect to their FSC rights, the Judge found, and I agree entirely with him, that the appellants did not adduce any evidence to support their contention that these rights “might” be adversely impacted. Even if the duty to consult is triggered at a low threshold (see *Mikisew Crew First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388, at

para. 55), mere submissions are not, in my view, sufficient to demonstrate that the Pilot Plan might have negative impacts upon the Aboriginal right to fish for FSC purposes.

[38] Hence, I am of the view that Blais J. did not err in finding that the respondent correctly determined that the appellants' right to fish commercially was the only right which might be adversely affected by the Pilot Plan. Although the Judge did not say what standard of review he applied, it is clear from his Reasons that he did not show any deference and thus he applied the standard of correctness.

C. Scope of the Duty to Consult

[39] The scope of the duty to consult depends not only on the strength of the case supporting the existence of the right at issue, but also on whether the right is limited and on whether there are potentially adverse effects upon the right claimed (*Haida, supra*, paras. 39 and 68). The Supreme Court has made it clear that when the Aboriginal right at issue is limited or the potential for infringement is minor, the scope of the duty lies at the lower end of the spectrum. At paragraphs 43 to 45 in *Haida, supra*, the Court said:

¶ 43 Against this background, I turn to the kind of duties that may arise in different situations. In this respect, the concept of a spectrum may be helpful, not to suggest watertight legal compartments but rather to indicate what the honour of the Crown may require in particular circumstances. At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice. "[C]onsultation' in its least technical definition is talking together for mutual understanding": T. Isaac and A. Knox, "The Crown's Duty to Consult Aboriginal People" (2003), 41 Alta. L. Rev. 49, at p. 61.

¶ 44 At the other end of the spectrum lie cases where a strong prima facie case for the claim is established, the right and potential infringement is of high significance to the

Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required. While precise requirements will vary with the circumstances, the consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision. This list is neither exhaustive, nor mandatory for every case. The government may wish to adopt dispute resolution procedures like mediation or administrative regimes with impartial decision-makers in complex or difficult cases.

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

[Emphasis added]

[40] The relevant weight to be given to each of the factors mentioned in *Haida, supra*, will depend upon the facts of the case. For example, one factor may be determinative for locating on the spectrum the duty to consult. In *Mikisew Cree First Nation, supra*, the Court found that the Crown's duty to consult laws at the lower end of the spectrum, notwithstanding that the rights at issue (treaty rights to hunt and trap) were certain and that the impacts upon those rights were clear, established and demonstrably adverse to the continued exercise of hunting and trapping rights.

[41] In the present matter, even though the Judge appears to have accepted that the appellants made a strong *prima facie* case with respect to their right to fish commercially, he nonetheless found that the Minister's duty to consult was located at the lower end of the spectrum because "any

infringements or adverse effects on the rights of the [appellants] to fish commercially resulting from the Pilot Plan would be limited, particularly in light of the fact that the [respondent] was pursuing a compelling and substantial objective of conservation of the resource in question for the benefit of all Canadians, including the [appellants]” (Judge’s Reasons, paragraph 46).

[42] It appears that the Judge came to that view in part by reason of the Minister’s submission that a government can legitimately pursue a broad range of objectives that can justify an infringement of the Aboriginal rights at issue. Such justification to the infringement would lead to a finding of a minimal duty to consult. This conclusion raises the question of whether the doctrine of justification, as set out in *Sparrow, supra*, and *Gladstone, supra*, is applicable in cases where the scope of the duty to consult is at issue.

[43] In *Mikisew Cree First Nation, supra*, the Supreme Court discussed the application of *Sparrow, supra*, in the context of the analysis of the Crown’s duty to consult:

56 In summary, the 1899 negotiations were the first step in a long journey that is unlikely to end any time soon. Viewed in light of the facts of this case, we should qualify Badger’s identification of two inherent limitations on Indian hunting, fishing and trapping rights under Treaty 8 (geographical limits and specific forms of government regulation) by a third, namely the Crown’s right to take up lands under the treaty, which itself is subject to its duty to consult and, if appropriate, accommodate First Nations’ interests before reducing the area over which their members may continue to pursue their hunting, trapping and fishing rights. Such a third qualification (not at issue in Badger) is fully justified by the history of the negotiations leading to Treaty 8, as well as by the honour of the Crown as previously discussed.

57 As stated at the outset, the honour of the Crown infuses every treaty and the performance of every treaty obligation. Treaty 8 therefore gives rise to Mikisew procedural rights (e.g. consultation) as well as substantive rights (e.g. hunting, fishing and trapping rights). Were the Crown to have barrelled ahead with implementation of the winter road without adequate consultation, it would have been in violation of its procedural obligations,

quite apart from whether or not the Mikisew could have established that the winter road breached the Crown's substantive treaty obligations as well.

58 *Sparrow* holds not only that rights protected by s. 35 of the Constitution Act, 1982 are not absolute, but also that their breach may be justified by the Crown in certain defined circumstances. The Mikisew rights under Treaty 8 are protected by s. 35. The Crown does not seek to justify in *Sparrow*-terms shortcomings in its consultation in this case. The question that remains, therefore, is whether what the Crown did here complied with its obligation to consult honourably with the Mikisew First Nation.

(3) Was the Process Followed by the Minister Through Parks Canada in this Case Sufficient?

59 Where, as here, the Court is dealing with a *proposed* "taking up" it is not correct (even if it is concluded that the proposed measure if *implemented* would infringe the treaty hunting and trapping rights) to move directly to a *Sparrow* analysis. The Court must first consider the process by which the "taking up" is planned to go ahead, and whether that process is compatible with the honour of the Crown. If not, the First Nation may be entitled to succeed in setting aside the Minister's order on the process ground whether or not the facts of the case would otherwise support a finding of infringement of the hunting, fishing and trapping rights.

[Emphasis added]

[44] In light of the above considerations, I am of the view that the learned Judge was wrong to rely on the grounds put forward by the Minister to justify the infringement of the appellants' right to fish commercially at the stage of determining what the scope of the Minister's duty to consult was. Even if the Judge did not expressly state in his Reasons that he was relying on *Sparrow*, *supra*, and on the Supreme Court's subsequent decision in *Gladstone*, *supra*, he nonetheless referred to passages in those decisions in characterizing the Minister's objective of conservation as "compelling and substantial". As appears clearly from its decision in *Mikisew Cree First Nation*, *supra*, the Supreme Court views the process followed and the duty to consult attached to it as a question distinct from that of whether there is infringement of an Aboriginal right and whether the

infringement is justified. Thus, the conservation objective of the Pilot Plan was, in my view, not relevant at this stage of the analysis, except to the extent that the pursuit of conservation would lead to or result in minimal impact on the Aboriginal right at issue.

[45] The proper approach required the Judge, in my view, to focus on whether the Aboriginal claim was weak, limited, or whether the potential for infringement was minor. Although the Judge erred in the approach that he took, I am nonetheless satisfied that he was correct in finding that the Minister's duty to consult was located at the lower end of the spectrum. Like the Judge, I am satisfied that any impact of the Pilot Plan on the appellants' right to fish commercially would be limited. On the evidence, it is unclear how exactly the Pilot Plan impacts negatively upon the appellants' right. It is clear, however, that the implementation of the Pilot Plan does not result in either an alteration of the Fisheries or create a high risk of non-compensable damages.

[46] I therefore conclude, as did the Judge, that the scope of the Minister's duty herein lies at the lower end of the spectrum. Again, although the Judge did not mention what standard of review he applied, he does not appear to have shown deference and therefore, in my view, he applied the correctness standard.

D. Was the Duty to Consult Met?

[47] Because he found that the Minister had correctly determined the right which triggered the duty to consult and the scope of that duty, the Judge then addressed the issue of whether the process of consultation and accommodation implemented by the Minister was reasonable. After reviewing the evidence and the authorities, he concluded that "the Minister's decision to proceed without

waiting for bilateral consultations with the applicants to conclude was justified, and did not constitute a failure to abide by his duty to consult with the applicants” (Judge’s Reasons, para. 66).

[48] More particularly, the Judge first dealt with the period during which the Reform Proposal was being developed. He concluded that during this period, bilateral consultations were not required and that the multilateral process through the CGIAC was sufficient to satisfy the Minister’s duty. With respect to the period during which the reform proposal was put forward for discussion by the Minister, the Judge found that notwithstanding the fact that bilateral consultations with the appellants had not run their full course, the Minister had nonetheless fulfilled his duty to consult. In so concluding, the Judge observed that the appellants’ conduct was responsible for some of the delays which had prevented the bilateral consultation process from concluding prior to the Minister’s decision.

[49] The determination of whether the Minister’s duty to consult and accommodate is reasonable depends essentially on the scope of the duty to consult. Where the scope of the duty is located at the lower end of the spectrum, as here, the respondent’s duty may possibly be limited to giving notice of its intended action, disclosing information and discussing issues raised in response to the notice.

[50] In the present matter, there can be no doubt, in my view, that the respondent clearly demonstrated an intention of substantially addressing Aboriginal concerns through a meaningful process of consultation. I can see no basis to disagree with the Judge’s finding that the Minister provided the appellants with sufficient opportunities to participate in the process. The Judge also

found, and I see no reason to disagree with his view, that the appellants were partly to blame for the delays which occurred during the course of the consultation process.

[51] In *R. v. Douglas*, 2007 BCCA 265, leave to appeal to S.C.C. refused, [2007] S.C.C.A. No. 352 (QL), the British Columbia Court of Appeal dealt with the question of whether multilateral consultations were sufficient so as to satisfy the Minister's duty to consult. The Court held that given the nature of the Fishery, the number of First Nations involved and the lack of unanimity between them, joint consultation was reasonable and appropriate as DFO had provided the First Nations with the necessary information, technical assistance and opportunities to express their concerns:

40 In this case, DFO conducted extensive and detailed consultations with Fraser River First Nations as to its conservation objectives. Given the nature of the Fraser River salmon fishery, the number of First Nations involved, and the lack of unanimity between them on important issues, DFO's emphasis on joint consultations was reasonable and appropriate. DFO provided the necessary information and technical assistance. DFO provided opportunities for the First Nations to express their concerns and resources to facilitate the meetings. DFO adjusted the escapement target and exploitation rate in response to First Nations' concerns. In this way, DFO complied with the standard set out in *Halfway River*, *supra*, and in *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388 at para. 64. Because the Cheam refused to participate in the joint consultations, DFO attempted to consult them separately. The trial judge found, and the appeal judge agreed, that DFO's efforts to engage the Cheam in consultation were reasonable and in good faith.

[Emphasis added]

[52] In *Douglas*, *supra*, the B.C. Court of Appeal also found that First Nations were duty-bound to consult with the Minister in good faith and that they could not, by their conduct, place unnecessary obstacles in the way of the consultation process. The Court, at paragraph 39 of its

Reasons, referred to the following passage from *Halfway River First Nation, supra*, which identified a reciprocal duty of First Nations in the consultation process:

161. ... There is a reciprocal duty on Aboriginal Peoples to express their interests and concerns once they have had an opportunity to consider the information provided by the Crown, and to consult in good faith by whatever means are available to them. They cannot frustrate the consultation process by refusing to meet or participate, or by imposing unreasonable conditions...

[53] In *Douglas, supra*, the B.C. Court of Appeal went on to find that the First Nations had not fulfilled their reciprocal duty to carry out their end of the consultation process to the extent that its members deliberately frustrated the Minister's attempts to consult:

45 Finally, it is illogical to conclude that DFO failed to conduct adequate consultations with the Cheam because DFO did not approach them on a minor matter, when the trial judge found that the Cheam had failed to respond to repeated requests to meet, consult or respond on the major issues. Significantly, the Cheam failed to communicate their needs in concrete terms in response to DFO's request that they do so. The Cheam did not fulfil their reciprocal obligation to carry out their end of the consultation. To hold that members of a First Nation who deliberately frustrated all of the government's attempts to consult, and thereby failed in its own obligations should receive a remedy for an infringement of its aboriginal right because the government did not approach it on a minor issue goes far beyond what is required to justify DFO's conduct. DFO's duty as described by the Supreme Court of Canada in *Sparrow* was to uphold the honour of the Crown and conform to the unique contemporary relationship between the Crown and aboriginal peoples. As the trial judge held, "the refusal by the Cheam to meet, to communicate, and to refuse to attend group discussions has direct implications on the assertion the consultation efforts of government are flawed" (at para. 73).

[54] It follows from *Haida, supra*, that in determining whether the Minister has met his duty to consult, perfect satisfaction is not required. To the extent that the Minister makes reasonable efforts to inform and consult the First Nations which might be affected by the Minister's intended course of action, this will normally suffice to discharge the duty. As McLauchlin C.J. said at paragraph 39 of her Reasons in *Haida, supra*:

[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 general 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.

[55] In my view, the Minister, in the present matter, took sufficient steps to discharge his duty to consult. His efforts, while not perfect, were reasonable and appropriate in the circumstances. DFO's commitment to continue to consult with the appellants and make extra lingcod and dogfish quota available as a means to accommodate potential impacts of the Pilot Plan on the appellants' commercial right to fish shows good faith on its part. Indeed, the appellants do not take the position that DFO acted in bad faith.

[56] I therefore conclude that Blais J. did not make a reviewable error in finding that the Minister had met his duty to consult with the appellants.

DISPOSITION

[57] For these reasons, I would dismiss the appeal with costs.

“M. Nadon”

J.A.

“I agree.
Marc Noël J.A.”

“I agree.
C. Michael Ryer J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-313-07

**(APPEAL FROM A JUDGMENT OF THE FEDERAL COURT DATED MAY 29, 2007
(2007 FC 567) IN COURT FILE T-781-06)**

STYLE OF CAUSE: THE AHOUSAHT INDIAN
BAND et al v. MINISTER OF
FISHERIES AND OCEANS.

PLACE OF HEARING: Vancouver, British Columbia

DATE OF HEARING: April 23, 2008

REASONS FOR JUDGMENT BY: NADON J.A.

CONCURRED IN BY: NOËL J.A.
RYER J.A.

DATED: June 12, 2008

APPEARANCES:

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Deputy Attorney General of Canada

Federal Court



Cour fédérale

Date: 20090512

Dockets: T-225-08
T-921-08
T-925-08

Citation: 2009 FC 484

Ottawa, Ontario, May 12, 2009

PRESENT: The Honourable Mr. Justice Barnes

Docket: T-225-08

BETWEEN:

**BROKENHEAD OJIBWAY NATION, LONG PLAIN FIRST NATION,
SWAN LAKE FIRST NATION, FORT ALEXANDER FIRST NATION, also known as
“SAGKEENG FIRST NATION”, ROSEAU RIVER ANISHINABE FIRST NATION,
PEGUIS FIRST NATION AND SANDY BAY FIRST NATION, known collectively as the
TREATY ONE FIRST NATIONS**

Applicants

and

**THE ATTORNEY GENERAL OF CANADA,
THE NATIONAL ENERGY BOARD
and
TRANSCANADA KEYSTONE PIPELINE GP LTD.**

Respondents

Docket: T-921-08

BETWEEN:

**BROKENHEAD OJIBWAY NATION, LONG PLAIN FIRST NATION,
SWAN LAKE FIRST NATION, FORT ALEXANDER FIRST NATION, also known as
“SAGKEENG FIRST NATION”, ROSEAU RIVER ANISHINABE FIRST NATION,**

**PEGUIS FIRST NATION AND SANDY BAY FIRST NATION, known collectively as the
TREATY ONE FIRST NATIONS**

Applicants

and

**THE ATTORNEY GENERAL OF CANADA,
THE NATIONAL ENERGY BOARD
and
ENBRIDGE PIPELINES INC.**

Respondents

T-925-08

2009 FC 484 (CanLII)

BETWEEN:

**BROKENHEAD OJIBWAY NATION, LONG PLAIN FIRST NATION,
SWAN LAKE FIRST NATION, FORT ALEXANDER FIRST NATION, also known as
“SAGKEENG FIRST NATION”, ROSEAU RIVER ANISHINABE FIRST NATION,
PEGUIS FIRST NATION AND SANDY BAY FIRST NATION, known collectively as the
TREATY ONE FIRST NATIONS**

Applicants

and

**THE ATTORNEY GENERAL OF CANADA,
THE NATIONAL ENERGY BOARD
and
ENBRIDGE PIPELINES INC.**

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicants are the seven First Nations who are the successors to those Ojibway First Nations who entered into what is known as Treaty One with the federal Crown on August 3, 1871¹. They are today organized collectively as the Treaty One First Nations and they assert

¹ Treaty One was the first of several treaties entered into from 1871 to 1877 between the federal Crown and the First Nations peoples who then occupied much of the lands of the southern prairies and the south-western corner of what is now Ontario.

treaty, treaty-protected inherent rights and indigenous cultural rights over a wide expanse of land in southern Manitoba. By these applications the Treaty One First Nations seek declaratory and other prerogative relief against the Respondents in connection with three decisions of the Governor in Council (GIC) to approve the issuance by the National Energy Board (NEB) of Certificates of Public Convenience and Necessity for the construction respectively of the Keystone Pipeline Project, the Southern Lights Pipeline Project and the Alberta Clipper Pipeline Expansion Project (collectively, “the Pipeline Projects”). All of the Pipeline Projects involve the use or taking up of land in southern Manitoba for pipeline construction by the corporate Respondents. Because the material facts and the legal principles that apply are the same for all three of the decisions under review, it is appropriate to issue a single set of reasons.

I. Regulatory Background

The Keystone Pipeline Project

[2] On December 12, 2006 TransCanada Keystone Pipeline GP Ltd. (Keystone) applied to the NEB for approvals related to the construction and operation of the Keystone Pipeline Project (the Keystone Project).

[3] The Keystone Project consists of a 1235 kilometer pipeline running from Hardisty, Alberta to a location near Haskett, Manitoba on the Canada-United States border. In Manitoba all new pipeline construction is on privately owned land with the balance of 258 kilometers running over existing rights-of-way (including 4 kilometers on leased Crown land and 2 kilometers on unoccupied Crown land). The width of the permanent easement in Manitoba is 20 metres and the pipeline is buried.

[4] During its hearings, the NEB considered submissions from Standing Buffalo First Nation near Fort Qu'Appelle, Saskatchewan and from five First Nations in southern Manitoba known collectively as the Dakota Nations of Manitoba. Keystone also engaged a number of Aboriginal communities located within 50 kilometers of the pipeline right-of-way including Long Plain First Nation, Swan Lake First Nation and the Roseau River Anishinabe First Nation.

[5] In its Reasons for Decision dated September 6, 2007 the NEB approved the Keystone Project subject to conditions. Included in those reasons are the following findings concerning project impacts on Aboriginal peoples:

Although discussions with Standing Buffalo and the Dakota Nations of Manitoba began somewhat later than they could have, overall, the Board is satisfied that Keystone meaningfully engaged Aboriginal groups potentially impacted by the Project. Aboriginal groups were provided with details of the Project as well as an opportunity to express their concerns to Keystone regarding Project impacts. Keystone considered the concerns and made Project modifications where appropriate. Keystone also worked within established agreements which TransCanada had with Aboriginal groups in the area of the Project and persisted in its attempts to engage certain Aboriginal groups. The Board is also satisfied that Keystone has committed to ongoing consultation through TransCanada.

The evidence before the Board is that TransCanada, on behalf of Keystone, was not aware that Standing Buffalo and the Dakota Nations of Manitoba had asserted claims to land in the Project area. The Board is of the view that, since TransCanada has a long history of working in the area of the Keystone Project, it should have known or could have done more due diligence to determine claims that may exist in the area of the Keystone Project. The Board acknowledges that as soon as Keystone became aware that Standing Buffalo and the Dakota Nations of Manitoba had an interest in the Project area, it did take action and initiated consultation activities. The Board further notes that consultation with Carry the Kettle and Treaty 4 was based upon TransCanada's established protocol agreements and that Keystone is willing to establish similar agreements and work plans with other Aboriginal groups, including Standing Buffalo and the Dakota Nations of Manitoba.

Once an application is filed, all interested parties, including Aboriginal persons, have the opportunity to participate in the Board's processes to make their views known so they can be factored into the decision-making. With respect to the Keystone Project, the Board notes that Standing Buffalo and the Dakota Nations of Manitoba took the opportunity to participate in the proceeding and the Board undertook efforts to facilitate their application. The Board agreed to late filings by Standing Buffalo and the Elders had an opportunity to provide oral testimony in their own language at the hearing. In addition, the Board held two hearing days in Regina to facilitate the participation of Standing Buffalo and was prepared to consider hearing time in Winnipeg for the benefit of the Dakota Nations of Manitoba. The Board notes it undertook to ensure it understood the concerns of Standing Buffalo by hearing the testimony of the Elders, making an Information Request and asking questions at the hearing.

The Board is satisfied that Standing Buffalo and the Dakota Nations of Manitoba were provided with an opportunity to participate fully in its process and to bring to the Board's attention all their concerns. The hearing process provided all parties with a forum in which they could receive further information, were able to question and challenge the evidence put forward by the parties, and present their own views and concerns with respect to the Keystone Project. Standing Buffalo and the Dakota Nations of Manitoba had the opportunity to present evidence, including any evidence of potential infringement the Project could have on their rights and interests. The Dakota Nations of Manitoba did not provide evidence at the hearing.

Standing Buffalo filed affidavit evidence and gave oral evidence at the hearing, which was carefully considered by the Board in the decision-making process. Standing Buffalo also suggested that the Project would further limit the Crown lands that would be available to meet the terms of its flood compensation agreement and any Treaty claim. In the Board's view, the evidence on this point is too speculative to warrant the Board's consideration of it as an impact given there are Crown lands available for selection and private lands available for purchase within the traditional territory claimed by Standing Buffalo.

It is not within the jurisdiction of the Board to deal with land claim matters. Accordingly, to the extent that the evidence provided by Standing Buffalo relates to its asserted land claim rather than the effects of this particular Project on its interests, it is of limited probative value to the consideration of the application before the Board.

Standing Buffalo presented evidence of a general nature as to the existence of sacred sites along the existing and proposed RoW. The

Board notes Keystone's commitment to discuss with Standing Buffalo the potential for the Project to impact sacred sites, develop a work plan and incorporate mitigation to address specific impacts to sacred sites into its Environment Protection Plan. The Board would encourage Standing Buffalo to bring to the attention of TransCanada its concerns with respect to impacts to sacred sites from existing projects and to involve their Elders in these discussions.

The Board notes that almost all the lands required for the Project are previously disturbed, are generally privately owned and are used primarily for ranching and agricultural purposes. Project impacts are therefore expected to be minimal and the Board is satisfied that potential impacts identified by Standing Buffalo which can be considered in respect of this application will be appropriately mitigated.

With respect to the request by the Dakota Nations of Manitoba for additional conditions, the Board notes that Keystone and the Dakota Nations of Manitoba have initiated consultations and that both parties have committed to continue these discussions. In addition, the Board notes Keystone's commitment to address concerns that are raised through all its ongoing consultation activities and its interest in developing agreements and work plans with Aboriginal groups in the area of the Project. The Board strongly supports the development of such arrangements and encourages project proponents to build relationships with Aboriginal groups with interests in the area of their projects. Given the commitments both parties have made to ongoing dialogue, the Board does not see a need to impose the conditions as outlined.

[6] On the recommendation of the NEB the GIC issued Order in Council No. P.C. 2007-1786 dated November 22, 2007 approving the issuance of a Certificate of Public Convenience and Necessity authorizing the construction and operation of the Keystone Project. This is the decision which is the subject of the Applicants' claim for relief in T-225-08.

The Southern Lights Pipeline Project and the Alberta Clipper Pipeline Expansion Project

[7] In March 2007 and May 2007 respectively, Enbridge applied to the NEB for approval of the Southern Lights Pipeline Project (Southern Lights Project) and the Alberta Clipper Pipeline Expansion Project (Alberta Clipper Project). These two projects are related. The Alberta Clipper

Project consists of 1078 kilometers of new oil pipeline beginning at Hardisty, Alberta and ending at the Canada-United States border near Gretna, Manitoba.

[8] The Southern Lights Project uses the same corridor as the Alberta Clipper Project. Both are constructed within or contiguous to existing pipeline rights-of-way which run almost entirely over private and previously disturbed land².

[9] The record discloses that Enbridge consulted widely with interested Aboriginal communities about their project concerns. This included communities located within an 80-kilometer radius of the pipeline right-of-way and, where other interest was expressed, beyond that limit. There were discussions with Long Plain First Nation, Swan Lake First Nation, Roseau River Anishinabe First Nation and collectively with the Treaty One First Nations. Enbridge also provided funding to the Treaty One First Nations to facilitate the consultation process.

[10] Furthermore, the NEB received representations from interested Aboriginal parties during its hearings. This included discussions with Standing Buffalo First Nation, the Dakota Nations of Manitoba, Roseau River Anishinabe First Nation and Peepeekisis First Nation. Among other concerns, Standing Buffalo raised the issue of unresolved land claims which the NEB characterized as follows:

Chief Redman stated in his written evidence that Standing Buffalo has been involved in extensive meetings with the Government of Canada and the Office of the Treaty Commissioner regarding outstanding issues concerning unextinguished Aboriginal title and governance rights of the Dakota/Lakota. Chief Redman also stated that there have been 70 meetings and yet the Government of Canada has not acknowledged its lawful obligation and continues to discriminate against Standing Buffalo regarding its lawful

² See Affidavit of Lyle Neis sworn September 19, 2008 at paras. 6 to 9.

obligations concerning Aboriginal title, sovereign rights and allyship status by failing to resolve these outstanding issues.

Despite sending a number of letters to the Government of Canada “regarding the discussions with the Government of Canada concerning the Board interventions and how they relate to outstanding Dakota/Lakota issues,” Chief Redman stated that he has received no response.

Chief Redman alleges the consultation listed in the Applicants’ evidence relates to the Alida to Cromer Capacity Expansion hearing and the Applicants and Canada have failed to consult Standing Buffalo in breach of lawful obligation to the First Nation. He stated that the route of the pipeline is through traditional territories of Standing Buffalo and suggested that the Project would further limit the Crown lands that would be available to meet the terms of its flood compensation agreement and any Treaty claim. Standing Buffalo also presented evidence of a general nature as to the existence of sacred sites along the existing and proposed RoW for the Project.

[11] The NEB’s Reasons for Decision by which it approved the Alberta Clipper Project include the following findings:

In the case of the Project, the Board notes that fourteen Aboriginal groups participated in various ways in the proceeding. The Board is satisfied that the Aboriginal groups were provided with an opportunity to participate fully in its process, and bring their concerns to the Board’s attention.

A number of Aboriginal intervenors expressed concerns regarding how the proposed Project could impact undiscovered historical, archaeological and sacred burial sites. The Board notes Enbridge’s commitments to work with Aboriginal communities in the event that such sites are discovered and the implementation of a Heritage Resource Discovery Contingency Plan which includes specific procedures for the discovery and protection of archaeological, palaeontological and historical sites including the evaluation and implementation of appropriate mitigation measures. The Board also notes Enbridge’s decision to route the pipeline path to avoid the Thornhill Burial Mounds site. However, in view of the importance of these sites, should the Project be approved, the Board would include a condition to direct Enbridge to immediately cease all work in the area of any archaeological discoveries and to contact the responsible provincial authorities. This would ensure the protection

and proper handling of any archaeological discoveries and potential impacts to traditional use. If the Project were to be approved, the Board would also direct Enbridge to file with the Board, and make available on its website, reports on its consultation with Aboriginal groups concerning the Thornhill Burial Mounds.

In terms of the potential adverse impacts of the Project to current traditional use, the Board notes that there were suggestions of current traditional use over the proposed route, but no specific evidence was provided. The large majority of the facilities would be buried and would be completed within a short construction window and a large majority of the land required for the Project has been previously disturbed and is generally privately owned and used for agricultural purposes. In view of these facts and Enbridge's commitment to ongoing consultation with Aboriginal people throughout the life cycle of the Project, the Board is of the view that potential Project impacts to Aboriginal interests, particularly with regard to traditional use over the RoW would be minimal and would be appropriately mitigated. The Board is satisfied that ongoing discussions between the Applicant and Aboriginal people, together with the Heritage Resource Discovery Contingency Plan, would minimize potential impacts to traditional use sites, if encountered.

The Board considers that Enbridge's Aboriginal engagement program was appropriate to the nature and scope of the Project. In view of Enbridge's demonstrated understanding that Aboriginal engagement is an ongoing process, its commitments and the proposed conditions, the Board finds that Enbridge's Aboriginal engagement program would fulfill the consultation requirements for Alberta Clipper.

[12] The NEB's findings concerning the impact of the Southern Lights Project on Aboriginal peoples included the following:

The Applicants indicated that they were not aware of any potential impacts on Aboriginal interests that had not been identified in the Southern Lights applications or subsequent filings. The Applicants submitted that, in the event that there are more interests that are identified that may be impacted, they would meet with the Aboriginal organization or community that has identified an interest and work with that community to jointly develop a course of action.

The Board is of the view that those Aboriginal people with an interest in the Southern Lights applications were provided with the details of the Project and were given the opportunity to make their

views known to the Board in a timely manner so that they could be factored into the decision-making process.

Further, the Board is of the view that the Applicants' consultation program was effective in identifying the impacts of the Project on Aboriginal people.

The Project would involve a relatively brief window of construction, with the vast majority of the facilities being buried. As almost all the lands required for the Project are previously disturbed, are generally privately owned, are used primarily for agricultural purposes and are adjacent to an existing pipeline RoW, the Board is of the view that potential Project impacts on Aboriginal interests could be appropriately mitigated. The Board is therefore of the view that impacts on Aboriginal interests are likely to be minimal.

[13] On the recommendation of the NEB the GIC issued Order in Council Nos. P.C. 2008-856 and P.C. 2008-857, both dated May 8, 2008, approving the issuance of Certificates of Public Convenience and Necessity authorizing the construction and operation respectively of the Southern Lights Project and the Alberta Clipper Project. These are the decisions which are the subject of the Applicants' claims for relief in T-921-08 and in T-925-08.

[14] In 2006 and 2007 the Treaty One First Nations attempted to directly engage the federal Crown in "a meaningful consultation and accommodation" concerning the Pipeline Projects and their impact upon their "constitutionally protected Aboriginal and Treaty rights and title" but those efforts were ignored.

II. Issues

[15] It is the position of the Treaty One First Nations in these proceedings that the federal Crown failed to fulfill its legal obligations of consultation and accommodation before granting the necessary approvals for the construction of the Pipeline Projects in their traditional territory.

Although the Treaty One First Nations acknowledge that the corporate Respondents and the NEB have engaged in consultations in connection with the Pipeline Projects and have accommodated some of their concerns, those efforts they say, are not a substitute for the larger obligations of the Crown. Indeed, while the NEB and the corporate Respondents appear to have been quite attentive to the remediation of Aboriginal construction or project-related concerns, they acknowledge an inability to resolve outstanding land claims³.

[16] At the root of these proceedings is the issue of the Treaty One First Nations' outstanding land claims in southern Manitoba. The primary issue before the Court is whether the Pipeline Projects have a sufficient impact on the interests of the Treaty One First Nations such that a duty to consult on the part of the Crown was engaged. If a duty to consult was engaged, the Court must also determine its content and consider whether and to what extent the duty may be fulfilled by the NEB acting essentially as a surrogate for the Crown.

III. Analysis

Standard of Review

[17] With respect to the issue of the standard of review that applies in these proceedings, I would adopt the view of my colleague Justice Danièle Tremblay-Lamer in *Tzeachten First Nation v.*

Canada (Attorney General), 2008 FC 928, 297 D.L.R. (4th) 300 at paras. 23-24:

23 In *Ka'a'Gee Tu First Nation v. Canada (Attorney General)*, 2007 FC 763, 315 F.T.R. 178 at paras. 91-93, my colleague Justice Edmond Blanchard, following the general principles espoused in *Haida Nation v. British Columbia (Minister of Forests)*,

³ The NEB Reasons for Decision by which the Keystone Pipeline Project was approved clearly acknowledge this limitation in the following passage: "It is not within the jurisdiction of the Board to deal with land claim matters. Accordingly, to the extent that the evidence provided by Standing Buffalo relates to its asserted land claim rather than the effects of this particular Project on its interests, it is of limited probative value to the consideration of the application before the Board." The same limitation was noted by the Federal Court of Appeal in *Standing Buffalo Dakota First Nation et al. v. Canada and Enbridge*, 2008 FCA 222 at para. 15.

2004 SCC 73, [2004] 3 S.C.R. 511 at paras. 61-63, indicated that a question as to the existence and content of the duty to consult and accommodate is a question of law reviewable on the standard of correctness and further that a question as to whether the Crown discharged this duty to consult and accommodate is reviewable on the standard of reasonableness.

24 Accordingly, when it falls to determine whether the duty to consult is owed and the content of that duty, no deference will be afforded. However, where a determination as to whether that duty was discharged is required, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] [...] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, above, at para. 47).

Also see: *Ahousaht Indian Band v. Canada (Minister of Fisheries and Oceans)*, 2008 FCA 212, 297 D.L.R. (4th) 722 at paras. 33 and 34.

[18] In the result the question of the existence and content of a Crown duty to consult in this case will be assessed on the basis of correctness. The question of whether any such duty or duties were discharged by the Crown will be determined on a standard of reasonableness.

To What Extent Was the Crown on Notice of the Applicants' Concerns?

[19] The Crown makes the preliminary point that much of the evidence tendered in this proceeding to establish a foundation for the asserted duty to consult was not placed before the GIC by the Treaty One First Nations. While that is true, the GIC was made aware and must be taken to have known of the Treaty One First Nations' primary concern that the Pipeline Projects traversed land that was at one time within their traditional territory and, as well, that the Treaty One First Nations have asserted a long-standing claim to additional land in southern Manitoba. In addition,

the Crown is always presumed to know the content of its treaties: see *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388 at para. 34.

[20] The record before me establishes very clearly that the Treaty One First Nations diligently attempted to directly engage the Crown in a dialogue about the impact of the Pipeline Projects on their unresolved treaty claims. Over several months in 2007 letters were sent from Treaty One First Nations' Chiefs to the Prime Minister, to the Minister of Indian Affairs, to other Ministers, and to the Secretary to the GIC seeking consultation, but their letters were never answered even to the extent of a simple acknowledgement. The frustration engendered by the Crown's refusal to open a dialogue with the Treaty One First Nations prior to the commencement of this litigation is reflected in the following passage from the affidavit of Chief Dennis Meeches of the Long Plain First Nation Reserve:

38. As Chief, I had been conducting myself under the belief that the federal government, on behalf of Her Majesty the Queen in Right of Canada, has a legal duty to consult with my First Nation before making any decisions related to lands in our traditional territory inside the boundaries of Treaty 1. I know also the Crown has a Duty to seek workable accommodations of our concerns and protect our interests, title, and rights.
39. I have no doubt that throughout all this time, the federal government, acting on behalf of the crown, has been aware of the existence of my First Nation's rights, title, and interests in the (*sic*) our traditional territory. I have brought this to the attention of federal ministers and the Canadian public many times over the years, and particularly in relation to the proposed construction of pipelines through our Territory.
40. The events in this process regarding consultation on pipeline construction have added to my serious concerns about the Federal Government's respect for me, our First Nation, my people, and our Treaty. We raised concerns about the pipelines crossing our territory and our rights, title, and interest being affected. We asked to be consulted about these matters, we told the government we would suffer serious adverse effects if the pipelines were constructed without

accommodating our interests and rights. We warned that if the pipelines proceeded without our being consulted, we would have no alternative except to appeal to the Courts for relief, and that this could cause unfortunate delays with the potential to cause damages for the companies involved and the Canadian economy in general. Nonetheless the federal Ministers have ignored us to this day, and with respect to the Keystone pipeline, made their decision without any consultation whatsoever. I feel frustrated, angry, saddened and disappointed about being ignored and treated this way.

To the extent noted above the GIC was well aware of the Treaty One First Nations' broad concerns about the potential impact of the Pipeline Projects. From the NEB Reasons for Decision issued in connection with the Pipeline Projects, the GIC was also aware of the specific concerns of the Aboriginal peoples who were either consulted or who made representations at the NEB hearings. Against this evidentiary background, it is disingenuous for the Crown to assert that it was unaware of the concerns raised by the Treaty One First Nations in these proceedings. The evidence the Crown objects to adds nothing of significance to what it already knew or would be taken to have understood.

Duty to Consult – Legal Principles

[21] For the sake of argument, I am prepared to accept that an approval given by the GIC under s. 52 of the *National Energy Board Act*, R.S.C. 1985, c. N-7 (NEB Act) may, in an appropriate context, be open to judicial review in accordance with the test established in *Thorne's Hardware Ltd. v. Canada*, [1983] 1 S.C.R. 106, [1983] S.C.J. No. 10 on the basis of a failure to consult. It is enough for present purposes to say that where a duty to consult arises in connection with projects such as these it must be fulfilled at some point before the GIC has given its final approval for the issuance of a Certificate of Public Convenience and Necessity by the NEB.

[22] The Crown's duties to consult and accommodate were thoroughly discussed in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511 and in *Taku River Tlingit First Nation v. British Columbia*, 2004 SCC 74, [2004] 3 S.C.R. 550. More recently in *Ka'a'Gee Tu First Nation v. Canada (Attorney General)*, 2007 FC 763, [2007] F.C.J. No. 1006, Justice Edmond Blanchard provided the following helpful summary of those and other relevant authorities:

94 The duty to consult was first held to arise from the fiduciary duty owed by the Crown toward Aboriginal peoples (see *Guerin v. Canada*, [1984] 2 S.C.R. 335, 13 D.L.R. (4th) 321 and *R. v. Sparrow*, [1990] 1 S.C.R. 1075). In more recent cases, the Supreme Court has held that the duty to consult and accommodate is founded upon the honour of the Crown, which requires that the Crown, acting honourably, participate in processes of negotiation with the view to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake (see *Haida*, supra; *Taku*, supra, and *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] S.C.J. No. 71).

95 In *Haida*, Chief Justice McLachlin sets out the circumstances which give rise to the duty to consult. At paragraph 35 of the reasons for decision, she wrote:

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 (Minister of Forests)*, [1997] 4 C.N.L.R. 45 (B.C.S.C), at p. 71, per Dorgan J.

96 For the duty to arise there must, first, be either an existing or potentially existing Aboriginal right or title that might be adversely affected by the Crown's contemplated conduct. Second, the Crown must have knowledge (either subjective or objective) of this potentially existing right or title and that the contemplated conduct might adversely affect those rights. While the facts in *Haida* did not concern treaties, there is nothing in that decision which would indicate that the same principles would not find application in Treaty cases. Indeed in *Mikisew*, the Supreme Court essentially decided that the *Haida* principles apply to Treaties.

97 While knowledge of a credible but unproven claim suffices to trigger a duty to consult and, if appropriate, accommodate, the content of the duty varies with the circumstances. Precisely what is required of the government may vary with the strength of the claim and the impact of the contemplated government conduct on the rights at issue. However, at a minimum, it must be consistent with the honour of the Crown. At paragraph 37 of *Haida*, the Chief Justice wrote:

...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. Hence, unlike the question of whether there is or is not a duty to consult, which attracts a yes or no answer, the question of what this duty consists, is inherently variable. Both the strength of the right asserted and the seriousness of the potential impact on this right are the factors used to determine the content of the duty to consult.

98 At paragraphs 43 to 45, the Chief Justice invokes the concept of a spectrum to assist in determining the kind of duties that may arise in different situations.

Against this background, I turn to the kind of duties that may arise in different situations. In this respect, the concept of a spectrum may be helpful, not to suggest watertight legal compartments but rather to indicate what the honour of the Crown may require in particular circumstances. At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice. "[C]onsultation' in its least technical definition is talking together for mutual understanding": T. Isaac and A. Knox, "The Crown's Duty to Consult Aboriginal People" (2003), 41 *Alta. L. Rev.* 49, at p. 61.

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.

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

99 The kind of duty and level of consultation will therefore vary in different circumstances.

[23] These are the general principles by which the issues raised in these proceeding must be determined. Of particular importance in this case is the principle that the content of the duty to consult with First Nations is proportionate to both the potential strength of the claim or right asserted and the anticipated impact of a development or project on those asserted interests.

Was a Duty to Consult Engaged and, if so, Was that Obligation Fulfilled?

[24] I do not intend nor do I need to determine the validity of the Treaty One First Nations' outstanding treaty claims and on a historical and evidentiary record as limited as this one, it would be inappropriate to do so: see *Ka'a'Gee*, above, at para. 107. Suffice it to say that I do not agree with Enbridge when it states that "Treaty One is clear on its terms that the Aboriginal parties cede all lands except those specifically set aside for reserves". The exercise of treaty interpretation is not constrained by a strict literal approach to the text or by rigid rules of construction. What the Court must look for is the natural common understanding of the parties at the time the treaty was entered into which may well be informed by evidence extraneous to the text: see *Mikisew*, above, at paras. 28-32. From the evidence before me there could well have been an understanding or expectation at the time of signing Treaty One that the First Nations' parties would continue to enjoy full access to unallocated land beyond the confines of the reserves, that additional reserve lands would be later made available and that further large scale immigrant encroachment on those lands was not contemplated. I am proceeding on the assumption, therefore, that the Applicants' claim to additional treaty lands and the right to continued traditional use of those lands within Manitoba is credible. The more significant issue presented by this case concerns the impact of the Pipeline Projects on the interests and claims asserted by the Treaty One First Nations and the extent to which those concerns were adequately addressed through the NEB regulatory processes.

[25] In determining whether and to what extent the Crown has a duty to consult with Aboriginal peoples about projects or transactions that may affect their interests, the Crown may fairly consider the opportunities for Aboriginal consultation that are available within the existing processes for regulatory or environmental review: *Hupacasath First Nation v. British Columbia*, 2005 BCSC

1712, 51 B.C.L.R. (4th) 133 at para. 272. Those review processes may be sufficient to address Aboriginal concerns, subject always to the Crown's overriding duty to consider their adequacy in any particular situation. This is not a delegation of the Crown's duty to consult but only one means by which the Crown may be satisfied that Aboriginal concerns have been heard and, where appropriate, accommodated: see *Haida*, above, at para. 53 and *Taku*, above, at para. 40.

[26] The NEB process appears well-suited to address mitigation, avoidance and environmental issues that are site or project specific. The record before me establishes that the specific project concerns of the Aboriginal groups who were consulted by the corporate Respondents or who made representations to the NEB (including, to some extent, the Treaty One First Nations) were well-received and largely resolved.

[27] These regulatory processes appear not to be designed, however, to address the larger issue of unresolved land claims. As already noted in these reasons, the NEB and the corporate Respondents have acknowledged that obvious limitation.

[28] From the perspective of the Treaty One First Nations, the remediation of their project specific concerns may not answer the problem presented by the incremental encroachment of development upon lands which they claim or which they have enjoyed for traditional purposes. While the environmental footprint of any one project might appear quite modest, the eventual cumulative impact of development on the rights and traditional interests of Aboriginal peoples can be quite profound.

[29] 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] The fundamental problem with the claims advanced in these proceedings by the Treaty One First Nations is that the evidence to support them is expressed in generalities. Except for the issue of their unresolved land claims in southern Manitoba that evidence fails to identify any interference with a specific or tangible interest that was not capable of being resolved within the regulatory process. Even to the extent that cultural, environmental and traditional land use issues were raised in the evidence, they were not linked specifically to the projects themselves. This is not surprising because the evidence was clear that the Pipeline Projects were constructed on land that had been previously exploited and which was almost all held under private ownership. For example, the evidence is clear that the Alberta Clipper and Southern Lights projects will have negligible, if any, impact upon the Treaty One First Nations outstanding land claims in southern Manitoba. The Southern Lights Pipeline uses the same corridor as the Alberta Clipper Pipeline. Both are constructed within or contiguous to existing pipeline rights-of-way which run almost entirely over private and previously disturbed land. With the exception of 700 meters of pipeline corridor crossing the Swan Lake Reserve (with that Band's consent) the Aboriginal representatives consulted by Enbridge indicated that the affected lands were not the subject of any land claim or the site of any traditional activity⁴.

[31] Although Enbridge and the NEB did receive representations from Aboriginal leaders about specific impacts upon known and unidentified archaeological, sacred, historical, and paleontological

⁴ See affidavit of Lyle Neis sworn September 19, 2008 at paras. 36-37.

sites, the record indicates that those concerns were considered and accommodated including, in one instance, the relocation of the right-of-way to protect a burial ground. The level of engagement between Enbridge and Aboriginal communities and Band Councils (including the Treaty One First Nations) was, in fact, extensive and quite thorough. The NEB findings in relation to the Aboriginal concerns raised before it are reasonably supported by the record before me and the Treaty One First Nations have not argued otherwise except to say that they do not necessarily agree.

[32] The NEB findings concerning the Keystone Pipeline were to the same general effect and are reasonably supported by the evidence in that record. In fact, the Treaty One First Nations do not dispute the NEB findings that the land affected by the Keystone Pipeline was almost all in private ownership and previously utilized for pipeline, agricultural and ranching purposes⁵. Once buried it is reasonable to conclude that this pipeline would have a minimal impact on the surrounding environment.

[33] The inability of the Treaty One First Nations to make a case for a substantial interference with a treaty or a traditional land use claim around these projects becomes evident from the affidavits they submitted. The affidavit of Chief Terrance Nelson offers one example of this at paras. 29-34:

29. We are located near the proposed pipeline, maybe 18 miles away. Our traditional community are very concerned that their culture, which involves the use of traditional herbs and medicines, will be affected by the pipeline. They are worried about spiritual aspects of having a pipeline running through the ground.

⁵ Paragraph 4 of the Applicants' Memorandum of Fact and Law in T-225-08 states: "While the lands required for the project are generally 'previously disturbed' agricultural lands and generally privately owned, the NEB determined that the project 'has the potential to adversely affect several components of the environment, as detailed in the ESR'". An almost identical passage is set out at para. 12 of the Applicants' Memorandum of Fact and Law in T-921-08.

30. The rivers are already quite polluted, and our people are concerned about further pollution if there would be a leak of the pipeline that would spread through the water ways in this low and flat area. There are tributaries of the Red River which flow south and then flow back north into Lake Winnipeg.
31. Our people do considerable hunting. There is a concern that the pipelines could affect animal migration, or that animals would abandon the area completely.
32. Our people have been in this are for centuries. There are numerous burial sites in the area. Our elders also know of sacred sites. Our people engage in many traditional activities throughout the year. They gather many herbs, and many plants are becoming very scarce and are at risk.
33. Our First Nation has no knowledge that at any time any Treaty One First Nation, including our own First Nation, has surrendered our Treaty, Treaty-protected inherent rights or title to our traditional territory within the boundaries of Treaty 1. Our only agreement was to share lands for “immigration and settlement”.
34. As Chief, I had been conducting myself under the belief that the federal government, on behalf of Her Majesty the Queen in Right of Canada, has a legal duty to consult with my First Nation before making any decisions related to lands in our traditional territory inside the boundaries of Treaty 1. I know also the federal government, on behalf of the Crown, has a Duty to seek workable accommodations of our concerns and protect our interests, title, and rights.

[34] I do not question that the above statements reflect a profoundly held concern not only of Chief Nelson but of others in the Manitoba Aboriginal community. The problem is that to establish a procedural breach around projects such as these there must be some evidence presented which establishes both an adverse impact on a credible claim to land or to Aboriginal rights accompanied by a failure to adequately consult. The Treaty One First Nations are simply not correct when they assert in their evidence that a duty to consult is engaged whenever the Government of Canada

makes “any decision related to lands in our traditional territory inside the boundaries of Treaty 1”⁶.

There is no at-large duty to consult that is triggered solely by the development of land for public purposes. There must be some unresolved non-negligible impact arising from such a development to engage the Crown’s duty to consult.

[35] Moreover, in a number of respects, the arguments advanced by Treaty One First Nations for a duty to consult outside of the NEB process exceeded the scope of the evidence they adduced in support.

[36] For example, the Treaty One First Nations assert that, had the Crown engaged in a separate consultation, it would have been told that the Pipeline Projects would disrupt “their ongoing harvesting activities” and that they were also concerned about “environmental pollution”. The Treaty One First Nations also claim that they needed to be consulted about previously unidentified sacred or cultural sites which might have been threatened by the Pipeline Projects. At the same time they acknowledge that these were matters that were brought before the NEB or raised with the corporate Respondents and largely accommodated or mitigated. The advantage of a separate consultation with the Crown about such matters is not explained beyond making the point that where mitigation measures are adequate but unilaterally imposed there must still be a consultation to meet the goal of reconciliation. This argument effectively ignores the fact that the mitigatory measures adopted here by the NEB were not unilaterally created but were the product of an extensive dialogue with interested Aboriginal communities including some of the Treaty One First Nations.

⁶ See affidavit of Chief Francine Meeches at para. 36.

[37] The Treaty One First Nations maintain that there must always be an overarching consultation regardless of the validity of the mitigation measures that emerge from a relevant regulatory review. This duty is said to exist notwithstanding the fact that Aboriginal communities have been given an unfettered opportunity to be heard. This assertion seems to me to represent an impoverished view of the consultation obligation because it would involve 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 NEB and not in a collateral discussion with either the GIC or some arguably relevant Ministry.

[38] The authorities relied upon by the Treaty One First Nations to support their separate argument for a duty to consult with respect to their land claims are distinguishable because each of those cases involved fresh impacts that were, to use the words of Justice Ian Binnie in *Mikisew*, above, “clear, established and demonstrably adverse” to the rights in issue. That cannot be fairly said of the relationship between the Pipeline Projects and the Treaty One First Nations’ land claims in this case where no meaningful linkage is apparent on the evidence before me.

[39] This is not a case like *Mikisew* where there was compelling evidence of injurious affection to the interests of local hunters and trappers notwithstanding the limited footprint of the proposed winter road. This is made clear at para. 55 of the decision:

55 The Crown has a treaty right to “take up” surrendered lands for regional transportation purposes, but the Crown is nevertheless under an obligation to inform itself of the impact its project will have on the exercise by the Mikisew of their hunting and trapping rights, and to communicate its findings to the Mikisew. The Crown must then attempt to deal with the Mikisew “in good faith, and with the intention of substantially addressing” Mikisew concerns (*Delgamuukw*, at para. 168). This does not mean that whenever a government proposes to do anything in the Treaty 8 surrendered lands it must consult with all signatory First Nations, no matter how

remote or unsubstantial the impact. The duty to consult is, as stated in *Haida Nation*, triggered at a low threshold, but adverse impact is a matter of degree, as is the extent of the Crown's duty. Here the impacts were clear, established and demonstrably adverse to the continued exercise of the Mikisew hunting and trapping rights over the lands in question.

Even though the project considered in *Mikisew* involved direct and immediate interference with identified Aboriginal interests, the Court said that the Crown's consultation duty was at the lower end of the spectrum requiring notice to the Mikisew and the careful consideration of their concerns with a view to minimizing adverse impacts.

[40] The development that was of concern in *Taku*, above, similarly involved the construction of an access road. Although the road was said to represent a small intrusion relative to the size of the outstanding land claim it would nonetheless "pass through an area critical to the [Taku River First Nation's] domestic economy". This was held sufficient to trigger a duty to consult that was significantly deeper than minimum requirement. Because the environmental assessment for the road mandated consultation with affected Aboriginal peoples and because the Taku River First Nation was consulted throughout the certification process, the Crown's duty was found to have been met.

[41] In *Ka'a'Gee*, above, Justice Blanchard dealt with an application for judicial review from a decision by the federal Crown to approve an oil and gas development in the Northwest Territories. That project was extensive and involved the drilling of up to 50 wells, the excavation of 733 kilometers of seismic lines, the construction of temporary camps, the use of water from area lakes and the disposal of drill waste. Justice Blanchard found that the project would have significant and lasting impact on an area over which the affected First Nation asserted Aboriginal title and where

they carried out harvesting activity. This, he said, triggered a duty to consult that was higher than the minimum described in *Mikisew*. Up to a point, Justice Blanchard was satisfied that the comprehensive regulatory process was sufficient to fulfill the Crown's duty to consult. It was only when the Crown unilaterally modified the process and made fundamental changes to important recommendations that had come out of the earlier consultations that the duty to consult was found to have been breached.

[42] I am satisfied that the process of consultation and accommodation employed by the NEB was sufficient to address the specific concerns of Aboriginal communities potentially affected by the Pipeline Projects including the Treaty One First Nations. The fact that the Treaty One First Nations may not have availed themselves fully of the opportunity to be heard before the NEB does not justify the demand for a separate or discrete consultation with the Crown. To the extent that regulatory procedures are readily accessible to Aboriginal communities to address their concerns about development projects like these, there is a responsibility to use them. First Nations cannot complain about a failure by the Crown to consult where they have failed to avail themselves of reasonable avenues for seeking relief. That is so because the consultation process is reciprocal and cannot be frustrated by the refusal of either party to meet or participate: see *Ahousaht v. Canada*, 2008 FCA 212, [2008] F.C.J. No. 946 at paras. 52-53. This presupposes, of course, that available regulatory processes are accessible, adequate and provide First Nations an opportunity to participate in a meaningful way.

[43] It cannot be seriously disputed that the Pipeline Projects have been built on rights-of-way that are not legally or practically available for the settlement of any outstanding land claims in southern Manitoba. Even the Treaty One First Nations acknowledge that the additional lands they

claim were intended to be taken from those lands not already taken up by settlement and immigration⁷. In the result, if the Crown had any duty to consult with the Treaty One First Nations with respect to the impact of the Pipeline Projects on their unresolved land claims, it was at the extreme low end of the spectrum involving a peripheral claim attracting no more than an obligation to give notice: see *Haida Nation*, above, at para. 37. Here the relationship between the land claims and the Pipeline Projects is simply too remote to support anything more: also see *Ahousaht v. Canada*, 2007 FC 567, [2007] F.C.J. No. 827 at para. 32, aff'd 2008 FCA 212, [2008] F.C.J. No 946 at para. 37.

[44] I have no doubt, however, that had any of the Pipeline Projects crossed or significantly impacted areas of unallocated Crown land which formed a part of an outstanding land claim a much deeper duty to consult would have been triggered. Because this is also the type of issue that the NEB process is not designed to address, the Crown would almost certainly have had an independent obligation to consult in such a context.

IV. Conclusion

[45] The consultation duty owed by the Crown to the Treaty One First Nations has been met. This is not to say that the Treaty One First Nations do not have a credible land claim but only that the impact these Pipeline Projects have upon those claims is negligible. The Pipeline Projects have been built almost completely over existing rights-of-way and on privately owned and actively utilized land not now nor likely in the future to be available for land claims settlement. The pipelines in question are also largely below ground and are reasonably unobtrusive. There is no evidence before me or, more importantly that was before the NEB or the GIC, to prove that the

⁷ See para. 52 of the Applicants' Memorandum of Fact and Law in T-225-08.

Pipeline Projects would be likely to interfere with traditional Aboriginal land use or would represent a meaningful interference with the future settlement of outstanding land claims in southern Manitoba. To the extent that any duty to consult was engaged, it was fulfilled by the notices that were provided to the Treaty One First Nations and to other Aboriginal communities in the context of the NEB proceedings and by the opportunities that were afforded there for consultation and accommodation.

[46] These applications are, accordingly, dismissed. If any of the Respondents are seeking costs against the Applicants, I will receive further submissions in that regard. Any such submissions shall not exceed 5 pages in length and must be submitted within 7 days of this Judgment. I will then allow the Applicants an additional 10 days to respond with their own submissions which individually shall not exceed 5 pages in length.

JUDGMENT

THIS COURT ADJUDGES that these applications are dismissed with the matter of costs to be reserved pending further submissions, if any, from the parties.

“ R. L. Barnes ”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-225-08, T-921-08 and T-925-08

STYLE OF CAUSE: Brokenhead Ojibway Nation, et al.
v.
AGC, et al.

PLACE OF HEARING: Winnipeg, MB

DATE OF HEARING: September 2 to 4, 2008 and January 16, 2009

**REASONS FOR JUDGMENT
AND JUDGMENT BY:** Mr. Justice Barnes

DATED: May 12, 2009

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COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Carrier Sekani Tribal Council v.
British Columbia (Utilities Commission),
2009 BCCA 67***

Date: 20090218
Docket: CA035715; CA035791

Between:

The Carrier Sekani Tribal Council

Appellant
(Applicant/Intervenor)

And

**The British Columbia Utilities Commission and
British Columbia Hydro and Power Authority and Alcan Inc.
and The Attorney General of British Columbia**

Respondents
(Respondents)

Before: The Honourable Mr. Justice Donald
The Honourable Madam Justice Huddart
The Honourable Mr. Justice Bauman

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Place and Date of Hearing:

Vancouver, British Columbia
November 24 and 25, 2008

Place and Date of Judgment:

Vancouver, British Columbia
February 18, 2009

Written Reasons by:

The Honourable Mr. Justice Donald

Concurred in by:

The Honourable Madam Justice Huddart

The Honourable Mr. Justice Bauman

Reasons for Judgment of the Honourable Mr. Justice Donald:

Introduction

[1] This is one of those cases foreseen by the Supreme Court of Canada in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, where the broad general principles of the Crown's duty to consult and, if necessary, accommodate Aboriginal interests are to be applied to a concrete set of circumstances.

[2] Consultation arises here in relation to the decision of British Columbia Hydro and Power Authority (B.C. Hydro) to buy electricity from Rio Tinto Alcan Inc. (Alcan) which is surplus to its smelter requirements, in accordance with an Energy Purchase Agreement (EPA) made in 2007.

[3] For the EPA to be enforceable, B.C. Hydro needs the approval of the British Columbia Utilities Commission (Commission) under s. 71 of the *Utilities Commission Act*, R.S.B.C. 1996, c. 473.

[4] The Carrier Sekani Tribal Council (the appellant) sought to be heard in the s. 71 proceeding before the Commission on the issue of whether the Crown fulfilled its duty to consult before B.C. Hydro entered into the EPA.

[5] The appellant's interest (asserted both in a pending action for Aboriginal title and within the treaty process) is in the water and related resources east of the discharge of the Nechako Reservoir created by Alcan in the early 1950s to drive its generators in Kemano for use at the Kitimat aluminum smelter.

[6] The appellant claims that the diversion of water for Alcan's use is an infringement of its rights and title and that no consultation has ever taken place.

[7] The Commission considered the appellant's request as a reconsideration of its decision, made prior to the appellant's involvement, that consultation was not relevant and, thus, not within the scope of its proceeding and oral hearing (the Scoping Order). It was held not to be relevant then because the only First Nations groups involved at that point were the Haisla First Nation and the Haisla Hereditary Chiefs, who did not press the issue of consultation.

[8] The Commission addressed the reconsideration in two phases. At Phase I, the Commission "concluded that the CSTC [Carrier Sekani Tribal Council] established a prima facie case sufficient to warrant a reconsideration of the Scoping Order", and that the ground for reconsideration was "the impacts on the water flows arising from the 2007 EPA": Reasons for Decision, "Impacts on Water Flows", 29 November 2007 (Letter No. L-95-07). Within Phase I, the Commission conducted a fact-finding hearing into water flow impacts and concluded as follows:

The Commission Panel accepts the submissions of counsel for BC Hydro regarding the determinations that should be made at this time in the proceeding. The Commission Panel concludes as a matter of fact that:

- a) the 2007 EPA will have no impact on the volume, timing or source of water flows into the Nechako River;
- b) the 2007 EPA will not change the volume of water to be released into the Kemano River; and
- c) the 2007 EPA may cause reservoir elevations to vary approximately one or two inches which will be an imperceptible change in the water levels of the Nechako Reservoir. This

change to reservoir levels will not affect water flows other than the timing of releases to the Kemano River.

[9] Then, in Phase II, the Commission received argument based on, *inter alia*, the facts found as described above and on certain assumptions built into the question framed by the Commission as follows:

Assuming there has been a historical, continuing infringement of aboriginal title and rights and assuming there has been no consultation or accommodation with CSTC on either the historical, continuing infringement or the 2007 EPA, would it be a jurisdictional error for the Commission to accept the 2007 EPA?

[10] On December 17, 2007, the Commission dismissed the appellant's reconsideration motion for reasons given in the overall s. 71 decision, January 29, 2008.

[11] In brief, the Commission rejected the appellant's motion because it found as a fact that since there were no "new physical impacts" created by the EPA, the duty to consult was not triggered:

... assuming a failure of the duty of consultation for the historical, continuing infringement and no consultation on the 2007 EPA, the Commission Panel concludes that acceptance of the 2007 EPA is not a jurisdictional error because a duty to consult does not arise by acceptance of the 2007 EPA and because a failure of the duty of consultation on the historical, continuing infringement cannot be relevant to acceptance of the 2007 EPA where there are no new physical impacts.

[12] Among other points taken in the appeal, the appellant says that the Commission was wrong in narrowing the inquiry to “new physical impacts” and ignoring other “non-physical impacts” affecting the appellant’s interests.

[13] But of greater importance from my viewpoint as a reviewing judge is the Commission’s decision not to decide whether B.C. Hydro had a duty to consult. It decided that it did not need to address that question because of its conclusion on the triggering issue. As I will explain later, I consider that to be an unreasonable disposition for, amongst other reasons, the fact that B.C. Hydro, as a Crown corporation, was taking commercial advantage of an assumed infringement on a massive scale, without consultation. In my view, that is sufficient to put the Commission on inquiry whether the honour of the Crown was upheld in the making of the EPA.

[14] There is an institutional dimension to this error. The Commission has demonstrated in several cases an aversion to assessing the adequacy of consultation. In three other decisions, the Commission deferred the consultation question to the environmental assessment process: *In the Matter of British Columbia Transmission Corporation, An Application for a Certificate of Public Convenience and Necessity for the Vancouver Island Transmission Reinforcement Project*, B.C.U.C. Decision, 7 July 2006, Commission Order No. C-4-06; *In the Matter of British Columbia Hydro and Power Authority, Application for a Certificate of Public Convenience and Necessity for Revelstoke Unit 5*, B.C.U.C. Decision, 12 July 2007, Commission Order No. C-8-07; *Re British Columbia Transmission Corporation*

Application for a Certificate of Public Convenience and Necessity for the Interior to Lower Mainland Transmission Project, First Nations Scoping Issue, B.C.U.C. Letter Decision No. L-6-08, 5 March 2008. (The appeal from the last decision (*Kwikwetlem First Nation v. British Columbia (Utilities Commission)*, CA035864) was heard together with the appeal in the present case.)

[15] The Commission is a quasi-judicial tribunal with authority to decide questions of law. As such, it has the jurisdiction, and in my opinion the obligation, to decide the constitutional question of whether the duty to consult exists and, if so, whether it has been discharged: *Paul v. British Columbia (Forest Appeals Commission)*, 2003 SCC 55, [2003] 2 S.C.R. 585. That obligation is not met by deciding, as a preliminary question, an adverse impact issue that properly belongs within an inquiry whether a duty is owed and has been fulfilled.

[16] B.C. Hydro may be able to defend the Crown's honour on a number of powerful grounds, including the impact question, but this should happen in a setting where the tribunal accepts the jurisdiction to make a decision on the duty to consult.

Factual Background

[17] I have said that the infringement, if such it is, associated with the Alcan/Kemano Power Project is on a massive scale. The project involved reversing the flow of a river and the creation of a watershed that discharges west into a long tunnel through a mountain down to sea level at Kemano where it drives the generators at the power station and then flows into the Kemano River. To the east

the watershed discharges into the Nechako River which eventually joins the Fraser River at Prince George. The westerly diversion is manmade. The natural water flows into the Nechako River system were altered by the project with implications for fish and wildlife, especially salmon. Alcan holds a water licence in perpetuity for the reservoir. It is obliged by the licence and an agreement made in 1987 settling litigation involving the Provincial and Federal Governments to maintain water flows that meet specifications for migratory fish.

[18] At the outset of the project in the late 1940s, Alcan envisioned a smelter at Kitimat and power station at Kemano roughly twice their present size. The water licence and related permits for the Nechako Reservoir were issued provisionally with the idea that when the plants were enlarged as planned, the licence would be made permanent.

[19] In the course of an expansion project, sometimes referred to as Kemano II, the Government of British Columbia changed its mind about allowing the full utilization of the reservoir. This shut down the project and prompted a law suit by Alcan. The parties settled the dispute in 1997 on terms which included a power deal whereby the Province would supply Alcan should it enlarge the smelter and need more electricity. The settlement also granted Alcan the water licence on a permanent basis.

[20] Alcan has been selling its excess power since the beginning of its operations, at first directly to neighbouring industries and communities, and later to those

customers through the B.C. Hydro grid and to B.C. Hydro for general distribution, and to Powerex Corporation (B.C. Hydro's exporting affiliate).

[21] The Commission found as a fact in the decision under appeal that (1) Alcan can sell its electricity to anyone – B.C. Hydro is not the only potential customer; and (2) water flows will not be influenced by the EPA.

[22] In written submissions on the motion for reconsideration, the appellant articulated a number of ways in addition to “new physical impacts” where the EPA might affect their interests:

18. There are many aspects of the EPA which demonstrate that it is an important decision in relation to the infringements of the Intervenor's rights and title, within the context set out by recent caselaw. This decision:
 - (a) Approves an EPA that will confirm and mandate extended electricity sales for a very long time – to 2034;
 - (b) Approves the sale to BC Hydro of all electricity which is surplus to Alcan's power needs – and therefore authorizes the sale of power resulting from diversions of water that are causing existing impacts and infringements;
 - (c) Removes or affects the flexibility to release additional water, because that power is now the subject of an agreement with BC Hydro;
 - (d) Changes the 'operator' – by creating a “Joint Operating Committee” (s.4.13), by authorizing B.C. Hydro to ‘jointly develop’ the reservoir operating model (s.4.17), and by requiring B.C. Hydro approval for any amendments to operating agreements “which constrain the availability of Kemano to generate electricity” (App.1, 70 “Operating Constraints”);
 - (e) Changes in objective – this agreement confirms that power will now be devoted to long-term ‘capacity’ for B.C. Hydro (Even if there had been a ‘compelling social

- objective' to grant the water to Alcan (in 1950) for the production of aluminum, that objective is no longer operative under this agreement. A new 'objective' requires further consultation.);
- (f) Creates added incentives to maximize power sales (rather than release water for conservation);
 - (g) Provides incentives to Alcan to 'optimize' efficiency of their operations (meaning additional power sales);
 - (h) Encourages sales (i.e. diversion of water) through financial incentives in the most significant low water months (January to March);
 - (i) Affects the complexity required for proper environmental management – e.g. temperature, variable flows, timing, over-spills etc. – in order to accommodate BC Hydro sales;
 - (j) Approves an agreement that contains no positive conditions protecting fish and First Nations rights and which will preclude (by financial disincentives) those conditions from being added later;
 - (k) Fails to include First Nations in any way in management decisions.
19. If, despite the jurisprudence pointing to the contrary, the BC Utilities Commission is not prepared to examine the impacts of existing operations, and instead views the EPA solely as a financial model, there are nevertheless clear impacts on the Intervenor's interests arising from this agreement:
- (a) Increases the cost of compensation to Alcan;
 - (b) Any change to the 1987 Settlement Agreement flows will be more difficult to achieve;
 - (c) Additional sales (and therefore diversions) may well occur (evidence of other purchasers – under all conditions and at all times of the year – is speculative).

[Emphasis in original.]

[23] To the extent that the Commission addressed those points, it did so broadly by distinguishing between issues relating to the use of power and the production of power and by noting that its authority under s. 71 is limited:

There may be steps contemplated by the Crown that have no new impacts that would nevertheless trigger the duty to consult because of a historical, continuing infringement. However, a section 71 review does not approve, transfer or change control of licenses or authorization and therefore where there are no new physical impacts acceptance of a section 71 filing would not be a jurisdictional error. That is, it is the combination of no new physical impacts together with the limited scope of a section 71 review that answers the principal question – there is no jurisdictional error in this Decision. Alcan states: “The Crown’s fiduciary duty arises in specific situations, in particular, when the Crown assumes discretionary control over specific Aboriginal interests” (Alcan Submission, para. 5.3). The decision to accept or declare unenforceable the 2007 EPA under section 71 of the Act does not affect underlying water resources or any CSTC aboriginal interests there may be in that resource (Alcan Submissions, para. 5.5).

The CSTC submits:

“The 2007 EPA will also constitute a significant change in use (from power produced for aluminum smelting purposes to power for general provincial consumption) which, if approved by the BCUC, will amount to approval by the Crown of that change in use – without consultation” (CSTC Submission, para. A6).

The 2007 EPA may change the use of power in the sense suggested by the CSTC. However, such change in the use of the power could be effected by Alcan without the 2007 EPA and by means that are beyond the authority of the Commission. Nevertheless, the important question is whether or not there is a change in water flows, not whether or not there is a change in use of power. And, as found by the Commission in Letter No. L-95-07, water flows will not change.

Relevant Enactments

[24] The Commission’s authority regarding energy supply contracts comes from s. 71 of the *Utilities Commission Act*, which, including amendments effective May 1, 2008, now reads:

71. (1) Subject to subsection (1.1), a person who, after this section comes into force, enters into an energy supply contract must

- (a) file a copy of the contract with the commission under rules and within the time it specifies, and
 - (b) provide to the commission any information it considers necessary to determine whether the contract is in the public interest.
- (1.1) Subsection (1) does not apply to an energy supply contract for the sale of natural gas unless the sale is to a public utility.
- (2) The commission may make an order under subsection (3) if the commission, after a hearing, determines that an energy supply contract to which subsection (1) applies is not in the public interest.
- (2.1) In determining under subsection (2) whether an energy supply contract is in the public interest, the commission must consider
- (a) the government's energy objectives,
 - (b) the most recent long-term resource plan filed by the public utility under section 44.1, if any,
 - (c) whether the energy supply contract is consistent with requirements imposed under section 64.01 or 64.02, if applicable,
 - (d) the interests of persons in British Columbia who receive or may receive service from the public utility,
 - (e) the quantity of the energy to be supplied under the contract,
 - (f) the availability of supplies of the energy referred to in paragraph (e),
 - (g) the price and availability of any other form of energy that could be used instead of the energy referred to in paragraph (e), and
 - (h) in the case only of an energy supply contract that is entered into by a public utility, the price of the energy referred to in paragraph (e).
- (2.2) Subsection (2.1) (a) to (c) does not apply if the commission considers that the matters addressed in the energy supply contract filed under subsection (1) were determined to be in the public interest in the course of considering a long-term resource plan under section 44.1.

- (2.3) A public utility may submit to the commission a proposed energy supply contract setting out the terms and conditions of the contract and a process the public utility intends to use to acquire power from other persons in accordance with those terms and conditions.
- (2.4) If satisfied that it is in the public interest to do so, the commission, by order, may approve a proposed contract submitted under subsection (2.3) and a process referred to in that subsection.
- (2.5) In considering the public interest under subsection (2.4), the commission must consider
- (a) the government's energy objectives,
 - (b) the most recent long-term resource plan filed by the public utility under section 44.1,
 - (c) whether the application for the proposed contract is consistent with the requirements imposed on the public utility under sections 64.01 and 64.02, if applicable, and
 - (d) the interests of persons in British Columbia who receive or may receive service from the public utility.
- (2.6) If the commission issues an order under subsection (2.4), the commission may not issue an order under subsection (3) with respect to a contract
- (a) entered into exclusively on the terms and conditions, and
 - (b) as a result of the process referred to in subsection (2.3).
- (3) If subsection (2) applies, the commission may
- (a) by order, declare the contract unenforceable, either wholly or to the extent the commission considers proper, and the contract is then unenforceable to the extent specified, or
 - (b) make any other order it considers advisable in the circumstances.
- (4) If an energy supply contract is, under subsection (3) (a), declared unenforceable either wholly or in part, the commission may order that rights accrued before the date of the order under that subsection be preserved, and those

rights may then be enforced as fully as if no proceedings had been taken under this section.

- (5) An energy supply contract or other information filed with the commission under this section must be made available to the public unless the commission considers that disclosure is not in the public interest.

[25] Provisions of that Act bearing on the relationship between the British Columbia Government and the Commission include:

- 3 (1) Subject to subsection (3), the Lieutenant Governor in Council, by regulation, may issue a direction to the commission with respect to the exercise of the powers and the performance of the duties of the commission, including, without limitation, a direction requiring the commission to exercise a power or perform a duty, or to refrain from doing either, as specified in the regulation.
- (2) The commission must comply with a direction issued under subsection (1), despite
 - (a) any other provision of
 - (i) this Act, except subsection (3) of this section, or
 - (ii) the regulations, or
 - (b) any previous decision of the commission.
- (3) The Lieutenant Governor in Council may not under subsection (1) specifically and expressly
 - (a) declare an order or decision of the commission to be of no force or effect, or
 - (b) require the commission to rescind an order or a decision.

* * *

- 5 (0.1) In this section, "**minister**" means the minister responsible for the administration of the *Hydro and Power Authority Act*.
- (1) On the request of the Lieutenant Governor in Council, it is the duty of the commission to advise the Lieutenant Governor in Council on any matter, whether or not it is a matter in respect of which the commission otherwise has jurisdiction.

- (2) If, under subsection (1), the Lieutenant Governor in Council refers a matter to the commission, the Lieutenant Governor in Council may specify terms of reference requiring and empowering the commission to inquire into the matter.
- (3) The commission may carry out a function or perform a duty delegated to it under an enactment of British Columbia or Canada.
- (4) The commission, in accordance with subsection (5), must conduct an inquiry to make determinations with respect to British Columbia's infrastructure and capacity needs for electricity transmission for the period ending 20 years after the day the inquiry begins or, if the terms of reference given under subsection (6) specify a different period, for that period.
- (5) An inquiry under subsection (4) must begin
 - (a) by March 31, 2009, and
 - (b) at least once every 6 years after the conclusion of the previous inquiry,unless otherwise ordered by the Lieutenant Governor in Council.
- (6) For an inquiry under subsection (4), the minister may specify, by order, terms of reference requiring and empowering the commission to inquire into the matter referred to in that subsection, including terms of reference regarding the manner in which and the time by which the commission must issue its determinations under subsection (4).
- (7) The minister may declare, by regulation, that the commission may not, during the period specified in the regulation, reconsider, vary or rescind a determination made under subsection (4).
- (8) Despite section 75, if a regulation is made for the purposes of subsection (7) of this section with respect to a determination, the commission is bound by that determination in any hearing or proceeding held during the period specified in the regulation.
- (9) The commission may order a public utility to submit an application under section 46, by the time specified in the order, in relation to a determination made under subsection (4).

* * *

71 ...

(2.1) In determining under subsection (2) whether an energy supply contract is in the public interest, the commission must consider

(a) the government's energy objectives, ...

[26] The provisions of the *Utilities Commission Act* dealing with the Commission's jurisdiction and appeals are:

79 The determination of the commission on a question of fact in its jurisdiction, or whether a person is or is not a party interested within the meaning of this Act, is binding and conclusive on all persons and all courts.

* * *

99 The commission may reconsider, vary or rescind a decision, order, rule or regulation made by it, and may rehear an application before deciding it.

* * *

- 101 (1) An appeal lies from a decision or order of the commission to the Court of Appeal with leave of a justice of that court.
- (2) The party appealing must give notice of the application for leave to appeal, stating the grounds of appeal, to the commission, to the Attorney General and to any party adverse in interest, at least 2 clear days before the hearing of the application.
- (3) If leave is granted, within 15 days from the granting, the appellant must give notice of appeal to the commission, to the Attorney General, and to any party adverse in interest.
- (4) The commission and the Attorney General may be heard by counsel on the appeal.
- (5) On the determination of the questions involved in the appeal, the Court of Appeal must certify its opinion to the commission, and an order of the commission must conform to that opinion.

* * *

- 105 (1) The commission has exclusive jurisdiction in all cases and for all matters in which jurisdiction is conferred on it by this or any other Act.
- (2) Unless otherwise provided in this Act, an order, decision or proceeding of the commission must not be questioned, reviewed or restrained by or on an application for judicial review or other process or proceeding in any court.

[27] B.C. Hydro's relationship with government is defined in the *Hydro and Power Authority Act*, R.S.B.C. 1996, c. 212, as follows:

- 3 (1) The authority is for all its purposes an agent of the government and its powers may be exercised only as an agent of the government.
- (2) The Minister of Finance is the fiscal agent of the authority.
- (3) The authority, on behalf of the government, may contract in its corporate name without specific reference to the government.
- 4 (1) The Lieutenant Governor in Council appoints the directors of the authority who hold office during pleasure.
- (2) The Lieutenant Governor in Council must appoint one or more of the directors to chair the authority.
- (3) A chair or other director must be paid by the authority the salary, directors' fee and other remuneration the Lieutenant Governor in Council determines.
- 5 The directors must manage the affairs of the authority or supervise the management of those affairs, and may
- (a) exercise the powers conferred on them under this Act,
 - (b) exercise the powers of the authority on behalf of the authority, and
 - (c) delegate the exercise or performance of a power or duty conferred or imposed on them to anyone employed by the authority.

[28] The authority to purchase power is found in s. 12(1)(m) of the *Hydro and Power Authority Act*:

12 (1) Subject to the approval of the Lieutenant Governor in Council, which may be given by order of the Lieutenant Governor in Council, the authority has the power to do the following:

* * *

(m) purchase power from or sell power to a firm or person;

[29] Section 35 of the *Constitution Act, 1982* reads:

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, “aboriginal peoples of Canada” includes the Indian, Inuit and Métis peoples of Canada.

(3) For greater certainty, in subsection (1) “treaty rights” includes rights that now exist by way of land claims agreements or may be so acquired.

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

Issues

[30] The appellant frames the grounds for appeal in its factum as follows:

22. The appellant submits that the Commission committed errors of law and jurisdiction in determining:

- a) That the failure of the Crown to consult and, if necessary, accommodate the member tribes of the CSTC was not relevant to the proceeding;
- b) to refuse to allow evidence or cross-examination on the on-going existing impacts of the operations of the Nechako reservoir and the Kemano Project on the

- aboriginal rights and title of the member tribes of the CSTC; and
- c) that the acceptance of the EPA between BC Hydro and Alcan does not trigger a duty to consult and, if necessary accommodate the member tribes of the CSTC.

[31] The Attorney General's factum identifies the question of law in the appeal as follows:

23. The Attorney General says that the question of law in this appeal is whether the Commission correctly refused to amend the Scoping Order to consider the adequacy of Crown consultation with First Nations regarding the impact of the Kemano System upon their asserted Aboriginal rights. In particular:

Is the duty to consult triggered by the Crown contemplating conduct which does not adversely impact claimed Aboriginal rights, but is nonetheless related to historical Crown conduct which does impact claimed Aboriginal rights?

[32] Alcan poses a threshold question about the Commission's jurisdiction and a further question on the merits:

35. This proposition [the appellant's contention that the Commission had a duty to ensure consultation took place] raises a threshold question about the jurisdiction of the Commission:

In a s. 71 review of an energy supply contract, does the Commission have the jurisdiction to decide whether the Crown's duty to consult under s. 35 of the *Constitution Act, 1982* arises and has been met in relation to that contract?

36. If the answer is "no", the appeal must be dismissed, because the CSTC's complaint about consultation will have been taken to the wrong forum. If the answer is "yes", then this Court must address a second question:

Did the 2007 EPA or the Commission's review of the 2007 EPA give rise to a duty to consult under s. 35 of the *Constitution Act, 1982*?

[33] B.C. Hydro's breakdown of the issues is this:

BC Hydro submits that the primary issue on appeal is as follows:

1. Did the review conducted by the BCUC in respect of the 2007 EPA pursuant to s. 71 of the UCA amount to the Crown contemplating conduct that might adversely affect the CSTC's aboriginal interests so as to give rise to the duty to consult with the CSTC?

2. If and only if the primary question is answered in the affirmative, then BC Hydro submits that there is a secondary issue on appeal as follows:

If the answer to question 1 is yes, does the UCA empower and require the Commission to adjudicate a dispute between the Crown and the CSTC regarding the sufficiency of consultation to discharge the Crown's obligation in respect of the original authorization, construction and operation of the Nechako Reservoir before the BCUC can exercise its jurisdiction under s. 71?

3. If and only if the secondary question is answered in the affirmative, then BC Hydro submits that there is a third issue on appeal as follows:

If the answer to both questions 1 and 2 is yes, what remedy is appropriate?

[34] I will analyze the issues according to this framework:

A. Was the Commission, in reviewing the enforceability of the EPA under s. 71 of the *Utilities Commission Act*, obliged to decide whether the Crown had a duty to consult and whether it fulfilled the duty?

B. Did the Commission commit a reviewable error in disposing of the consultation issue on a preliminary or threshold question defined too strictly and in terms which did not include all of the interests asserted by the appellant?

- C. What is the appropriate remedy if the appellant establishes a reviewable error?

Discussion

A. The Power and Duty to Decide

1. The Power

[35] Under the heading of power to decide, I will discuss three propositions:

- (a) As a quasi-judicial tribunal with authority to decide questions of law, the Commission is competent to decide relevant constitutional questions, including whether the Crown has discharged a duty to consult.
- (b) Section 71 of the *Utilities Commission Act* mandates review of the enforceability of an energy purchase agreement according to factors which include the public interest. This agreement engages the honour of the Crown in its dealings with Aboriginal peoples.
- (c) The Commission has the capacity to address the adequacy of consultation.

(a) Competency

[36] The Commission has not explicitly declared that it has no jurisdiction to decide a consultation issue. But since the Commission has shown a disinclination to grapple with the issue, and the proponents of the EPA have questioned whether it

lies within the Commission's statutory mandate, I think the court should settle the point.

[37] In *Paul v. British Columbia (Forest Appeals Commission)*, the Supreme Court of Canada decided, at para. 38, "there is no principled basis for distinguishing s. 35 rights from other constitutional questions."

[38] Moving on to whether administrative tribunals have the power to decide constitutional law questions, the Court in *Paul* stated, at para. 39:

The essential question is whether the empowering legislation implicitly or explicitly grants to the tribunal the jurisdiction to interpret or decide any question of law. If it does, the tribunal will be presumed to have the concomitant jurisdiction to interpret or decide that question in light of s. 35 or any other relevant constitutional provision.

[39] I take those statements to be of broad application and not limited to the facts particular to *Paul*. In my opinion, they apply to the instant case, notwithstanding that the determination for the Forest Appeals Commission would have had a more direct effect on Mr. Paul's use of the forest resource than would the effects of B.C. Hydro's involvement in the EPA on the appellant's interests in the water resource.

[40] It can be inferred from the *Utilities Commission Act* that the Commission has the authority to decide relevant questions of law. Section 79, "findings of fact conclusive", implies that the right to appeal under s. 101 is restricted to questions of law or jurisdiction. Further, consideration of the exclusive jurisdiction clause in s. 105 indicates that the Legislature must have empowered the Commission to decide questions of law, otherwise the appellate review would be meaningless.

[41] The Commission is therefore presumed to have the jurisdiction to decide relevant constitutional questions, including whether the Crown has a duty to consult and whether it has fulfilled the duty. These are issues of law arising from Part II of the *Constitution Act, 1982*, ss. 35 and 35.1 that the Commission is competent to decide.

(b) Construction of Section 71

[42] Section 71 of the *Utilities Commission Act* focuses on whether the EPA is in the public interest. I think the respondents advance too narrow a construction of public interest when they define it solely in economic terms. How can a contract formed by a Crown agent in breach of a constitutional duty be in the public interest? The existence of such a duty and the allegation of the breach must form part and parcel of the public interest inquiry. In saying that, I do not lose sight of the fact that the regulatory scheme revolves around the economics of energy: *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140, and that Aboriginal law is not in the steady diet of the Commission. But there is no other forum more appropriate to decide consultation issues in a timely and effective manner. As I will develop later, the rationale for the duty to consult, explained in *Haida Nation v. British Columbia (Minister of Forests)*, discourages resort to the ordinary courts for injunctive relief and encourages less contentious measures while reconciliation is pursued. It would seem to follow that the appropriate forum for enforcement of the duty to consult is in the first instance the

tribunal with jurisdiction over the subject-matter – here the Commission in relation to the EPA.

[43] B.C. Hydro cites this Court's decision in *British Columbia Hydro & Power Authority v. British Columbia (Utilities Commission)* (1996), 20 B.C.L.R. (3d) 106, as support for the argument that s. 71 should not be interpreted to include the power to assess adequacy of consultation. It was held in that case that the governing statute, then the *Utilities Commission Act*, S.B.C. 1980, c. 60, did not confer jurisdiction on the Commission to enforce as mandatory the guidelines it developed on resource planning. One of the guidelines required public consultation, the inadequacy of which, as perceived by the Commission, led it to issue directions to B.C. Hydro in connection with an application for a certificate of public convenience and necessity. The Court examined the contested power to enforce guidelines against the language of the *Act*, its purpose and object, and found that no explicit provision enabled the Commission to promulgate mandatory guidelines which intruded on the management of the utility and none should be implied.

[44] On the strength of that case, B.C. Hydro turns to *Dunsmuir v. New Brunswick*, 2008 SCC 9, 291 D.L.R. (4th) 577, for the following general proposition that it says applies to the present matter:

[28] By virtue of the rule of law principle, all exercises of public authority must find their source in law. All decision-making powers have legal limits, derived from the enabling statute itself, the common or civil law or the Constitution. Judicial review is the means by which the courts supervise those who exercise statutory powers, to ensure that they do not overstep their legal authority. The function of judicial

review is therefore to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes.

[29] Administrative powers are exercised by decision makers according to statutory regimes that are themselves confined. A decision maker may not exercise authority not specifically assigned to him or her. By acting in the absence of legal authority, the decision maker transgresses the principle of the rule of law. Thus, when a reviewing court considers the scope of a decision-making power or the jurisdiction conferred by a statute, the standard of review analysis strives to determine what authority was intended to be given to the body in relation to the subject matter. This is done within the context of the courts' constitutional duty to ensure that public authorities do not overreach their lawful powers: *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220, at p. 234, 127 D.L.R. (3d) 1; also *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19, 223 D.L.R. (4th) 599, at para. 21.

[Emphasis added.]

[45] I do not accept B.C. Hydro's argument. The rule in question sought to be enforced through proceedings before the Commission arises not as an internal prescription, as in the *B.C. Hydro v. British Columbia (Utilities Commission)* decision just discussed, but from the *Constitution* itself. *Haida*, at paras. 60-63, contemplates review of consultation by administrative tribunals. It is not necessary to find an explicit grant of power in the statute to consider constitutional questions; so long as the Legislature intended that the tribunal decide questions of law, that is sufficient.

[46] It is necessary to address a case cited by all the respondents as standing for the proposition that a tribunal's power to decide the adequacy of consultation requires an explicit provision in the constituent statute. In *Dene Tha' First Nation v. Energy and Utilities Board (Alta.)*, 2005 ABCA 68, 363 A.R. 234, the Alberta Court of Appeal held that the Board's refusal to accept an intervention in the matter of

licences for well drilling and access roads was not reviewable as it was based on a factual finding that the First Nation seeking to intervene had not demonstrated an adverse impact. The court said it had no jurisdiction to review findings of fact. Therein lies the *ratio decidendi* of the judgment. The court noted at para. 24 that it was common ground that neither the Utility nor the Board had a duty to consult. As to the duty on the Crown, the court said, *obiter dicta*:

[28] A suggestion made to us in argument, but not made to the Board, was that the Board had some supervisory role over the Crown and its duty to consult on aboriginal or treaty rights. No specific section of any legislation was pointed out, and we cannot see where the Board would get such a duty. We will now elaborate on that.

[47] The court went on to record that consultation was not addressed at the Board level. I regard the above quoted remarks as having been made *en passant* in an oral judgment rather than a definitive judicial opinion made with the benefit of full argument. With respect, I do not find it persuasive authority for the proposition advanced by the respondents in the present case.

(c) Capacity to decide

[48] I turn to consider the Commission's capacity to decide. As I understand Alcan's submission, the issues surrounding the consultation duty are so remote from the Commission's usual terms of reference that the Commission should not be expected to decide them. Alcan argues that the appellant should go to court for redress. I quote from paras. 88 and 89 of Alcan's factum:

88. ... to accept the CSTC's invitation [to entertain the consultation issue] would mire the Commission in complex questions of fact and law to which its mandate, statutory powers and remedies are ill-suited.

89. In the end, the argument comes full circle: the CSTC are seeking redress for their grievances in the wrong forum.

[49] *Paul* rejected the argument that Aboriginal law issues may be too complex and burdensome for an administrative tribunal, at para. 36:

To the extent that aboriginal rights are unwritten, communal or subject to extinguishment, and thus a factual inquiry is required, it is worth noting that administrative tribunals, like courts, have fact-finding functions. Boards are not necessarily in an inferior position to undertake such tasks. Indeed, the more relaxed evidentiary rules of administrative tribunals may in fact be more conducive than a superior court to the airing of an aboriginal rights claim.

[50] I heard nothing in the appeal which causes me to doubt the capacity of the Commission to hear and decide the consultation issue. Expressed in more positive terms, I am confident that the Commission has the skill, expertise and resources to carry out the task.

2. The Duty to Decide

[51] Not only has the Commission the ability to decide the consultation issue, it is the only appropriate forum to decide the issue in a timely way. Furthermore, the honour of the Crown obliges it to do so. As a body to which powers have been delegated by the Crown, it must not deny the appellant timely access to a decision-maker with authority over the subject matter.

[52] The process of consultation envisaged in *Haida* requires discussion at an early stage of a government plan that may impact Aboriginal interests, before matters crystallize, so that First Nations do not have to deal with a plan that has become an accomplished fact. *Haida* said this on the question of timing, at para. 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.

As to timing, see also *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388 at para. 3:

... the principle of consultation in advance of interference with existing treaty rights is a matter of broad general importance to the relations between aboriginal and non-aboriginal peoples.

[53] If First Nations are entitled to early consultation, it logically follows that the tribunal with the power to approve the plan must accept the responsibility to assess the adequacy of consultation. Otherwise, the First Nations are driven to seek an interlocutory injunction, which, according to *Haida* at para. 14, is often an unsatisfactory route:

Interlocutory injunctions may offer only partial imperfect relief. First, as mentioned, they may not capture the full obligation on the government alleged by the *Haida*. Second, they typically represent an all-or-nothing solution. Either the project goes ahead or it halts. By contrast, the alleged duty to consult and accommodate by its very nature entails balancing of Aboriginal and other interests and thus lies closer to the aim of reconciliation at the heart of Crown-Aboriginal relations, as set out in *R. v. Van der Peet*, [1996] 2 S.C.R. 507, at para.

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

[54] While the Commission is a quasi-judicial tribunal bound to observe the duty of fairness and to act impartially, it is a creature of government, subject to government direction on energy policy. The honour of the Crown requires not only that the Crown actor consult, but also that the regulatory tribunal decide any consultation dispute which arises within the scheme of its regulation. It is useful to remember the relationship between government and administrative tribunals generally.

[55] In *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52, [2001] 2 S.C.R. 781, the issue was the independence of members of the Liquor Appeal Board given their terms of appointment. The Court contrasted the ordinary courts with administrative tribunals in the following analysis at para. 24:

Administrative tribunals, by contrast, lack this constitutional distinction from the executive. They are, in fact, created precisely for the purpose of implementing government policy. Implementation of

that policy may require them to make quasi-judicial decisions. They thus may be seen as spanning the constitutional divide between the executive and judicial branches of government. However, given their primary policy-making function, it is properly the role and responsibility of Parliament and the legislatures to determine the composition and structure required by a tribunal to discharge the responsibilities bestowed upon it. While tribunals may sometimes attract *Charter* requirements of independence, as a general rule they do not. Thus, the degree of independence required of a particular tribunal is a matter of discerning the intention of Parliament or the legislature and, absent constitutional constraints, this choice must be respected.

[56] No one suggests the Commission has a duty itself to consult: *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159 at 183.

The obligation arising from its status as a Crown entity is to grasp the nettle and decide the consultation dispute.

[57] The honour of the Crown as a basis for the duty to decide is compelling on the facts here: one Crown entity, the responsible Ministry, granted the water licence, allegedly infringing Aboriginal interests without prior consultation; another Crown entity, B.C. Hydro, purchases electricity generated by the alleged infringement on a long-term contract; and a third, the tribunal, dismisses the appellant's claim for consultation on a preliminary point.

B. Did the Commission commit a reviewable error in disposing of the consultation issue on a preliminary or threshold question?

[58] In this part, I identify the appropriate standard of review and apply the standard to the decision under appeal. I conclude that (1) the standard is reasonableness; (2) the Commission set an unreasonably high threshold for the

appellant to meet; and (3) it took too narrow a view of the Aboriginal interests asserted.

1. Standard of Review

[59] The appellant argues that the Commission has to be correct in disposing of constitutional issues such as those that arise here. The respondents submit the standard is reasonableness.

[60] I accept the respondents' position. The Commission's decision involves matters of fact, some assumed and others actually found, some questions of mixed fact and law and procedure. While I think the Commission took the wrong approach to the dispute, I cannot isolate a pure question of law for review on a correctness standard. Guidance on the standard is provided by *Haida*, at para. 61:

On questions of law, a decision-maker must generally be correct: for example, *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585, 2003 SCC 55. On questions of fact or mixed fact and law, on the other hand, a reviewing body may owe a degree of deference to the decision-maker. The existence or extent of the duty to consult or accommodate is a legal question in the sense that it defines a legal duty. However, it is typically premised on an assessment of the facts. It follows that a degree of deference to the findings of fact of the initial adjudicator may be appropriate. The need for deference and its degree will depend on the nature of the question the tribunal was addressing and the extent to which the facts were within the expertise of the tribunal: *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20; *Paul, supra*. Absent error on legal issues, the tribunal may be in a better position to evaluate the issue than the reviewing court, and some degree of deference may be required. In such a case, the standard of review is likely to be reasonableness. To the extent that the issue is one of pure law, and can be isolated from the issues of fact, the standard is correctness. However, where the two are inextricably entwined, the standard will likely be reasonableness: *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748.

2. Reasoning Error

[61] In my respectful judgment, the Commission wrongly decided something as a preliminary matter which properly belonged in a hearing of the merits. The logic flaw was in predicting that consultation could have produced no useful outcome. Put another way, the Commission required a demonstration that the appellant would win the point as a precondition for a hearing into the very same point.

[62] I do not say that the Commission would be bound to find a duty to consult here. The fault in the Commission's decision is in not entertaining the issue of consultation within the scope of a full hearing when the circumstances demanded an inquiry. I refer to the assumed facts, namely, that there is an infringement without consultation and on the unquestioned fact that B.C. Hydro, a Crown agent, takes advantage of the power produced by the infringement by signing the EPA. In my opinion, this is enough to clear any reasonable hurdle. As stated in *Mikisew*, at para. 55:

The duty to consult is, as stated in *Haida Nation*, triggered at a low threshold, but adverse impact is a matter of degree, as is the extent of the Crown's duty.

[Emphasis added.]

Whether the EPA triggered a duty is for a hearing on the merits.

[63] Deciding whether a trigger occurred at the threshold becomes all the more problematic when the range of issues presented by the appellant went beyond the "new physical impacts" test formulated by the Commission. The process deprived the appellant the opportunity to develop a case for the non-physical impacts listed in

their written application for reconsideration and reproduced earlier at para. 22 of these reasons. For instance, the decision in question does not deal in any substantive way with the appellant's allegations that the EPA tends to perpetuate an historical infringement and to make less likely a satisfactory resolution of the appellant's claimed right to manage the water resource in the future. They say the power sale has cemented the current regime for many years in the future. Arguably, the surface facts would seem to indicate that B.C. Hydro will at least participate in the infringement.

[64] Again, these points may not carry the day for the appellant, but the appellant should have had the opportunity to develop them.

[65] Finally, the consultation duty is not a concept that lends itself to hard-edged tests. The trigger formula in *Haida* is to be applied within the proceeding, not on a threshold inquiry. The duty is to discuss, not necessarily to agree or to make compromises. It is to be open to accommodation, if necessary. The discussion itself has intrinsic value as a tool of reconciliation. It is not always possible to say in advance that consultation would be either productive or futile – the Crown may be influenced by the Aboriginal perspective in the way it carries out a project. At the very least, the First Nation will have had a chance to put its views forward.

[66] In reviewing the history of the duty to consult, the Court in *Haida* said, at para. 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.

[67] According to *Haida*, at para. 38, the consultation may advance the goal of reconciliation by improving the relationship between the Crown and First Nations:

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

[Emphasis added.]

[68] In summary, I would allow the appeal on the ground that the Commission unreasonably refused to include the consultation issue in the scope of the proceeding and oral hearing.

Remedy

[69] As I have indicated, the merits of the consultation issue are for the Commission to decide in the first instance. The issue should be remitted to it for

consideration. The order I would make is in terms similar to those suggested by

B.C. Hydro in the event the appeal is allowed:

THAT the proceeding identified as “Re: British Columbia Hydro and Power Authority Project No. 3698475/Order No. G-100-07 Filing of 2007 Electricity Purchase Agreement with RTA as an Energy Supply Contract Pursuant to section 71” be re-opened for the sole purpose of hearing evidence and argument on whether a duty to consult and, if necessary, accommodate the appellant exists and, if so, whether the duty has been met in respect of the filing of the 2007 EPA.

“The Honourable Mr. Justice Donald”

I agree:

“The Honourable Madam Justice Huddart”

I agree:

“The Honourable Mr. Justice Bauman”



SUPREME COURT OF CANADA

CITATION: Castillo v. Castillo, [2005] 3 S.C.R. 870, 2005 SCC
83

DATE: 20051222
DOCKET: 30534

BETWEEN:

Maribel Anaya Castillo
Appellant
and
Antonio Munoz Castillo
Respondent
and
Attorney General of Alberta
Intervener

CORAM: McLachlin C.J. and Major, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella and
Charron JJ.

REASONS FOR JUDGMENT: Major J. (McLachlin C.J. and Binnie, LeBel, Deschamps,
(paras. 1 to 11) Fish, Abella and Charron JJ. concurring)

REASONS CONCURRING IN THE Bastarache J.

RESULT:
(paras. 12 to 52)

APPEAL HEARD AND JUDGMENT RENDERED: November 16, 2005

REASONS DELIVERED: December 22, 2005

Castillo v. Castillo, [2005] 3 S.C.R. 870, 2005 SCC 83

Maribel Anaya Castillo

Appellant

v.

Antonio Munoz Castillo

Respondent

and

Attorney General of Alberta

Intervener

Indexed as: Castillo v. Castillo

Neutral citation: 2005 SCC 83.

File No.: 30534.

Hearing and judgment: November 16, 2005.

Reasons delivered: December 22, 2005.

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

on appeal from the court of appeal for alberta

Limitation of actions — Conflict of laws — Car accident in California — Action brought in Alberta court — Action statute-barred under California limitations law but within limitations period in Alberta — Whether s. 12 of Alberta Limitations Act can revive an action time-barred by substantive law of place where accident occurred — Limitations Act, R.S.A. 2000, c. L-12, s. 12.

Constitutional law — Division of powers — Administration of justice — Time limits to entertain actions — Whether s. 12 of Alberta Limitations Act valid provincial legislation — Constitution Act, 1867, s. 92(14) — Limitations Act, R.S.A. 2000, c. L-12, s. 12.

The parties, husband and wife, were involved in a single vehicle car accident in California. The wife brought an action against her husband in Alberta where the parties were resident within the province's two-year limitations period but after the California one-year limitations period had expired. The husband sought to have the action dismissed as statute-barred, but the wife argued that, under s. 12 of the *Alberta Limitations Act*, the two-year limitations period applied notwithstanding the expiry of California's one-year limitations period. Section 12 provides that "[t]he limitations law of the Province shall be applied whenever a remedial order is sought in this Province, notwithstanding that, in accordance with conflict of law rules, the claim will be adjudicated under the substantive law of another jurisdiction." The Court of Queen's Bench dismissed the wife's action as statute-barred under California law, holding that in order to maintain the action in Alberta under s. 12, neither limitation period could have expired prior to the commencement of the action. The Court of Appeal upheld the decision.

Held: The appeal should be dismissed.

Per McLachlin C.J. and Major, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ.: The applicable substantive law governing the accident was the law of California, including its limitations law. Since the California limitations period applied and had expired prior to the commencement of the action, no right of action existed when the wife initiated her claim in the Alberta court. Section 12 of the *Limitations Act* does not purport to revive an action time-barred by the substantive law of the place where the accident occurred. [3-4] [8]

In view of this interpretation of s. 12, it is unnecessary to determine whether the impugned provision exceeds the territorial limits on provincial legislative jurisdiction. Section 12 is perfectly valid provincial legislation under s. 92(14) of the *Constitution Act, 1867*. The Alberta legislature can, in relation to the administration of justice in the province, determine the time limits within which the Alberta courts can entertain actions, including live actions arising in a foreign jurisdiction and governed by the substantive law of that foreign jurisdiction. [5-6] [10]

Per Bastarache J.: The legislative jurisdiction of the provinces is limited to matters “[i]n each Province” by the wording of s. 92 of the *Constitution Act, 1867*. Here, s. 12 of the *Limitations Act* is an unconstitutional attempt by Alberta to legislate extra-territorially. This is true for both interpretations of s. 12 proposed by the parties. The California one-year limitation period therefore applies to bar the wife’s action. [18] [30] [47] [52]

Limitation periods, like s. 12, are substantive in nature and have the effect of cancelling the substantive rights of plaintiffs and of vesting a right in defendants not to be sued. While the pith and substance of s. 12 is related to civil rights pursuant to s. 92(13) of the *Constitution Act, 1867*, s. 12 exceeds the territorial limits of legislative competence contained in s. 92. The impugned provision not only did not provide for a meaningful connection between Alberta, the civil rights affected by s. 12, and the plaintiffs and defendants made subject to it, but it also disregarded the legislative sovereignty of other jurisdictions within which the substantive rights at issue were situated. [34-35] [46] [50]

Section 12 is, in essence, a choice of law rule that is not premised on any connection, other than the real and substantial connection necessary for the Alberta courts to take adjudicative jurisdiction, but the real and substantial connection established is not sufficient to provide a meaningful connection between the province, the legislative subject matter and the individuals made subject to the law. The real and substantial connection necessary for the courts of a province to take jurisdiction over a claim constitutes a lower threshold than the meaningful connection required for a province to legislate with respect to the rights at issue. Both notions cannot be conflated. [41-45]

Cases Cited

By Major J.

Followed: *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022.

By Bastarache J.

Followed: *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022; **applied:** *British Columbia v. Imperial Tobacco Canada Ltd.*, [2005] 2 S.C.R. 473, 2005 SCC 49; **referred to:** *Ryan v. Moore*, [2005] 2 S.C.R. 53, 2005 SCC 38; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Reference re Firearms Act (Can.)*, [2000] 1 S.C.R. 783, 2000 SCC 31; *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, [2003] 2 S.C.R. 157, 2003 SCC 42; *McKay v. The Queen*, [1965] S.C.R. 798; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077; *Hunt v. T&N plc*, [1993] 4 S.C.R. 289; *Reference re Upper Churchill Water Rights Reversion Act*, [1984] 1 S.C.R. 297; *Block Bros. Realty Ltd. v. Mollard* (1981), 122 D.L.R. (3d) 323; *Clark v. Naqvi* (1989), 99 N.B.R. (2d) 271; *Unifund Assurance Co. v. Insurance Corp. of British Columbia*, [2003] 2 S.C.R. 63, 2003 SCC 40; *Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20.

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APPEAL from a judgment of the Alberta Court of Appeal (Russell, Berger and Wittmann JJ.A.) (2004), 244 D.L.R. (4th) 603, [2004] 9 W.W.R. 609, 30 Alta. L.R. (4th) 67, 357 A.R. 288, 334 W.A.C. 288, 1 C.P.C. (6th) 82, 6 M.V.R. (5th) 1, [2004] A.J. No. 802 (QL), 2004 ABCA 158, upholding a decision of Rawlins J. (2002), 3 Alta. L.R. (4th) 84, 313 A.R. 189, 24 C.P.C. (5th) 310, [2002] A.J. No. 519 (QL), 2002 ABQB 379. Appeal dismissed.

Anne L. Kirker and *Catherine McAteer*, for the appellant.

Avon M. Mersey and *Michael Sobkin*, for the respondent.

Robert Normey, for the intervener.

The judgment of McLachlin C.J. and Major, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ. was delivered by

1 MAJOR J. — The parties are husband and wife. While vacationing in California, they were involved in a single vehicle car accident on May 10, 1998. Both are residents of Alberta. The appellant wife sued the respondent husband in Calgary two years less a day after the date of the accident. The husband sought to have the action dismissed as statute-barred in accordance with the one-year limitation under California law. The wife argued that, under s. 12 of the Alberta *Limitations Act*, R.S.A. 2000, c. L-12, Alberta's two-year limitations period applied notwithstanding the expiry of

California's one-year limitations period, and that her action therefore ought to be allowed to proceed.

2 Section 12 of the Act provides:

12 The limitations law of the Province shall be applied whenever a remedial order is sought in this Province, notwithstanding that, in accordance with conflict of law rules, the claim will be adjudicated under the substantive law of another jurisdiction.

3 In *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022, the Court held that the *lex loci delicti* — the substantive law of the place where the tort occurred — applies in a tort action. In that case the plaintiff was injured in a motor vehicle accident in Saskatchewan. His claim became time-barred in that province but he commenced an action in British Columbia where it was not. Our Court held that the Saskatchewan law that governed the action included the Saskatchewan limitations period and dismissed the claim. In the present case, following *Tolofson*, the Alberta Court of Queen's Bench found the applicable substantive law governing the car crash to be the law of California including California's limitations law, which barred the claim ((2002), 3 Alta. L.R. (4th) 84, 2002 ABQB 379). The trial judge held that to determine whether the wife's action should be allowed to proceed required consideration of both California's and Alberta's limitations laws. In order to maintain the action in Alberta, neither limitation period could have expired. The Court of Appeal of Alberta unanimously upheld the trial judge's finding ((2004), 30 Alta. L.R. (4th) 67, 2004 ABCA 158). I agree with their conclusion.

4 Since the California limitations period applied and had expired prior to the commencement of the action, there was no right of action at the time the appellant

initiated her claim in the Alberta court. Section 12 does not purport to revive an action time-barred by the substantive law of the place where the accident occurred. Had the intention of the legislature been as argued, the legislation would have said so.

5 Section 12 is perfectly valid provincial legislation under s. 92(14) of the *Constitution Act, 1867* (the “Administration of Justice in the Province”). *Tolofson* was a “choice of law” case. The Court’s classification of limitation periods for “choice of law” purposes as substantive rather than procedural did not (and did not purport to) deny the province’s legislative authority over the “Administration of Justice in the Province”. A foreign jurisdiction, by adopting a limitation period longer than that of Alberta, cannot validly impose on Alberta courts an obligation to hear a case that Alberta, as a matter of its own legislative policy, bars the court from entertaining.

6 The Alberta legislature can, in relation to the administration of justice in the province, determine the time limits within which the Alberta courts can entertain actions, including live actions arising in a foreign jurisdiction governed by the substantive law of that foreign jurisdiction.

7 In *Tolofson*, as stated, this Court concluded that limitations law, which in the past had frequently been classified as procedural in common law traditions and substantive in civil law traditions, was, in fact, substantive in nature and must be treated as such. Accordingly, when the California limitation period expired on May 10, 1999, the appellant’s action against her husband became time-barred, and he acquired a substantive right under California law not to be further troubled by any claims arising out of the car crash.

8 Section 12 does not purport to revive time-barred actions. In this case, the doors of the Alberta court were still open on May 9, 2000, when the claim was filed but there was no right of action arising under the law of California capable of being pursued by the wife against her husband. They both lived in Alberta but the law governing the consequences of the car crash, California's, had barred the claim a year earlier.

9 Section 12 will operate, of course, if the law in the place the accident occurred provides for a limitation period longer than that of Alberta. In such a case, the claimant might still have a live cause of action against a defendant in Alberta, but the effect of s. 12 would be to close the door of the Alberta court against the claim's being heard in that jurisdiction (though it may be capable of pursuit elsewhere). This result follows from the legislature's use of a "notwithstanding" provision in s. 12, i.e., "[t]he limitations law of the Province shall be applied whenever a remedial order is sought in this Province, notwithstanding that, in accordance with conflict of law rules, the claim will be adjudicated under the substantive law of another jurisdiction".

10 Both the parties and the intervener made submissions on the constitutionality of s. 12 on the assumption that the Alberta legislature had purported to breathe life into an action that was time-barred by the applicable substantive law. As I conclude that s. 12 does no such thing, it is unnecessary to address the constitutional question.

Conclusion

11 The limitations law forming part of the applicable foreign substantive law, in this case California law, applies. As the applicable California limitation is one year, the appellant's action is statute-barred. The appeal is dismissed with costs.

The following are the reasons delivered by

BASTARACHE J. —

1. Introduction

12 This appeal concerns the proper interpretation and constitutional validity of
s. 12 of the Alberta *Limitations Act*, R.S.A. 2000, c. L-12, which provides:

12 The limitations law of the Province shall be applied whenever a remedial order is sought in this Province, notwithstanding that, in accordance with conflict of law rules, the claim will be adjudicated under the substantive law of another jurisdiction.

The circumstances in which the question came to be presented to this Court are as follows.

13 While on a holiday, the parties were involved in a single car accident in or around Fresno, California, on May 10, 1998. The respondent was driving. The appellant and respondent are married and, at the time of the accident, were in the process of moving from British Columbia to Alberta. The vehicle they were driving was registered and insured in British Columbia. The parties have admitted that, for the purposes of this action, they were at all material times resident in Calgary, Alberta.

14 On May 9, 2000, the appellant filed a statement of claim in the Court of Queen's Bench of Alberta to recover compensation for the injuries and damages she sustained as a result of the accident. The respondent successfully sought an order for

summary dismissal of the claim on the basis that the action was barred under California law, where the applicable limitation period is one year: (2002), 3 Alta. L.R. (4th) 84, 2002 ABQB 379. That decision was upheld by the Court of Appeal: (2004), 30 Alta. L.R. (4th) 67, 2004 ABCA 158. The appellant argues that the purpose and effect of s. 12 is to apply the two-year Alberta limitation period to the exclusion of the California one-year limitation period, thereby allowing the action to proceed.

15 The question before this Court is whether s. 12 effectively excludes the operation of the limitations law of the foreign jurisdiction whose laws otherwise govern the cause of action. Section 12 purports to apply Alberta limitations law “notwithstanding that, in accordance with conflict of law rules, the claim will be adjudicated under the substantive law of another jurisdiction”. The difficulty in interpreting these words results in particular from the decision of this Court in *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022, which recognized that limitation periods are substantive. As such, the reference to the substantive law of the foreign jurisdiction in s. 12 would normally include that jurisdiction’s limitations law. The appellant argues here, however, that the use of the word “notwithstanding” serves to exclude the limitations law of the foreign jurisdiction.

16 If, as the appellant suggests, s. 12 is interpreted as ousting the limitations law of the foreign jurisdiction, then Alberta limitations law applies exclusively in all cases where a remedial order is sought in Alberta. Where, as here, the relevant California limitation period is shorter than Alberta’s, the longer Alberta limitation period applies and effectively recognizes a cause of action that California law would have extinguished. If the relevant California limitation period were longer than Alberta’s, then the shorter Alberta limitation period would apply so as to bar the action in Alberta. Whether the

appellant could file an action in California in such a case is not discussed by the Court of Appeal; this question is no doubt left to a determination of the *forum conveniens* by the court in which the action is eventually brought.

17 If, as the respondent suggests, s. 12 is interpreted so as not to oust the limitations law of the foreign jurisdiction, then the court must apply the California limitation period first, followed by the Alberta limitation period. This is because the Alberta limitation period applies notwithstanding the fact that the claim is adjudicated under the substantive law of the foreign jurisdiction, including its limitations law. Thus, where, as here, the substantive law of California bars the action, the Alberta limitations law does not apply. This is because there is no right upon which a remedial order can be sought in the Alberta courts, and the conditions of s. 12 are therefore not met.

18 For the reasons that follow, I conclude that either interpretation of s. 12 results in an unconstitutional attempt by the province of Alberta to legislate extra-territorially.

2. The Proper Interpretation of Section 12 of the *Limitations Act*

2.1 *The Plain Language of Section 12*

19 The parties differ as to the meaning of the term “notwithstanding”, specifically whether it ousts the limitations law of the foreign jurisdiction. According to P.-A. Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 356:

Because the legislature is aware of possible inconsistencies, it sometimes adopts explicit rules establishing an order of priority between different enactments.

A variety of well-known terms is used. The statute will declare that it applies “notwithstanding” provisions to the contrary. If, on the other hand, precedence is to be given to another provision, the statute will operate “subject to” that enactment. Sometimes, a statute will contain a separate section decreeing that its provisions “prevail over any provision of any statute which may be inconsistent therewith”.

Two types of difficulty arise with this kind of enactment. The more obvious is the problem of identifying the inconsistency. This is not always a simple matter. Deciding on the mere existence of inconsistency itself gives rise to major issues of interpretation. [Emphasis added; footnotes omitted.]

20 Accepting for the sake of argument only that the use of the term “notwithstanding” establishes an order of priority favouring the application of Alberta limitations law in case of inconsistency, the question is whether an inconsistency arises as a result of the application of both limitations laws. The Alberta Court of Appeal concluded that the proper interpretation of s. 12 requires consideration of both California’s and Alberta’s limitations laws. The end result is that in order for an action to proceed in the Alberta courts, neither the foreign limitation period nor the Alberta limitation period can have expired. The Court of Appeal found that s. 12 recognizes that California law governs and therefore creates the cause of action; the effect of s. 12 would then merely be to shorten the time period within which an action can be brought in Alberta: see *Ryan v. Moore*, [2005] 2 S.C.R. 53, 2005 SCC 38.

21 Nonetheless, the operation of both limitation periods may result in an implicit inconsistency. Professor Côté explains that “implicit inconsistency occurs when the cumulative application of the two statutes creates such unlikely and absurd results that it is fair to believe this was not what the legislature desired” (p. 352). The effect of the Court of Appeal’s interpretation would be the following: in actions proceeding before

the Alberta courts where foreign law applies, the defendant would always benefit from the shortest available limitation period. There does not seem to be any legislative purpose served by such a result. If it is determined that the application of both limitations laws results in an implicit inconsistency, then the effect of the term “notwithstanding” is to favour the application of Alberta limitations law to the exclusion of foreign limitations law. Such an interpretation is likely more faithful to what the legislature intended. In fact, the legislature’s inclusion of the word “notwithstanding” suggests that it contemplated the possibility that inconsistencies would arise in the application of both the forum limitations law and the foreign limitations law.

2.2 *Extrinsic Evidence of Legislative Intent*

22 This Court has consistently held that

[t]oday there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

(*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21, quoting E. A. Driedger, *The Construction of Statutes* (2nd ed. 1983), at p. 87)

23 The appellant contends that where the plain language of a legislative provision is clear and unambiguous, extrinsic evidence of legislative intent should not be admissible. I do not find the ordinary meaning of s. 12 to be clear and unambiguous. I would also question whether statutory interpretation should ever proceed solely on the basis of the plain language of the legislation, without consideration of the entire context, including the purpose and the scheme of the Act. In approving of Professor Driedger’s approach to statutory interpretation, Iacobucci J. recognized that “statutory interpretation

cannot be founded on the wording of the legislation alone” (*Rizzo & Rizzo Shoes*, at para. 21; see also R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at pp. 9-18). It is now well accepted that legislative history, Parliamentary debates and similar material may be quite properly considered as long as they are relevant and reliable and not assigned undue weight: *Reference re Firearms Act (Can.)*, [2000] 1 S.C.R. 783, 2000 SCC 31, at para. 17.

24 There is very little available extrinsic evidence of the legislative intent behind s. 12. The appellant relies on the Alberta Law Reform Institute, Report No. 55, *Limitations* (1989), which concluded that limitations law was properly classified as procedural and that courts should apply local procedural law. The recommendation in the Report to include s. 12 in the new Alberta *Limitations Act* was premised in part on the uncertainty resulting from the characterization of limitation periods as substantive or procedural, depending upon their particular wording. The Report predated the decision in *Tolofson* by five years. In *Tolofson*, La Forest J. recognized that all limitation periods, regardless of their particular wording, were substantive, thereby resolving the uncertainty that had motivated the Report and its recommendation.

25 More importantly, there is no evidence on the record that the legislature considered or debated *Tolofson* or the Report, which was not tabled at the time the Act was introduced and passed. The government of Alberta opted not to implement the Report’s recommendation in 1989. In 1996, s. 12 was introduced by way of private member’s bill. The only other extrinsic evidence upon which the appellant relies is a single sentence spoken by Mr. Herard, the member of the Legislature who introduced the bill:

To remove the often difficult task of categorizing limitations legislation to determine whose law applies to a claim, Bill 205 states that, regardless, limitations law is governed by Alberta law if an action is brought in this province.

(*Alberta Hansard*, vol. I, 23rd Leg., 4th Sess., March 20, 1996, at p. 707)

Such evidence, taken alone, cannot be indicative of legislative intent. In fact, Mr. Herard refers to the difficult task of categorizing limitations legislation, even though La Forest J. authoritatively recognized in *Tolofson* that all limitation periods are substantive in nature.

2.3 *The Presumption Against Changing the Common Law*

26 This principle was recently affirmed by Iacobucci J., speaking for a majority of this Court in *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, [2003] 2 S.C.R. 157, 2003 SCC 42, at para. 39:

To begin with, I think it useful to stress the presumption that the legislature does not intend to change existing law or to depart from established principles, policies or practices. In *Goodyear Tire & Rubber Co. of Canada v. T. Eaton Co.*, [1956] S.C.R. 610, at p. 614, for example, Fauteux J. (as he then was) wrote that “a Legislature is not presumed to depart from the general system of the law without expressing its intentions to do so with irresistible clearness, failing which the law remains undisturbed”. In *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, at p. 1077, Lamer J. (as he then was) wrote that “in the absence of a clear provision to the contrary, the legislator should not be assumed to have intended to alter the pre-existing ordinary rules of common law”.

27 I do not find the principle to be applicable in this case. As mentioned earlier, the relevant principles of common law were developed by La Forest J. in *Tolofson*. In that case, La Forest J. held that the rule of private international law that should generally be applied in torts is the law of the place where the activity occurred or the *lex loci*

delicti. This choice of law rule was largely premised on the territorial principle that organizes the international legal order and federalism in Canada. La Forest J. was also motivated by a number of important policy considerations, including the need for certainty, predictability, and ease of application. The *lex loci delicti* rule has the benefit of being forum-neutral and eliminates potential forum-shopping concerns. La Forest J. explained that “[o]rdinarily people expect their activities to be governed by the law of the place where they happen to be and expect that concomitant legal benefits and responsibilities will be defined accordingly” (*Tolofson*, at pp. 1050-51).

28 Also in *Tolofson*, La Forest J. determined that where the governing law is the *lex loci delicti*, the relevant limitation period under that law is applicable and binding on the court hearing the dispute. The reason for this was that limitation periods constitute substantive law. I shall return to this issue in addressing the constitutionality of the impugned legislation. Generally then, the common law provides that the law of the place of the tort governs and that the limitation period it prescribes is applicable and binding on the court in which the action proceeds.

29 Section 12 accepts that “in accordance with conflict of law rules, the claim will be adjudicated under the substantive law of another jurisdiction”. However, it seeks to apply Alberta limitations law “notwithstanding” these rules. The interpretation suggested by the appellant means that Alberta limitations law will displace the foreign limitations law in all cases. In effect, her argument would suggest that s. 12 has determined that limitation periods are procedural. The interpretation suggested by the respondent means that Alberta limitations law will only displace the foreign limitations law in cases where the applicable Alberta limitation period is shorter than its foreign counterpart. Effectively, the respondent argues that though the limitation period of

California is part of its substantive law, Alberta can apply a procedural limitation period to determine whether a cause of action subsisting under the laws of California can be adjudicated in Alberta. Since both interpretations alter the common law, the presumption cannot be determinative.

2.4 *The Presumption Against Extra-Territorial Effect*

30 The legislative jurisdiction of the provinces is limited to matters “[i]n each Province” by the wording of s. 92 of the *Constitution Act, 1867*. Unless otherwise explicitly or implicitly provided, legislatures are presumed to respect the territorial limits of their legislative powers: Côté, at pp. 200-203. If possible, legislation should be construed in a manner consistent with this presumed intent. Similarly, it is now accepted that where legislation is open to more than one meaning, it should be interpreted so as to make it consistent with the Constitution: *McKay v. The Queen*, [1965] S.C.R. 798, at p. 803; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, at p. 1078.

31 The parties have proposed two interpretations of s. 12. Although I find the interpretation suggested by the appellant to be more plausible, there is insufficient indicia of legislative intent to determine which interpretation should be preferred. I will therefore address the constitutionality of both interpretations.

3. The Constitutional Validity of Section 12 of the *Limitations Act*

32 The most recent authority on extra-territoriality is *British Columbia v. Imperial Tobacco Canada Ltd.*, [2005] 2 S.C.R. 473, 2005 SCC 49. The legislative power of the provinces is territorially limited as a result of the words “[i]n each

Province” appearing in the introductory paragraph of s. 92 of the *Constitution Act, 1867*, as well as by the requirements of order and fairness that underlie Canadian federalism: *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, at pp. 1102-3; *Hunt v. T&N plc*, [1993] 4 S.C.R. 289, at pp. 324-25; *Imperial Tobacco*, at paras. 26-27. The dual purposes of s. 92 are to ensure that provincial legislation has a meaningful connection to the enacting province and to pay respect to the legislative sovereignty of other territories: *Imperial Tobacco*, at para. 36.

33 The first step is to determine the pith and substance of the legislation and to determine under what head of power it falls: *Reference re Upper Churchill Water Rights Reversion Act*, [1984] 1 S.C.R. 297, at p. 332; *Imperial Tobacco*, at para. 36. If the pith and substance is intangible, the court must look to the relationships among the enacting territory, the subject matter of the legislation and the persons made subject to it: *Imperial Tobacco*, at para. 36. The court must also consider whether s. 12 pays respect to the legislative sovereignty of other territories: *Imperial Tobacco*, at para. 36. If these two conditions are met, then the purposes of s. 92 of the *Constitution Act, 1867* are respected and the legislation is valid.

3.1 *The Pith and Substance of Section 12 of the Limitations Act*

34 The purpose and effect of s. 12 is to render Alberta limitations law applicable whenever a remedial order is sought in the Alberta courts. Alberta limitations law being ordinarily applicable in cases proceeding before the Alberta courts where Alberta law otherwise governs the claim, the only circumstance in which s. 12 operates is where the Alberta conflict of law rules point to the substantive law of another jurisdiction as governing the cause of action. Typically, in applying this other law, the

Alberta court would also apply the limitation period it prescribes, as this Court recognized in *Tolofson* that limitation periods are substantive in nature. The purpose and effect of s. 12 is therefore to render Alberta limitations law applicable in cases where it would not otherwise be — precisely because the Alberta choice of law rules point to the law of a foreign jurisdiction as the governing law.

35 Limitation periods have the effects of cancelling the substantive rights of plaintiffs and of vesting a right in defendants not to be sued in such cases. The pith and substance of the law must therefore be characterized as relating to civil rights, pursuant to s. 92(13) of the *Constitution Act, 1867*.

36 The appellant contended in oral argument that it was open to the Alberta Legislature to reverse the holding in *Tolofson* that limitation periods are substantive law and that this is what Alberta did by adopting s. 12. I believe this argument rests on a misunderstanding of *Tolofson*. La Forest J. did not decide as a principle of common law that limitation periods should simply be treated substantively. Instead, La Forest J. explained that “the purpose of substantive/procedural classification is to determine which rules will make the machinery of the forum court run smoothly as distinguished from those determinative of the rights of *both parties*” (*Tolofson*, at pp. 1071-72 (emphasis in original)). La Forest J. recognized that limitation periods are, *by their very nature*, substantive, precisely because they are determinative of the rights of both parties in a cause of action: they destroy the right of the plaintiff to bring suit and vest a right in the defendant to be free from suit. The provinces cannot change the nature of limitations law without fundamentally changing the content of limitations law. No implicit intention to that effect could be found in the present case. Indeed, because substantive legislation can be applied by a court so as to affect rights governed by a foreign law, “legislation should

be categorized as procedural only if the question is beyond any doubt. If there is any doubt, the doubt should be resolved by holding that the legislation is substantive” (*Block Bros. Realty Ltd. v. Mollard* (1981), 122 D.L.R. (3d) 323 (B.C.C.A.), at p. 328, cited with approval in *Tolofson*, at pp. 1068-69).

37

The procedural/substantive distinction is essentially a label. That label, however, has important constitutional consequences. Where a law is characterized as procedural, it constitutes valid law under s. 92(14) of the *Constitution Act, 1867*, as relating to the administration of justice within the province, so long as it applies to the Alberta courts or to actions proceeding before the Alberta courts. No other enquiry is required. If Alberta can treat limitation periods as procedural, then it can prescribe limitation periods for all actions proceeding before the Alberta courts without ever running afoul of the Constitution. If a law is characterized as substantive, however, it must be justified pursuant to s. 92(13) of the *Constitution Act, 1867*, as relating to civil rights in the province, meaning that the *Imperial Tobacco* analysis for the *situs* of intangibles is engaged. To allow Alberta to treat limitation periods as procedural is, essentially, to allow it to circumvent the *Imperial Tobacco* meaningful connection test. The effect would be to allow Alberta to legislate extra-territorially. In other words, the question of whether limitation periods are procedural or substantive is not something the province can decide. The reason for this is that the procedural/substantive distinction essentially determines, for purposes of constitutional validity, whether a law falls under s. 92(14) or s. 92(13) of the Constitution. That distinction must be based on something other than what a province says. It should in my view be based on the actual effects of the law. The effects of limitation periods were made clear in *Tolofson*: they cancel the substantive rights of plaintiffs to bring the suit, and they vest a right in defendants to be free from suit. This is the reality Alberta cannot ignore.

38 This may seem strange in light of the common law's traditional conception of limitation periods as procedural. This conception was relatively unchallenged until the decision in *Tolofson*, although La Forest J. notes at pp. 1071-72 that some common law courts had already begun to chip away at the right/remedy distinction on the basis of relevant policy considerations. In addition, at least one Canadian common law judge had recognized that limitation periods vest a right in the defendant to be free from suit: Stratton C.J.N.B., in *Clark v. Naqvi* (1989), 99 N.B.R. (2d) 271 (C.A.), at p. 275-76, cited with approval in *Tolofson*, at p. 1072. La Forest J. identified the two main reasons for the common law's long and mistaken acceptance of the procedural nature of limitation periods: the view that foreign litigants should not be granted advantages not available to forum litigants, and the mystical view that a common law cause of action gave the plaintiff a right that endured forever (*Tolofson*, at p. 1069). Neither of these is persuasive. I think the principle developed in *Tolofson* should no longer be questioned.

39 Nonetheless, the common law long considered limitation periods as procedural, such that it may seem strange, at first glance, to conclude that limitations law must be considered substantive and, as regards provincial legislation, must be justified pursuant to s. 92(13) of the *Constitution Act, 1867*, as constituting laws in pith and substance directed at civil rights. The characterization of limitation periods has up until now never raised constitutional concerns. This is the first time this Court has addressed a legislated choice of law rule dealing with limitation periods and had to pronounce on its constitutionality. In dealing with the issue, the Court must first recognize that the provinces cannot legislate extra-territorially. The common law was not similarly concerned with the territoriality principle until the decision in *Tolofson*, where La Forest

J. refers to it explicitly. In holding that the proper choice of law rule for torts was the *lex loci delicti*, or the law of the place of the tort, La Forest J. explained that:

It will be obvious from what I have just said that I do not accept the former British rule, adopted in *McLean v. Pettigrew*, that in adjudicating on wrongs committed in another country our courts should apply our own law, subject to the wrong being “unjustifiable” in the other country. As I see it, this involves a court’s defining the nature and consequences of an act done in another country. This, barring some principled justification, seems to me to fly against the territoriality principle. [Emphasis added; p. 1052.]

Turning to the mistaken common law rule that limitation periods are procedural, La Forest J. referred to this same analysis: “The principle justification for the rule [that limitation periods are procedural], preferring the *lex fori* over the *lex loci delicti*, we saw, has been displaced by this case” (p. 1071). In *Tolofson*, La Forest J. was formulating common law choice of law rules. In this case, the Court is faced with a provincially legislated choice of law rule. It must be remembered that the territoriality principle of which La Forest J. speaks is not merely a matter of comity; it also constitutes a constitutional limit on the legislative jurisdiction of the provinces.

40 The next question is whether, pursuant to the test developed in *Imperial Tobacco*, the rights to which s. 12 purports to apply are located in the province within the meaning of s. 92 of the *Constitution Act, 1867*. If they are not, s. 12 will be deemed unconstitutional because of its extra-territorial effects.

3.2 *The Meaningful Connection Test*

41 Section 12 only renders Alberta limitations law applicable to actions proceeding before the Alberta courts. It constitutes in this sense a legislated choice of

law rule that determines when the Alberta courts will apply Alberta limitations law. The appellant contends that the law on adjudicative jurisdiction and *forum conveniens* will ensure that, in all cases where s. 12 renders Alberta limitations law applicable, a real and substantial connection between Alberta and the cause of action will have been demonstrated. However, a real and substantial connection is not equivalent to a meaningful connection as defined in *Imperial Tobacco*. The two notions cannot be conflated.

42 In order for provincial legislation to be valid, there must be a meaningful connection between the enacting province, the legislative subject matter and the persons made subject to it. By contrast, the existence of a “real and substantial connection” is a more flexible inquiry that is meant to determine which court should hear the case as a matter of convenience. As La Forest J. explained in *Hunt*, at p. 325, the test “was not meant to be a rigid test, but was simply intended to capture the idea that there must be some limits on the claims to jurisdiction”. Binnie J. stated in *Unifund Assurance Co. v. Insurance Corp. of British Columbia*, [2003] 2 S.C.R. 63, 2003 SCC 40, at para. 58, that “a ‘real and substantial connection’ sufficient to permit the court of a province to take jurisdiction over a dispute may not be sufficient for the law of that province to regulate the outcome”.

43 Turning to the doctrine of *forum conveniens*, it is generally concerned with matters of convenience. This is why the real and substantial connection test and the *forum conveniens* doctrine do not necessarily require the same degree of connection between the province, the subject matter of the relevant law and the parties subject to that law, as does the *Imperial Tobacco* test. This led La Forest J. to recognize in *Tolofson*, at p. 1070, that “[t]he court takes jurisdiction not to administer local law, but

for the convenience of litigants, with a view to responding to modern mobility and the needs of a world or national economic order.”

44 The parties are making arguments that, should they be accepted, would bring this Court to conflate the constitutional threshold for adjudicative jurisdiction and the constitutional threshold for legislative jurisdiction. Such a result is unwarranted and would be contrary to *Imperial Tobacco*. The real and substantial connection necessary for the courts of a province to take jurisdiction over a claim constitutes a lower threshold than the meaningful connection required for a province to legislate with respect to the rights at issue.

45 Section 12 is, in essence, a choice of law rule that is not premised on any connection other than the real and substantial connection necessary for the Alberta courts to take adjudicative jurisdiction. I therefore conclude that the real and substantial connection established is not sufficient to provide a meaningful connection between the province, the legislative subject matter and the individuals made subject to the law. Relying partly on *Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20 (C.A.), I concluded in dissenting reasons in *Unifund Assurance*, at para. 133, that “a link with the subject matter of the claim is sufficient to establish the jurisdiction *simpliciter* of a forum given the flexible approach that has been endorsed by this Court”. The flexibility of the approach used to determine jurisdiction is reflected in the unanimous decision of the Ontario Court of Appeal in *Muscutt*, which identifies the factors which ought to be considered:

- the connection between the forum and the plaintiff’s claim;
- the connection between the forum and the defendant;

- unfairness to the defendant in assuming jurisdiction;
- unfairness to the plaintiff in not assuming jurisdiction;
- the involvement of other parties to the suit;
- the court's willingness to recognize and enforce an extra-provincial judgment rendered on the same jurisdictional basis;
- whether the case is interprovincial or international in nature; and
- comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere.

These factors are not strictly concerned with the connection of the forum to the parties and the cause of action. Instead, these factors reflect important policy considerations such as fairness, comity and efficiency.

46 Since s. 12 does not provide for a meaningful connection between Alberta, the civil rights affected by s. 12, and the plaintiffs and defendants made subject to s. 12, it violates the territorial limits of legislative competence contained in s. 92 of the *Constitution Act, 1867*. The purpose and effect of s. 12 is to apply Alberta law so as to destroy accrued and existing rights situate without the province, regardless of whether or not Alberta has a meaningful connection to those rights or right-holders.

47 This is true for both proposed interpretations. The interpretation suggested by the appellant means that in all cases where a remedial order is sought in Alberta and where foreign law governs the claim, s. 12 will destroy the substantive right of either the plaintiff or the defendant. Where the Alberta limitation period is shorter than its foreign counterpart, s. 12 will destroy the right of the plaintiff to bring the suit. Where the

Alberta limitation period is longer than its foreign counterpart, s. 12 will destroy the right of the defendant to be free from suit.

48 The interpretation suggested by the respondent means that s. 12 only has effect where the Alberta limitation period is shorter than the foreign limitation period. Where the Alberta limitation period is longer than its foreign counterpart, the respondent argues that the cause of action will have ceased to exist under the foreign law and that there will therefore be no claim upon which to sue in Alberta. According to this interpretation, s. 12 only destroys the substantive rights of plaintiffs. Leaving aside the correctness of this interpretation, the fact that s. 12 destroys the substantive rights of plaintiffs to bring suit is sufficient to render it unconstitutional. This is because Alberta is legislating so as to destroy the substantive rights of plaintiffs to bring an action without providing for a meaningful connection between Alberta, the rights in question and the right-holders.

49 The notion that this problem can be overcome because a new action could be started in California, even where the Alberta court has decided that it constitutes the proper forum, is questionable. The question of whether or not the action could proceed in California is not before the Court. Instead, an Alberta court has taken jurisdiction and, in accordance with s. 12, must apply the substantive law of California to govern the claim. Here, the effect of s. 12 is then to deny the plaintiff the right to bring the suit. Accepting that s. 12 does not provide a meaningful connection between Alberta and the right upon which the plaintiff is suing, such an interference with the plaintiff's right is unconstitutional.

50 For the reasons given above, s. 12 of the *Limitations Act* also fails the second branch of the *Imperial Tobacco* test insofar as it simply disregards the legislative sovereignty of other jurisdictions within which the substantive rights at issue are situated.

51 This is not to say that the provinces are constitutionally prohibited from modifying the ordinary choice of law rules. However, should they chose to do so, they must legislate within their territorial limits and ensure that there is a meaningful connection between the enacting province, the legislative subject matter and the persons made subject to their laws.

4. Conclusion

52 Since I find that both proposed interpretations of s. 12 are unconstitutional, I need not resolve the issue of the proper interpretation of s. 12. Section 12 of the Alberta *Limitations Act* is invalid and of no force or effect. I therefore agree that the California one-year limitation period applies to bar the plaintiff's action.

Appeal dismissed with costs.

Solicitors for the appellant: Macleod Dixon, Calgary.

Solicitors for the respondent: Fasken Martineau DuMoulin, Vancouver.

Solicitor for the intervener: Alberta Justice, Edmonton.

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

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

Appellants

v.

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

Respondents

and between

Weyerhaeuser Company Limited

Appellant

v.

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

Respondents

and

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

Interveners

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

Neutral citation: 2004 SCC 73.

File No.: 29419.

2004: March 24; 2004: November 18.

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

on appeal from the court of appeal for british columbia

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Allan Donovan, for the intervener the Haisla Nation.

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

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

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

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

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

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

The judgment of the Court was delivered by

THE CHIEF JUSTICE —

I. Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. Analysis

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. When the Duty to Consult and Accommodate Arises

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

43 Against this background, I turn to the kind of duties that may arise in different situations. In this respect, the concept of a spectrum may be helpful, not to suggest watertight legal compartments but rather to indicate what the honour of the Crown may require in particular circumstances. At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice. “[C]onsultation’ in its least technical definition is talking together for mutual understanding”: T. Isaac and A. Knox, “The Crown’s Duty to Consult Aboriginal People” (2003), 41 *Alta. L. Rev.* 49, at p. 61.

44 At the other end of the spectrum lie cases where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required. While precise requirements will vary with the circumstances, the consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision. This list is neither exhaustive, nor mandatory for every case. The government may wish to adopt dispute resolution procedures like mediation or administrative regimes with impartial decision-makers in complex or difficult cases.

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

46 Meaningful consultation may oblige the Crown to make changes to its proposed action based on information obtained through consultations. The New Zealand Ministry of Justice’s *Guide for Consultation with Māori* (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 Māori opinion on those proposals
- informing Māori of all relevant information upon which those proposals are based
- not promoting but listening with an open mind to what Māori have to say
- being prepared to alter the original proposal
- providing feedback both during the consultation process and after the decision-process.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

F. *The Province's Duty*

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

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

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

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

G. Administrative Review

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

61 On questions of law, a decision-maker must generally be correct: for example, *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585, 2003 SCC 55. On questions of fact or mixed fact and law, on the other hand, a reviewing body may owe a degree of deference to the decision-maker. The existence or extent of the duty to consult or accommodate is a legal question in the sense that it defines a legal duty. However, it is typically premised on an assessment of the facts. It follows that a degree of deference to the findings of fact of the initial adjudicator may be appropriate. The need for deference and its degree will depend on the nature of the question the tribunal was addressing and the extent to which the facts were

within the expertise of the tribunal: *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20; *Paul, supra*. Absent error on legal issues, the tribunal may be in a better position to evaluate the issue than the reviewing court, and some degree of deference may be required. In such a case, the standard of review is likely to be reasonableness. To the extent that the issue is one of pure law, and can be isolated from the issues of fact, the standard is correctness. However, where the two are inextricably entwined, the standard will likely be reasonableness: *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748.

62 The process itself would likely fall to be examined on a standard of reasonableness. Perfect satisfaction is not required; the question is whether the regulatory scheme or government action “viewed as a whole, accommodates the collective aboriginal right in question”: *Gladstone, supra*, at para. 170. What is required is not perfection, but reasonableness. As stated in *Nikal, supra*, at para. 110, “in . . . information and consultation the concept of reasonableness must come into play. . . . So long as every reasonable effort is made to inform and to consult, such efforts would suffice.” The government is required to make reasonable efforts to inform and consult. This suffices to discharge the duty.

63 Should the government misconceive the seriousness of the claim or impact of the infringement, this question of law would likely be judged by correctness. Where the government is correct on these matters and acts on the appropriate standard, the decision will be set aside only if the government’s process is unreasonable. The focus, as discussed above, is not on the outcome, but on the process of consultation and accommodation.

H. *Application to the Facts*

(1) Existence of the Duty

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

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

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

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

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

(2) Scope of the Duty

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

(i) *Strength of the Case*

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

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

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

(1) a “reasonable probability” that the Haida may establish title to “at least some parts” of the coastal and inland areas of Haida Gwaii, including coastal areas of Block 6. There appears to be a “reasonable possibility” that these areas will include inland areas of Block 6;

(2) a “substantial probability” that the Haida will be able to establish an aboriginal right to harvest old-growth red cedar trees from both coastal and inland areas of Block 6.

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

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

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

(ii) *Seriousness of the Potential Impact*

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

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

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

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

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

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

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

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

(3) Did the Crown Fulfill its Duty?

78 The Province did not consult with the Haida on the replacement of T.F.L.

39. The chambers judge found, at para. 42:

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

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

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

III. Conclusion

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

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

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

Solicitors for the respondents: EAGLE, Surrey.

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

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

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Blaney et al v. British Columbia (The Minister of Agriculture Food and Fisheries) et al,***
2005 BCSC 283

Date: 20050302
Docket: L043154
Registry: Vancouver

Between:

Darren Blaney, Chief Councillor, Florence Hackett, Bonnie Wilson, Clyde Leo, Bill Blaney, Band Councillors, suing on their own behalf and on behalf of all the members of the Homalco Indian Band, and the Homalco Indian Band

Petitioners

And

The Minister of Agriculture Food and Fisheries and Marine Harvest Canada

Respondents

Before: The Honourable Mr. Justice Powers

Reasons for Judgment

Counsel for the Petitioners

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Canada

S.B. Armstrong, Q.C., J.M. Shore
and C.J. Kowbel

Date and Place of Trial/Hearing:

January 24 – 28, January 31,
February 1 & 2,
February 10 & 11, 2005
Vancouver, B.C.

INTRODUCTION

[1] The petitioners, who I will refer to as “the Homalco”, are the Chief councillor and Band councillors suing on their own behalf, and on behalf of the members of the Homalco Indian Band. The Homalco Band is also known as the Xwèmalhkwu First Nation.

[2] The Minister of Agriculture, Food and Fisheries (“MAFF” or “Ministry”) is the Minister responsible on behalf of the Crown in right of British Columbia for licensing and approval of aquaculture facilities and amendments to aquaculture licenses.

[3] “Marine Harvest Canada” is a trade name for Nutreco Canada Inc. Marine Harvest Canada (“Marine Harvest”) operates an aquaculture facility in British Columbia at a site adjacent to the Church House Indian Reserve at Bute Inlet. The reserve is held in trust by the Crown in right of Canada on behalf of the Homalco.

[4] The Homalco seek judicial review of the decision by the Minister, through its decision maker, to approve an amendment to an existing fish farm licence on Bute Inlet. Marine Harvest has a licence to operate a fish farm and raise Chinook salmon at this facility. They applied to amend that licence in April of 2004 to allow them to raise Atlantic salmon. The amendment was granted effective December 8, 2004.

[5] The Homalco say the approval of the amendment was done without proper consultation and accommodation of their concerns, as required by law.

[6] The Homalco seek the following in their petition:

1. a declaration that the Minister has failed to properly consult and accommodate them with respect to the amendment;
2. an order quashing or setting aside the decision of the Minister;
3. relief in the nature of certiorari quashing the decision of the Minister approving the amendment;
4. a declaration that the decision of the Minister to proceed with the granting of approval of the amendment prior to meaningful consultation with the Homalco in good faith was a breach of the constitutional duty of the Crown to consult in good faith with the Homalco;
7. a permanent injunction prohibiting Marine Harvest from placing Atlantic salmon in the Church House fish farm without proper authorization from the Department of Fisheries and Oceans for the harmful alteration, disruption or destruction [HAAD] of fish habitat pursuant to s. 35(2) of the **Fisheries Act**, R.S.C. 1985, c. F-14 ("**Fisheries Act**") and without obtaining a licence pursuant to s. 55 of the **Fishery (General) Regulations**.

[7] They also seek an order that the Atlantic salmon which are presently located in this fish farm be removed.

BACKGROUND

[8] The Homalco Band are Aboriginal people who claim Aboriginal title and rights to an area on the central coast of British Columbia that includes Bute Inlet and the area surrounding the Church House and Barlett Island Indian Reserves.

[9] Marine Harvest operates the aquaculture facility which is at the site adjacent to the Church House Reserve and at the mouth of Bute Inlet. The licence was originally granted in 2002, allowing the raising of Chinook salmon. Marine Harvest applied in April of 2004 to amend the licence to allow them to raise Atlantic salmon. The MAFF wrote to Homalco on July 20, 2004 to notify them of the application and to obtain their input. A biologist at MAFF “approved” the application on July 28, 2004.

[10] Homalco replied, expressing their concerns about the amendment, and seeking additional information.

[11] These exchanges were followed by a number of letters and emails, as well as telephone communication between the Ministry representatives, Homalco’s lawyers, and in some instances, the Homalco themselves. Despite this communication and the expressed desire and willingness to meet in some of the communications, the parties never did have a meeting to discuss the concerns raised by the Homalco. The Ministry, in late November, indicated that it intended to make its decision by December 9. In fact, its decision was made on December 8, without a meeting

occurring between the parties. The Homalco submitted further materials, and the Ministry responded to those materials on January 18, 2005.

[12] These proceedings were commenced on December 22, 2004, after Marine Harvest had placed 700,000 Atlantic smolts out of a possible 1 million in the Church House site.

THE LAW

[13] The Supreme Court of Canada has dealt with the issue of the obligation to consult and accommodate in two recent decisions. These decisions are **Haida Nation v. British Columbia (Minister of Forests)** 2004 SCC 73, [2004] S.C.J. No. 70 (S.C.C.) (Q.L.) and **Taku River Tlingit First Nation v. (British Columbia) (Project Assessment Director)**, [2004] S.C.J. No. 69. These decisions were delivered November 18, 2004. They confirm the Crown's obligations to consult, and decided that a third party in the position of Marine Harvest did not have a duty to consult.

[14] The Supreme Court of Canada in **Haida, supra**, said the following:

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

¶17 The historical roots of the principle of the honour of the Crown suggest that it must be understood generously in order to reflect the underlying realities from which it stems. In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution

of claims and the implementation of treaties, the Crown must act honourably. Nothing less is required if we are to achieve “the reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown”: *Delgamuukw, supra*, at para. 186, quoting *Van der Peet, supra*, at para. 31.

...

¶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.

...

¶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.

...

¶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).

[15] The Supreme Court of Canada said in the *Taku, supra*, case:

¶24 The Province's submissions present an impoverished vision of the honour of the Crown and all that it implies. As discussed in the companion case of *Haida, supra*, the principle of the honour of the Crown grounds the Crown's duty to consult and if indicated accommodate Aboriginal peoples, even prior to proof of asserted Aboriginal rights and title. The duty of honour derives from the Crown's assertion of sovereignty in the face of prior Aboriginal occupation. It has been enshrined in s. 35(1) of the *Constitution Act, 1982*, which recognizes and affirms existing Aboriginal rights and titles. Section 35(1) has, as one of its purposes, negotiation of just settlement of Aboriginal claims. In all its dealings with Aboriginal peoples, the Crown must act honourably, in accordance with its historical and future relationship with the Aboriginal peoples in question. The Crown's honour cannot be interpreted narrowly or technically, but must be given full effect in order to promote the process of reconciliation mandated by s. 35(1).

WHEN DOES THE DUTY ARISE?

[16] The petitioner correctly argues that the duty arises when the Crown makes decisions that have a serious impact on asserted Aboriginal rights and title. The duty comes into existence when:

1. the Crown has knowledge, real or constructive of the potential existence of Aboriginal rights or titles; and
2. it contemplates conduct that might adversely affect them.

[17] The Supreme Court of Canada in *Haida* said:

¶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 (Minister of Forests)*, [1997] 4 C.N.L.R. 45 (B.C.S.C.), at p. 71, *per* Dorgan J.

(Also see *Taku* at ¶25).

[18] In situations where claims have not yet been resolved, the court in *Haida* said:

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

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

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

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

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

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

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

¶ 41 Transposing this passage to pre-proof claims, one may venture the following. While it is not useful to classify situations into

watertight compartments, different situations requiring different responses can be identified. In all cases, the honour of the Crown requires that the Crown act with good faith to provide meaningful consultation appropriate to the circumstances. In discharging this duty, regard may be had to the procedural safeguards of natural justice mandated by administrative law.

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

¶ 43 Against this background, I turn to the kind of duties that may arise in different situations. In this respect, the concept of a spectrum may be helpful, not to suggest watertight legal compartments but rather to indicate what the honour of the Crown may require in particular circumstances. At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice. "[C]onsultation' in its least technical definition is talking together for mutual understanding": T. Isaac and A. Knox, "The Crown's Duty to Consult Aboriginal People" (2003), 41 *Alta. L. Rev.* 49, at p. 61.

¶ 44 At the other end of the spectrum lie cases where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required. While precise requirements will vary with the circumstances, the consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that

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

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

¶ 46 Meaningful consultation may oblige the Crown to make changes to its proposed action based on information obtained through consultations. The New Zealand Ministry of Justice's *Guide for Consultation with Maori* (1998) provides insight:

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 ... (at s. 2.0 of Executive Summary)
... genuine consultation means a process that involves ...:

- gathering information to test policy proposals
- putting forward proposals that are not yet finalized
- 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. (at s. 2.2 of Deciding)

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

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

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

¶ 50 The Court's decisions confirm this vision of accommodation. The Court in *Sparrow* raised the concept of accommodation, stressing the need to balance competing societal interests with Aboriginal and treaty rights. In *R. v. Sióui*, [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 *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.

[19] The court in *Haida* then went on to consider the nature of the review of the government's conduct where it is challenged. In particular, the court said the following:

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

¶ 61 On questions of law, a decision-maker must generally be correct: for example, *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585, 2003 SCC 55. On questions of fact or mixed fact and law, on the other hand, a reviewing body may owe a degree of deference to the decision-maker. The existence or extent of the duty to consult or accommodate is a legal question in the sense that it defines a legal duty. However, it is typically premised on an assessment of the facts. It follows that a degree of deference to the findings of fact of the initial adjudicator may be appropriate. The need for deference and its degree will depend on the nature of the question the tribunal was addressing and the extent to which the facts were within the expertise of the tribunal: *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20; *Paul, supra*. Absent error on legal issues, the tribunal may be in a better position to evaluate the

issue than the reviewing court, and some degree of deference may be required. In such a case, the standard of review is likely to be reasonableness. To the extent that the issue is one of pure law, and can be isolated from the issues of fact, the standard is correctness. However, where the two are inextricably entwined, the standard will likely be reasonableness: *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748.

¶ 62 The process itself would likely fall to be examined on a standard of reasonableness. Perfect satisfaction is not required; the question is whether the regulatory scheme or government action "viewed as a whole, accommodates the collective Aboriginal right in question": *Gladstone, supra*, at para. 170. What is required is not perfection, but reasonableness. As stated in *Nikal, supra*, at para. 110, "in ... information and consultation the concept of reasonableness must come into play. ... So long as every reasonable effort is made to inform and to consult, such efforts would suffice ... ". The government is required to make reasonable efforts to inform and consult. This suffices to discharge the duty.

¶ 63 Should the government misconceive the seriousness of the claim or impact of the infringement, this question of law would likely be judged by correctness. Where the government is correct on these matters and acts on the appropriate standard, the decision will be set aside only if the government's process is unreasonable. The focus, as discussed above, is not on the outcome, but on the process of consultation and accommodation.

H. *Application to the Facts*

(1) *Existence of the Duty*

[20] The process of consultation and accommodation places obligations on both sides of the discussion. The parties are not obliged to reach an agreement, but they are obliged to make reasonable efforts in the process of consultation, and to keep an open mind. Failure to reach an agreement does not mean that consultation and reasonable accommodation has not occurred. Accommodation involves a balancing of competing societal interests with Aboriginal and treaty rights. The Supreme Court

of Canada has made it clear that balance and compromise are inherent in the notion of reconciliation as discussed in *Haida*.

[21] I find that there is a duty on the Crown to consult in the circumstances of this case. The Crown has actual knowledge of the claims by the Homalco to Aboriginal title and rights in the area of the Bute Inlet. The basis of that knowledge includes the following:

1. The submissions of Homalco's statement of intent filed with the British Columbia Treaty Commission;
2. Information regarding Homalco's traditional and present day use of the Homalco territory transmitted directly to British Columbia and Canada by Homalco elders and other representatives in the course of the treaty process and regional planning process.
3. Information regarding Homalco's traditional and present day use of the Homalco Territory contained in the Homalco Traditional Use Study and in the March 2003 Marine Resources Study prepared by Dorothy Kennedy and Randy Bouchard and transmitted to British Columbia during the course of treaty negotiations.
4. Published information regarding Homalco traditional use and occupation of the Homalco Territory available on reasonable enquiry and Sliammon people, Sliammon lands, 1999.

5. The Homalco had made earlier submissions to MAFF regarding licensing applications with respect to the Marine Harvest fish farm.

[22] The fish farm in question is close to the Church House reserve. The Church House reserve is not presently occupied by the Homalco but it is an area which they have rights to and where they may attend.

[23] The Homalco have claimed the rights to harvest wild salmon stocks, clam beds, rock fish and other stocks and they are concerned about the management protection and enhancement of these resources within their claimed territory.

[24] The Crown is aware that the Homalco claim Aboriginal rights with regard to the wild Pacific salmon stocks that spawn in rivers and creeks flowing into Bute Inlet. The Homalco argue that these wild stocks can pass by the fish farm and be affected by it. The Homalco also argue that their rights to harvest shell fish and clams at sites in the vicinity of the fish farm can be impacted. They argue that these rights are an integral part of their Aboriginal culture for their sustenance needs, social needs and trade.

[25] There may be claims by other bands that overlap a portion of the territory claimed by the Homalco (the Sliammon and the Klahoose), however, I am satisfied that:

1. There is a reasonable probability that the Homalco will be able to establish Aboriginal title to at least some parts of the Homalco Territory including portions of Bute Inlet in the vicinity of Church House.

The Homalco certainly have rights to the use and occupation of the reserve lands;

2. There is a substantial probability that the Homalco will be able to establish Aboriginal rights to harvest wild Pacific salmon and other marine resources of the Homalco territory.

EXTENT OF THE SCOPE AND CONTENT OF THE OBLIGATION TO CONSULT AND ACCOMMODATE IN THIS CASE

[26] The parties disagree as to the scope and content of the obligation to consult and whether there has been reasonable accommodation.

[27] The Homalco argue that they have presented a strong *prima facie* case with regard to their claims to title and rights. The Homalco also argue that the evidence they have presented and the evidence which was submitted to the Ministry demonstrates the seriousness of their concerns and the serious potential risks to their Aboriginal rights to continue to harvest marine resources.

[28] The Ministry, supported by Marine Harvest, argue that in this case the scope and content of the consultation is at the low end of the scale. They say that the obligation to consult relates only to the amendment to the license to substitute Atlantic salmon for Chinook salmon. They argue that any issues regarding the existence or location of the fish farm have been resolved or dealt with when the license was initially granted. They argue that the evidence submitted by the Homalco with regard to the potential harm against wild salmon stocks or marine life

has already been considered when the Province conducted an extensive review of salmon aquaculture in the past. They argue that any new evidence submitted by the Homalco has been considered by the Ministry and is inconsistent with other expert opinions known to the Ministry. They argue that any risk to wild salmon or marine life from the introduction of Atlantic salmon to the Church House fish farm is low or non-existent.

[29] The parties have submitted voluminous affidavits including opinions of various scientists to support their positions. The parties have all agreed that it is not the function of the Court to decide which of these conflicting opinions is correct. Marine Harvest refers to the decision ***Vancouver Island Peace Society v. Canada***, [1992] 3 F.C. 42 at 51 (T.D.). This was a case dealing with a federal decision to allow nuclear powered ships into Canadian ports. Voluminous affidavit material was provided which offered opinions on environmental risks. The Honourable Mr. Justice Strayer said:

It is not the role of the Court in these proceedings to become an academy of science to arbitrate conflicting scientific predictions, or to act as a kind of legislative upper chamber to weigh expressions of public concern and determine which ones should be respected. Whether society would be well served by the Court performing either of these roles, which I gravely doubt, they are not the roles conferred upon it in the exercise of judicial review under section 18 of the Federal Court Act [R.S.C., 1985, c. F-7]

They refer to this material, however, to support their arguments about the risks of potential harm or infringement of the rights claimed by the Homalco.

[30] In their supplemental argument, the Homalco identify what they say are the potential adverse impacts on wild salmon arising from the introduction of Atlantic salmon to include the following:

- (a) The potential of farmed Atlantic salmon from their net cages through accident, negligence or force of nature;
- (b) The certainty of 'leakage' of Atlantic salmon from the aquaculture facility;
- (c) The potential colonization of the spawning habitat of wild Pacific salmon stocks by escaped Atlantic salmon and their offspring;
- (d) The potential displacement of wild stocks through competition from escaped Atlantic salmon for competition for food and other resources;
- (e) The potential spread of diseases such as ISA, IHN and Kudoa from farmed Atlantic salmon to wild Pacific salmon stocks;
- (f) The potential spread of sea lice from farmed Atlantic salmon to migrating wild Pacific salmon smolts causing significant declines in those stocks;
- (g) The potential adverse impact on wild Pacific salmon stocks arising from the cumulative effect of any of these adverse impacts in the impact such as habitat loss, overfishing and climate change which are already causing a significant decline in wild stocks;
- (h) The potential scale effects of the introduction of Atlantic salmon to the facility at issue when taken together with the adverse impacts arising from other salmon farms which may have an impact on the relevant stocks.

[31] Regarding shell fish and other marine life the Homalco argue that the impact is effluent from the farm containing feces, food waste, and chemotherapeutants on nearby clam beds and other aquatic life forms may detrimentally affect their interests.

[32] They also raise the issue of the potential impact on marine mammals which may attempt to feed on the Atlantic salmon at the fish farm and be destroyed in order to prevent that.

[33] The Homalco argue that the Ministry has failed to properly consider the significant evidence of potential adverse impacts on their Aboriginal rights and failed to apply proper principles of risk assessment. They also argue that the Ministry, in making its decision, has failed to properly apply the “precautionary principle”.

[34] I have been referred to large volumes of scientific information in the affidavits. However, as I said earlier, all of the parties agreed that the court should not become the arbitrator of scientific theories. I agree. However, what is clear from the material is that there are differences in scientific opinion about the effects and risks involved with salmon aquaculture, and particularly the farming of Atlantic salmon and its affect, or potential affect on wild salmon stocks. All of the scientists and panels involved in studying the issues confirm that there are serious gaps in knowledge and that research is needed to fill those gaps.

[35] The Ministry referred to the Salmon Aquaculture Review. The review commenced in 1995 and the report was released August 1997. The study was conducted through the Environmental Assessment Office. Input was received from various groups including scientists and technical experts. The presenters included government agencies, local governments, Aboriginal people, industry, support services to the industry, environmental organizations, wild salmon commercial fishing organizations, recreational and tourism organizations and labour.

[36] The review was to assess environmental, economic, social, cultural, heritage and health impacts related to issues of (1) escaped farm fish, (2) fish health, (3) waste discharges, (4) interactions between salmon farms and coastal mammals and other species, and (5) fish farm siting. The review did not deal with the issue of sea lice but that issue does not appear to have been identified at the time.

[37] The Salmon Aquaculture Review in its summary, Volume 1, p. 4 stated the following:

The technical advisory team concluded that salmon farming in B.C. as presently practised and at current production levels, presents a low overall risk to the environment. However, this general finding is tempered by certain reservations. First, continuing concern about localized impacts on benthic (sea bed) organisms, shell fish populations and marine mammals suggests the need for additional measures to protect them. Second, significant gaps in the scientific knowledge on which the technical advisory teams' conclusions are based point to the need for monitoring and research in areas such as the potential impacts of interactions of escaped farm salmon with wild populations, identification and control of disease and disease pathogens, potential for disease transfer and impacts from antibiotic residues, and affects of waste discharges on water quality and sea bed life.

Science rarely has the ability to reach definitive conclusions on the risk or potential severity of the consequences of human interactions with complex ecosystems. In the face of this uncertainty, governments still need to make land and resource management decisions. Direction is provided by the precautionary principle which advocates the consideration and anticipation of the potential negative impacts of any activity before it is approved. Similarly, the concept of preventative management allows government to manage, to prevent certain specific events even though not all potential outcomes can be predicted. Where the risk of environmental impacts from an economically important activity is low but the consequences of damages may be significant, the public interest may best be served by dealing with risk, by being precautionary and invoking a series of measures, including: preventative management, adaptive management, and performance-based standards. In the case of salmon farming, this means reducing

risk by setting high standards for farm operations based on the best available knowledge, and rigorously enforcing the implementation of those standards. And it means being prepared to alter management practices over time to take account of increased understanding of risk and different means of reducing it. This means that industry will be required to adapt to evolving management schemes.

[38] The Ministry argues the response to this report included the development of extensive obligatory requirements dealing with the issues identified by the Salmon Aquaculture Review. The Ministry argues that as a result of this, the practices in salmon aquaculture have greatly improved and, therefore, argue the risks or any potential risks are reduced. It should be noted that since the review and the new regulations, the number of salmon aquaculture sites has also increased.

[39] The thrust of the Salmon Aquaculture Review is not that its recommendations will address all of the concerns. The thrust of the review is that its recommendations are important in reducing potential risks, but that further research and ongoing preventative management and review are required.

[40] The Homalco argue that the application of the precautionary principle or approach requires the Ministry to take steps to avoid the identified risks until further research allows the uncertainty with respect to the extent of those risks to be reduced or eliminated.

[41] The respondent's arguments are essentially that the precautionary principle does not require government action, but simply says that lack of scientific knowledge is not an excuse to fail to take action. The respondents argue that the adaptive

management approach that the government has taken is in line with precautionary principles and appropriate in this case.

[42] In correspondence and in argument, the Homalco referred to the precautionary principle as defined in the **Bergen Ministerial Declaration on Sustainable Development (1990)** as follows:

In order to achieve sustainable development, policies must be based on the precautionary principle. Environmental measures must anticipate, prevent and attack the cause of environmental degradation. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

[43] The Homalco take the position that there should be no amendment to allow the aquaculture of Atlantic salmon until the Ministry and Marine Harvest can prove that there is no risk to wild salmon stock. They argue, that the gaps in scientific knowledge and research make it impossible to prove that there is no risk to wild salmon stock. Therefore, they argue that no amendment should be allowed.

[44] The respondents argue that the Homalco have misunderstood the precautionary principle. They argue that the principle really means that lack of scientific knowledge is not a basis for failing to pass regulations or controls to avoid potential serious or irreversible damage to the environment. They argue that it does not mean, nor are governments bound, to prevent all activities which might cause such harm however low the risk might be, or however speculative the risk might be, until it is proven as a certainty that there is no risk.

[45] I agree with the respondents that the precautionary principle does not require governments to halt all activity which may pose some risk to the environment until that can be proven otherwise. The decisions on what activity to allow and how to control it often require a balancing of interests and concerns and a weighing of risks. This is exactly the kind of situation which requires consultation, discussion, exchange of information, and perhaps accommodation.

[46] In some portions of the submissions, it appears the parties are confusing the issues of the obligation to consult and the appropriate accommodation after that consultation. However, I do not think I could say the adaptive management approach is not a proper means of accommodation, although there may be some other things that should be considered. Some of these may be the levels of enforcement of the regulations and monitoring those regulations, et cetera. These matters are certainly the proper subject of consultation and discussions about accommodation, and do not appear to have been considered here. I am sure there are many other matters as well that the parties can discuss, and that may amount to reasonable accommodation.

THE REQUIRED SCOPE AND CONTENT OF CONSULTATION

[47] The respondents argue that the only matters or issues that require consultation were those that involve the change in risks between the introduction of Atlantic as opposed to Chinook salmon at this fish farm. They argue the existence of the fish farm and any potential harm caused by fish farming in general has already been dealt with when the original license was granted. The respondents point to the

fact that the prior Chief and council supported the establishment of this fish farm at this particular location. Marine Harvest had originally considered a different location, but with the encouragement of the Chief agreed to establish the fish farm at the present Church House location. The Chief at that time wrote a letter of support for the granting of a license for a fish farm for Chinook salmon. The original application had been for Chinook and Atlantic salmon but Marine Harvest withdrew its request with regard to Atlantic salmon. Shortly after the licences were granted there were new elections within the band and the Chief and council were replaced. The new Chief and council appeared to oppose fish farming in general and the fish farm at Church House in particular.

[48] The Ministry has taken the position that it is only concerned with regard to the change of species which is the subject matter of consultation. Their position is that unless some new evidence was submitted to them to demonstrate some significant risk over and above that of salmon farming in general, to the Homalco's Aboriginal rights or title, there was no need for anything more than the lowest level of consultation. They argue that any consultation necessary did occur by an exchange of correspondence and the accommodations that were necessary have occurred as a result of the implementation of the detailed Aquaculture Regulations, following the Salmon Aquaculture Review.

[49] I agree that matters which have been extensively consulted on in the past do not require a full repetition of that consultation. However, that does not mean that these matters do not continue to be the subject of review and further consultation in

light of additional knowledge or information. The fact that there may be some controversy about the new evidence or information provided does not mean that it is not a proper matter of consultation. The underlying message in the Salmon Aquaculture Review is that the present state of knowledge is incomplete, further research is required, and that the approaches to management of salmon aquaculture need to be reviewed and altered as the circumstances dictate.

[50] The issue of siting of a particular aquaculture fish farm is not something that is concluded once and for all. Additional information may require a review of the siting and further consultation with the Homalco.

[51] The fact that the Salmon Aquaculture Review occurred and that some Aboriginal people may have been involved in that study does not eliminate or reduce the need for consultation on a site by site basis. Different Aboriginal groups may take different positions on aquaculture. The Homalco are a group of people whose claims to Aboriginal title and Aboriginal rights may well be affected by the actions of the government. It is the obligation of the Crown to consult with them and it is their entitlement to be consulted. In this case, the obligation to consult, and if appropriate, accommodate, is not at the lowest end of the spectrum as argued by the respondents. Nor is it the deep level of consultation that the petitioners argue.

WHAT HAS OCCURRED IN THIS CASE?

[52] The Homalco take the position that the Ministry has failed to fulfill the obligation to consult and accommodate. They argue that the Ministry has failed to

act in good faith through a meaningful process with the intention of substantially addressing the Homalco's concerns.

[53] The Homalco and the Ministry both appear to lack any faith in the good will of the other. The Homalco argue that the Ministry has acted in bad faith. The Homalco argue that the Ministry approved the application by Marine Harvest on July 28, only eight days after sending notice of the application to Homalco and before Homalco could respond. The Homalco argue that there was no genuine consultation after that.

[54] The Ministry argue and believe that the Homalco were not interested in consultation, but had simply decided that they no longer supported aquaculture of any kind. The Ministry believed that the Homalco were not really prepared to engage in meaningful consultation. The Ministry argues in any event that they did consult and have accommodated or addressed the concerns raised by the Homalco. The Ministry argues that the Homalco have not demonstrated any real risk or infringement on any of their claimed rights or title. The Ministry, therefore, argues that any obligation to consult is at the lower end of the scale in any event.

[55] The Ministry received the application to amend the license in April 2004. However, it was not until July 20, 2004, that they wrote to the Homalco advising them of this application, enquiring as to how it may affect the Homalco. The delay is explained by the workload the Ministry experienced at the time. The letter does indicate that the Ministry would be available to discuss any issues with regard to the amended application. The same correspondence was sent to the Klahoose First

Nation and the Sliammon First Nation. The Ministry believes they have overlapping claims to this area. The Klahoose and Sliammon First Nations did not respond to these letters.

[56] The Homalco responded with a letter from their counsel on August 9, 2004. The letter requests a copy of the amended management plan and any studies or documentation furnished by Marine Harvest regarding any applications whether new or for amendments. The Homalco say they require this information in order to properly consult.

[57] Prior to receiving that information, however, the initial response of the Chief and council was that they did not support the amendment application because of too many outstanding risks to the marine environment related to open netcage finfish aquaculture as it presently practiced at the site. They stated the introduction of the Atlantic salmon would only exacerbate those conditions.

[58] The letter included a July 16, 2003 correspondence and a report by Dorothy Kennedy dealing with the traditional use of that area. The July 2003 letter sent was a letter sent by the Homalco's lawyers. It is just over eighteen pages long and deals with an earlier application by Marine Harvest to expand the aquaculture operation by adding two additional pens. The application appears to be made in order to provide additional space for the same number of fish. The material in support of that application and the Ministry's response indicates that it was believed by having additional area there would be better disbursement of waste. It appears that the

application was not to add additional fish but merely to make more room for the fish that were there.

[59] The letter of July 2003 refers to the Homalco's claim and the obligation to consult. The letter refers to the traditional and current uses of the Church House area by the Homalco including the harvesting of clams, oysters, mussels, sea urchins, prawns, herring, red snapper, rock fish and various kinds of wild salmon. The letter makes clear the importance of the wild salmon and other marine resources to the Homalco. The letter then identifies what the Homalco believe to be extremely serious risks to the wild salmon and environment as a result of aquaculture. The risks identified include:

1. Spread of disease;
2. Spread of parasites such as sea lice;
3. Introduction of non-native species, being Atlantic salmon and potential escapements and competition with wild salmon;
4. Destruction of mammals attempting to feed or to feed at the net pens;
5. Pollution from waste feed, excrement, pesticides, antibiotics.

[60] The letter refers to the concerns about sea lice infestation in the Broughton Archipelago in June 2001, and the need to invoke the precautionary principle as a result of these concerns. The letter points out that the Church House site is on a wild salmon migration route and that the wild salmon species are already depressed making them more vulnerable.

[61] The letter makes it clear that the Salmon Aquaculture Review cannot be relied upon because it was based on the then levels of production and as it

identified, there was severe gaps in knowledge or research. The letter takes a position that most of the recommendations by the Salmon Aquaculture Review have not been meaningfully implemented. The letter takes a position that the precautionary principle must be applied "...where any risk of severe, irreversible impacts exist, that risk must be eliminated before those impacts have already occurred and it may then be too late to preserve the wild salmon stocks. It is even more important to apply the precautionary principle where what is at stake are the resources on which the exercise of the most fundamental rights of an Aboriginal people depend." The letter refers to the Supreme Court of Canada decision 114957, **Canada Ltée (Spraytech, Société and Société d'arrosage the Hudson Town)** [2001] S.C.J. 42, ¶31, where the precautionary principle is referred to as defined at ¶7 of The Burgen Ministerial Declaration on Sustainable Development (1990) as follows:

In order to achieve sustainable development, policies must be based on the precautionary principle. Environmental measures must anticipate, prevent and attack the cause of environmental degradation. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

[62] The letter does recognize that there is little or no evidence of these risks but says the reason is because of the lack of research by the provincial or federal government.

[63] The letter also refers to cumulative impacts they say could arise because of the location and a number of other fish farms in the vicinity.

[64] The letter does refer to the fact that the Homalco had approved Marine Harvest's original application including the one at Church House. The letter makes the point that those approvals were given before more current information was available particularly with regard to the potential impact of sea lice. The letter alleges a lack of full disclosure by the provincial government and Marine Harvest and says that vitiates any approval given.

[65] It is not clear to me what the claims of failure to disclose are based on. The letter concludes stating that meaningful consultation and accommodation is required with regard to the application to add additional netcages that was made in 2003.

[66] The August 9, 2004, letter also refers to a Johnstone Bute Coastal Plan and the submissions of the Homalco with regard to the area that includes the Church House site.

[67] The letter points out that the Homalco have declared this area as a Xwèmalhkwu salmon enhancement and protected area, as a Xwèmalhkwu Xwèmalhkwu rock fish conservation area, and as a Xwèmalhkwu krill conservation area, and a Xwèmalhkwu heritage and protected zone. The letter takes the position that the amendment by adding Atlantic salmon and even the fish farm aquaculture as it is presently practiced is in conflict with those designations.

[68] The letter included a report from a fisheries biologist that indicated the addition of Atlantic salmon would create new risks because of the possibility of

escaped Atlantic salmon competing with native species. The report also indicates that the existing wild salmon stocks are already under pressure or decline.

[69] The Homalco's lawyer sent a second letter dated August 9, 2004, which is a one page letter which encloses the Band Council's Resolution regarding the application and the submission of the Homalco to the Johnstone Bute Coastal Plan.

[70] The letter again asks for the amended management plan and any studies or documentation furnished by Marine Harvest to support the application. The final paragraph of the letter indicates the Homalco would be pleased to meet in person and provide information on their concerns and Aboriginal perspectives and traditional, ecological knowledge, and the potential infringements on their rights and titles.

[71] The August 8, 2004 Band Council Resolution that was attached resolves that the Band and council do not approve of open netcage fin fish aquaculture as presently practiced in British Columbia and in their traditional territory. The letter does not approve the facility at Church House or the amendment to add Atlantic salmon or any species to the operation.

[72] The Church House management plan was provided to Homalco's counsel by email October 4, 2004. The Homalco counsel responded by email on the same date and itemized the information that they required, including the Management Plan; any amended management plans, any studies or reports subsequent to the first management plan for the site, any environmental monitoring results with respect to

the site; any new policy or approach by the proponent to deal with potential escapees; any studies or updated studies by the proponent with respect to historical or current escapement data or monitoring of streams in the environs which they may have used in bringing forward this amendment or any previous amendment or the initial application; any specific consultation the proponent has carried out with my client with respect to learning of any Aboriginal interests in the site area and the surrounding Bute Inlet area, including any important fish streams or marine resources harvested close to or potentially affected by the introduction of yet another species to the site; any updated provincial policies on aquaculture, including specifically the introduction of Atlantic salmon and its potential harm to wild salmon stocks, clam beds, rock fish habitat, et cetera; any previous amendment applications or approvals, including rationale for such approval and reconciliation with the potential harm to my client's interest.

[73] A letter dated October 7, 2004, from Homalco's counsel to the Ministry confirms a telephone conversation between counsel and Ministry representatives on September 28, 2004. Their letter repeats the submissions opposing the application and lists them. They ask for information about how Marine Harvest will monitor and respond to potential Atlantic salmon escapes. The letter again speaks of information necessary for consultation and asks if the Minister has taken into account the Johnstone Bute Coastal Plan including the Homalco submission and the conservation declarations made by the Homalco. The letter refers to the Johnstone Bute Coastal Plan with regard to Unit 15 where Church House is located and that

plan provides only tenure modifications relating to anchoring or waste management should be considered.

[74] The letter expresses concern that the Ministry refers to Marine Harvest by the term “client”. The letter confirms that the Ministry representative, Mr. Westlake, will review all of the materials submitted and provide a written response. The letter confirms that Mr. Westlake is prepared to meet with the Homalco and their counsel to review the process by which applications are organized and co-ordinate the status of outstanding applications. It also confirms that communications with regard to the application should be made through counsel and not directly to the Homalco. The letter states at p. 4:

However, I have now advised our client that you confirm that no aquaculture application would be decided until meaningful consultation had occurred with Homalco. By this I understand that you agree that no decision will be made until any and all follow-up questions and information requests for original or amended management plans, studies or research information provided by the various proponents to your Ministry regarding each and every application has been provided to my client by your Ministry.

[75] A similar letter was sent on October 28, 2004, including further requests for specific information including the following:

...any studies completed by the proponent since the original management plan for the site, including results of environmental monitoring, letters to the proponent approving any previous amendments, new technical information or reports to the ministry has been provided, and will use in relation to making such a decision.

[76] The Ministry responded to this by an email dated October 29, 2004 indicating they were working on a substantive response to the October 7 letter. The email also discusses the request for clarification about potential earlier escapes.

[77] The Homalco counsel responded by email November 2, 2004, referring to the earlier escape of Chinook salmon that they say occurred, and asking what remediation was proposed.

[78] The Homalco counsel sent an email to the Ministry on November 3, 2004 requesting a copy of Marine Harvest's fish health management plan for the Church House site. This is a document that was submitted by Marine Harvest to the Ministry as a condition of its licence. It again confirms that the Chief and council are prepared to meet with the Ministry to discuss their concerns.

[79] Mr. Westlake did provide a letter dated November 22, 2004 responding to the concerns raised by the Homalco. The letter does point out that the fish health management plan is proprietary, that is, the property of Marine Harvest, and cannot be released by the Ministry. The template for a fish health management plan is referred to. Mr. Westlake indicates that he believes that this information and that available on the electronic website should be sufficient for a response. The letter refers Chief Blaney to the Ministry of Water, Land and Air Protections, FinFish Agriculture Waste Control Regulations and a contact person where Chief Blaney can obtain information that has been gathered by the licence holder in fulfillment of those regulations.

[80] The letter makes it clear that the position of the Ministry is that the Homalco have already approved the initial site, and that the Ministry is seeking information in support of specific concerns relating to the addition of Atlantic salmon. The letter also makes it clear that the Ministry will consider information relating to potential infringements that may have arisen through the operation of the facility since the initial decision to grant the licence.

[81] The letter deals with the report of the biologist indicating that it had been reviewed by the Ministry's biologist and states:

In their view, the concerns raised in the report are not sufficient to result in a rejection of the species amendment application.

[82] There is no further discussion about why that conclusion has been reached.

[83] The letter states that the anthropological information referred to in the July 2003 letter was relevant to the original licensing, and confirms that the **Heritage Conservation Act**, [RSBC 1996] c. 187 protects archaeological resources from disturbance or damage. The letter asks for any specific aspects of the anthropological information contained in the Kennedy report of July 31, 2003 that relates to potential infringement as a result of the amendment application.

[84] The letter states the Johnstone-Bute Coastal Plan is not in effect, but that the Ministry will refer to it for general guidance.

[85] The letter confirms that Atlantic salmon are an approved species for FinFish Aquaculture.

[86] The letter states that the Ministry has received no reports of escapes from the Church House facility, and that the regulations require reporting of any escapes. The letter confirms that Marine Harvest's plan to deal with escapes is contained in the management plan which was forwarded to the Homalco or their counsel. The letter refers to the regulatory framework that deals with escapes and its requirements that each aquaculture facility implemented Best Management Practices document describing how they will meet the regulations.

[87] The letter confirmed that the Department of Fisheries and Oceans ("DFO") did not object to the application pending negotiation of an authorization to "Harmfully Alter, Disrupt and Destroy" habitat under the federal ***Fisheries Act***.

[88] The letter confirms that it is aware of the Homalco's opposition to the application, and will ensure that the Ministry's statutory decision maker is aware of their position.

[89] The letter confirms the Ministry's interest in further discussions with Homalco, and suggests that a meeting could be arranged to discuss those concerns, particularly the monitoring of potential escapes and regarding the proximity of the fish farm to shellfish resources. The letter confirms that Marine Harvest has expressed a willingness to participate in those discussions. The letter also refers to the fact that Marine Harvest is participating in the development of a multi-stakeholder area management process for finfish aquaculture that includes areas within the Homalco's asserted traditional territory.

[90] The letter concludes:

Unless there are specific infringement concerns, MAFF will be making a decision on this application on December 9, 2004. If there are specific infringement concerns related to this amendment application, we ask that you provide them to us by the end of November.

[91] The Homalco's counsel responded by letter dated November 29, 2004 indicating that they have significant substantive concerns and will be providing a substantive response in reply. The letter confirmed that Homalco had an interest in meeting with Mr. Westlake to attempt to address those concerns. The letter confirms that counsel had been asked by their clients to coordinate that meeting time.

[92] The Ministry replied by letter November 30, 2004 confirming that the Ministry would be happy to meet with Homalco and their counsel, but that they required a written copy of the substantive concerns so that they could be reviewed ahead of time and an agenda be formulated. The letter confirms that a decision will be made on the application on December 9, 2004. The letter asks for the substantive response no later than December 2.

[93] The letter confirms that if a meeting is not possible, the concerns of the Homalco will be taken into consideration.

[94] Chief Blaney responded to that letter by his of December 2, 2004, expressing his disappointment in the response from the Ministry, and seeking meaningful consultation by way of a meeting between the Ministry and the Chief and council.

He confirms that, in his opinion, meaningful consultation should include meeting with them and addressing their concerns prior to making a decision. He confirms that further submissions will be delivered. He states that the short timeline given by the Ministry is not reasonable, especially given that it took approximately a month for the Ministry to respond to counsel's letter at the end of October 2004. The letter asks that a decision not be made prior to the Ministry knowing the Homalco's concerns and meeting with them.

[95] The Ministry responded by letter dated December 3, 2004 confirming a willingness to meet with the Homalco, and confirming the need to develop an agenda before any meeting. The letter does state, however, that they are prepared to meet with the band and counsel, either on December 6 or December 8.

[96] Chief Blaney responded by letter dated December 3, 2004, and stated that a number of requests for information remained outstanding. He asked that at any meeting Ministry staff be prepared to substantially and meaningfully respond to numerous concerns and impacts on the Homalco rights that have already been raised. He expresses concern that substantial and meaningful consultations cannot occur if the meeting does not occur until December 8, when the decision is to be made December 9, 2004. He formally requests an extension of the deadline for making a decision on the application. He confirms that he will be unavailable on December 6 or 8, because he is required to be in Ottawa and asks for an extension of the deadline so that a proper meeting can occur. He confirms that Homalco's further submissions would be sent within a week.

[97] The actual approval by the Ministry was granted on December 8, 2004, and the Homalco were notified of this on December 10, 2004. They were told a decision had made, but not the nature of the decision. When learning of the decision, Homalco's counsel immediately forwarded their further submissions to the Ministry on December 10, 2004.

[98] The Ministry advised Chief Blaney, by letter dated December 17, 2004, that the decision was made before receiving the December 10 submission, but offers to continue discussions. The letter confirms that the Ministry will review the materials received on December 10 and 13, provide a response. The letter also confirms that the Ministry is prepared to meet and discuss the response with the Homalco, and consider any new information when renewals of the licence occur. The letter confirms that the application to amend the licence was approved.

[99] The Homalco's counsel then sent a letter December 20, 2004, seeking the name of the statutory decision maker and a copy of the decision as soon as possible.

[100] The Ministry provided a response to the December 10 submissions by letter dated January 18, 2005, after these proceedings were commenced. The covering letter pointed out that many of the concerns appeared to relate to the site and the original licence rather than the amendment to allow Atlantic salmon, as opposed to Chinook salmon. The letter confirms that the response deals with those issues, with the concerns about the site as well as the amendment. The letter also states that

the Ministry is committed to meaningful consultation, including meetings with the Homalco, if requested.

[101] The response consists of a twenty-seven page document that deals with the concerns raised in the material of the Homalco's on an item by item basis. Attached to the report were thirteen appendices referred to in the response. The response is extensive, and I accept that it is an honest attempt by Mr. Westlake to address the concerns raised. Basically, the position is that the government does apply the precautionary principle in dealing with aquaculture by way of an adapted management strategy and by implementation of detailed regulations controlling aquaculture. The Ministry states that the application of the precautionary approach includes an assessment of the proposed risks, incorporates mitigation and management strategies and adjustments based on experience. The response confirms that aquaculture has to develop in consideration of its possible effects on other marine resources and in a precautionary manner.

[102] The response also takes the position that the amendment to allow Atlantic salmon in the Church House facility will not produce any infringement of asserted Aboriginal rights, and then addresses the assertions made by the Homalco on an item by item basis.

[103] The response at page 9 indicates that the Ministry's position is that the initial approval by the Homalco of the Church House site is binding on the Homalco. The response states that the Ministry will continue to respond to new scientific information where appropriate, but that new information does not invalidate the

processes or approvals that predate that information. The response is that this information will be considered in future management strategies if appropriate. The response reviews the submissions made by the Homalco and the evidence in support of those submissions, and comments on it.

[104] Page 20 of the report deals with the requirement by DFO for an authorization to Harmfully Alter, Disrupt and Destroy habitat (“HADD”). The response essentially is that that is a matter between DFO and Marine Harvest, and it was not a condition of the amendment. The Homalco are simply referred to the DFO. The response is not particularly helpful to the Homalco. I would have expected that the Ministry would be concerned about whether Marine Harvest was compliant with all of the federal regulations as well as the provincial regulations.

[105] The response concludes this is an initial response provided for Homalco’s consideration and future discussion. The response also states that the Ministry is committed to meaningful consultation, including meetings as are required to fully understand the Homalco’s position and accommodate any unidentified infringements on rights or title.

HAS SUFFICIENT OR APPROPRIATE CONSULTATION OCCURRED?

[106] I agree with the Ministry that all of their responses are relevant. They form an excellent basis for continuing discussion. However, the responses by themselves do not amount to the level of consultation that I find was necessary in this case. I understand why the Ministry might conclude that the Homalco’s statement of

concerns were really a statement of position, on which they had little interest in moving. Despite the strong position that the Homalco appeared to take, however, the communications from them made it clear that they wished to discuss their position with the Ministry. They did not assert, at any time, that they were not prepared to change their position as a result of further consultation.

[107] I do not agree with the Homalco's assertion that the Ministry was not prepared to engage in meaningful consultation because it had already made up its mind with regard to this application. The Homalco argue that the Ministry has been guilty of bad faith, or sharp dealing, because the licence has the word "Approved" dated July 28, 2004. I understand why this would initially give them some concern, but the explanation given by the Ministry is reasonable. The "Approved" simply indicates when the Ministry's biologist had reviewed the application to make an initial determination as to whether it meets their requirements. It is clear throughout the correspondence that the Ministry understood that consultation with the Homalco was necessary before a final determination was made as to whether the "Approval" would be made effective. The effective date of the approval was December 8, 2004. I am not convinced that the Ministry has been guilty of bad faith or sharp dealing as alleged by the Homalco.

[108] I find that the Ministry has erred in failing to consult to the extent necessary in these particular circumstances. The Ministry believed that the change of species from Chinook to Atlantic salmon was not a significant amendment, and did not have any different impact on the claims or rights of the Homalco than the original licence.

Based on that starting point, they believed that the level of consultation required was not great. Their approach also was that it was only with regard to the effect of the amendment itself that they were required to consult. They believed that the matter would proceed fairly quickly, and when correspondence continued until late 2004, found themselves in a situation where Marine Harvest was making inquiries as to when the amendment might be granted, because they had been raising smolts and needed to place them somewhere. This combination of circumstances led the Ministry to proceed with the final approval of the amendment before there was an opportunity for them to meet with the Homalco, discuss their concerns and the Ministry's response. The concerns raised by the Homalco were not frivolous or vexatious. The Ministry does not agree with the scientific opinions presented by the Homalco, and the response required was significantly more than that contained in the letter of November 22, 2004. The letter of January 18, 2005 is a good foundation for the face to face meetings that consultation requires. Consultation, in some cases, may include the parties educating each other as to their concerns and responses to those concerns. The concerns raised may not necessarily be accepted, but they may still lead to some reasonable accommodation of those concerns. This type of consultation should have occurred before the amendment to the existing licence was approved.

STANDARD OF REVIEW

[109] On the issue of standard of review, the counsel referred to the comments of the Supreme Court of Canada in **Haida** at ¶61 to 63 as follows:

¶ 61 On questions of law, a decision-maker must generally be correct: for example, *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585, 2003 SCC 55. On questions of fact or mixed fact and law, on the other hand, a reviewing body may owe a degree of deference to the decision-maker. The existence or extent of the duty to consult or accommodate is a legal question in the sense that it defines a legal duty. However, it is typically premised on an assessment of the facts. It follows that a degree of deference to the findings of fact of the initial adjudicator may be appropriate. The need for deference and its degree will depend on the nature of the question the tribunal was addressing and the extent to which the facts were within the expertise of the tribunal: *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20; *Paul, supra*. Absent error on legal issues, the tribunal may be in a better position to evaluate the issue than the reviewing court, and some degree of deference may be required. In such a case, the standard of review is likely to be reasonableness. To the extent that the issue is one of pure law, and can be isolated from the issues of fact, the standard is correctness. However, where the two are inextricably entwined, the standard will likely be reasonableness: *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748.

¶ 62 The process itself would likely fall to be examined on a standard of reasonableness. Perfect satisfaction is not required; the question is whether the regulatory scheme or government action "viewed as a whole, accommodates the collective aboriginal right in question": *Gladstone, supra*, at para. 170. What is required is not perfection, but reasonableness. As stated in *Nikal, supra*, at para. 110, "in ... information and consultation the concept of reasonableness must come into play. ... So long as every reasonable effort is made to inform and to consult, such efforts would suffice ... ". The government is required to make reasonable efforts to inform and consult. This suffices to discharge the duty.

¶ 63 Should the government misconceive the seriousness of the claim or impact of the infringement, this question of law would likely be judged by correctness. Where the government is correct on these matters and acts on the appropriate standard, the decision will be set aside only if the government's process is unreasonable. The focus, as discussed above, is not on the outcome, but on the process of consultation and accommodation.

[110] In determining the standard of review on a judicial review procedure, the courts often distinguish between questions of law where the standard is correctness,

and questions of fact or mixed fact in law, where the court may show a degree of deference to the decision maker. The deference recognizes in some cases the expertise of the decision maker in an area where the courts may not have the same expertise. In cases such as this, the decision maker may have expertise which the court does not have with regard to the analysis of scientific evidence. However, the decision maker does not have any special expertise over and above that of the court in determining when the obligation to consult arises. In determining whether the decision maker has correctly decided whether an obligation to consult has arisen, the standard of review is correctness.

REQUEST FOR INFORMATION

[111] The Homalco argue that there has been a breach of the obligation to consult because of a failure to provide information. Certainly, the obligation to consult includes the provision of relevant information that the Ministry may have in its possession. A great deal of information was provided, but there were some items that were still in contention between the parties. Some of the information that was only provided at the hearing included some survey results conducted on behalf of the Ministry or Marine Harvest of the seabed beneath and around the fish netcages. The Ministry failed to provide this information simply as a result of an oversight not with any intention to deprive the Homalco of information they required in order to engage in meaningful consultation.

[112] The Homalco were provided with the management plan relating to the Church House site, or at least part of it, but did not receive a copy of the fish health

management plan. Marine Harvest took the position that the information contained in that plan is proprietary information. They are concerned that if it is delivered to the Homalco that it could be used for purposes other than consultation. They are concerned that it may get into the hands of their competitors, or could be used by the Homalco themselves, if they decided to enter the aquaculture business. The Homalco are, at present, opposed to aquaculture in the area they claim as their traditional territory, but that has not always been the case. They were involved in applications to allow the aquaculture of Atlantic salmon in the Bute Inlet as recently as 2002. It does not appear that they are presently pursuing those applications. Marine Harvest is also concerned that the information may be delivered to the Georgia Strait Alliance, an organization opposed to aquaculture, and with whom the Homalco are presently cooperating.

[113] I accept Marine Harvest's argument that the Fish Health Management Plan, which is a 218 page comprehensive document, does contain confidential proprietary information. The document specifically details operational instructions and procedures during all stages of production, specifies operational instructions and procedures determined by their veterinarian or fish house staff. The document is for the use of the operators' site staff in training, and in day-to-day contact with the fish by the fish house staff. Marine Harvest also use this document in making decisions about fish health. The Fish Health Management also applies to sites other than the Church House site. I accept Marine Harvest's argument that it contains the collective experience and expertise in producing Chinook and Atlantic salmon. This

expertise is derived from extensive research and experience of their experts, and enables Marine Harvest to maintain a competitive advantage over its competitors.

[114] The Best Management Practices Plan may also contain confidential information. However, it was my understanding that this plan had been disclosed. The plan contains the process by which Marine Harvest meets its obligations under the regulations dealing with aquaculture. Some of the information may not be confidential or proprietary. However, I accept that some of it may contain in-house specific procedures, technologies and techniques developed and used by Marine Harvest. Marine Harvest says that this information is based on expertise that has allowed it to be the only aquaculture company in North America that is both ISO14001 and ISO9001 certified. Marine Harvest does say that it is prepared to share this information, provided there are confidentiality arrangements and communication protocol agreements in place.

[115] The Ministry and Marine Harvest point out that the template for the fish health management plan, that has been provided to the Homalco, which they were able to access on the Ministry's website, gives the Homalco a great deal of information about the sort of things which would be contained in the plan. Marine Harvest indicates that they are prepared to sit down with the Homalco and discuss the contents of the fish health management plan, as they do with the Ministry, but they wish some assurances to be made regarding the confidentiality of that information.

[116] I find that the concerns raised by Marine Harvest are reasonable. I would not order the production of the fish health management plan without specific terms that

protect the interests of Marine Harvest, if actual production of the plan is necessary. Marine Harvest's suggestion that they meet and discuss the contents of the plan with the Homalco under certain conditions may be sufficient to meet the needs of all of the parties.

THE REMEDY

[117] The Homalco argue that the only appropriate remedy is a declaration that the Ministry has failed to properly consult, and an order quashing the approval of the amendment. They say an order should then be made that all of the Atlantic salmon presently at the Church House site be removed until consultation and, if necessary, reasonable accommodation is made for their concerns. They say this is necessary to put them in the position they were in before December 8, 2004.

[118] The Ministry and Marine Harvest argue that such an order is unnecessary and inappropriate in these circumstances. They argue that even on the evidence provided by the Homalco, the risks that they raise regarding potential infringement of their Aboriginal rights are at the low end of the scale. Marine Harvest argues that it would cost them approximately \$300,000.00 to move the Atlantic salmon that are presently at the Church House site. They also argue that this would have a significant impact on their potential earnings because they would lose the capacity for rearing salmon that they have at the Church House site. In other words, even if they had somewhere else to place these salmon, they will still lose the opportunity to use the Church House site and profit from the activities there. They estimate that

the value of the salmon presently at Church House will be approximately 15 million dollars when the salmon reaches the stage where they are able to harvest them.

[119] I find that it would be unreasonable to order the immediate removal of all of the Atlantic salmon presently at the Church House site.

[120] Marine Harvest, in their argument, points out that the court has a discretion to exercise in determining what remedy to apply in a judicial review proceeding. They cite from ***Brown and Evans, Judicial Review of Administrative Action in***

Canada:

The exercise of the court's supervisory jurisdiction is discretionary. That is, even where a litigant has established a ground on which the courts may intervene in the administrative process, relief will not necessarily be granted: the court may decline to provide a remedy for reasons other than the merits of the application for a judicial review.

(Judicial Review of Administrative Action in Canada Volume I Toronto: canvas back, loose leaf updated August 2003 release chapter 3 ... pages 3-1).

[121] Marine Harvest points to other cases in which the court did grant a remedy short of attempting to place the parties back in their original positions.

[122] Some of those cases are:

Cheslatta Carrier Nation v. British Columbia (Project Assessment Director) (1998), 53 B.C.L.R. (3D) 1 (S.C.). In this case, Chief Justice Williams, as he then was, attempted to balance the rights and potential prejudices to the parties, and

made orders requiring the respondents to fulfil their obligation to consult meaningfully and properly and made directions for production of information.

They refer to the ***Gitksan First Nation v. British Columbia (Minister of Forests)*** 2002 BCSC 1701. In that case, Mr. Justice Tysoe dealt with the issue of remedies, beginning at ¶100. There Mr. Justice Tysoe also referred to a decision ***Haida Nation v. British Columbia (Minister of Forests)***, [2002] B.C.C.A 147 (Haida No. 1) where the court declined to quash a decision of the Ministry even though consultation had not occurred. Haida No. 1 was a decision of the Court of Appeal, and the Court of Appeal indicated that a decision on whether or not to quash the licence itself, or the transfer of the licence, is better determined after the extent of any infringement had been determined.

[123] Similarly, in ***Gitksan, supra***, Mr. Justice Tysoe determined at ¶106:

...it is my view that it is preferable to first make a declaration with respect to the duty of consultation on an interim basis and to then allow the parties to undertake a proper process of consultation and accommodation. If the process does not succeed, the matter can be brought back before the Court for further directions or further declarations.

[124] Mr. Justice Tysoe also dealt with the issue of the disclosure of information. In that case, he found that there should be discussion between the parties as to the exact type and extent of information to be provided before the court makes a determination as to whether specific documents should be provided. (¶113).

[125] Marine Harvest suggests that an appropriate order in this case that would balance the interests of all of the parties would include:

1. an adjournment of the application for judicial review;
2. a declaration of the need for further consultation between the Homalco and the Crown;
3. some direction as to the scope and content of the consultation, and potentially the schedule for consultation;
4. an encouragement to Marine Harvest to participate in an appropriate way in the consultation (which Marine Harvest is prepared to do);
5. some direction on the provision of information, subject to protection for confidentiality with respect to the fish health management plan and the best management plan;
6. providing leave to the parties to seek further directions; and
7. providing leave to the Homalco to pursue its remedy in the event that they are of the view that further consultation and accommodation are inadequate.

[126] I find that the remedy suggested by Marine Harvest is appropriate.

[127] Therefore, I make the following orders:

1. I adjourn the application for judicial review generally;

2. I declare that the Minister had, and continues to have, a legally enforceable duty to the Homalco to consult with them in good faith, and to endeavour to seek workable accommodation between their interests and the long-term objectives of the Crown and Marine Harvest, and the public interest, both Aboriginal and non-Aboriginal. This includes issues surrounding the location and management of the Church House fish farm and the amendment to the existing licence to allow the introduction of Atlantic salmon;
3. The parties are at liberty to apply for further directions if they are unable to agree on a schedule for consultation;
4. Marine Harvest is to participate in an appropriate way in the consultation;
5. Marine Harvest will provide information subject to protection of confidentiality with respect to the fish health management plan and the best management plan. The parties have liberty to apply if they are unable to agree under the specific terms required to protect the confidentiality of the information;
6. Marine Harvest will not add any more Atlantic salmon to the Church House site until the process of consultation and potential accommodation has been completed, and the Ministry confirms the amendment of the licence, if it does so;

7. The Ministry is to approach this consultation with an open mind and be prepared to withdraw its approval of the amendment if, after reasonable consultation, it determines that it is necessary to do so, or add whatever conditions appear to be necessary for reasonable accommodation of the concerns of the Homalco;
8. The parties have leave to apply for further directions;
9. The Homalco have leave to bring the matter back before the court in the event that they are of the view that further consultation and accommodation are inadequate.

[128] In making this order I have considered the factors referred to in Marine Harvest's argument:

Marine Harvest argues the factors to consider are:

- a) that there is no direct or immediate interference with Homalco's claimed rights arising from the farm raising Atlantic salmon rather than Pacific. I would point out, however, that it is not simply direct or immediate interference which is a concern. It is also indirect and potential future interference. This is the very subject matter of the consultation. This is also a matter on which the various scientists differ;
- b) concerns of the Homalco respecting risks to wild salmon and to the marine environment or substantively addressed through the regulatory

requirements which govern the operation of the fish farm (e.g. protection against escapes, and measures respecting fish health, waste management and general protection of the environment).

I have considered the regulatory requirements, but again, that is not the end of the matter. Those are the proper subject matters of discussion during consultation.

There may well be additional measures which should be taken to address the concerns of the Homalco.

[129] Marine Harvest also refers to:

- a) The fact that there was consultation prior to the decision, further submission issued by the Homalco after the decision (on December 10, 2004), and the substantive response giving additional reasons by the Crown on January 18, 2005;
- b) This does indicate a willingness to consult and is a good starting point;
- c) The recognition that the obligation to consult and accommodate is an evolving one, which was only fully articulated by the Supreme Court of Canada on November 18, 2004 (in *Haida* and in *Taku River*), only twenty days before the decision of MAFF was made on December 8, 2004. Each of the parties to the consultation can take direction respecting rights and obligations from these cases.

However, I note the recognition of the obligation to consult is not a new one and did not arise simply out of the Supreme Court of Canada

decisions referred to. The obligation to consult has been recognized by the courts for a considerable period of time, and the British Columbia Court of Appeal decision in **Haida** certainly made it clear that the province had this obligation whether or not they agreed with that decision or were appealing it.

- d) The fact that Marine Harvest, as a third party, has relied on the December 8, 2004 decision, and would suffer significant damages if the decision was quashed and the salmon requested to be removed. This would be particularly unjust if the only issue is further consultation and a similar decision may be the ultimate result.

I have pointed out the estimated financial cost to Marine Harvest. I also find that they are entitled to rely on the amendment granted to them.

- e) The fact that further consultation may well satisfy the Homalco in their concerns, or identify some further accommodation which could be implemented, in other words, that setting aside the decision may be premature.

I agree that this is a reasonable matter to consider, including the willingness of Marine Harvest to participate in that consultation.

- f) The fact that continuing with the Atlantic salmon in the fish farm will not cause irreparable harm (e.g. unlike carrying on with timber harvesting

or building a road). If the ultimate decision of the court, after a period of further consultation, is that the December 8, 2004 decision should be set aside, the salmon could then be removed. The potential for any harm during an interim period allowing for further consultation is low (remote).

To some extent this is part of the argument that is made and the disagreement between the scientists. The consultation, including the early portion of the consultation, could be specific steps that may be taken to further minimize the risk above and beyond the existing regulations, or steps that could be taken to ensure that the existing regulations are enforced.

[130] I have also considered the evidence submitted about Marine Harvest's practices. Marine Harvest's evidence is that they take seriously all of their obligations under the regulations, and pride themselves in the manner in which they operate their fish farms. They state they are the world's largest aquaculture company, and the largest producer and supplier of farmed salmon. They point out that they own or operate 19 salmon farms in British Columbia, all but five of which are currently licensed for both Chinook and Atlantic salmon production. They also point out that they own and operate two land-based fresh water hatcheries that produce almost all of the smolts that they use.

[131] Their position is that they are at the leading edge of development in aquaculture and are committed to conducting their operations to maximize

environmental protection of fish health. They argue that they impose their own stringent environmental management and fish health policies, as well as applying all of the governmental regulations and policies.

[132] Marine Harvest points out that its environmental management system for its fin fish production sites is registered to the Environmental Management System Standard ISO14001: 1996 which is an international standard that specifies a process for controlling and improving a company's environmental performance. In addition to the creation and implementation of strict policies and procedures, there must be a monitoring system in place to monitor compliance. The standards also require internal and external audits to ensure compliance. Marine Harvest is also ISO9001 certified, which deals with quality management systems, including product quality, management style, customer relations and other business related issues. Marine Harvest points out that they are one of only five aquaculture companies worldwide who hold both ISO14001 and ISO9001 registrations. Their management plan includes a goal to eliminate all escapes from marine netcage operations, and a detailed fish escape prevention and response plan. They say that this plan is implemented daily.

[133] I should deal with the comment made by Mr. Westlake in his affidavit #2 at paragraph 25, which reads as follows:

In my view, if I were to recommend that MAFF deny Marine Harvest's application to farm Atlantic salmon on the basis that escapees might cause one or any of the various harms that are identified from time to time, I could not recommend approval of Atlantic or any other salmon farming at all in British Columbia.

[134] It was suggested that this was one of the principle reasons that Mr. Westlake recommended approval of the amendment. Counsel for the Ministry argues that Mr. Westlake is merely indicating the issues with regard to escapees have already been considered at length, and that the appropriate regulations and policies are in place to deal with that issue. The Ministry argues this is really not a new or significant issue.

[135] Clearly, the Ministry must deal with each application on its own merits, and consult and address the individual concerns of the Homalco with regard to this specific sight. If, after consultation, reasonable accommodation of the concerns raised by the Homalco required a refusal to allow the amendment, then that would be the decision that the Ministry must make. The Ministry must deal with the concerns of potential infringements on a sight by sight basis, not based on any general policy.

[136] There was a significant amount of argument about the admissibility and consideration of certain evidence, including the scientific evidence. Counsel have made it clear that they do not feel it is the court's position to chose between the scientific opinions. Therefore, I have not found it necessary to consider the arguments about the validity or qualifications of the various scientists making their opinions. The only use I have made of the scientific evidence, is for the purposes of concluding that there is some basis for the Homalco's concerns without deciding the strength or weight that should be given to those opinions of concern.

[137] The Homalco did argue that the provincial jurisdiction under s. 92(5) of the ***Constitution Act*** 1867 which is the basis of the authority for the ***Fisheries Act***,

[RSBC 1996) c. 149 and the way in which the regulations are framed as prohibitions or requirements for permission, supports the argument that the purpose and the constitutional obligations in the **Fisheries Act** are to conserve the stock of fish and to protect the fish environment. They referred to **Peter Hogg, Constitutional Law 3rd Edition** at 29.5(c) as follows:

The management of public lands in section 92(5) [of the *Constitution Act 1867*] must include measures to conserve the stock of fish and to protect the fish environment. [my emphasis added]

[138] No authority was cited for the proposition that the **Fisheries Act** and regulations must conserve the stock of fish and protect the fish environment. I conclude that all Hogg was saying is that the powers that the province has under s. 92(5) must include measures to conserve, not that the province must pass legislation and regulations to conserve stock. He is merely stating what the province can do as a result of its legislative authority, not what it must do.

RELIEF UNDER PARAGRAPH 7 OF THE PETITION

[139] Paragraph 7 of the petition applies for the following relief:

7. An interlocutory and permanent injunction prohibiting the Respondent, Marine Harvest Canada, from placing Atlantic salmon in the Church House fish farm without proper authorization from the Department of Fisheries and Oceans for the harmful alteration, disruption or destruction [“HADD”] of fish habitat pursuant to s. 35(2) of the **Fisheries Act** and without obtaining a licence pursuant to s. 55 of the **Fisheries (General) Regulations**.

[140] Marine Harvest argues that relief applied for in paragraph 7 of the petition is not available under Rule 10 of the **Rules of Court** and that it is not available under the **Judicial Review Procedures Act**.

[141] I am satisfied that if it were necessary, directions could be given as to how to resolve this issue to eliminate any concerns whether the petition under Rule 10 was the appropriate method of pursuing this relief. Rule 2(3) states:

(3) The court shall not wholly set aside a proceeding on the ground that it was required to be commenced by an originating process other than the one employed.

[142] In other words, appropriate directions or orders could be made to allow the matter to be resolved, even though it had been commenced by way of petition.

[143] I agree with the petitioner that an injunction can be included in claims for relief under the **Judicial Review Procedures Act**.

[144] Marine Harvest also argues that this claim for relief really relates to the exercise of the jurisdiction of the federal Minister of Fisheries and Oceans, and that the petitioners have started separate proceedings for relief in the federal court where these matters should be resolved.

[145] The Homalco respond by saying that they are simply attempting to prevent a breach of a federal statute, where that breach may have a direct impact upon themselves. They point to the decision **Re National Capital Commission et al v. Pugliese et al; Re Regional Municipality of Ottawa – Carleton et al and Dunn**,

97 D.L.R. (3d) 631. The Supreme Court of Canada found that individual homeowners had a right of action for damages to their property. They say that damage arose when the defendants breached the Ontario **Water Resources Act** by abstracting more than 10,000 gallons of water per day without a permit. They argued that the removal of under-surface water caused their properties to subside and suffer damage. The Homalco argue that this demonstrates that an individual may have the right to sue a party for breach of a statute.

[146] The Federal **Fisheries Act** provides that someone shall not cause a HADD without a permit. In this case, there is discussion between Marine Harvest and the Department of Fisheries as to whether they require a permit to cause a HADD in this case. The initial operation of the Church House site operated under an agreement not to cause a HADD. Marine Harvest is in the process of negotiating with the Department of Fisheries to determine whether a permit to cause a HADD is necessary, or should be granted. There is evidence that the Department of Fisheries may require a permit, but it is not clear on the evidence that Marine Harvest is operating in contravention of the **Fisheries Act**. The Department of Fisheries and Oceans did send a letter to the Ministry on July 14, 2004 indicating that they were not opposed to the amendment of the licence, provided Marine Harvest obtained a HADD. Marine Harvest was in the process of negotiating for a HADD, but only as part of an overall process to convert permits not to cause a HADD to a permit to cause a HADD. It is not clear that they were unable to continue to operate with the existing permit.

[147] Marine Harvest also points out that the petition has not alleged that the Church House facility has caused a HADD, or is likely to cause a HADD. Nor is there any evidentiary foundation to conclude that the facility has caused a HADD, or is expected to cause a HADD. The Ministry has referred to the decision **Operation Dismantle Inc. v. Canada**, [1985] 1 S.C.R. 441. This dealt with a judicial review of a Cabinet decision relating to missile testing. The opponents were concerned about risks of nuclear war and alleged that their s. 7 **Charter** rights, life and security of the person were being infringed. The court said that the government did not have a duty to refrain from the action it proposed to take based on the **Charter** rights, and the allegation of infringement was based on speculation or hypotheses about possible effects of the government action (¶29). The court in **Operation Dismantle** said the following at ¶34 through ¶36:

¶ 34 A similar concern with the problems inherent in basing relief on the prediction of future events is found in the principles relating to injunctive relief. Professor Sharpe, *Injunctions and Specific Performance* (1983), clearly articulates the difficulties in issuing an injunction where the alleged harm is prospective, at pp. 30-31:

All injunctions are future looking in the sense that they are intended to prevent or avoid harm rather than compensate for an injury already suffered....

Where the harm to the plaintiff has yet to occur the problems of prediction are encountered. Here, the plaintiff sues quia timet -- because he fears -- and the judgment as to the propriety of injunctive relief must be made without the advantage of actual evidence as to the nature of harm inflicted on the plaintiff. The court is asked to predict that harm will occur in the future and that the harm is of a type that ought to be prevented by injunction.

¶ 35 The general principle with respect to such injunctions appears to be that "there must be a high degree of probability that the harm will in fact occur": (Sharpe, supra, at p. 31). In *Redland Bricks Ltd. v. Morris*, [1970] A.C. 652, at p. 665, per Lord Upjohn, the House of Lords laid down four general propositions concerning the circumstances in which mandatory injunctive relief could be granted on the basis of prospective harm. The first of these stated [at p. 665]:

1. A mandatory injunction can only be granted where the plaintiff shows a very strong probability upon the facts that grave damage will accrue to him in the future.... It is a jurisdiction to be exercised sparingly and with caution but in the proper case unhesitatingly.

¶ 36 It is clearly illustrated by the rules governing declaratory and injunctive relief that the courts will not take remedial action where the occurrence of future harm is not probable. This unwillingness to act in the absence of probable future harm demonstrates the courts' reluctance to grant relief where it cannot be shown that the impugned action will cause a violation of rights.

[148] I conclude that this is a matter better resolved through the process provided by the **Fisheries** Act, rather than making findings with only a portion of the evidence available. In these circumstances, even if I have discretion or the authority to grant an injunction, I decline to do so on the evidence before me.

[149] I am satisfied that this is a matter that is more properly handled, at this stage, through the Department of Fisheries and Oceans. Certainly, I anticipate the Department of Fisheries and Oceans would consult with the Homalco on the issue of whether a permit for a HADD should be granted, or whether an agreement to prevent a HADD is appropriate. Those matters, however, may be the subject of the proceedings in the federal court, and I do not wish to make any further comment on them.

[150] The parties have not addressed the issue of costs. They are at liberty to do so if they are unable to agree on that issue.

“R.E. Powers, J.”
The Honourable Mr. Justice R.E. Powers

March 23, 2005 – **Revised Judgment**

Corrigendum issued advising that on the first page, counsel for the Respondent, The Minister of Agriculture Food and Fisheries should read L. Mrozinski and P.E. Yearwood.

At paragraph 1, “Xwemahlkwu” should read “Xwèmalhkwu” and elsewhere throughout the judgment.

At paragraph 3, “Neutreco Canada Inc.” should be spelled “Nutreco Canada Inc.”.

At paragraph 8, “Bartlett” should read “Bartlett Island”.

At paragraph 21, clause 3: “Homalco Treaty” should read “Homalco Territory”.

At paragraph 24, the second line: “wild Pacific salmon stocks spawn” should read “wild Pacific salmon stocks that spawn”.

At paragraph 31, the reference to “affluent” should be “effluent”.

At paragraph 35, 26, 38 and 39 the courts refers to the “salmon agriculture report” and should be referred to the “Salmon Aquaculture Review”. Also at paragraph 35, the “Environmental Assessment Office” should be capitalized.

At paragraph 56, second line: “amendment management plan” should read “amended management plan”.

At paragraph 57, third line: “open netcage fin fish culture” should read “open netcage finfish aquaculture”.

At paragraph 61, 69 and 73, “Johnson” should read “Johnstone”.

At paragraph 98, fourth line: “received on December 10 and 13 and provides a response” should read “received on December 10 and 13 provide a response”.

At paragraph 122, ninth line: “(Haidia No. 1)” should read “(Haida No. 1)”.

At paragraph 127.7 it reads:

“... to withdraw its approval of the amendment if, after reasonable compensation, it determines ...”

and should read:

“... to withdraw its approval of the amendment if, after reasonable consultation, it determines ...”

Citation: Halfway River First Nation v. B.C. Date: 19990812
1999 BCCA 470 Docket: CA023526, CA023539
Registry: Vancouver

COURT OF APPEAL FOR BRITISH COLUMBIA

BETWEEN:

**CHIEF BERNIE METECHEAH, on his own behalf and
on behalf of all other members of the
HALFWAY RIVER FIRST NATION, and the
HALFWAY RIVER FIRST NATION**

PETITIONERS
(RESPONDENTS)

AND:

**DAVID LAWSON, DISTRICT MANAGER,
FORT ST. JOHN FOREST DISTRICT and
THE MINISTRY OF FORESTS**

RESPONDENTS
(APPELLANTS)

AND:

CANADIAN FOREST PRODUCTS LTD.

RESPONDENTS
(APPELLANTS)

Before: The Honourable Madam Justice Southin
The Honourable Mr. Justice Finch
The Honourable Madam Justice Huddart

M. W. W. Frey and Counsel for the Appellant,
H. M. Groberman, Q.C. District Manager and
Ministry of Forests

S. B. Armstrong and Counsel for the Appellant,
J. M. Marks Canadian Forest Products Ltd.

C. Allan Donovan Counsel for the Respondents,
Chief Bernie Metecheah and
Halfway River First Nation

Place and Date of Hearing Vancouver, British Columbia
19, 20, 21 and 22 January, 1999

Place and Date of Judgment Vancouver, British Columbia
12 August, 1999

Written Reasons by: (with Index)

The Honourable Mr. Justice Finch

Concurred in by:

The Honourable Madam Justice Huddart (P. 80, para. 170)

Dissenting Reasons by:

The Honourable Madam Justice Southin (P. 93, para. 194)

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Reasons for Judgment of the Honourable Mr. Justice Finch:

I

Introduction

[1] The Ministry of Forests ("the Ministry"), its District Manager at Fort St. John, David Lawson, ("the District Manager") and Canadian Forest Products Limited ("Canfor") appeal the order of the Supreme Court of British Columbia pronounced 24 June, 1997, which quashed the decision of the District Manager on 13 September, 1996, approving Canfor's application for Cutting Permit 212. Canfor holds the timber harvesting licence for the wilderness area in which C.P.212 would permit logging. It is Crown land, adjacent to the reserve land granted to the Halfway River First Nation. The Halfway Nation are descendants of the Beaver People who were signatories to Treaty 8 in 1900.

[2] The part of Treaty 8 that preserved the signatories right to hunt says:

And Her Majesty the Queen HEREBY AGREES with the said Indians that they shall have the right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and **saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.**

(my emphasis)

[3] The petitioners claimed under the Treaty the traditional right to hunt on the Crown land adjacent to their reserve, which they refer to as the "Tusdzuh" area, including the areas covered by C.P.212. In addition, they have an outstanding Treaty Land Entitlement Claim (T.L.E.C.) against the federal Crown, and they say lands recoverable in that claim may be located in the Tusdzuh.

[4] Among many other arguments advanced the petitioners said that issuance of the permit, and the logging it will allow, infringes their hunting rights under the Treaty, and that such infringement cannot be justified by the Crown. The petitioners also claimed that C.P.212 was granted by the District Manager in breach of his administrative law duty of fairness, in that he fettered his discretion by applying government policy, prejudged Canfor's right to have the permit issued, failed to give adequate notice of his intention to decide the question, and failed to provide an adequate opportunity for them to be heard. The petitioners also said the District Manager reached a patently unreasonable decision in deciding factual issues on an incomplete evidentiary base.

[5] The learned chambers judge accepted all these submissions and held therefore that C.P.212 should be quashed. Other

submissions were rejected.

[6] On this appeal, the appellants say the learned chambers judge erred on all counts. They say that, properly construed, the plaintiffs' right under Treaty 8 to hunt is subject to the Crown's right to "require", or "take up" lands from time to time for, among other purposes, "lumbering"; and that the issuance of C.P.212 therefore did not breach or infringe the petitioners' treaty rights to hunt. Alternatively, the petitioners say that if the treaty right to hunt was breached, that breach was justified within the test laid down in **R. v. Sparrow**, [1990] 1 S.C.R. 1075, 3 C.N.L.R. 160, 4 W.W.R. 410.

[7] As to the administrative law issues, the appellants say the learned chambers judge erred in finding that the District Manager had fettered his discretion, that his decision gave rise to a reasonable apprehension of bias, and that he failed to give adequate notice or opportunity to be heard. They also say the learned chambers judge erred in holding the District Manager's decision to be patently unreasonable.

[8] For the reasons that follow, I have concluded that the only lack of procedural fairness in the decision-making process of the District Manager was the failure to provide to the petitioners an opportunity to be heard. In my respectful view,

the learned chambers judge erred in holding that there was a lack of procedural fairness on the other three grounds that were raised. I have also concluded that the issuance of the cutting permit infringed the petitioners' treaty right to hunt, that the Crown has failed to show that infringement was justified, and that the learned chambers judge did not err in quashing the District Manager's approval of Canfor's permit application.

II

Background

[9] Treaty 8 is one of 11 numbered treaties made between the federal government and various Indian bands between 1871 and 1923. B.C. joined confederation in 1871, but the provincial government was not represented in these treaty negotiations. Treaty 8 was negotiated in 1899, and was adhered to in that year by a number of bands who lived in what are now Alberta, Saskatchewan and the Northwest Territories. The first adherents, a band of Cree Indians, signed the treaty at Lesser Slave Lake in June, 1899. The Hudson Hope Beaver people, from whom the petitioners are descended, adhered to the treaty at Fort St. John in 1900. At that time there were 46 Beaver people living in the vicinity of Fort St. John. The Hudson Hope people are now spread between the Halfway River Nation and the West Moberley Band.

[10] On this appeal, counsel for the Ministry of Forests told the Court that the British Columbia government acknowledged that it was bound by the provisions of Treaty 8 concerning the petitioners' rights to hunt and fish, but made no similar concession in respect of the petitioners' right to lands under the treaty.

[11] The full provisions of the treaty are set out in the reasons of my colleague, Madam Justice Southin. The Indians could neither read nor write English, and the terms of the treaty were interpreted to them orally. There is a question in this case as to what extrinsic evidence, if any, is admissible in interpreting the treaty. The commissioners who acted on behalf of the federal government made a report concerning their discussions and negotiations with the original adherents to the treaty in 1899. There is no similar record of what was said to the Beaver people of Fort St. John in 1900. The appellant Minister says the extrinsic evidence of what occurred in 1899, and which was admitted and considered in *R. v. Badger*, [1996] 1 S.C.R. 771, is not admissible for the purposes of construing the treaty adhered to by the petitioners' ancestors in 1900.

[12] In 1900 title to Crown land was vested in the provincial Crown by virtue of the terms of union between British Columbia

and Canada in 1871. Treaty 8 provides for reserve lands to be set aside for the Indians, to the extent of one square mile for each family of five, or 160 acres per individual. The "selection" of such reserves was to be made in the manner provided for in the treaty.

[13] On 15 May, 1907 the provincial government transferred administration and control of lands in the Peace River block to the federal government by Executive Order-in-Council. The transfer covered about 3.5 million acres of land, selected as agreed in 1884. By virtue of s.91(24) of the **Constitution Act, 1867**, the federal government already had all jurisdiction to deal with "Indians and land reserved for Indians".

[14] The reserve lands of the Halfway River Nation were not finally surveyed and located until 1914. The reserve is located on the north bank of the Halfway River, about 100 miles west of the city of Fort St. John. The reserve comprises about 9,880 acres.

[15] The lands to the south and west of the Halfway River reserve were, in 1900 and 1914, unsettled and undeveloped wilderness. The Halfway River Nation referred to this area as the Tuszuh. It is an area that the petitioners and their ancestors have used for hunting, fishing, trapping and the

gathering of food and medicinal plants. The area was plentiful with game, and conveniently located for the purposes of the Halfway Nation. The petitioners or their forebears built cabins, corrals and meat drying racks in the area for use in conjunction with their hunting activities. The time of building, and the precise location of these structures, is not disclosed in the evidence.

[16] In 1930 the federal government transferred administration and control of the lands in the Peace River block back to the provincial government by the ***Railway Belt Retransfer Agreement Act***, S.B.C. 1930, c.60. Also in 1930, the ***Constitution Act, 1930*** was enacted by the parliament of the United Kingdom giving effect to, *inter alia*, the agreement between the federal and B.C. provincial governments by which the retransfer of lands, including the Peace River block, took place. There was an exception from the retransfer of the Indian reserve lands located in the Peace River block.

[17] It is significant for the purposes of this case, and to understanding earlier jurisprudence interpreting Treaty 8 and other of the numbered treaties, that B.C. is not affected by the ***Natural Resources Transfer Act, 1930 (Constitution Act, 1930 Schedule II)***, which was an important consideration in such cases as ***R. v. Badger***, *supra* and ***R. v. Horse***, [1988] 1 S.C.R.

187.

[18] In 1982, the *Constitution Act, 1982* was enacted. Section 35 of the *Act* provides:

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

[19] About 15 years ago, at a date not disclosed in the evidence, the Halfway River Nation entered into negotiations with both the federal and provincial governments to allow the expansion of its reserve lands. They subsequently advanced a Treaty Land Entitlement Claim (TLEC) against the Crown in Right of Canada asserting a shortfall of over 2,000 acres in the reserve lands allocated to them in 1914. In fact, the Nation has made a demand for over 35,000 acres of additional land, the basis for which claim was not made clear in the submissions of counsel. Whatever the area entitlement of the petitioners to further reserve lands may be, there is an unresolved issue as to their location. The petitioners claim that the entitlement may be located, in whole or in part, in the Tusdzuh, the wilderness area to the south of their present reserve lands.

[20] There are now said to be 184 men, women and children in the Halfway River Nation. They are a poor people,

economically, and have in general not adapted themselves to the agricultural lifestyle contemplated in those parts of Treaty 8 granting each family of five one square mile of land, or each individual 160 acres of land, as well as livestock, farm implements and machinery, and such seed as was suited to the locality of the Band. They have instead pursued their traditional means of support and sustenance, of which moose hunting is an important element. 75% of the members of the Halfway River Nation live on social assistance.

[21] The lands referred to by the petitioners as the Tuzdzh are vast areas in which, until fairly recent times, there has been limited industrial use or development. There has been some mining since the early 1900s and, more recently, some oil and gas exploration. A network of seismic lines was cut for that purpose. The evidence does not disclose when the first timber harvesting licence was granted. Canfor obtained one part of its current timber harvesting licence in 1983, and a second part in 1989. These licences were amalgamated into Forest Licence No. A181154.

[22] In 1991, Canfor first identified the areas covered by C.P.212 in its five year Forest Development Plan for 1991-96. Chief Metcheah wrote to the Minister of Forests on 20 January, 1992 requesting a meeting to discuss the development of lands

in the Tusdzuh. On 30 June, 1992, Canfor wrote to the Treaty 8 Tribal Association (of which the Halfway River Nation is a member) advising of the proposed harvesting. From that time up to the present litigation there have been both correspondence and telephone communications between the parties to these proceedings: these are more specifically detailed in the reasons for judgment of the learned chambers judge, and in Appendix A to her reasons, setting out a "chronology of notices and consultation". Particular reference to some of these communications will be made later in these reasons, as may appear necessary.

III

The Legislative Scheme

[23] The authority of the District Manager to issue a cutting a permit derives from the **Forest Act**, R.S.B.C. 1979, c. 140, as am. S.B.C. 1980, c. 14 (the **Act**), the **Forest Practices Code of British Columbia Act**, S.B.C. 1994, c. 41 (the **Code**, now R.S.B.C. 1996, c. 159) and subsequent regulations, and the **Ministry of Forests Act**, R.S.B.C. 1979, c. 272, as am. S.B.C. 1980, c. 14. That latter statute amended various aspects of the **Forest Act**, the **Ministry of Forests Act**, and the **Range Act**, R.S.B.C. 1979, c. 355. The 1980 amendment to s. 158(2) of the **Forest Act** provides:

158 (2) Without limiting ss. (1), the Lieutenant Governor in Council may make regulations respecting ...
(d.1) the establishment of an area of the Province as a forest district, the abolition and variation in boundaries and name of a forest district and the consolidation of 2 or more forest districts; ...

Section 2(1) of the **Ministry of Forests Act**, R.S.B.C. 1979, c. 272 (now R.S.B.C. 1996, c.300) was amended to state:

2 (1) The following persons may be appointed under the **Public Service Act**: ...
(d) a district manager for a forest district established under the **Forest Act** and the part of a range district established under the **Range Act** that covers the same area as the forest district; ...

[24] That section, in combination with the **Public Service Act**, R.S.B.C. 1979, c.343, authorized the Lieutenant Governor in Council to appoint district managers for forest districts established under the **Forest Act**. Section 9 of the 1979 **Forest Act** (now section 11) specified that no rights to harvest Crown timber could be granted on behalf of the government except in accordance with the **Act**. Section 10 (now section 12) specified that a District Manager, a regional manager or the minister may enter into agreements granting rights to harvest timber in the form of licenses and/or permits subject to the provisions of the **Act** and the **Regulations**. In 1994, section 247 of the **Code** amended section 10 of the **Forest Act**, subjecting the District Manager's authority to enter into agreements granting rights to harvest timber to the requirements of the **Code**. Section 238 of

the **Code** states that every cutting permit in existence at the time the **Code** came into force remains in existence, but ceases to have effect two years after the date the section came into force unless the District Manager determines that the operational planning requirements of the cutting permit are consistent with the requirements of the **Code**. With the exception of a few sections, the **Code** came into effect pursuant to Reg. 165/95 on June 15, 1995.

[25] The relationship between the **Forest Act** and the **Forest Practices Code** with respect to the District Manager's authority to issue a cutting permit pursuant to a forest licence agreement is important. The **Code** regulates the actual practice of forestry as it occurs on the ground, whereas the **Act** governs matters such as the formation of forest licence agreements and the determination of the annual allowable cut. The **Code** does not replace the **Act** but supplements it, as contemplated by s. 10 of the **Act** (now s. 12) where the authority of officials (including the District Manager) in the Ministry of Forests to issue licenses is circumscribed by the **Code** insofar as the **Code** requires that certain operational plans receive approval before the granting of licenses or permits. The process by which those plans receive approval is set out in the **Code** and in the **Regulations** enacted pursuant to the **Code**. Sections 10 and 12 of the 1979 **Act**, as amended in 1980, provide:

- 10. Subject to this **Act** and the **Regulations**, a district manager, a regional manager or the minister, on behalf of the Crown, may enter into an agreement granting rights to harvest Crown timber in the form of a
 - (a) forest licence;
 - (b) timber sale licence;
 - (c) timber licence;
 - (d) tree farm licence; ...

- 12. A forest licence ...
 - (f) shall provide for cutting permits to be issued by the Crown to authorize the allowable annual cut to be harvested, within the limits provided in the licence, from specific areas of land in the public sustained yield unit or timber supply area described in the licence;

. . . .

[26] The enactment of the **Forest Practices Code** further amended these provisions, so as to render the formation of agreements under section 10 of the **Act** subject to the provisions of the **Code** (s. 247 of the **Code**).

[27] In addition, the preamble to the **Code** provides a broad set of principles to guide the actions of forestry officials, and by which the statute is to be interpreted.

[28] The preamble to the **Forest Practices Code** is as follows:

WHEREAS British Columbians desire sustainable use of the forests they hold in trust for future generations;

AND WHEREAS sustainable use includes

- (a) managing forests to meet present needs without compromising the needs of future generations,

- (b) providing stewardship of forests based on an ethic of respect for the land,
- (c) balancing productive, spiritual, ecological and recreational values of forests to meet the economic and cultural needs of peoples and communities, including First Nations,
- (d) conserving biological diversity, soil, water, fish, wildlife, scenic diversity and other forest resources, and
- (e) restoring damaged ecologies;

THEREFORE HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:

[29] The **Code** is to be interpreted so as to achieve the principles set out in the preamble: see *Koopman v. Ostergaard* (1995), 12 B.C.L.R. (3d) 154 (S.C.); *Chetwynd Environmental Society v. British Columbia* (1995), 13 B.C.L.R. (3d) 338 (S.C.). The preamble of the **Code**, therefore, is to receive a broad and liberal construction so as to best ensure the attainment of the **Code's** goals: *International Forest Products v. British Columbia (Ministry of Forests)* (unreported, 19 March, 1997. Forest Appeals Commission (Vigod, Chair), App. No. 96/02(b)).

[30] In addition to receiving guidance from the preamble's principles, the District Manager's authority to grant cutting permits is subject to certain specific operational planning requirements under the **Code**. These generally take the form of

requiring the permit holder to demonstrate that the plans for harvesting conform to certain environmental standards. The operational planning requirements are set out in Part 3 of the **Code**, directing that the holder of an agreement under the **Forest Act** must carry out certain impact assessments of the proposed harvest area and integrate the findings of such an assessment into forest development plans (ss. 10, 17-19), logging plans (s. 11, 20-21), silviculture prescriptions and plans (s. 12, 14, 22-23, 25), and access management, stand management, and range use plans (ss. 13, 15-16, 24, 26-27). There are numerous provisions that allow for the holder of an agreement under the **Forest Act** to apply for exemptions from these requirements (Part 3, Division 3).

[31] Finally, the District Manager's authority to grant cutting permits pursuant to forest licence agreements entered into under the **Act** is limited by many of the regulations enacted pursuant to the **Code**. Specifically, the **Operational Planning Regulations** [B.C. Reg. 174/95] identify areas where the District Manager must satisfy himself of the nature of the various kinds of public consultations that have occurred and need to occur. According to sections 5-8 of the **Operational Planning Regulations** the proponent of an operational plan or forest development plan is required to ensure that the best information available is used and that the District Manager

approves of it.

[32] Under the **Regulations**, before a person submits, or a District Manager puts into effect, a forest development plan, they must publish notice of the plan to the public (s.2). The District Manager must provide an opportunity for review and comment to an interested or affected person (s.4(4)), and must consider all comments received (s.4(5)).

[33] Section 4(4) of the **Regulations** provides:

An opportunity for review and comment provided to an interested or affected person under s-s.(1) will only be adequate for the purposes of that subsection if, in the opinion of the district manager, the opportunity is commensurate with the nature and extent of that person's interest in the area under the plan and any right that person may have to use the area under the plan.

[34] Finally, under s.6(1)(a) of the **Regulations** the District Manager has a discretion to require that operational plans be referred to any other resource agency, person, or other agency he may specify. I observe in passing that the District Manager's discretion to determine the adequacy of the opportunity to "review and comment" does not extend to that consultation required by the jurisprudence concerning the Crown's obligation to justify infringement of aboriginal or treaty rights.

[35] The proponent of a plan is under an obligation to use the best information available (s.11(1)) and to use all information known to the person (s.11(2)(b)). These provisions confer a very broad discretion. It would appear, however, to be the sort of discretion calling for expertise beyond that of a professional forester. Whether a set plan of logging is acceptable to those members of the public who have a stake in it appears to be a question of judgment that any properly informed person would be as well able to answer as a forester.

[36] **In summary then**, the District Manager's powers to issue cutting permits are found in s.10 of the 1979 **Forest Act** as amended by s.247 of the **Code** in 1994, and those powers are subject to the requirements of the **Code**. The preamble to the **Code** states the guiding principles for forest management which include meeting "the economic and cultural needs of First Nations". Section 4(4) to the **Regulations** gives the District Manager a discretion to determine the adequacy of consultation with interested parties, as specified in s.4(1).

IV

The Decision of the District Manager

[37] After investigation, reviews and discussion, the District

Manager finally decided to issue C.P.212 on 13 September, 1996.

His reasons for doing so are set out in a letter he wrote to Chief Meticheah on 3 October, 1996. In summary, the District Manager held:

1. Canfor's application for C.P.212 was consistent with Canfor's approved five year forest development plan;
2. C.P.212 was in substantial compliance with the requirements of the **Forest Practices Code**;
3. Canfor's harvesting operations would have minimal impacts on wildlife habitat suitability and capability for ungulates (moose and deer) and black bear in the area;
4. There would be minimal to no impact on fish habitat or fishing activities;
5. It was not the policy of the Provincial government to halt resource development pending resolution of a Treaty Land Entitlement Claim (TLEC) advanced by the petitioners against the federal Crown;
6. Canfor would be required to perform an Archeological Impact Assessment (AIA) in block 4 of C.P.212 where an old First Nations pack trail was located;
7. The proposed harvesting plan included sufficient measures to mitigate any concerns as to the trapping of fur bearing animals in the area;
8. Canfor's plan would deactivate all roads seasonally, to make them impassable, and on completion of harvesting, would deactivate the roads permanently.
9. Canfor's proposed harvesting activities would not infringe the petitioners' Treaty 8 rights of hunting, fishing and trapping.

[38] There does not appear to be any statutory requirement for the giving of such reasons, either oral or written. The reasons are useful, however, because they record the factors the District Manager took into account in reaching his decision, and they lend an air of openness to the process he followed. On the other hand, the giving of reasons may suggest a more judicial or quasi-judicial process than is required by the legislative scheme.

v

The Decision of the Chambers Judge

[39] The Halfway River First Nation brought an application for judicial review, seeking to quash the decision of the District Manager to issue C.P.212. That application was brought pursuant to the *Judicial Review Procedure Act*, which provides remedies for administrative actions in excess of statutory powers. Whether this was the proper form of proceedings to bring is considered more fully below. On that application, Madam Justice Dorgan granted *certiorari* and quashed the decision of the District Manager, citing reasons related to the various issues involved, which are outlined below.

A. Fettering:

[40] The learned chambers judge held that the District Manager had fettered his discretion. She said at para.35:

[35] Notwithstanding these references which indicate a notion of weighing various interests, on the whole of the record I am satisfied that Lawson fettered his discretion by treating the government policy of not halting development as a given and by simply following the direction of the Minister of Forests not to halt development. This is particularly evident from p.4 of his Reasons for Decision which reads:

... in December 1995 the Minister of Forests advised both ourselves and the Halfway band that it is not the policy of the provincial government to halt resource development pending resolution of the Treaty Land Entitlement (TLE) claim and that we must honour legal obligations to both the Forest Industry as well as First Nations. This fact was again reiterated by Janna Kumi, Assistant Deputy Minister, Operations, upon her meeting with the Halfway Band in January 1996.

B. Bias

[41] The learned chambers judge held that there was no actual bias in the District Manager's decision, but that there was a reasonable apprehension of bias. She said at paras.48-9:

[48] However, a further statement by Lawson is of concern. In his letter to Chief Meticheah dated August 29, 1996 Lawson states:

"I must inform you that if the application is in order and abides by all ministry regulations and the **Forest Practices Code I**

have no compelling reasons not to approve their application."

This statement strongly suggests that Lawson had already concluded that there was no infringement of Treaty or Aboriginal Rights. His only remaining concerns about the application were with respect to compliance with MOF and **Code** requirements. He requests information on Aboriginal and Treaty Rights with respect to future Canfor activities but makes no reference to such rights vis-a-vis CP212. The only conclusion to be drawn from this letter is that Lawson had already decided that there was no infringement of Halfway's rights.

[49] As well, it should be noted that at paragraph 18 of the affidavit of David Menzies, he states:

Approval to proceed with harvesting in Blocks 1, 2, 4, 5, 17 and 19 was granted by the District Manager on September 13, 1996 (attached as Exhibit 8). The formal application letter was only sent after the Ministry of Forests confirmed that the application would be granted, consistent with the approval already granted for the Development Plan.

[emphasis added]

This evidence indicates that once the Development Plan was approved, all applications for cutting permits within it will likely be approved as well and is evidence which supports a finding of a reasonable apprehension of bias.

[42] She held that the petitioners had not waived their right to rely on the allegation of apprehended bias.

C. The District Manager's "Errors of Fact"

[43] The learned chambers judge held that it was patently

unreasonable for the District Manager to conclude that there was no infringement of the petitioner's hunting rights under Treaty 8. In reaching this conclusion, she said in part at paras. 63, 66 and 68:

[63] In the present case, it cannot be said that there was no evidence supporting Lawson's finding that Aboriginal and Treaty Rights would not be infringed. Lawson had the CHOA report and information provided by BCE staff regarding the impact of harvesting on the traditional activities of hunting, trapping and fishing.

. . .

[66] Given the limited evidence available to Lawson, the factual conclusions which he reached as to infringement of Treaty 8 or Aboriginal Rights is unreasonable. There was some evidence supporting his findings, however, Lawson had no information from Halfway. How can one reach any reasonable conclusion as to the impact on Halfway's rights without obtaining information from Halfway on their uses of the area in question? This problem was recognized in the CHOA report, which stated, at 33-34:

In summary, the Cultural Heritage (Ethnographic) Overview presented here provides a useful starting point for assessing the extent of the Halfway River First Nation's use of the Tuszah study area. It demonstrates the area was, and continues to be, utilized for hunting, fishing, trapping and plant collecting, and provides a ranking of the use potential for each of these activities. However, these data alone are not sufficient to understanding the issues surrounding infringement of Treaty and/or Aboriginal rights of the Halfway River Peoples. It is my opinion that additional cultural and ecological studies of the Tuszah study area are required before this issue can be adequately addressed.

. . .

However, as discussed above, there are numerous shortcomings with a study of this nature, from both a cultural and ecological perspective. In fact, I suggest that until more detailed information is obtained in both these areas, studies such as this will fail to adequately address the concerns and management needs of forest managers and First Nations.

. . . .

[68] Given the importance attached to Treaty and Aboriginal Rights, in the absence of significant information and in the face of assertions by Halfway as to their uses of CP212, it was patently unreasonable for Lawson to conclude that there was no infringement.

D. Notice

[44] The learned chambers judge held that the highest standard of fairness should apply in the circumstances of this case, and although the petitioners had some notice of Canfor's application for C.P.212, that notice was inadequate because the petitioners did not see Canfor's application in final form until after the Cutting Permit had been approved by the District Manager, and the petitioners had no specific notice that the District Manager would make his decision on 13 September, 1996 or on any other date. The history of the notice given to the petitioners is set out in para.73 of her reasons.

E. Infringement of Treaty 8 Right to Hunt

[45] The learned chambers judge held that there was a prima facie infringement of the petitioners Treaty 8 right to hunt, as recognized and affirmed by s.35(1) of the **Constitution Act, 1982** which provides:

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

[46] She held that infringement was to be determined in accordance with the test laid down in **R. v. Sparrow**, *supra*. She said in part at paras.91-93:

[91] Pursuant to Treaty 8 the Beaver First Nation (of which Halfway is a member) agreed to surrender "all their rights, titles and privileges whatsoever" to the Tusdzuh area. Treaty 8 appears to have extinguished any non-Treaty Aboriginal Rights Halfway may have had prior to entering into the Treaty.

See for example **Ontario (Attorney General) v. Bear Island Foundation**, [1991] 2 S.C.R. 570 at 575; 83 D.L.R. (4th) 381.

[92] In return for the surrender of land, the government agreed that the Natives would have the "right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered." In **R. v. Noel**, [1995] 4 C.N.L.R. 78 at 88 (N.W.T. Terr. Ct.), Halifax J. stated:

There is no doubt that Treaty No. 8 provided a right to fish, hunt and trap to persons covered under that Treaty.

[93] According to the Treaty, these rights were subject to "such regulations as may from time to time

be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.

[47] She held, citing *R. v. Badger*, *supra* (at para.101):

... that any interference with the right to hunt, fish or trap constitutes a *prima facie* infringement of Treaty 8 rights.

[48] She considered the availability to Canfor of other areas in which to log at para.108:

[108] While the onus is on the petitioners to establish infringement, it is worth noting that there is no persuasive evidence to suggest that other areas do not exist which Canfor could log in place of CP212 to avoid interfering with aboriginal rights.

She said at para.114:

[114] The MOF and Canfor argue that Halfway has the rest of the Tuzdzu area in which to enjoy the preferred means of exercising its rights. This again ignores the holistic perspective of Halfway. Their preferred means are to exercise their rights to hunt, trap and fish in an unspoiled wilderness in close proximity to their reserve lands. In that sense, the approval of CP 212 denies Halfway the preferred means of exercising its rights.

F. Justification of Infringement

[49] The learned chambers judge held that the Crown's infringement of the petitioners' Treaty 8 right to hunt was not justified because it had failed in its fiduciary duty to engage in adequate, reasonable consultation with the petitioners. She said, in part at paras. 140-142 and 158-159:

[140] In summary, then, the following meaningful opportunities to consult were provided:

- (a) Fourteen letters from the MOF to Halfway during 1995 and 1996 requesting information and/or a meeting or offering consultation.
- (b) Three meetings between Lawson and Halfway: on November 27/28, 1995; and February 2 and May 13, 1996.
- (c) Five telephone calls between the MOF and Halfway in 1995 and 1996.
- (d) An opportunity to provide feedback on the CHOA.

[141] The following reasonable opportunities to consult were denied to Halfway:

- (a) Halfway was not invited to attend the meeting between MOF and Canfor employees at which the cutting permit was approved.
- (b) The report "Potential Impacts to Fish & Wildlife Resources" was not provided to Halfway until August 26, 1996, despite that a draft copy was available January 4, 1996.
- (c) There was no real opportunity to participate in the CHOA.
- (d) Canfor's actual application for CP212 was not provided to Halfway until after the decision was made.

[142] While the MOF did make some efforts to inform itself, by requesting information from and

meetings with Halfway, I have concluded these measures were inadequate. Briefing notes prepared by the MOF indicate that there was inadequate information with respect to potential infringement of treaty and aboriginal rights.

. . .

[158] Finally, the present case is categorically different from **Ryan** in that in the present case the MOF failed to make all reasonable efforts to consult.

In **Ryan** Macdonald J. stated, at 10, "I accept the submission that the M.O.F. more than satisfied any duty to consult which is upon it." While Halfway may not have been entirely reasonable, the fact remains that the MOF did not meet its fiduciary obligations.

. . .

[159](1) Halfway has a treaty right to hunt, fish and trap in the Tuzdzuh area. There is some evidence to suggest that the harvesting in CP212 will infringe upon this right, and in my view this evidence establishes *prima facie* infringement. The MOF has failed to justify this infringement under the second stage of the **Sparrow** test. Of particular significance is the fact that the MOF did not adequately consult with Halfway prior to approving Canfor's CP212 application.

(2) The MOF owes a fiduciary duty to Halfway. As part of this duty, the MOF must consult with the Band prior to making decisions which may affect treaty or aboriginal rights. The MOF failed to make all reasonable efforts to consult with Halfway, and in particular failed to fully inform itself respecting aboriginal and treaty rights in the Tuzdzuh region and the impact the approval of CP212 would have on these rights. The MOF also failed to provide Halfway with information relevant to CP212 approval.

Issues

[50] The following issues are raised by this appeal:

1. Whether judicial review of the District Manager's decision to issue a cutting permit is a proper proceeding in which to consider the alleged infringement of treaty rights;
2. The standard of review to be applied by this Court in reviewing the chambers judge's decisions as to fettering, reasonable apprehension of bias, adequacy of notice, and opportunity to be heard;
3. Whether the chambers judge erred in deciding that the District Manager had fettered his discretion, that there was a reasonable apprehension of bias, or that there was inadequate notice, or opportunity to be heard;
4. Whether the chambers judge applied the correct standard of review to the District Manager's decision that treaty rights had not been infringed, and that the cutting permit should issue;
5. What is the true interpretation of Treaty 8, and the effect of s.35 of the *Constitution Act, 1982*, and then, whether the petitioner's right to hunt under the Treaty has been infringed; and
6. If there is an infringement of treaty rights, whether

that infringement is justified.

VII

Form of Proceedings

[51] Madam Justice Southin takes the position that this Court should not decide the question of treaty rights or infringement on an application for judicial review, and that an action properly constituted is necessary for that purpose. With respect I take a different view of that matter.

[52] Review of administrative decisions is traditionally challenged by way of judicial review: **Judicial Review Procedure Act**, R.S.B.C. 1996, c. 241, s.2(a). The Halfway River First Nation was a party in the consultation process contemplated under the **Forest Practices Code** and by Ministerial policy guidelines. It brought a petition for *certiorari*, seeking to quash the District Manager's decision. Such proceedings are usually decided on affidavit evidence.

[53] Where the issues raised on such an application are sufficiently complex, and are closely tied to questions of fact, a chambers judge has a discretion to order a trial of the proceedings. Under Supreme Court Rule 52(11)(d), "the court may order a trial of the proceeding, either generally or on an issue, and order pleadings to be filed, and may give directions

for the conduct of the trial and of pre-trial proceedings, and for the disposition of the application." The court's powers under this Rule can be invoked on the court's own motion or on an application of a party.

[54] Here we are told by counsel for the Minister that he took the position in the court below that the issue of Treaty rights and their breach had not been properly raised in the petition, and could not properly be decided on affidavit evidence, and without pleadings. The chambers judge does not mention these matters in her reasons, and it is impossible to tell how strenuously the point was argued. In any event, counsel for the Minister does not appear to have moved under Rule 52(11)(d) to have the proceedings converted into a trial.

[55] In considering whether to issue C.P.212, the District Manager must be taken to have been aware of his fiduciary duty to the petitioners, as an agent of the Crown, of the right the petitioners asserted under Treaty 8, and of the possibility that issuance of the permit might constitute an infringement of that right. Of necessity his decision included a ruling on legal and constitutional rights. On these matters his decision is owed no deference by the courts, and is to be judged on the standard of correctness.

[56] Those matters are nonetheless capable of disposition on affidavit evidence on an application for judicial review. And the District Manager and the forest industry would be in an impossible situation if, before deciding to issue a cutting permit, the applicant was required to commence an action by writ for resolution of any dispute over treaty rights, and the District Manager was bound to wait for the disposition of such an action (and the appeals) before deciding to issue a permit.

[57] The learned chambers judge had a discretion under Rule 52(11)(d) whether to have the proceedings converted into a trial, and I am not at all persuaded that she erred in the exercise of that discretion by proceeding as she did. Counsel for the minister did not make a motion under the Rule, and it would be unfair to all concerned to refuse now to decide the treaty issues dealt with by the chambers judge, and which the District Manager could not avoid confronting.

VIII

Standard of Review to be Applied to the Decision of the Chambers Judge Concerning Fettering, Bias, Notice and Hearing

[58] The learned chambers judge held that the process followed

by the District Manager offended the rules of procedural fairness in four respects: he fettered his decision by applying government policy; he pre-judged the merits of issuance of the cutting permit before hearing from the petitioners; he failed to give the petitioners adequate notice of his intention to decide whether to issue C.P.212; and he failed to provide an opportunity to be heard. These are all matters of procedural fairness, and do not go to the substance or merits of the District Manager's decision. There is, therefore, no element of curial deference owed to that decision by either the chambers judge or by this Court.

[59] The chambers judge's decisions on fettering, apprehension of bias, inadequacy of notice and opportunity to be heard are all questions of mixed law and fact. To the extent that her decision involves questions of fact decided on affidavit and other documentary evidence, this Court would intervene only if the decision was clearly wrong, that is to say not reasonably supported by the evidence: see *Placer Development Limited v. Skyline Explorations Limited* (1985), 67 B.C.L.R. 367 (C.A.) at 389; *Colliers Macaulay Nichols Inc. v. Clark*, [1989] B.C.J. No. 2445 (C.A.) at para.13; *Orangeville Raceway Limited v. Wood Gundy Inc.* (1995), 6 B.C.L.R. (3d) 391 (C.A.) at 400; and *Rootman Estate v. British Columbia (Public Trustee)*, [1998] B.C.J. No. 2823 (C.A.) at para.26.

[60] To the extent that her decision involves questions of law this Court would, of course, intervene if it were shown that the judge misapprehended the law or applied the appropriate legal principles incorrectly.

IX

Whether the Chambers Judge Erred in Deciding Those Issues

A. Fettering

[61] The learned chambers judge held (para.35) that the District Manager fettered his discretion concerning issuance of the cutting permit by "treating the government policy of not halting development as a given and by simply following the direction of the Minister of Forests not to halt development."

[62] The general rule concerning fettering is set out in **Maple Lodge Farms Ltd. v. Canada**, [1982] 2 S.C.R. 2, which holds that decision makers cannot limit the exercise of the discretion imposed upon them by adopting a policy, and then refusing to consider other factors that are legally relevant. Other cases to the same effect are **Davidson v. Maple Ridge (District)** (1991), 60 B.C.L.R. (2d) 24 (C.A.) and **T(C) v. Langley School District No. 35** (1985), 65 B.C.L.R. 197 (C.A.). Government

agencies and administrative bodies must, of necessity, adopt policies to guide their operations. And valid guidelines and policies can be considered in the exercise of a discretion, provided that the decision maker puts his or her mind to the specific circumstances of the case rather than blindly following the policy: see *Maple Lodge Farm*, *supra* at pages 6-8 and *Clare v. Thompson* (1983), 83 B.C.L.R. (2d) 263 (C.A.). It appears to me, with respect, that the learned chambers judge applied correct legal principles in her consideration of whether the District Manager fettered his discretion.

[63] The question then is whether she applied those principles correctly in the circumstances of this case. In my respectful view she did not. Government policy, as expressed by the District Manager, was to not halt resource development pending resolution of the TLECs. In other words, such claims would not be treated as an automatic bar to the issuance of cutting permits. Even though such a claim was pending in respect of a potential logging area, the policy was to consider the application for a cutting permit in accordance with the requirements of the regulations, *Act* and *Code*.

[64] A TLEC does not, on its face, require the cessation of all logging in the subject area. Such a claim does not impose any obligation on the District Manager, or on the Ministry

generally. The claim is simply one factor for the District Manager to consider with respect to the land's significance as a traditional hunting area, and to potential land use.

[65] The government policy in respect of TLECs does not preclude a District Manager from considering aboriginal hunting rights, and the effect that logging might have upon them. It is apparent in this case that the District Manager gave a full consideration to the information before him concerning those hunting rights. Cognisance by him of the government policy on TLECs did not give rise to the automatic issuance of a cutting permit without further consideration of other matters relevant to that decision.

[66] I am therefore of the view that the learned chambers judge erred in applying the legal principles concerning fettering to the facts of this case. While the existence of TLEC was a factor for the District Manager to consider, the government policy of not halting resource development while such a claim was pending did not limit or impair the District Manager's discretion, or its exercise. Misapplication of the appropriate legal principle is an error of law that this Court can and should correct.

B. Reasonable Apprehension of Bias

[67] The basic legal test on this issue is whether reasonable right-minded persons informed of the relevant facts, and looking at the matter realistically and practically, would consider that the District Manager had prejudged the question of whether to issue C.P.212: see *Committee for Justice and Liberty v. Canada (National Energy Board)* (1978), 1 S.C.R. 369 at 394-95, and *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)* (1992), 1 S.C.R. 623.

[68] The matter is a little more complex in this case where the District Manager's role includes both an investigative and an adjudicative function. The expression of a tentative or preliminary opinion on what the evidence shows in the investigative stage does not necessarily amount to a reasonable apprehension of bias: see *Emcom Services Inc. v. British Columbia (Council of Human Rights)* (1991), 49 Admin.L.R. 220 (B.C.S.C.) and *United Metallurgists of America Local 4589 v. Bombardier-MLW Limited*, [1980] 1 S.C.R. 905.

[69] In a case such as this the District Manager has a continuing and progressive role to play in making the numerous enquiries required of him by the *Regulations, Act* and *Code*, and in communicating with the applicant and others who have a stake

in his decision. It is to be expected that his conclusions would develop over time as more information was obtained, and as interested parties made their positions known. His "decision letter" was written to Chief Metecheah on 3 October, 1996, but it is clear that the components of that decision were the result of previous investigations and deliberations.

[70] In these circumstances I think one should be very cautious about inferring prejudice or the appearance of bias to the District Manager.

[71] The learned chambers judge's conclusion that there was a reasonable apprehension of bias is based primarily on the statement the District Manager made in his letter of 29 August, 1996 to Chief Metecheah, that if the appellants' application complied with the Ministry's regulations and the **Code** he had "no compelling reasons" not to approve their application.

[72] Applying the legal test set out above, and having regard to the nature of the District Manager's investigative and adjudicative roles, it would, in my view, be unreasonable to infer from that letter that the District Manager had closed his mind to anything further the petitioners might wish to put forward. A fair reading of his statement is that he had formed a tentative view on the information then available that the

permit should issue, but that the final decision had not been made, and he was prepared to refuse issuance of the permit if there was a good reason to do so.

[73] Nor in my view does the statement from David Menzies' affidavit, quoted at para.49 of the chambers judge's reasons, support an inference of bias reasonably apprehended.

Administrative procedures followed by the District Manager in confirming approval of the appellants' application, before the formal application was received, are consistent with the continuing nature of the District Manager's contact and dialogue with the applicants.

[74] It may be that the District Manager held a mistaken view of the law concerning the Crown's duty to satisfy itself that there was no infringement of the aboriginal right to hunt, and that the onus did not lie upon the petitioners to assert and prove that right or infringement. But in my view a misapprehension of the law by an administrative officer does not necessarily demonstrate a failure by him to keep an open mind, or an unwillingness to decide the issues on the merits as he saw them. Even the most open minds may sometimes fall into legal error.

[75] In my respectful view, the learned chambers judge erred in

holding that the District Manager's conduct gave rise to a reasonable apprehension of bias.

C. Adequacy of Notice

[76] The learned chambers judge held that the petitioners did not have adequate notice that the District Manager would make his decision on 13 September, 1996 (para.78 of her reasons). With respect, I think the learned chambers judge more closely equated the decision making process in this case with a purely adjudicative process than is warranted by the legislative scheme.

[77] As indicated above, this is not a case where a formal hearing on a fixed date was held or required. The District Manager's job required him to develop information over time, and it was properly within his role as an administrator to make tentative decisions as he went along, up to the time when he was finally satisfied that a cutting permit should or should not issue in accordance with the requirements of the **Regulations, Act** and **Code**.

[78] In para.73 of her reasons the learned chambers judge set out in detail the means by which the petitioners were made aware of Canfor's logging plans for the area covered by

C.P.212. The first notice, on the chambers judge's findings of fact, occurred in 1991. On 8 November, 1995 the District Manager sent the petitioner a copy of Canfor's application for C.P.212, and on 5 March, 1996 the District Manager wrote to the petitioners' lawyer to advise that "a decision regarding C.P.212 would be made within the next couple of weeks". In fact, the decision was not made for another six months.

[79] On 13 May, 1996 the District Manager provided the petitioners with a map of Canfor's proposed harvesting activities, including blocks in C.P.212. The map was colour-coded and clearly identified the cut blocks under consideration by the District Manager. The learned chambers judge described the meeting at which this map was presented to the petitioners as "the only true advance notice" of Canfor's plans, but she held it to be defective as notice because it did not give the date on which his decision would be made.

[80] In my respectful view the learned chambers judge was plainly wrong to conclude that adequate notice had not been given in this case. Only if it could be said that notice of a fixed date for decision was required by law could her conclusion be justified. For the reasons expressed above, notice of such a fixed date was not required either by the statute, or by the requirements of procedural fairness.

Imposing a requirement for such a fixed date would be inconsistent with the administrative regime under which the District Manager operated, and would unnecessarily restrict the flexibility that such a regime contemplates. The petitioners were well aware of Canfor's plans to log in the area covered by C.P.212 and had time to submit evidence and to make representations. The notice was adequate in the context of the legislative scheme, and the nature of the District Manager's duties.

D. The Right to be Heard

[81] The learned chambers judge dealt with this issue at paras. 69-72. She held that the District Manager had not met the high standards of fairness in ensuring that the petitioners had an effective opportunity to be heard. She said the right to be heard was very similar to the consultation requirement encompassed by the Ministry's fiduciary duty to the petitioners.

[82] Under the legislative scheme described above, there is no requirement for the District Manager to hold a formal "hearing", and in fact none was. However, the legislation and the **Regulations** do require consideration of First Nations' economic and cultural needs, and imply a positive duty on the

District Manager to consult and ascertain the petitioners' position, as part of an administrative process that is procedurally fair. As the District Manager did not do this it is my view that the learned chambers judge was correct in holding there to have been a breach of the duty of procedural fairness.

E. Conclusion on Administrative Law Issues

[83] In my respectful view, there was a failure to provide the petitioners an adequate opportunity to be heard. Otherwise, there was no lack of procedural fairness on any of the other grounds asserted by the petitioners, and found by the learned chambers judge.

X

The Standard of Review Applicable to the District Manager's Decision

[84] The learned chambers judge treated the District Manager's decision as to treaty rights, and breach of same, as a question of fact (see para.37 above, quoting the chambers judge's reasons at paras. 63, 66 and 68). She appears to have concluded, or assumed, that it was within the statutory powers of the District Manager to decide such matters, and she

therefore asked whether his decisions on those matters were patently unreasonable. She concluded that the District Manager's decisions on those matters were patently unreasonable (see her conclusion No. 5 at para.158), and she therefore held that she was justified in substituting her view on those matters for those of the District Manager.

[85] With respect, interpreting the treaty, deciding on the scope and interplay of the rights granted by it to both the petitioners and the Crown, and determining whether the petitioners' rights under the treaty were infringed, are all questions of law, although the last question may be one of mixed fact and law. Even though he has a fiduciary duty, the District Manager had no special expertise in deciding any of these issues, and as I understand the legislation, he has no authority to decide questions of general law such as these. To the extent that his decisions involve legal components, in the absence of any preclusive clause, they are reviewable on the standard of correctness: see *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557 at para.63; *Zurich Insurance Company v. Ontario (Human Rights Commission)*, [1992] 2 S.C.R. 321; *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554; and *University of British Columbia v. Berg*, [1993] 2 S.C.R. 353.

[86] Moreover, as an agent of the Crown, bound by a fiduciary duty to the petitioners arising from the treaty in issue, the District Manager could not be seen as an impartial arbitrator in resolving issues arising under that treaty. To accord his decision on such questions the deference afforded by the "patently unreasonable" standard would, in effect, allow him to be the judge in his own cause.

[87] As I consider these issues, characterized in the chambers judge's reasons as aboriginal issues, to be questions of law, the test applied to the District Manager's decision is that of correctness. Similarly, of course, the standard of correctness applies to her conclusions. In other words, the question for us is whether she erred in law.

XI

Treaty 8

A. Principles of Treaty Interpretation

[88] The principles applicable in the interpretation of treaties between the Crown and First Nations have been discussed and expounded in a number of cases: see **Calder v. Attorney General of British Columbia**, [1973] S.C.R. 313 at p.404; **R. v. Sutherland**, [1980] 2 S.C.R. 451; **R. v. Taylor**

(1981), 34 O.R. (2d) 360 (Ont.C.A.); *R. v. Bartleman* (1984), 55 B.C.L.R. 78 (C.A.); *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29; *Simon v. R.*, [1985] 2 S.C.R. 387; *R. v. Horse*, *supra* *Saanichton Marina Ltd. et al v. Tsawout Indian Band* (1989), 36 B.C.L.R. (2d) 79 (C.A.); *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85; *R. v. Sioui*, [1990] 1 S.C.R. 1025; *R. v. Sparrow*, *supra*; and *R. v. Badger*, *supra*.

[89] In *Saanichton v. Tsawout*, *supra*, Mr. Justice Hinkson conveniently summarized the then principles of interpretation at pp. 84-85:

(b) Interpretation of Indian treaties - general principles

In approaching the interpretation of Indian treaties the courts in Canada have developed certain principles which have been enunciated as follows:

- (a) The treaty should be given a fair, large and liberal construction in favour of the Indians;
- (b) Treaties must be construed not according to the technical meaning of their words, but in the sense that they would naturally be understood by the Indians;
- (c) As the Honour of the Crown is always involved, no appearance of "sharp dealing" should be sanctioned;
- (d) Any ambiguity in wording should be interpreted as against the drafters and should not be interpreted to the prejudice of the Indians if another construction is reasonably possible;
- (e) Evidence by conduct or otherwise as to how the parties understood the treaty is of

assistance in giving it content.

[90] Paragraph (d) in that list should now be modified to include the statement of Mr. Justice Cory in *R. v. Badger*, *supra* at 794:

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.

[91] And to para.(e) one might add the following, from *R. v. Sioui*, *supra*, at 1035, per Lamer, J. (as he then was):

In particular, [Courts] must take into account the historical context and perception each party might have as to the nature of the undertaking contained in the document under consideration

[92] Those are the principles which I consider applicable in the circumstances of this case.

B. The Parties' Positions

1. The Appellants' Position

[93] The positions of the Ministry of Forests and of Canfor are very similar, if not identical, and I consider them together.

[94] Both the Minister and Canfor say that the Indian right to hunt preserved in paragraph 9 of Treaty 8 (quoted above at para.2 of these reasons) is expressly made subject to two independent rights of the Crown which are of equal status to the Indian's rights. Those two Crown rights are the government power to regulate hunting etc. and the government right to "require" or "take up" parts of the Treaty lands for, *inter alia*, "lumbering". The appellants say that the Crown's right to require or take up lands for one of the listed purposes limits or qualifies the petitioners' right to hunt. The appellants say the Crown's right to acquire or take up land is clearly expressed, and is not ambiguous.

[95] The appellants say that no extrinsic evidence is necessary or admissible to alter the terms of the treaty by adding to or subtracting from its express terms.

[96] The appellants say the granting of C.P.212 was an exercise by the Crown of its express right to require or take up land, and there is therefore no infringement of the petitioners' treaty right to hunt.

[97] The appellants say that the learned chambers judge erred when she held that any interference with the petitioners' right

to hunt was a breach of Treaty 8, and say further that she erred in basing her decision on the petitioners' "holistic perspective" and in holding that they had the right to exercise their "preferred means" of hunting in an "unspoiled wilderness". The Minister says such conclusions are embarrassing as they do not reflect the historical realities of what had occurred in the Tuzdzu (mining and oil and gas exploration) before the granting of C.P.212.

[98] The appellants say that s.35 of the **Constitution Act, 1982** gives the petitioners no better position than they held before 1982, because their right to hunt in the treaty lands was, and remains, a defeasible right subject to derogation by the Crown's exercise of its rights. The power to require and take up lands remains unimpaired by s.35.

[99] The appellants maintain that "taken up" includes designation of land by the Crown in a cutting permit, and that visible signs of occupation, or incompatible land use (see **R. v. Badger**, *supra*, at paragraphs 53, 54, and 66-68) are not necessary as indicia. The appellants say those considerations that are relevant where an Indian is charged with an offence as in **Badger**, are not relevant here where such an offence is not alleged, and the Crown is merely exercising its Treaty right.

[100] So the appellants say that as a result of the "geographical limitation" in Treaty 8 the Crown is entitled to take up Treaty lands for "settlement, mining, lumbering, or other purposes" without violating any promise made by the Crown to the Indians. As there has been no infringement of Indian treaty rights, no "justification" analysis is required.

2. The Petitioners' Position

[101] The petitioners say that the Crown's (and Canfor's) approach to Treaty 8 would give the Crown "the unlimited and unfettered right to take up any land or all lands as it sees fit and does not have to justify its decision in any way". It says this approach would allow the Crown to ignore the impact of such conduct on the rights of aboriginal signatories and would render meaningless the 1982 constitutionalization of Treaty rights. The Crown's approach, say the petitioners, is therefore unreasonable and manifestly wrong. To give the Treaty such an interpretation would not uphold the honour and integrity of the Crown.

[102] The petitioners say that the government power to require or take up land is not a separate right in itself. It is rather a limitation on the petitioners' right to hunt, etc. The petitioners say s.35 guaranteed the aboriginal rights to

hunt and fish. The Crown's right of defeasance is not mentioned in s.35, and is therefore not subject to a similar guarantee.

[103] Prior to 1982, before the right to hunt was guaranteed by s.35, the Crown could have exercised its right of defeasance, and so overridden or limited the right to hunt. But since the enactment of s.35 the Crown's right is not so unlimited. Now the Crown can only exercise its right after consultation with the Indians. The Treaty creates competing, or conflicting rights - the Indian right to hunt on the one hand, and the Crown's right to take up such hunting grounds for the listed purposes on the other. Such competing rights cannot be exercised in disregard of one another. If exercise of the Crown right will impair or infringe the aboriginal right, then such infringement must be justified on the analysis set out in *Sparrow*, *supra* (a non-Treaty case).

[104] The petitioners say the meaning of the Treaty proviso allowing the Crown to require or take up lands is ambiguous and can be read in more than one way. It should therefore be read in the context of the Crown's oral promises at the time of Treaty negotiations. Extrinsic evidence, including the representations made by the Crown's negotiators to the signatories in 1899, as well as in 1900, is admissible for the

purposes of construing the Treaty. The petitioners say the Treaty should be read in a broad, open fashion, and construed in a liberal way in favour of the Indians. All subsequent adhesions refer back to the Treaty made at Lesser Slave Lake with the Cree people in 1899, and the oral promises made there are essential to a true understanding of the Treaty made with the petitioners' forebears.

C. The Admissibility of Extrinsic Evidence

[105] In support of its argument against the admissibility of extrinsic evidence, The Ministry of Forests relies on **R. v. Horse**, *supra*, where Mr. Justice Estey, writing for the court, said at S.C.R. 201:

I have some reservations about the use of this material as an aid to interpreting the terms of Treaty No. 6. In my view the terms are not ambiguous. The normal rule with respect to interpretation of contractual documents is that extrinsic evidence is not to be used in the absence of ambiguity; nor can it be invoked where the result would be to alter the terms of a document by adding to or subtracting from the written agreement.

And further at p.203:

In my opinion there is no ambiguity which would bring in extraneous interpretative material. Nevertheless I am prepared to consider the Morris text, proffered by the appellants, as a useful guide to the interpretation of Treaty No. 6. At the very

least, the text as a whole enables one to view the treaty at issue here in its overall historical context.

[106] Those comments were made in a case involving Treaty 6, which has an identical "geographical limitation" to that contained in Treaty 8. Further, **Horse** was concerned with the interpretation of s.12 of the Saskatchewan Natural Resources Transfer Agreement, which required interpretation of the words "unoccupied Crown land" and "right of access", language not at issue in this case. Counsel for the Ministry also referred us to **R. v. Sioui**, *supra* and **R. v. Badger**, *supra*. In my respectful view, the conventional statement of the rule governing admissibility of extrinsic evidence enunciated in **R. v. Horse** has been somewhat relaxed by subsequent decisions. In **R. v. Sioui**, *supra*, after referring to **R. v. Horse** at p.1049, Mr. Justice Lamer (as he then was) said at p.1068:

The historical context, which has been used to demonstrate the existence of the treaty, may equally assist us in interpreting the extent of the rights contained in it. As MacKinnon J.A. said in **Taylor and Williams**, *supra*, at p.232:

Cases on Indian or aboriginal rights can never be determined in a vacuum. It is of importance to consider the history and oral traditions of the tribes concerned, and the surrounding circumstances at the time of the treaty, relied on by both parties, in determining the treaty's effect.

[107] And in *R. v. Badger*, *supra*, Mr. Justice Cory for the majority held at pp.798-9:

Third, the applicable interpretative principles must be borne in mind. Treaties and statutes relating to Indians should be liberally construed and any uncertainties, ambiguities or doubtful expressions should be resolved in favour of the Indians. In addition, when considering a treaty, a court must take into account the context in which the treaties were negotiated, concluded and committed to writing. The treaties, as written documents, recorded an agreement that had already been reached orally and they did not always record the full extent of the oral agreement: see Alexander Morris, The Treaties of Canada with the Indians of Manitoba and the North-West Territories (1880), at pp.338-42; *Sioui*, *supra*, at p.1068; Report of the Aboriginal Justice Inquiry of Manitoba (1991); Jean Fiesen, Grant me Wherewith to Make my Living (1985). The treaties were drafted in English by representatives of the Canadian government who, it should be assumed, were familiar with common law doctrines. Yet, the treaties were not translated in written form into the languages (here Cree and Dene) of the various Indian nations who were signatories. Even if they had been, it is unlikely that the Indians, who had a history of communicating only orally, would have understood them any differently. As a result, it is well settled that the words in the treaty must not be interpreted in their strict technical sense nor subjected to rigid modern rules of construction. Rather, they must be interpreted in the sense that they would naturally have been understood by the Indians at the time of the signing. This applies, as well, to those words in a treaty which impose a limitation on the right which has been granted. See *Nowegijick*, *supra*, at p.36; *Sioui*, *supra*, at pp. 1035-36 and 1044; *Sparrow*, *supra*, at p.1107; and *Mitchell*, *supra*, where La Forest J. noted the significant difference that exists between the interpretation of treaties and statutes which pertain to Indians.

[108] I observe in passing that *R. v. Badger*, like *R. v. Horse* also involved interpretation of s.12 of the Natural

Resources Transfer Agreement, 1930. But I understand the ruling concerning the admissibility of extrinsic evidence to be equally applicable in a case such as this one, where that agreement is not in issue.

[109] In this case, the learned chambers judge held that extrinsic evidence was admissible to explain the "context" in which the Treaty was signed (at paras. 96-98 of her reasons). In my respectful view in so doing she did not err in principle.

The passage quoted above from the judgment of Mr. Justice Cory in *Badger* at pp.798-9 is particularly apt in this case. The Treaty, written in English, purports to reflect the mutual understanding of the Crown and all aboriginal signatories. The understanding of the aboriginal peoples cannot be deduced from the language of the Treaty alone, because its meaning to the aboriginal signatories could only have been expressed to them orally by interpretation into their languages, and by whatever oral explanations were necessary to ensure their understanding.

D. What Extrinsic Evidence is Admissible

[110] The Crown says, without admitting any ambiguity in the Treaty, that even if extrinsic evidence is admissible for the purpose of giving historical context, evidence of the Commissioner's Report on negotiations in 1899 is not admissible

in this case, because there is no evidence that what was said by the government negotiators at Lesser Slave Lake, and elsewhere in 1899, was also said at Fort St. John in 1900, when the Beaver people signed. In particular, the Crown says that the passage of the Commissioner's Report referred to by Mr. Justice Cory in *Badger*, and by the learned chambers judge in this case, is not evidence of what was said to the Beaver people at Fort St. John. In the Crown's submission, only the report of the Commissioners made in 1900 is admissible.

[111] What the Commissioners report of 1889 said, as quoted in part by the learned chambers judge at para.98 of her reasons, is this:

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 ...

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.

[112] In my respectful view, the position of the Crown on this issue is not tenable. The adhesion signed by the representatives of the Beaver people at Fort St. John in 1900 contains this:

The Beaver Indians of the Upper Peace River and the country thereabouts, having met at Fort St. John, on this thirtieth day of May, in this present year 1900, Her Majesty's Commissioner, James Ansdell Macrae, Esquire, and having had explained to them the terms of the treaty unto which the Chief and Headmen of the Indians of Lesser Slave Lake and adjacent country set their hands on the twenty-first day of June, in the year 1899, do join in the cession made by the said Treaty, and agree to adhere to the terms thereof in consideration of the undertakings made therein.

(my emphasis)

[113] The terms of the Treaty signed by the Indians at Lesser Slave Lake had been explained to them orally, as indicated in the Commissioner's report in 1899, and it is therefore, in my view, a reasonable inference from the terms of the Beavers' adhesion in 1900 that the terms of the Treaty were explained to them in similar, if not identical, terms.

[114] Moreover, it would not be consistent with the honour and integrity of the Crown to accept that the Treaty was interpreted and explained to the Indians at Lesser Slave Lake

in one way, but interpreted and explained to the Beaver at Fort St. John in another less favourable and more limited way. To accept the proposition put forward by the Ministry would be to acknowledge that the same Treaty language is to be given different meanings in respect of different signatories. Only the clearest evidence could persuade me to such a conclusion, and such evidence is not present in this case.

[115] The Ministry of Forests further objects to the admission of the affidavit evidence of Father Gabriel Breynat, an interpreter present at the signing of Treaty 8 in 1899 at Fort Chippewan, and Fond du Lac. This affidavit was sworn in 1937 at Ottawa, Ontario. The Ministry says the document is irrelevant, and in addition has not been properly proven as an ancient document.

[116] The objection as to relevance is similar to the Crown's objection to the Commissioner's Report of 1899, as relating to events at a different time and place, and with a different Indian people. I would not give effect to the objection based on relevance for the reasons expressed above.

[117] Turning to the question of proof, the general rule in Canada governing the admissibility of ancient documents (a document more than thirty years old) is that any document

"which is produced from proper custody, is presumed in the absence of circumstances of suspicion, to have been duly signed, sealed, attested, delivered, or published according to its purport": Sopinka, Lederman and Bryant, The Law of Evidence in Canada, (Toronto: Butterworths, 1992) at 955. If there are suspicious circumstances surrounding the origins of the document, the court will either require proof of the execution of it as being in a similar manner as the execution of a similar document of a more recent date. Further, documents are considered to have been in "proper custody" when they have been kept by someone in a place where the documents might reasonably and naturally be expected to be found:

Sopinka et al, *supra* at 956, citing ***Doe d. Jacobs v. Phillips*** (1845), 8 Q.B. 158, 115 E.R. 835, and ***Thompson v. Bennett*** (1872), 22 U.C.C.P. 393 (C.A.).

[118] The affidavit of Father Breynat appears on its face to have been executed in a manner consistent with the execution of modern affidavits. The copy produced is not entitled in any particular cause or matter, and one cannot tell from the document itself the purpose for which it was sworn. I would not say that this gives rise to suspicions concerning its origins, but rather that there is an unanswered question as to why it was sworn.

[119] The affidavit of Father Breynat was adduced in these proceedings as an exhibit to the affidavit of Michael Pflueger. He is Alberta counsel representing the Halfway River First Nation in its Treaty Land Entitlement Claim. His affidavit does not disclose in whose custody Father Breynat's affidavit has been kept. There is a notation at the top of page 1 of Father Breynat's affidavit, clearly not part of the original, which says "Anthropology UA", which I take to be a reference to the Anthropology Department at the University of Alberta. However, there is nothing to indicate whether the University was the custodian of the document. Mr. Pflueger deposes that the affidavit of Father Breynat is part of "the standard treaty package that is submitted with Treaty Land Entitlement Claims".

[120] On the evidence as it stands, I do not think there is any indication of suspicious circumstances surrounding the document's origins. However, I think the evidence falls short of proving that the document was produced from "proper custody". Wigmore, Evidence in Trials at Common Law vol. 7 (Boston: Middlebound & Company, 1978) explains why evidence as to custody of such a document is important:

A forger usually cannot secure the placing of a document in such custody; and hence the naturalness of its custody, being relevant circumstantially, is required in combination with the document's age.

I think therefore that Father Breynat's affidavit is inadmissible as not having been properly proven. The learned chambers judge did not refer to this affidavit, so she cannot be said to have made any error on that account.

E. R. v. Sparrow and its Application

[121] In *R. v. Sparrow*, *supra*, the Supreme Court of Canada considered the effect of s.35(1) of the *Constitution Act, 1982* on the status of aboriginal rights, and set out a framework for deciding whether aboriginal rights had been interfered with, and if so, whether such interference could be justified. In *Sparrow* a native fisher was charged with an offence under the *Fisheries Act*, R.S.C. 1970, CF-14. In his defence, he admitted the constituent elements of the charge, but argued that he was exercising an existing aboriginal right to fish, and that the statutory and regulatory restrictions imposed were inconsistent with s.35.

[122] The court held that the words in s.35 "existing aboriginal rights" must be interpreted flexibly, so as to permit their evolution over time, and that "an approach to the constitutional guarantee embodied in s.35(1) that would incorporate 'frozen rights' must be rejected." It held that the Crown had failed to discharge the onus of proving that the

aboriginal right to fish had been extinguished, and it held that the scope of the right to fish for food was not confined to mere subsistence, but included as well fishing for social and ceremonial purposes.

[123] The court also considered the meaning of the words "recognized and affirmed" in s.35. It held that a generous, liberal interpretation of those words was required. It held the relationship between government and aboriginal peoples was trustlike, rather than adversarial, and that the words "recognized and affirmed" incorporated a fiduciary relationship, and so imported some restraint on the exercise of sovereign power. Federal legislative powers continue to exist, but those powers "must be reconciled with the federal duty", and that reconciliation could best be achieved by requiring "justification" of any government regulation that infringed or denied aboriginal rights. Section 35 was therefore "a strong check on legislative power". The court emphasized the importance of "context" and the "case by case approach to s.35(1)".

[124] The court then set out the test for *prima facie* interference with an existing aboriginal right. First, does the impugned legislation have the effect of interfering with an existing aboriginal right, having regard for the character or

incidence of the right in issue? Infringement may be found where the statutory limitations on the right are unreasonable, impose undue hardship, or deny the aboriginal the preferred means of exercising the right. The question is whether either the purpose or effect of the statutory regulation unnecessarily infringes the aboriginal interest.

[125] The court then considered the question, if a *prima facie* infringement be found, of how the Crown could show that the infringement was justified. The justification analysis involved asking whether there is a valid legislative objective. In the context of *Sparrow*, conservation and resource management were considered to be valid legislative objectives. The Crown has a heavy burden on the justification issue because its honour is at stake. Justification also requires considering whether the aboriginal interest at stake has been infringed, "as little as possible", whether in cases of expropriation fair compensation is available, and whether the aboriginal group has been consulted with respect to conservation, or at least informed of the proposed regulatory scheme. This list of factors was said not to be exhaustive.

[126] There are several features in the present case that differ from *Sparrow*, and the extent to which those differences may qualify or limit *Sparrow*'s application to this case will

have to be considered. First, there is the fact that the right to hunt in this case is based on Treaty 8. There was no treaty in *Sparrow*. Second, *Sparrow* is another case involving the allegation of an offence against a native person, in answer to which charge he has relied upon his aboriginal right. In this case there is no offence alleged. It is the provincial Crown which asserts a positive right under Treaty 8 to require or to take up land as the basis for its legislative scheme in respect of forestry. Third, in *Sparrow* the attack was made on the constitutional validity of federal legislation, the *Fisheries Act*. In this case the petitioners do not allege that any legislation is unconstitutional. The amended petition alleges that the decision of the District Manager in issuing C.P.212 was in breach of constitutional or administrative law duties. The attack is therefore on executive or administrative conduct rather than on any legislative enactment. Fourth, and finally, it is provincial legislation that authorizes the impugned conduct. In *Sparrow*, the attack was on federal legislation.

[127] The fact that a treaty underlies the aboriginal right to hunt in this case does not, to my mind, render inapplicable the s.35(1) analysis engaged in by the court in *Sparrow*. Section 35(1) gives constitutional status to both aboriginal and treaty rights. As indicated above, treaties with aboriginal peoples have always engaged the honour and integrity

of the Crown. The fiduciary duties of the Crown are, if anything, more obvious where it has reduced its solemn promises to writing.

[128] As noted above in discussing some of the other cases, there is in this case no allegation of an offence by an aboriginal person. The Crown asserts its positive rights under the Treaty as the basis for its forestry program. In *Sparrow*, the federal Crown relied on its enumerated powers in s.91 of the *Constitution Act, 1867* (the *BNA Act*) as the basis for its legislative and regulatory scheme in respect of fisheries. Here, even if one accepts that the Crown's right to require or take up land under Treaty 8 has achieved constitutional status under s.35(1) (a position which the petitioners stoutly reject), its authority to act could be no higher than the constitutional powers the federal Crown sought to exercise in *Sparrow*.

[129] In my view the fact that the Crown asserts its rights under Treaty 8 can place it in no better position vis-a-vis a competing or conflicting aboriginal treaty right than the position the Crown enjoys in exercising the powers granted in either s.91 or 92 of the *Constitution Act, 1867*.

[130] There is also a distinction between the alleged

unconstitutionality of legislation in *Sparrow*, and the attack here on the conduct of a government official; and the fact that the conduct was authorized under provincial legislation, whereas in *Sparrow* a federal statute was impugned. Here the petitioners do not challenge the validity of the provincial legislation concerning forestry. They seek to prohibit any activity in connection with C.P. 212 until the Ministry has fulfilled its "fiduciary and constitutional" duty to consult with the petitioners.

F. Interpretation of Treaty 8 and Infringement of the Right to Hunt

[131] The appellants say the learned chambers judge erred in holding, at para.101, that: "...That any interference with the right to hunt, fish or trap constitutes a *prima facie* infringement of Treaty 8 rights" and further erred in holding (at para.114) that the issue was to be considered from the petitioners' "holistic perspective", and that the approval of C.P.212 denied the petitioners "their preferred means... to hunt... in an unspoiled wilderness in close proximity to their reserve lands." The appellants assert the Crown's independent right under the Treaty to require or take up lands as described above in these reasons.

[132] I begin by observing that earlier cases involving the

interpretation of the proviso in Treaty 8 (e.g. *R. v. Badger*, *supra*) or similar language in other treaties (e.g. *R. v. Horse*, *supra*) are of limited assistance for two reasons. First, they are cases involving a charge against an Indian for breach of a provincial statute, in answer to which the accused relied upon the treaty right to hunt. Second, they are cases involving the interpretation of s.12 of the Natural Resources Transfer Agreement, in addition to the language of the treaty granting the right to hunt. The only case we were cited involving the interpretation of Treaty 8, and in which the Natural Resources Transfer Agreement was not a factor, is *R. v. Noel*, [1995] 4 C.N.L.R. 78, a decision of the Northwest Territories Territorial Court. As with the other cases, *Noel* was a charge against a native for breach of legislation in answer to which he relied on his Treaty 8 right to hunt.

[133] A second observation I would make is that prior to the enactment of s.35 of the *Constitution Act, 1982*, parliamentary sovereignty was not limited or restricted by treaties with aboriginal peoples, and the federal government had the power to vary or repeal treaty rights by act of parliament: see *R. v. Sikyea*, [1964] S.C.R. 642, and *Daniels v. White*, [1968] S.C.R. 517 where the *Migratory Birds Convention Act* was held to supersede Indian treaty rights.

[134] The third observation I would make is that the Indians' right to hunt granted to the signatories of Treaty 8, and the Crown's right to regulate, and to require or take up lands, cannot be given meaning without reference to one another. They are competing, or conflicting rights as has been recently affirmed in *R. v. Sundown*, [1999] S.C.J. No. 13 at paras. 42 and 43. The Indians' right to hunt is subject to the "geographical limitation", and the Crown's right to take up land cannot be read as absolute or unrestricted, for to do so (as even the Crown concedes) would render the right to hunt meaningless. Such a position cannot be asserted in conformity with the Crown's honour and integrity. So even before the enactment of s.35 in 1982, a balancing of the competing rights of the parties to the Treaty was necessary.

[135] Fourth, the enactment of s.35 in 1982 has improved the position of the petitioners. Their right to hunt, and other treaty rights, now have constitutional status. They are therefore protected by the supreme law of Canada, and those rights cannot be infringed or restricted other than in conformity with constitutional norms.

[136] I am therefore of the view that it is unrealistic to regard the Crown's right to take up land as a separate or independent right, rather than as a limitation or restriction

on the Indians' right to hunt. In either case, however, the Crown's right qualifies the Indians' rights and cannot therefore be exercised without affecting those rights.

[137] The effect of the decision to issue C.P.212, and the reasonableness of the District Manager's decision, must be viewed in the context of the competing rights created by Treaty 8, namely the Indians' right to hunt, and the government's right to take up land for lumbering. The petitioners' interest in the logging activity proposed in the Tusdzuh was known from the outset, and it was recognized by both appellants. In his letter of 3 October, 1996, the District Manager recognized the petitioners' assertion of a Treaty Land Entitlement Claim (TLEC) in the area where C.P.212 was located, as well as the effect logging might have on wildlife habitat and hunting activities. His view was that Canfor's proposed logging plan would have "minimal impact" on those matters, and that the plan included elements that would "mitigate" the impact of logging.

[138] In my view the District Manager effectively acknowledged that C.P.212 would affect the petitioners' hunting rights in some way. Given the fiduciary nature of the relationship between government and Indians, and the constitutional protection afforded by s.35 over the treaty right to hunt, it seems to me that the interference

contemplated by C.P.212 amounts to an infringement of the petitioners' right to hunt. The granting of C.P.212 was the *de facto* assertion of the government's right to take up land, a right that by its very nature limited or interfered with the right to hunt.

[139] I do not think the learned chambers judge erred in holding that any interference with the right to hunt was a *prima facie* infringement of the petitioners' Treaty 8 right to hunt.

[140] In my respectful view, the learned chambers judge overstated the petitioners' position in holding that they were entitled to exercise their "preferred means of hunting" by doing so in an "unspoiled wilderness". The Tuszuh was not unspoiled wilderness in 1996 when the District Manager approved C.P.212, nor was it unspoiled wilderness in 1982 when treaty rights received constitutional protection. This was a wilderness criss-crossed with seismic lines, where oil and gas exploration and mining had taken place.

[141] Nor do I think "preferred means" should be taken to refer to an area, or the nature of the area, where hunting or fishing rights might be exercised. Those words more correctly refer to the methods or modes of hunting or fishing employed.

[142] But despite these disagreements with the reasons of the learned chambers judge, I do not think she erred in concluding that approval of C.P.212 constituted a *prima facie* infringement of the Treaty 8 right to hunt because the proposed activity would limit or impair in some degree the exercise of that right.

[143] The appellants contend that in reaching that conclusion the learned chambers judge substituted her finding of fact for that of the District Manager. But the interpretation of Treaty rights, and a decision as to whether they have been breached, are not within any jurisdiction conferred on the District Manager by the **Forest Act**, **Forest Practices Code** or relevant regulations. They are questions of law and even the District Manager acknowledges that the proposed harvesting would have some effect on hunting. He said (at p.3 of the letter of 3 October, 1996) that:

...the proposed harvest areas would have minimal impacts on wildlife habitat suitability and capability for ungulates and black bear...

[144] I respectfully agree with the learned chambers judge that any interference with the right to hunt is a *prima facie* infringement of the Indians' treaty right as protected by s.35

of the *Constitution Act, 1982*.

XII

Justification

[145] The analysis required in deciding whether infringement of a treaty right is justified is referred to above briefly in paragraph 83. Although *Sparrow* was not a treaty case, in my view the same approach is warranted here as in cases of aboriginal rights, as both treaty and aboriginal rights have constitutional protection under s.35(1) of the *Constitution Act, 1982*.

[146] Justification requires consideration of the following questions (said in *Sparrow* not to be an exhaustive or exclusive list):

1. Whether the legislative or administrative objective is of sufficient importance to warrant infringement;
2. Whether the legislative or administrative conduct infringes the treaty right as little as possible;
3. Whether the effects of infringement outweigh the benefits derived from the government action; and
4. Whether adequate meaningful consultation has taken place.

[147] Overriding all these issues is whether the honour and integrity of the Crown has been upheld in its treatment of the petitioners' rights.

[148] I will consider those issues in turn.

A. Importance of the Legislative Objective

[149] The learned chambers judge does not appear to have addressed this question, nor does the petitioner appear to have led any evidence to suggest that the objectives of the **Forest Act** and **Code** are not of sufficient importance to warrant infringement of the petitioners right to hunt.

[150] It would, in my view, be unduly limited, and therefore wrong, to consider the objective in issuing a cutting permit only from the perspective of Canfor's presumed goal to have a productive forest business with attendant economic benefits, or from the perspective of the Provincial Government to have a viable forest industry and a vibrant Provincial economy. The objectives of the forestry legislation go far beyond economics. The preamble to the **Code** (see para.28 above) refers to British Columbians' desire for sustainable use of the forests they hold in trust for future generations, and to the varied and sometimes competing objectives encompassed within

the words "sustainable use".

[151] In *Sparrow* the legislative objective was found to be conservation of the fishery, and the Court held that to be a sufficiently important objective to warrant infringement of the aboriginal right to fish for food. Viewing the legislative scheme in respect of forestry as a whole, and by a parity of reasoning with *Sparrow*, in my view the legislative objectives of the *Forest Act* and *Code* are sufficiently important to warrant infringement of the petitioners' treaty right to hunt in the affected area. Those objectives include conservation, and the economic and cultural needs of all peoples and communities in the Province.

B. Minimal Impairment

[152] As with the first issue, the learned chambers judge does not appear to have addressed directly the question of minimal infringement. When dealing with the issue of infringement of the right to hunt, she did say (at para.108) that "there is no persuasive evidence to suggest that other areas do not exist which Canfor could log in place of C.P.212 to avoid interfering with aboriginal rights".

[153] But the learned chambers judge stopped short of

saying that minimal interference means no interference, and correctly so, for the law does not impose such a stringent standard. In *R. v. Nikal*, [1996] 1 S.C.R. 1013 at 1065, the Court held that "[s]o long as the infringement was one which in the context of the circumstances presented could reasonably be considered to be as minimal as possible then it will meet the test".

[154] The onus for showing minimal impairment rests on the Crown. See *Semiahmoo Indian Band v. Canada* (1997), 148 D.L.R. (4th) 523, [1998] 1 C.N.L.R. 250 at 268 (F.C.A.).

[155] In this context, the findings of the District Manager are significant. He found (see para.32 above) that Canfor's proposed operations would have minimal impacts on wildlife habitat suitability and capability for moose, deer and bear, that there would be minimal to no impact on fish habitat or fishing activities, and that the proposed harvesting plan included sufficient measures to mitigate any concerns as to the trapping of fur bearing animals in the area.

[156] In my respectful view, these findings, which are within the scope of the District Manager's authority to make, are sufficient to meet the tests for minimal impairment or infringement of the right to hunt.

C. Whether the Effects of Infringement Outweigh the Benefits to be Derived from the Government Action

[157] Again, this issue was not addressed by the chambers judge. Given the minimal effects on hunting that the proposed logging would have, as found by the District Manager, and in the absence of any evidence to the contrary, it is in my view a fair inference that the benefits to be derived from implementation of the legislative scheme, and the issuance of cutting permits in accordance with its requirements, would outweigh any detriment to the petitioners caused by the infringement of the right to hunt.

D. Adequate Meaningful Consultation

[158] The learned chambers judge found that there had been inadequate consultation with the petitioners, and it is upon this ground that she found the Crown had failed in its attempts to justify the infringement of the petitioners' right to hunt.

[159] It is perhaps worth mentioning here the difference between adequate notice as a requirement of procedural fairness (considered above at paras.66-70) and adequate consultation, which is a substantive requirement under the test for justification. The fact that adequate notice of an intended

decision may have been given, does not mean that the requirement for adequate consultation has also been met.

[160] The Crown's duty to consult imposes on it a positive obligation to reasonably ensure that aboriginal peoples are provided with all necessary information in a timely way so that they have an opportunity to express their interests and concerns, and to ensure that their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action: see *R. v. Sampson* (1995), 16 B.C.L.R. (3d) 226 at 251 (C.A.); *R. v. Noel*, [1995] 4 C.N.L.R. 78 (Y.T.T.C.) at 94-95; *R. v. Jack* (1995), 16 B.C.L.R. (3d) 201 at 222-223 (C.A.); *Eastmain Band v. Robinson* (1992), 99 D.L.R. (4th) 16 at 27 (F.C.A.); and *R. v. Nikal*, *supra*.

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

[162] The chambers judge's findings as to what steps were taken by way of consultation are matters of fact that cannot be impugned unless there is no evidence to support them. In my view there is such evidence and we must accept the facts as found by her.

[163] It remains to consider the adequacy or inadequacy of the Crown's efforts in that behalf.

[164] The learned chambers judge found (at para.141) that:

The following reasonable opportunities to consult were denied to Halfway:

- (a) Halfway was not invited to attend the meeting between MOF and Canfor employees at which the cutting permit was approved.
- (b) The report "Potential Impacts to Fish & Wildlife Resources" was not provided to Halfway until August 26, 1996, despite that a draft copy was available January 4, 1996.
- (c) There was no real opportunity to participate in the CHOA.
- (d) Canfor's actual application for CP212 was not provided to Halfway until after the decision was made.

[165] These findings, particularly (b) and (c) support the conclusion that the Crown did not meet the first and second parts of the consultation test referred to, namely to provide

in a timely way information the aboriginal group would need in order to inform itself on the effects of the proposed action, and to ensure that the aboriginal group had an opportunity to express their interests and concerns.

[166] I respectfully agree with the learned chambers judge that given the positive duty to inform resting on the Crown, it is no answer for it to say that the petitioners did not take affirmative steps in their own interests to be informed, conduct that the learned chambers judge described as possibly "not ... entirely reasonable".

[167] As laid down in the cases on justification, the Crown must satisfy all aspects of the test if it is to succeed. Thus, even though there was a sufficiently important legislative objective, the petitioners rights were infringed as little as possible, and the effects of the infringement are outweighed by the benefits to be derived from the government's conduct, justification of the infringement has not been established because the Crown failed in its duty to consult. It would be inconsistent with the honour and integrity of the Crown to find justification where the Crown has not met that duty.

Remedy

[168] The learned chambers judge granted "an order quashing the decision made September 13, 1996 which approved the application for CP.212".

[169] I would dismiss the appeal from that order for the reasons given above.

"The Honourable Mr. Justice Finch"

Reasons for Judgment of the Honourable Madam Justice Huddart:

[170] My approach to the issues on this appeal varies somewhat from those of my colleagues, whose reasons I have had the opportunity to read in draft. While I agree entirely with Mr. Justice Finch with regard to the administrative law issues, like Madam Justice Southin I part company with him on his application of the principles from *Sparrow, supra*, to the circumstances of this case.

[171] The larger question may be whether the province's forest management scheme permits the accommodation of treaty and aboriginal rights with the perceived rights of licensees. However, the constitutionality of the legislative scheme governing the management of the province's forests is not in issue on this appeal. So we must accept, for the purposes of

our analysis in this case, that the legislature and executive have provided an acceptable method of "recognizing and affirming" treaty and aboriginal rights of first nations in making the decisions required by that management scheme. The scheme obviously contemplates situations where shared use would be made of the territory in question. Shared use was also envisaged by the treaty makers on both sides of Treaty 8. That is evident from the evidence in this case and from the discussion in *Badger, supra*, about the same Treaty 8. Thus accepting the adequacy of the legislative scheme to accommodate treaty and aboriginal rights is not necessarily offensive to the interests of the Halfway River First Nation.

[172] I agree with Mr. Justice Finch that the District Manager's decision must be reviewed "in the context of the competing rights created by Treaty 8". On the facts as the District Manager found them, however, this is not a case of "visible incompatible uses" such as would give rise to the "geographical limitation" on the right to hunt as Cory J. discussed it in *Badger, supra*.

[173] I do not think the District Manager for a moment thought he was "taking up" or "requiring" any part of the Halfway traditional hunting grounds so as to exclude Halfway's right to hunt or to extinguish the hunting right over a

particular area, whatever the Crown may now assert in support of his decision to issue a cutting permit. At most the Crown can be seen as allowing the temporary use of some land for a specific purpose, compatible with the continued long-term use of the land for Halfway's traditional hunting activities. The Crown was asserting a shared use, not a taking up of land for an incompatible use. There was evidence before the District Manager to support a finding that the treaty right to hunt and Canfor's tree harvesting were compatible uses. That finding must underpin his conclusion that CP212 would not infringe the treaty right to hunt.

[174] Nor do I agree with Canfor's argument that the test formulated by Cory J. in *Badger* is not applicable to a lumbering use. Justice Cory is clear that, "whether or not land has been taken up or occupied is a question of fact that must be resolved on a case-by-case basis" i.e. whether a proposed use is incompatible with the treaty right is a question of fact. The same can be said of "required or taken up ... for the purpose of ... lumbering", although I would compare lumbering more with the wilderness park use in *R. v. Sioui* [1990] 1 S.C.R. 1025 and *R. v. Sundown* [1999] S.C.J. No. 13, than with settlement, or the use for a game preserve in *Rex v. Smith* (1935), 2 W.W.R. 433 (Sask. C.A.) or a public road corridor in *R. v. Mousseau* [1980] 2 S.C.R. 89.

[175] The District Manager's task was to allocate the use of the land in the Timber Supply Area among competing, perhaps conflicting, but ultimately compatible uses among which the land could be shared; not unlike the sharing of herring spawn in *R. v. Gladstone* [1996] 2 S.C.R. 723.

[176] Nevertheless, a shared use decision may be scrutinized to ensure compliance with the various obligations on the District Manager, including his obligation to "act constitutionally", as I recall Crown counsel putting it in oral argument. Counsel agreed *Sparrow* provided the guidelines for that scrutinization on judicial review if a treaty right was engaged and I will expand further on that analysis below.

[177] Just as the impact of a statute or regulation may be scrutinized to ensure recognition and affirmation of treaty rights of aboriginal peoples, so may the impact of a decision made under such a statute or regulation by an employee of the Crown. The District Manager can no more follow a provision of a statute, regulation, or policy of the Ministry of Forestry in such a way as to offend the Constitution than he could to offend the *Criminal Code* or the *Offence Act*.

[178] I share Mr. Justice Finch's view that the District Manager was under a positive obligation to the Halfway River First Nation to recognize and affirm its treaty right to hunt in determining whether to grant Cutting Permit 212 to Canfor. This constitutional obligation required him to interpret the **Forest Act** and the **Forest Practices Code** so that he might apply government forest policy with respect for Halfway's rights. Moreover, the District Manager was also required to determine the nature and extent of the treaty right to hunt so as to honour the Crown's fiduciary obligation to the first nation: **Delgamuukw v. B.C.** [1997] 3 S.C.R. 1010 at 1112-1113 per Lamer C.J.C.; and see the discussion by Williams C.J.S.C. in **Cheslatta Carrier Nation v. B.C.** (1998), 53 B.C.L.R. 1 at 14-15.

[179] Mr. Justice Finch points out that the District Manager's failure to consult adequately precluded justification under the second stage of the **Sparrow** analysis of the infringement of the Halfway treaty right to hunt he considered was constituted by CP212. In my view this deficiency in the decision-making process is a breach of the Crown's fiduciary responsibilities that makes this Court's application of the **Sparrow** analysis premature.

[180] Because only the first nation will have information

about the scope of their use of the land, and of the importance of the use of the land to their culture and identity, if the **Sparrow** guidelines are to organize the review of an administrative decision it makes good sense to require the first nation to establish the scope of the right at the first opportunity, to the decision-maker himself during the consultation he is required to undertake, so that he might satisfy his obligation to act constitutionally. It is only upon ascertaining the full scope of the right that an administrative decision maker can weigh that right against the interests of the various proposed users and determine whether the proposed uses are compatible. This characterization is crucial to an assessment of whether a particular treaty or aboriginal right has been, or will be infringed. Thus, particularly in the context of a judicial review where the Court relies heavily upon the findings of the decision maker, a consideration of whether consultation has been adequate must precede any infringement/justification analysis using the **Sparrow** guidelines.

[181] It is implicit in Halfway's submission that the proposed lumbering use is incompatible with its rights or at least would be found to be so if the District Manager had full information and properly considered the scope of its treaty right to hunt and of its aboriginal right to use the particular

tract in question for religious and spiritual purposes.

[182] The requirement that a decision-maker under the **Forest Act** and the **Forest Practices Code** consult with a first nation that may be affected by his decision does not mean the first nation is absolved of any responsibility. Once the District Manager has set up an adequate opportunity to consult, the first nation is required to co-operate fully with that process and to offer the relevant information to aid in determining the exact nature of the right in question. The first nation must take advantage of this opportunity as it arises. It cannot unreasonably refuse to participate as the first nation was found to have done in **Ryan et al v. Fort St. James Forest District (District Manager)** (25 January, 1994) Smithers No. 7855, affirmed (1994), 40 B.C.A.C. 91. In my view, a first nation should not be permitted to provide evidence on judicial review it has had an appropriate opportunity to provide to the decision-maker, to support a petition asserting a failure to respect a treaty right.

[183] The District Manager's failure to consult adequately means that we cannot know what additional information might have been available to him regarding the nature and extent of the Treaty 8 right to hunt or of other aboriginal rights not surrendered by the treaty. Nor can we know how he might have

weighed that information with information he might have sought regarding other possible cutting areas to meet Canfor's needs while minimizing the effects on the Halfway River First Nation's treaty right to hunt. Counsel adverted in argument to Canfor having obtained permits to cut in other areas to replace CP212 after the chambers judge made her order. Finally, any weighing of benefits is limited by the evidence, in this case almost entirely put forward by Canfor. Only when adequate consultation has taken place and both parties have fulfilled their respective consultation duties will the District Manager be in a position to determine whether the uses are compatible or a geographical limitation is being asserted, and the consequences in either event to the application for a cutting permit.

[184] Halfway did not receive an appropriate opportunity to establish the scope of its right. Thus, the District Manager's decision must be set aside because it was made without the information about Halfway's rights he should have made reasonable efforts to obtain. The most that can be decided definitively on judicial review in such circumstances is whether the legislative objective was sufficiently important to warrant infringement. About that there has never been a question in this case.

[185] This conclusion does not signify agreement with Canfor's submission that the interference by CP212 with Halfway's treaty right to hunt could not be elevated to an infringement of a constitutional right. There was evidence of a diminution of the treaty right in this case for the valid purpose of lumbering, a purpose recognized by the treaty itself as a reason for government encroachment on the treaty right to hunt. There was evidence the proposed lumbering activity would preclude hunting in an area considerably larger than the particular cutting blocks during active logging for two years.

While mitigating steps were to be taken, there was also evidence of the detrimental effect of road construction on the long-term use of the area by native hunters. Common sense suggests these effects might be sufficiently meaningful, particularly when they are felt in an area near the first nation's reserve, to require justification by the government of its action, depending on the nature of the hunting right. Had the District Manager understood the extent of his obligation to consult, he might have concluded the activities of Canfor authorized by CP212 would result in a meaningful diminution of the Treaty 8 right to hunt, just as he might have seen to the mitigation of such effects or to compensation for them as part of his analysis of how the proposed use and the treaty right could be accommodated to each other.

[186] My difference with the reasoning of Mr. Justice Finch flows from my view that the chambers judge was wrong when she found that "any interference" with the right to hunt constituted an "infringement" of the treaty right requiring justification. I cannot read either *Sparrow* or *Badger* to support that view. As my colleague notes at para. 124, in *Sparrow* the court stated the question as "whether either the purpose or effect of the statutory regulation unnecessarily infringes the aboriginal interest." In *Badger*, at 818, in his discussion as to whether conservation regulations infringed the treaty right to hunt, Cory J. indicated the impugned provisions might not be permissible "if they erode an important aspect of the Indian hunting rights." In *Gladstone*, *supra*, Lamer C.J.C. indicated that a "meaningful diminution" of an aboriginal right would be required to constitute an infringement. Each of these expressions of the test for an "infringement" imports a judgment as to the degree and significance of the interference. To make that judgment requires information from which the scope of the existing treaty or aboriginal right can be determined, as well as information about the precise nature of the interference.

[187] Incidentally, as an aside, given the significance of particular land to aboriginal culture and identity, I would not preclude "preferred means" from being extended to include a

preferred tract of land. Proof may be available that use of a particular tract of land is fundamental to a first nation's collective identity, as it is to many indigenous cultures. While it may be that "preferred area" for hunting is not relevant, "preferred area" for religious and spiritual purposes is likely to be. Such rights do not appear to have been included in the treaty-making one way or the other.

[188] If, after the requisite consultation has occurred, the District Manager confirms the nature of his decision is one involving compatible shared uses, modification of the *Sparrow* guidelines for review of his allocation of the resources is likely to be necessary. I find support for such modification in the following statement from *Sparrow*, at 1111 (per Dickson C.J.C. and La Forest J.):

... We wish to emphasize the importance of context and a case-by-case approach to s. 35(1). Given the generality of the text of the constitutional provision and especially in light of the complexities of aboriginal history, society and rights, the contours of a justificatory standard must be defined in the specific factual context of each case.

[189] As is apparent from the discussion in *Gladstone*, *supra*, it will be impossible to determine how the contours of the justificatory standard should be modified without an understanding of the existing treaty and aboriginal rights and

the precise nature of the competing use or uses proposed. Lamer C.J.C. emphasized the distinction between a right with an internal limit such as the right to fish for social, ceremonial and food purposes in *Sparrow* and a right with an external, market-driven limit such as the right to sell herring spawn commercially at issue in *Gladstone*. As he noted, the scope of the aboriginal right can determine whether or not exclusive exercise of that right is warranted or how the doctrine of priority will be applied in a government decision on resource allocation. In the circumstances of the case at hand the scope of the Halfway nation's hunting right is yet to be fully determined. Thus it is impossible to reach a conclusion as to what justificatory standard would be applied to the issuance of the cutting permit.

[190] Where the decision maker has determined the proposed uses are compatible with the aboriginal right, the question becomes one of accommodation as opposed to one of exclusive exercise of either the aboriginal right in question or the Crown's proposed use. In *Sioui, supra*, the Court held it was up to the Crown "to prove that its occupancy of the territory cannot be accommodated to reasonable exercise of the Hurons' rights," if the Crown wanted to assert its occupancy of the land in question was incompatible with the Hurons' religious customs or rites. It may be that guidance can be found in this

concept for the review of an administrative decision on the allocation of resources among compatible uses.

[191] In summary, so as to fulfill the Crown's fiduciary and constitutional duties to Halfway, the District Manager is required to initiate a process of adequate and meaningful consultation with Halfway to ascertain the nature and scope of the treaty right at issue. Having done so, and having determined the effect of the proposed non-aboriginal use, he then makes a determination as to whether the proposed use is compatible with the treaty right. If it is he must seek to accommodate the uses to each other. It will be that accommodation the court reviews within the contours of a justificatory standard yet to be determined.

[192] If the District Manager determines the proposed use is incompatible with the treaty right, he will be asserting a geographical limitation on the treaty right. In that event, I agree with Mr. Justice Finch that his decision may be reviewed under the *Sparrow* analysis.

[193] It follows from these reasons that I too would affirm the order of Dorgan J. setting aside the decision of the District Forest Manager to grant CP212.

"The Honourable Madam Justice Huddart"

Reasons for Judgment of the Honourable Madam Justice Southin:

[194] This is an appeal by the respondents below from this judgment pronounced 24 June 1997:

THIS COURT ORDERS that

- the decision of the District Manager made September 13, 1996, approving the application for Cutting Permit 212 be quashed; and
- costs be awarded to the Petitioner.

[195] What led to this judgment was a petition for judicial review brought in late 1996 for an order:

- [1. Reviewing and setting aside the decision of the Ministry of Forests to allow forestry] activities within Cutting Permit 212;
2. Declaring that the Ministry of Forests has a fiduciary and constitutional duty to adequately consult with the Halfway River First Nation and declaring that the level of consultation to date is insufficient;
3. Compelling the Ministry of Forests to consult with the Halfway River First Nation with respect to the full scope, nature and extent of the impact of proposed forestry activities on the exercise of the Treaty and Aboriginal rights of the Halfway River First Nation in accordance with the reasons and directions of this Honourable Court, and compelling the Ministry of Forests to provide funding to the Halfway River First Nation to support this consultation process;

[There is no "4." in the amended petition.]

5. Remitting the matter to the Respondent Ministry of Forests to complete the consultation process and then reconsider and determine whether to consent to the proposed cutting activities, and to determine appropriate conditions and

requirements to be imposed upon any such cutting activities;

6. Prohibiting the Ministry of Forests from making any decision with respect to forestry activity within Cutting Permit 212 until completing the consultation process ordered by this Honourable Court.
7. Retaining jurisdiction over matters dealt within this application such that any party may return to the Court, by motion, for determination of any issue relating to the consultation or the implementation of this Order.
8. Such other relief as this Honourable Court may deem meet; and
9. Costs on a solicitor client basis.

[196] The central point was an assertion by the respondents in this Court that rights preserved to them under s. 35 of the **Constitution Act, 1982** were infringed by that act of the District Manager.

[197] The learned judge below had before her not only this petition for judicial review but also an application by the respondent below, here the appellant, Canadian Forest Products Ltd., more familiarly known in this Province as Canfor, for an interlocutory injunction restraining the Chief and Halfway River First Nation from interfering with the implementation of the cutting permit.

[198] The petition recites that in support of it will be read the affidavits of Chief Bernie Metecheah, Chief George Desjarlais, Stewart Cameron, Peter Havlik, Judy Maas, and Michael Pflueger. These affidavits and their exhibits comprise nearly 1,000 pages in the appeal book.

[199] As both proceedings came on together, the learned judge below had affidavits from both sides in both proceedings.

In its action, Canfor filed the affidavits of James Stephenson, Jill Marks and J. David Menzies, totalling 330 pages of the appeal book. The Crown in this proceeding filed, among others, two affidavits of Mr. Lawson, the District Manager, bearing date the 20th December, 1996, and amounting to 432 pages. There were some further shorter affidavits from both sides. Thus, the appeal book, excluding the reasons for judgment, judgment and notice of appeal, is 2,376 pages.

[200] These proceedings engaged the chambers judge in eight days of hearing.

[201] As I shall explain, I would allow the appeal on the simple footing that the central issue in this case concerning the existence or non-existence of rights in the Halfway River First Nation under s. 35 of the *Constitution Act, 1982*, ought to have been dealt with by action. For a precedent of an

action on a treaty, see *Saanichton Marina Ltd. v. Claxton* (1988), 18 B.C.L.R. (2d) 217, aff'd. (1989), 36 B.C.L.R. (2d) 79, in which the learned trial judge, Mr. Justice Meredith, most usefully included in his reasons for judgment the Tsawout Indian Band statement of claim.

[202] In revising these reasons, I have had the benefit of the draft reasons of my colleagues.

[203] If this were not the first case on the implications for British Columbia of Treaty 8 and if these implications did not go far beyond whether Canfor can or cannot log these cut blocks, I would agree with Mr. Justice Finch that, as the parties did not object to the mode of proceeding, it must be taken to be satisfactory. But, in my opinion, the courts do have an obligation to ensure that a case the implications of which extend beyond the parties – and the implications of this case may extend not only to all the inhabitants of the Peace River but also, because the Peace River country is not poor in resources, to all the inhabitants of British Columbia – is fully explored on proper evidence. Furthermore, to my mind, the so-called administrative law issues in this case are nothing but distractions from the issues arising on the Treaty.

[204] By s. 35(1), of the *Constitution Act, 1982*:

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

[205] Because Treaty No. 8 is central to this case and to all other cases which may arise in the Peace River between First Nations, on the one hand, and the Crown and the non-aboriginal inhabitants on the other, I set it out in full:

TREATY No. 8

ARTICLES OF A TREATY made and concluded at the several dates mentioned therein, in the year of Our Lord one thousand eight hundred and ninety-nine, between Her most Gracious Majesty the Queen of Great Britain and Ireland, by Her Commissioners the Honourable David Laird, of Winnipeg, Manitoba, Indian Commissioner for the said Province and the Northwest Territories; James Andrew Joseph McKenna, of Ottawa, Ontario, Esquire, and the Honourable James Hamilton Ross, of Regina, in the Northwest Territories, of the one part; and the Cree, Beaver, Chipewyan and other Indians, inhabitants of the territory within the limits hereinafter defined and described, by their Chiefs and Headmen, hereunto subscribed, of the other part:-

WHEREAS, the Indians inhabiting the territory hereinafter defined have, pursuant to notice given by the Honourable Superintendent General of Indian Affairs in the year 1898, been convened to meet a Commission representing Her Majesty's Government of the Dominion of Canada at certain places in the said territory in this present year 1899, to deliberate upon certain matters of interest to Her Most Gracious Majesty, of the one part, and the said Indians of the other.

AND WHEREAS, the said Indians have been notified and informed by Her Majesty's said Commission that it is Her desire to open for settlement, immigration, trade, travel, mining, lumbering, and such other purposes as to Her Majesty may seem meet, a tract of

country bounded and described as hereinafter mentioned, and to obtain the consent thereto of Her Indian subjects inhabiting the said tract, and to make a treaty, and arrange with them, so that there may be peace and good will between them and Her Majesty's other subjects, and that Her Indian people may know and be assured of what allowances they are to count upon and receive from Her Majesty's bounty and benevolence.

AND WHEREAS, the Indians of the said tract, duly convened in council at the respective points named hereunder, and being requested by Her Majesty's Commissioners to name certain Chiefs and Headmen who should be authorized on their behalf to conduct such negotiations and sign any treaty to be founded thereon, and to become responsible to Her Majesty for the faithful performance by their respective bands of such obligations as shall be assumed by them, the said Indians have therefore acknowledged for that purpose the several Chiefs and Headmen who have subscribed hereto.

AND WHEREAS, the said Commissioners have proceeded to negotiate a treaty with the Cree, Beaver, Chipewyan and other Indians, inhabiting the district hereinafter defined and described, and the same has been agreed upon and concluded by the respective bands at the dates mentioned hereunder, the said Indians DO HEREBY CEDE, RELEASE, SURRENDER AND YIELD UP to the Government of the Dominion of Canada, for Her Majesty the Queen and Her successors for ever, all their rights, titles and privileges whatsoever, to the lands included within the following limits, that is to say:-

Commencing at the source of the main branch of the Red Deer River in Alberta, thence due west to the central range of the Rocky Mountains, thence northwesterly along the said range to the point where it intersects the 60th parallel of north latitude, thence east along said parallel to the point where it intersects Hay River, thence northeasterly down said river to the south shore of Great Slave Lake, thence along the said shore northeasterly (and including such rights to the islands in said lakes as the Indians mentioned in the treaty may possess), and thence easterly and northeasterly along the south shores of Christie's Bay and McLeod's Bay to old Fort Reliance near the mouth of Lockhart's River, thence

southeasterly in a straight line to and including Black Lake, thence southwesterly up the stream from Cree Lake, thence including said lake southwesterly along the height of land between the Athabasca and Churchill Rivers to where it intersects the northern boundary of Treaty Six, and along the said boundary easterly, northerly and southwesterly, to the place of commencement.

AND ALSO the said Indian rights, titles and privileges whatsoever to all other lands wherever situated in the Northwest Territories, British Columbia, or in any other portion of the Dominion of Canada.

TO HAVE AND TO HOLD the same to Her Majesty the Queen and Her successors for ever.

And Her Majesty the Queen HEREBY AGREES with the said Indians that they shall have the right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.

And Her Majesty the Queen hereby agrees and undertakes to lay aside reserves for such bands as desire reserves, the same not to exceed in all one square mile for each family of five for such number of families as may elect to reside on reserves, or in that proportion for larger or smaller families; and for such families or individual Indians as may prefer to live apart from band reserves, Her Majesty undertakes to provide land in severalty to the extent of 160 acres to each Indian, the land to be conveyed with a proviso as to non-alienation without the consent of the Governor General in Council of Canada, the selection of such reserves, and lands in severalty, to be made in the manner following, namely, the Superintendent General of Indian Affairs shall depute and send a suitable person to determine and set apart such reserves and lands, after consulting with the Indians concerned as to the locality which may be found suitable and open for selection.

Provided, however, that Her Majesty reserves the right to deal with any settlers within the bounds of any lands reserved for any band as She may see fit; and also that the aforesaid reserves of land, or any interest therein, may be sold or otherwise disposed of by Her Majesty's Government for the use and benefit of the said Indians entitled thereto, with their consent first had and obtained.

It is further agreed between Her Majesty and Her said Indian subjects that such portions of the reserves and lands above indicated as may at any time be required for public works, buildings, railways, or roads of whatsoever nature may be appropriated for that purpose by Her Majesty's Government of the Dominion of Canada, due compensation being made to the Indians for the value of any improvements thereon, and an equivalent in land, money or other consideration for the area of the reserve so appropriated.

And with a view to show the satisfaction of Her Majesty with the behaviour and good conduct of Her Indians, and in extinguishment of all their past claims, She hereby, through Her Commissioners, agrees to make each Chief a present of thirty-two dollars in cash, to each Headman twenty-two dollars, and to every other Indian of whatever age, of the families represented at the time and place of payment, twelve dollars.

Her Majesty also agrees that next year, and annually afterwards for ever, She will cause to be paid to the said Indians in cash, at suitable places and dates, of which the said Indians shall be duly notified, to each Chief twenty-five dollars, each Headman, not to exceed four to a large Band and two to a small Band, fifteen dollars, and to every other Indian, of whatever age, five dollars, the same, unless there be some exceptional reason, to be paid only to heads of families for those belonging thereto.

FURTHER, Her Majesty agrees that each Chief, after signing the treaty, shall receive a silver medal and a suitable flag, and next year, and every third year thereafter, each Chief and Headman shall receive a suitable suit of clothing.

FURTHER, Her Majesty agrees to pay the salaries of such teachers to instruct the children of said Indians as to Her Majesty's Government of Canada may seem advisable.

FURTHER, Her Majesty agrees to supply each Chief of a Band that selects a reserve, for the use of that Band, ten axes, five hand-saws, five augers, one grindstone, and the necessary files and whetstones.

FURTHER, Her Majesty agrees that each Band that elects to take a reserve and cultivate the soil, shall, as soon as convenient after such reserve is set aside and settled upon, and the Band has signified its choice and is prepared to break up the soil, receive two hoes, one spade, one scythe and two hay forks for every family so settled, and for every three families one plough and one harrow, and to the Chief, for the use of his Band, two horses or a yoke of oxen, and for each Band potatoes, barley, oats and wheat (if such seed be suited to the locality of the reserve), to plant the land actually broken up, and provisions for one month in the spring for several years while planting such seeds; and to every family one cow, and every Chief one bull, and one mowing-machine and one reaper for the use of his Band when it is ready for them; for such families as prefer to raise stock instead of cultivating the soil, every family of five persons, two cows, and every Chief two bulls and two mowing-machines when ready for their use, and a like proportion for smaller or larger families. The aforesaid articles, machines and cattle to be given one for all for the encouragement of agriculture and stock raising; and for such Bands as prefer to continue hunting and fishing, as much ammunition and twine for making nets annually as will amount in value to one dollar per head of the families so engaged in hunting and fishing.

And the undersigned Cree, Beaver, Chipewyan and other Indian Chiefs and Headmen, on their own behalf and on behalf of all the Indians whom they represent, DO HEREBY SOLEMNLY PROMISE and engage to strictly observe this Treaty, and also to conduct and behave themselves as good and loyal subjects of Her Majesty the Queen.

THEY PROMISE AND ENGAGE that they will, in all respects, obey and abide by the law; that they will maintain peace between each other, and between

themselves and other tribes of Indians, and between themselves and others of Her Majesty's subjects, whether Indians, half-breeds or whites, this year inhabiting and hereafter to inhabit any part of the said ceded territory; and that they will not molest the person or property of any inhabitant of such ceded tract, or of any other district or country, or interfere with or trouble any person passing or travelling through the said tract or any part thereof, and that they will assist the officers of Her Majesty in bringing to justice and punishment any Indian offending against the stipulations of this Treaty or infringing the law in force in the country so ceded.

[Emphasis mine.]

[206] The Beaver Indians, from whom the present respondents are descended, adhered to the Treaty in 1900:

The Beaver Indians of the Upper Peace River and the country thereabouts, having met at Fort St. John, on this thirtieth day of May, in this present year 1900, Her Majesty's Commissioner, James Ansdell Macrae, Esquire, and having had explained to them the terms of the treaty unto which the Chief and Headmen of the Indians of Lesser Slave Lake and adjacent country set their hands on the twenty-first day of June, in the year 1899, do join in the cession made by the said treaty, and agree to adhere to the terms thereof, in consideration of the undertakings made therein.

In witness whereof, Her Majesty's said Commissioner, and the following of the said Beaver Indians, have hereunto set their hands, at Fort St. John, on this the thirtieth day of May, in the year herein first above written.

[Here followed the signatures.]

[207] Canfor holds under the Crown a forest licence A18154 dated 28th June, 1993, which covers a very substantial area of

northeastern British Columbia between the Rocky Mountains and 120° west longitude, being there the boundary between this Province and Alberta. Under such a licence the District Manager from time to time issues cutting permits. The issuance of such permits is governed not only by the terms of the licence but also by the terms of the **Forest Act**.

[208] For the purposes of these reasons for judgment I accept:

1. The Halfway River First Nation, which has its reserve on the Halfway River, claims under Treaty 8 the right to hunt, fish and trap, particularly to hunt moose, in the area covered by the cutting permit, the logging of which may impede their hunting for moose.
2. The holder of a forest licence does not, under its licence, acquire any exclusive right of occupation of the lands encompassed in a cutting permit.
3. Neither the **Wildlife Act**, R.S.B.C. 1996, c. 488, nor any other statute of this Province forbids hunting on lands upon which logging is being carried on but it does prohibit the dangerous discharge of firearms. It would be dangerous to discharge firearms where logging is being carried on and I do not think for one moment that any

member of the Halfway River First Nation would do such a thing even if there were no statutory prohibition.

[209] The respondents assert a breach of the Treaty in two ways:

1. When the reserve for the Halfway people was set up, which was said not to have happened until 1914, that is, some fourteen years after the Beaver had adhered to the Treaty, they received less than their entitlement under the Treaty. In its claim to the Federal Government, submitted in 1995 under the Federal Land Claims Process, the Halfway River First Nation calculated the shortfall thus:

15.1 The following is a summary of the key population figures indicating a shortfall at date of first survey. Detailed information concerning individual members of the Halfway River Band, absentees/arrears and late adherents is contained in the Genealogical Appendices.

Halfway River Band on Hudson Hope Band Paylist - Date of First Survey - 1914	77
Deduct Double Counts	0
Base Paylist	77
Absentees/Arrears	13
Late Adherents	4
Adjusted Date of First Survey Population	94

Calculation of Shortfall
 94 x 128 acres - 9823 acres = Treaty Land
 Entitlement Shortfall of 2,139 acres

I do not pretend to have grasped the full import of this claim, nor the relationship to it, if any, of Section 13 of the British Columbia Terms of Union and the various events arising from that section, as to which see my judgment in *British Columbia (Attorney General) v. Mount Currie Indian Band* (1991), 54 B.C.L.R. (2d) 156 at 176 (C.A.), where the whole sorry history of reserves in other parts of the Province is recounted and in which, in my opinion, the right clearly belonged to the Mount Currie Indian Band. If the Halfway River First Nation is right and the claim is not settled but must be pursued in an action, an interesting question of law will fall to be determined: Is British Columbia bound to provide further lands and, if so, who is to choose those lands, or is Canada bound to pay compensation and, in either event, to what ancillary remedies, if any, is the Halfway River First Nation entitled? At this stage, no authority with the power to resolve the claim as made in 1995 has made any findings of fact or law relating thereto.

2. Development in the area has deleteriously affected the hunting. Chief Metecheah deposes:

3. The Halfway River First Nation community is very poor. More than 75% of our members rely on social assistance and hunting to feed their families. Because we are so poor, the members of our community rely very much on hunting to feed their children.

4. All of the land within Cutting Permit 212 ("C.P. 212") is very good for hunting and is the land that is used the most by our people to feed their children. The C.P. 212 area is next to our reserve. Our members don't need to spend much money to get there to get food for their families.

5. All through C.P. 212, there is proof of this use. Our members' permanent camp sites, corrals and meat drying racks are everywhere in the area.

6. We have many religious, cultural and historical sites in C.P. 212.

7. I am told by one of our members that some of the cut blocks are right where important spiritual ceremonies are held.

8. We have told the Ministry of Forests ("Ministry") that we are willing to gather this information but we need money and help to do this.

9. I have hunted throughout the Treaty 8 territory all my life and I have seen the effects of forestry activities on wildlife and hunting. The land is not as good for hunting once the trees have been cut. Non-Native hunters use the roads left by the forestry people to hunt in our traditional territory and there is less game left to feed our families.

10. If the hunting in C.P. 212 is affected, children in our community will go hungry.

11. C.P. 212 is right next to our Reserve. Because of all of the things that the government has done to our traditional territory by allowing logging companies and oil and gas companies to cut trees and pollute the land without consulting us or respecting our rights, our people must go farther and farther from our Reserve to get to land where we can hunt and gather berries and medicine. We use the land in C.P. 212 for teaching our children about our spiritual beliefs and our way of life. If the trees in C.P. 212 are cut down and the animals are driven away we will not be able to teach our children how to hunt and how our ancestors lived.

[210] The appellants do not accept that the development of the area has adversely affected the animal population or, more particularly, that cutting pursuant to this cutting permit will do so. There is some evidence that logging, because it results in fresh growth, ultimately produces good browse for ungulates, including moose.

[211] The assertions by the Chief in paragraphs 9-11 are sweeping and I am sure he is profoundly convinced of their truth. But, in my opinion, assertions, even if contained in an affidavit, which are sweeping in scope but which the deponent does not support, to use Lord Blackburn's words in another context, by condescending to particulars, should be given little weight in a proceeding seeking a final, in contradistinction to an interlocutory, order.

[212] As I understand Mr. Justice Finch's reasons, his central premise is set forth in this paragraph:

[144] I respectfully agree with the learned chambers judge that any interference with the right to hunt is a *prima facie* infringement of the Indians' treaty right as protected by s.35 of the **Constitution Act, 1982**.

[213] That premise leads inexorably to the application of the doctrine of **R. v. Sparrow**, [1990] 1 S.C.R. 1075, [1990] 3 C.N.L.R. 160, [1990] 4 W.W.R. 410, 46 B.C.L.R. (2d) 1.

[214] It is upon that premise that my colleague and I part company.

[215] I accept that the doctrine of the honour of the Crown applies to the interpretation of treaties which are within s. 35(1) of the **Constitution Act**. But I do not accept that the central words of the Treaty bear the construction put upon them by my colleague. To my mind, the words which, in the court below, ought to have been but were not addressed, except perhaps by a side wind, are "as may be required or taken up". Do the words empower the Crown, to whom all the lands covered by the Treaty were surrendered, to convey those lands away to others in fee simple? Such a conveyance would, of course, give exclusive possession to the grantee.

[216] In the case at bar, the issuance of a cutting permit did not give exclusive possession to the appellant Canfor. It did not exclude the respondents from hunting. But if the Crown did grant all the lands away, it might be argued with some force that it had made the reservation nugatory. One might apply the common law doctrine of derogation from a grant, by analogy, to such a state of affairs.

[217] In order that the significance of the principal issue to this Province may be understood, I must set out some history.

[218] By the British Columbia **Boundaries Act**, 26 & 27 Vict., c. 83 (1863), Parliament at Westminster established the boundaries of then Colony of British Columbia thus:

3. *British Columbia* shall for the Purposes of the said Act, and for all other Purposes, be held to comprise all such Territories within the Dominions of Her Majesty as are bounded to the South by the Territories of the United States of *America*, to the West by the *Pacific Ocean* and the Frontier of the *Russian Territories in North America*, to the North by the Sixtieth Parallel of North Latitude, and to the East, from the Boundary of the United States Northwards, by the *Rocky Mountains* and the One hundred and twentieth Meridian of West Longitude, and shall include *Queen Charlotte's Island* and all other Islands adjacent to the said Territories, except *Vancouver's Island* and the Islands adjacent thereto.

[219] When the Colony of British Columbia, which by then encompassed Vancouver Island as well, became part of Canada in 1871, it did so pursuant to the Terms of Union and the order in council of 16 May 1871. By the Terms of Union a substantial part of British Columbia known as the Railway Block was conveyed to the Dominion government. By subsequent statutes, other lands known as the Peace River Block were granted by the Province to Canada. These statutes are recited in the **Railway Belt Retransfer Agreement Act**, S.B.C. 1930, c. 60.

[220] From the time that the Beaver adhered to this treaty in 1900 until after the Second World War, there was very little settlement in what British Columbians call the Peace River which, more sensibly, ought to have been part of Alberta, lying as it does east of the Rocky Mountains.

[221] The introduction by Gordon E. Bowes to *Peace River Chronicles* (Prescott Publishing Co., 1963) gives a sufficient overview [p. 13 *et seq*]:

The Hudson's Bay Company remained in undisturbed possession of its huge fur preserve until the gold rush to the Peace and the Finlay in 1862. Many of the gold-seekers turned to the fur trade themselves, and so ended the Company's monopoly. There was another gold rush in the years 1870-73, this time to the Omineca country. Klondikers passed through in 1898-99, and a few returned later as traders. In 1908-09, there was a smaller gold rush to McConnell Creek on the Ingenika River.

Ignoring difficulties and hardships, the miners and the independent traders and trappers opened up the country and made it known to the outside world. They were soon followed by missionaries, travellers, and railway and geological survey parties. Their favourable reports drew attention to the agricultural advantages of the eastern part of the region.

Land surveyors and settlers entered the Peace River region of British Columbia only a few years prior to the First World War. Until that time, the area from the Rockies east to the Alberta boundary had been kept under a provincial government reserve which prohibited homesteading. The purpose of this reserve was to permit the federal government to select 3,500,000 acres of unalienated arable land (the Peace River Block) in return for aid given earlier by Ottawa for railway construction elsewhere in the province. The long-delayed choice of the

block was announced in 1907, and Ottawa threw open some of the lands for homesteading in 1912.

Lack of transportation has been the great obstacle to development of the region. Some settlers came in on the mere rumour of a railway. In 1913 there were 40 settlers near Hudson Hope, 30 along the Peace down to Fort St. John, and about 400 in the Pouce Coupe prairie. Even Finlay Forks had two general stores in 1913, and hopes were high. The First World War pricked the bubble, leaving deserted cabins everywhere.

The building of what is now the Northern Alberta Railways line in 1916 from Edmonton to Grande Prairie on the Alberta side facilitated some further settlement of the eastern half of the region. Following the war, the Soldier Settlement Board helped to establish veterans on the land. Another influx of land-hungry settlers occurred in 1928 and 1929, with the result that there were almost 7,000 persons in the eastern part of the region by 1931.

The completion of the Northern Alberta Railways line to Dawson Creek in January 1931 marked the beginning of a new era. At long last the railway had arrived, if only just within the area's eastern boundary! During the depression years discouraged wheat farmers from the parched districts of southern Alberta and Saskatchewan swelled the migratory waves. The trek into the Promised Land with livestock and farm equipment sometimes took as long as three or four months.

The arrival of bush pilots and the establishment of air lines in the thirties heralded the coming of further improvements in transportation. The Second World War, with its building of airports and the Alaska Highway and its forced economic expansion, played a sudden and spectacular part in the region's growth. Dawson Creek was given a highway to the Yukon and Alaska a full decade before it obtained one to the rest of the province! In the immediate post-war years, settlement continued in substantial volume. A major land boom occurred in 1948-49. Dawson Creek established itself in the front rank in all of Western Canada for grain shipments. The eastern part of the region is still the fastest-growing section of British Columbia.

The initial exploitation of the oil and gas fields, the completion of the John Hart Highway from Prince George in 1952, the building in 1957 of Canada's first major natural gas pipeline, Westcoast Transmission Company's line from Taylor south to the American border, the long-delayed and eagerly-awaited extension of the Pacific Great Eastern Railway to Fort St. John and Dawson Creek in 1958, the completion of the Western Pacific Products and Crude Oil pipeline to Kamloops in 1961, and the construction, now under way, of the great hydro-electric power project near Hudson Hope, all represent other significant steps in the region's development in recent years.

The present prosperity and the growing commercial importance of Dawson Creek, Fort St. John, Hudson Hope, Taylor, and Chetwynd contrast sharply with conditions two decades ago. Isolated no longer, and provided with air lines, highways, railways, and gas and oil pipelines, the region has overcome its transportation problems. Nature's lavish endowment of this corner of British Columbia is becoming evident to all. Not only one of the world's greatest power sites but also the untold wealth of natural gas, oil, coal, base metals, gold, timber, and millions of fertile acres for agriculture are beginning to make the pioneers' wildest dreams come true.

[222] Thus, I think it fair to infer that from the time they adhered to the Treaty in 1900 until after the Second World War, the Beaver people, including the present respondents, were left with their hunting ranges largely free of the "taking up" for any purpose by the Crown of lands ceded to it and from intrusion by non-natives upon those lands for such purposes as hunting, fishing, exploring for minerals, and so forth. Thus, until then, no issue could have arisen of breach by the Crown.

[223] Since the early 1960's, there has been in the Peace River further extensive taking up of land by the Crown, although to what extent that taking up has excluded the Beaver people from their traditional hunting ranges by the granting of exclusive possession to others, does not appear with any clarity in the evidence in this case.

[224] In my opinion the issue is not whether there is an infringement and justification within the *Sparrow* test, but whether the Crown has so conducted itself since 1900 as to be in breach of the Treaty. The proper parties to a proceeding to determine that issue are in my opinion the Halfway River First Nation and the Attorney General for British Columbia, or, if monetary compensation is sought, Her Majesty the Queen in right of British Columbia, and the proper means of proceeding is an action.

[225] The question in such an action would be whether what the Crown has done throughout the Halfway River First Nation's traditional lands by taking up land for oil and gas production, forestry, and other activities has so affected the population of game animals as to make the right of hunting illusory. "To make the right of hunting illusory" may be the wrong test. Perhaps the right test is "to impair substantially the right of hunting" or some other formulation of words.

[226] Whatever is the correct formulation, it cannot be applied without addressing all that has been done by the Crown since the lands were ceded to it. The Beaver Indians have the right to hunt but that right is burdened or cut down by the right of the Crown to take up lands. There are many issues of fact to be addressed on proper evidence to answer the question in whatever terms one puts it.

[227] My colleague, Madam Justice Huddart, approaches this case differently from Mr. Justice Finch. The culmination of her reasons is in this paragraph:

[191] In summary, so as to fulfill the Crown's fiduciary and constitutional duties to Halfway, the District Manager is required to initiate a process of adequate and meaningful consultation with Halfway to ascertain the nature and scope of the treaty right at issue. Having done so, and having determined the effect of the proposed non-aboriginal use, he then makes a determination as to whether the proposed use is compatible with the treaty right. If it is he must seek to accommodate the uses to each other. It will be that accommodation the court reviews within the contours of a justificatory standard yet to be determined.

[228] Essentially, therefore, she accedes to the respondent's prayer for relief contained in the petition for judicial review.

[229] With respect, to create a system in which those appointed to administrative positions under the **Forest Act** or any other statute of British Columbia regulating Crown land in the Peace River are expected to consult "to ascertain the nature and scope of the treaty right at issue" and to determine "whether the proposed use is compatible with the treaty right" is to place on our civil servants a burden they should not have to bear - a patchwork quilt of decision making by persons appointed not for their skill in legal questions but for their skill in forestry, mining, oil and gas, and agriculture.

[230] A District Manager under the **Forest Act** is no more qualified to decide a legal issue arising under this treaty than my colleagues and I are qualified to decide how much timber Canfor should be permitted or required to cut in any one year in order to conform to the terms of its tenure.

[231] Not only is this burden on the civil servants unfair to them, but also it ladens the people of British Columbia with burdens heavy to be borne, burdens which no other province's people have to bear, even though the other provinces, except Newfoundland, also have First Nations.

[232] If my colleagues are right, British Columbia, which was once described as the spoilt child of Confederation, is about to become the downtrodden stepchild of Confederation.

[233] This case has serious economic implications. To decide the issues arising on the evidence here adduced, which, as the parties chose to proceed, was not focused on that question only, is a course fraught with danger, especially to third parties. Those third parties include, as well as those who have rights acquired under the **Forest Act**, R.S.B.C. 1996, c. 157, and predecessor statutes, those who have rights acquired under the **Petroleum and Natural Gas Act**, R.S.B.C. 1996, c. 361, and predecessor statutes, the **Mineral Tenure Act**, R.S.B.C. 1996, c. 292, and predecessor statutes, and the **Land Act**, R.S.B.C. 1996, c. 245, and predecessor statutes.

[234] If the Crown has so conducted itself that it has committed a breach of its obligations under the Treaty to the respondents, and, perhaps, other First Nations who are also Beaver Indians, then it is right that the Crown should answer for that wrong and pay up. The paying up will be done by all the taxpayers of British Columbia. But it is not right that Canfor and all others, who in accordance with the Statutes of British Columbia have obtained from the Crown rights to lands in the Peace River and conducted their affairs in the not

unreasonable belief that they were exercising legal rights, should find themselves under attack in a proceeding such as this.

[235] Canfor, a substantial corporation, presumably can afford this litigation. But others whose rights may be imperilled may not have Canfor's bank account.

[236] I would allow the appeal and set aside the judgment below.

"The Honourable Madam Justice Southin"

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Hupacasath First Nation v. British Columbia (Minister of Forests) et al.***,
2005 BCSC 1712

Date: 20051206
Docket: L043095
Registry: Vancouver

Between:

**Ke-Kin-Is-Uqs, also known as Judith Sayers, Chief Councillor
suing on her own behalf and on behalf of all members of the
Hupacasath First Nation, the Hupacasath First Nation Council and
the Hupacasath First Nation**

Petitioners

And:

**Minister of Forests of the Province of British Columbia,
the Chief Forester and Brascan Corporation**

Respondents

Before: The Honourable Madam Justice Lynn Smith

Reasons for Judgment

Counsel for Petitioners:

P.R. Grant
D. Schultze

Counsel for Respondents Minister of Forests
and The Chief Forester:

G.R. Thompson

Counsel for the Respondent Brascan Corporation:

D.R. Clark, Q.C.

Date and Place of Trial/Hearing:

July 11-15, 2005
Vancouver, B.C.

I. INTRODUCTION

[1] The Hupacasath First Nation (“HFN”) seeks judicial review of decisions by the British Columbia Minister of Forests and the Chief Forester.

[2] The individual petitioner, Ke-Kin-Is-Uqs (also known as Judith Sayers), is a member and elected Chief of the petitioner HFN. The Hupacasath people were formerly known as the Opetchesaht, and are an aboriginal people of Canada within the meaning of s. 35 of the **Constitution Act, 1982**, being Schedule B to the **Canada Act 1982** (U.K), 1982, c.11.

[3] The respondent Brascan Corporation (“Brascan”) controls the lands and is the licensee under the Tree Farm Licence (“TFL”) relevant to these proceedings. Brascan has recently changed its name to Brookfield Asset Management Inc., but for convenience I will continue to refer to it as Brascan.

[4] The petitioners seek judicial review of two decisions: (1) the July 9, 2004 decision of the Minister of Forests consenting to the removal of certain privately owned land (the “Removed Lands”) from Tree Farm Licence 44 (“TFL 44”); (2) the August 26, 2004 decision of the Chief Forester determining a new allowable annual cut for TFL 44, effective July 9, 2004.

[5] The petitioners seek relief based on an alleged breach of the constitutional duty of the Provincial Crown to consult with them regarding the Crown’s decisions to permit removal of the land from TFL 44 and to amend the allowable annual cut for TFL 44. Alternatively, they seek relief based on an alleged failure of the relevant provincial authorities to comply with the governing statutes and regulations. They seek orders quashing or suspending the two decisions, and referring the matter for reconsideration after there has been consultation and compliance with the statutes.

[6] The respondents oppose the petition on a number of grounds, one of the most significant being that the Removed Lands are privately owned. Their position is that there was no duty on the Crown to consult; if there was any duty, it

was met; and if there was any failure in a duty to consult, the relief sought by the petitioners should not be granted in all of the circumstances. Their position is further that the decisions were made in compliance with applicable laws.

[7] The origin of the constitutional duty of the Crown to aboriginal peoples is in s. 35 of the **Constitution Act, 1982**, which states:

- 35 (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

[8] The statutory provision governing the removal of land from a TFL is s. 39.1 of the **Forest Act**, R.S.B.C. 1996, c. 157, brought into force May 13, 2004:

- 39.1 (1) The minister may change the boundary or area of a tree farm licence with the consent of its holder.
- (2) The discretion of the minister under subsection (1) includes the discretion to change the boundary or area of the tree farm licence with the consent of its holder by
- (a) adding private land of the holder of the tree farm licence to the area of the licence, or
- (b) removing private land from the area of the licence.

The **Ministry of Forests Act**, R.S.B.C. 1996, c. 300, provides authority for the Minister to enter into agreements:

- 6 The minister may
- (a) enter into an agreement or arrangement with any person or province or with Canada relating to a matter included in the minister's duties, powers and functions, and ...

The **Forest Act** provides for the determination of the allowable annual cut in s. 8, which states in part:

- 8 (1) The chief forester must determine an allowable annual cut at least once every 5 years after the date of the last determination, for

- (a) the Crown land in each timber supply area, excluding tree farm licence areas, community forest agreement areas and woodlot licence areas, and
- (b) each tree farm licence area.

[9] Evidence was tendered in the form of affidavits (in a Chambers Record of some 21 volumes). The evidence went in almost entirely without objection, but where objection was taken to evidence or submissions were made as to its weight, I have disregarded the evidence or have taken those submissions into account in weighing it.

II. FACTS

[10] The Hupacasath live near Port Alberni, on Vancouver Island. They assert aboriginal rights and title with respect to some 232,000 hectares of land in central Vancouver Island. They claim that most of the privately owned Removed Lands are within their traditional territory. The territory which they claim is described in the affidavit of Chief Sayers as encompassing:

... the headwaters of the Ash and Elsie River systems in the northwest, east to the height of land on the Beaufort Range and then southeast to Mount Arrowsmith to Labour Day Lake and the Cameron River system; the southeast boundary includes the China Creek, Franklin River, Corrigan Creek Areas and the north part of the Coleman Creek Area; the southern boundary follows Alberni Inlet to Handy Creek then northwest to follow the height of land between Henderson Lake and Nahmint Lake; the west boundary includes the headwaters of the Sproat Lake and Great Central Lake Areas; and including the river beds and lake beds of all bodies of water.

[11] The HFN occupied their claimed traditional territory at the time of first contact with Europeans, according to the evidence they tendered. They have never surrendered their aboriginal rights and title by treaty.

[12] Hupacasath elders deposed that the Hupacasath have names, which pre-date contact, for places found throughout their traditional territory. They have traditionally used the claimed traditional territory for hunting wildlife (including deer

and marmot), gathering food and medicinal plants, fishing for trout and salmon (a mainstay of their diet) and harvesting red and yellow cedar for numerous uses, including the building of houses and canoes. The Hupacasath traditionally visited sacred sites throughout their traditional territory for spiritual purposes, and continue to do so. The petitioners' evidence is that their sacred sites are secret, specific to families, and must be secluded from, and untouched by, other human beings. One particularly important sacred site is Grassy Mountain, which is in the Removed Lands and has never been logged.

[13] The petitioners' evidence as to their traditional use of the land was not contradicted, although the Crown tendered some evidence regarding overlapping claims to some of the same territory.

[14] Chief Judith Sayers deposed that the Hupacasath have never been conquered. That assertion is questioned by the Crown. Counsel for the Crown referred to some historical sources stating that another First Nation, the Tseshaht, may have been the dominant group in a portion of the land in the upper Alberni Inlet and the lower Somass River at the time the Crown asserted sovereignty in 1846. The Crown also pointed to some evidence that the Ucluelet took another area (called Nahmint) from the Hupacasath. I make no finding on this point, because the scant evidence before me does not permit it, but note that the evidence referred to by the Crown, if accepted, would not on its own ground a conclusion that the Hupacasath had been conquered.

[15] About 50% of the HFN claimed traditional territory is not subject to any competing claim.

[16] With respect to the other 50%, the Tseshaht, Cape Mudge, Comox, Qualicum, Snuneymuxw, Te'mexw, Uchucklesaht and Ucluelet First Nations have advanced claims and indicated consultative boundaries that overlap with some portions of the HFN claimed territory.

[17] The Tseshaht have two Indian Reserves in the middle of the HFN asserted traditional territory. The largest of the Tseshaht Reserves is between two smaller HFN Reserves near the city of Port Alberni.

[18] In 1980 the Nuu-Chah-Nulth Tribal Council, of which the HFN was a member, filed a comprehensive land claim with the federal government.

[19] In 1993, the Nuu-Chah-Nulth Tribal Council provided to the Provincial Crown a Statement of Intent, which included the claims of the HFN, as part of the British Columbia Treaty Process. This led to a Framework Agreement signed with the provincial and federal Crown on March 27, 1996, marking entry into Stage Four of the treaty process.

[20] The HFN provided its own land selection to the Provincial Crown on September 23, 1998. The land selection covered lands in TFL 44, including the Removed Lands, which were then owned by Weyerhaeuser Company Limited (“Weyerhaeuser”).

[21] On February 22, 2000, the HFN filed a Statement of Intent to engage in direct treaty negotiations with Canada and British Columbia, following HFN withdrawal from negotiations as part of the Nuu-Chah-Nulth Tribal Council, and confirmed its agreement to resolve overlapping claims. On February 21, 2001, the Crown agreed to resume treaty negotiations directly with the HFN. Those Treaty negotiations are currently at Stage Four.

[22] The Removed Lands are located in the centre of Vancouver Island. The area of the Removed Lands is about 70,000 hectares and is largely within the HFN claimed traditional territory. The Removed Lands roughly form a rectangle that runs along the northwest/southeast plane of Vancouver Island, but exclude an area around Port Alberni that stretches northeast. Their western border cuts through the eastern tip of Great Central Lake and Sterling Arm in Sprout Lake, and their eastern border stops short of Home and Cameron Lakes. Smaller

pockets of the Removed Lands are located within the borders of TFL 44, primarily around Great Central Lake and Sprout Lake, Alberni Inlet, Bamfield and Ucluelet.

[23] The Removed Lands have been privately owned since 1887 when the Dominion of Canada transferred a tract of land (the “Railway Lands”) to the Esquimalt and Nanaimo Railway Company. The Dominion had received the lands from the British Columbia Government in 1884 under the **Settlement Act**, 1884, chap. 14 S.B.C. (**An Act relating to the Island Railway, the Graving Dock and Railway Lands of the Province**)).

[24] MacMillan Bloedel Limited owned the lands for a time, and Weyerhaeuser owned them until May, 2005.

[25] Although the lands have been used for logging for over 100 years, some old growth areas remain untouched.

[26] Making an estimate based on the maps provided in evidence, about 40% of the Removed Lands is not subject to any competing claim from other First Nations.

[27] TFLs are created under the **Forest Act**, and permit logging by private entities on Crown land.

[28] A TFL may also cover private land. This occurs when an owner of private land adjacent to a TFL on Crown land agrees to have the same TFL extend to cover the private land, in order to permit a unified managed logging operation. In the past, private landowners were given tax incentives, preferential harvesting rights, and other economic incentives to bring their land under a TFL.

[29] Once private land has come under a TFL, the land or an interest in the land cannot be alienated to third parties without the prior written consent of the Minister of Forests (s. 54.7 of the **Forest Act**). The land cannot be used for other non-forestry purposes (s. 2(1) of the **Forest Practices Code of British Columbia Act**, R.S.B.C. 1996, c. 159 (“**Forest Practices Code**”)). The permission of the Minister

of Forests must be obtained to remove the land from the TFL (s. 39.1 of the ***Forest Act***).

[30] The ***Land Title Act***, R.S.B.C. 1996, c. 250, s. 281, provides that the Minister of Forests may file a written notice in the Land Title Office showing that land for which indefeasible title is registered has become subject to a TFL. The evidence is silent as to whether the Minister had filed a written notice with respect to the TFL covering the Removed Lands.

[31] Around 1945 the then owner of the Removed Lands held a TFL covering adjacent Crown land and agreed to have the Removed Lands brought under that TFL. Brascan produced evidence that the Removed Lands have been moved in and out of the TFL more than once.

[32] Beginning in about 1995, the Provincial Crown engaged in consultation with the HFN and Weyerhaeuser regarding forestry activity within TFL 44.

[33] John Laing, a Tenures Officer of the Ministry of Forests, deposed that there is “a long history of extensive consultations and accommodations with the [HFN] in relation to forestry operations and activities on TFL 44”. In the exhibits to Mr. Laing’s affidavit, recording consultations with the HFN, there is no indication that those involved in the consultation made a distinction between the private lands and the Crown lands. It appears from the evidence as a whole that in general no distinction was made between the Crown lands and the Removed Lands regarding the fact or degree of consultation.

[34] In 1997, the HFN established a liaison position within the Band to review and respond to forest consultation requests. In 1998, a Joint Forest Council was formed between the Crown and the HFN.

[35] Chief Judith Sayers deposed that the consultation processes dealt with the following concerns: protecting and enhancing fish habitat and rebuilding salmon runs, protecting and enhancing water quality, protecting sacred sites, protecting and managing red and yellow cedar and maintaining old growth trees, protecting

culturally modified trees, protecting and enhancing bird and wildlife habitat, protecting uncommon tree and plant species such as Yew which are used for cultural and medicinal purposes, and providing access to the territory for HFN members to exercise spiritual practices and aboriginal hunting and fishing rights. She swore that between 1998 and June 2004, the HFN and Weyerhaeuser met almost monthly to consult on forestry-related issues and by 2001 had developed an efficient process for considering and integrating aboriginal interests into the operational-level planning of forestry operations, with the result that Ministry intervention was rarely required.

[36] On August 6, 1999, following public consultations, the *MacMillan Bloedel Parks Settlement Agreement*, written by David Perry (the “*Perry Report*”) was submitted to government regarding the contemplated removal of private lands from TFL 44 and TFL 39. The report concluded that such a transfer might impinge on aboriginal rights because any removed lands would be subject to the much less restrictive private forest regulations.

[37] On November 30, 2000, Weyerhaeuser entered into a Memorandum of Understanding with the HFN, which included a consultation protocol regarding the Ash River lands, which at that time were being transferred from the Crown to Weyerhaeuser. They form part of the Removed Lands.

[38] In 2001, Weyerhaeuser published a document (*Coastal Competitive Reform: A Proposal for Market-based Stumpage and Tenure Diversification for Coastal B.C.*, October 2001) in which it referred to the economic benefits of removing private lands from Tree Farm Licences. The document states:

4.2.2 Removal of Private Lands from TFLs

A few coastal companies have private land within their Tree Farm Licences (TFLs). Private land within TFLs is managed to the Forest Practices Code. Private land outside TFLs is managed to the lower cost and results-based private forest land regulations. Private land inside the TFLs is subject to an AAC approval from the Chief Forester of the Ministry of Forests. Private land outside TFLs is subject to an economic harvest regime. Private land inside the TFLs is subject to

provincial log export restrictions with the logs financially restricted for being exported. The value of removing private lands from the TFLs is attributed to those three areas: 1) regulatory cost reduction; 2) harvest rate benefit; and 3) log export benefit.

[39] On October 1, 2003, the HFN announced that it had completed the first phase of a *Land Use Plan* for its claimed traditional territory.

[40] Weyerhaeuser wrote to the Minister of Forests on December 5, 2003, requesting removal of private land from both TFL 39 and TFL 44.

[41] Counsel for the petitioners advised the court that the petitioners filed a writ (Van. Reg. No. SO36690) claiming aboriginal title to their traditional territory on December 10, 2003, in order to avoid a possible limitations defence.

[42] The West Island Woodlands Community Advisory Group (“WIWAG”) was formed around 1998. It was sponsored by Weyerhaeuser in compliance with one of the requirements for certification by the Canadian Standards Association (“CSA”). It is composed of representatives from various sectors, including regional and city governments, small businesses, Parks Canada, woodlot owners, sawmill owners, logging contractors, First Nations (Hupacasath and Tseshaht), environmental organizations, Ministry of Forests and contractors.

[43] The *CSA Standard 5.2* (in *Sustainable Forest Management: Requirements and Guidance*) states:

5.2 Interested Parties

The organization shall

- a) openly seek representation from a broad range of interested parties, including DFA-related workers, and invite them to participate in developing the public participation process;
- b) provide interested parties with relevant background information;

- c) demonstrate through documentation that efforts were made to contact Aboriginal forest users and communities affected by or interested in forest management in the DFA;
- d) demonstrate through documentation that efforts were made to encourage Aboriginal forest users and communities to become involved in identifying and addressing SFM values;
- e) recognize Aboriginal and treaty rights and agree that Aboriginal participation in the public participation process will not prejudice those rights;
- f) establish and maintain a list of interested parties, including those that chose to participate, those that decided not to participate, and those that were unable to participate. The list shall contain names and contact information, as well as any links to the organization.

[44] The WIWAG minutes show that on September 19, 2002, Tom Holmes of Weyerhaeuser made a presentation to WIWAG in which he advised WIWAG that Weyerhaeuser was “trying to change the status of Private Lands inside of the TFL”.

[45] The minutes of the January 8, 2004 meeting of WIWAG state that “[t]he rumor mill has indicated that Private Lands currently in TFL #44 will be taken out of the Tree Farm Licence by March”, that the group asked Steve Chambers of Weyerhaeuser for more information, and that he inquired and reported that Weyerhaeuser was not aware of this development.

[46] On February 12, 2004, Stan Coleman, the Unit Manager (West Island Timberlands) for Weyerhaeuser, advised a WIWAG meeting that Weyerhaeuser was “actively seeking to remove its private lands from TFL 44” and addressed “the likely management practices that would apply on those lands after their removal”. There was further discussion about the “fate of the private lands in the TFL” at the WIWAG meeting of May 13, 2004.

[47] The minutes of the meetings show that Tawney Lem attended as the HFN representative at all of these meetings and that, with the exception of the

September 19, 2002 meeting, there was apparently no representative of the Provincial Crown present.

[48] Chief Sayers deposed, and her evidence was not contradicted in this respect, that no representative of the Minister or Chief Forester ever contacted her or any other HFN representative to propose consultation regarding the removal of the lands from the TFL.

[49] On June 11, 2004, Chief Sayers, at a meeting with Weyerhaeuser discussing the Removed Lands, proposed certain conditions before Weyerhaeuser could “get the land out”.

[50] Tawney Lem and Judith Sayers both deposed that they believed that Weyerhaeuser and the government were having discussions, but did not know that Weyerhaeuser had made formal application for permission to remove the lands.

[51] The evidence thus shows that the HFN (through WIWAG meetings with Weyerhaeuser) became aware of Weyerhaeuser’s desire to remove the lands from the TFL as early as 2002, and learned of the company’s pursuit of the issue with government in early 2004. The evidence does not show, however, any formal consultation or indeed any discussion between the Minister or other agent of the Crown and the HFN regarding Weyerhaeuser’s initiative.

[52] The Minister of Forests made the removal decision on July 9, 2004, pursuant to the newly-enacted s. 39.1 of the ***Forest Act***. In his letter advising of the decision, the then Minister, the Honourable Michael DeJong, set out a number of terms and conditions. These were:

Future Forest Management

Subject to applicable law and Weyerhaeuser’s operation, risk management and other needs, the current status of “managed forest” on the private property will continue and be subject to all applicable legislation and regulations within the *Private Managed Forest Land Act* that governs planning, soil conservation, harvesting rate and

reforestation. Variable retention and stewardship zoning on old growth areas will be maintained indefinitely. Federally, the Department of Fisheries and Oceans and the *Species at Risk Act* will govern fish habitat and wildlife issues.

Water Quality

Private Forest Watershed Assessment Plan (PFWAP) for key community watersheds will be developed in collaboration with the Ministry of Sustainable Resource Management, Department of Fisheries and Oceans, local stream keepers and municipal governments. Weyerhaeuser will commit to periodic follow-up meetings with impacted stakeholders to verify the commitments have been kept. Weyerhaeuser commits to initiating a PLWAP on the China Creek Watershed within 1-year of closing and other communities with high fisheries value watersheds, within private lands, will be prioritized for PLWAP within 1-year of closing.

Critical Wildlife Habitat

Weyerhaeuser will maintain all current critical wildlife habitat areas within the subject private lands for 2 years while a long-term plan for protecting Ungulate Winter Ranges and Wildlife Habitat Area #1-002 is developed with the Ministry of Water, Land and Air Protection.

Certification

Weyerhaeuser will maintain ISO and/or CSA certifications and continue to subject the private lands to the public advisory as per CSA standards.

Access (Road Systems)

Weyerhaeuser will maintain current access for the public, industrial road user and aboriginal groups.

Log Exports

Weyerhaeuser will maintain its commitment to a voluntary moratorium of log exports from the private lands authorized by this letter for removal from the TFL until February 1, 2006.

Research Installations

Within 60 days of the date of this letter, Weyerhaeuser will enter into a Memorandum of Understanding that reconfirms the relationship between the Ministry of Forests and Weyerhaeuser regarding ministry research installations located on the private lands.

First Nations Consultation

Based on the commitment by Weyerhaeuser with respect to the managed forest designation, land-use does not change significantly. If Weyerhaeuser's use of its private land will interfere with an exercise of an aboriginal right, Weyerhaeuser will endeavour to provide notice and the period of time the areas would be affected.

Powell River Canoe Route

Identifying the canoe route as a high value recreation feature for the Powell River community, subject to applicable law and Weyerhaeuser's operational and risk management needs, Weyerhaeuser in consultation with CSA Community Advisory Group commits to maintaining its protection. This commitment to maintain this important recreational feature will be maintained for the duration of the Forest Stewardship Plan.

Allowable Annual Cut (AAC) Determination

Due to the significance of the private land deletion and its impact on the AAC determination for TFLs 39 and 44, I expect the chief forester will make a new AAC determination reflecting the reduction in size of the TFLs effective the date the private lands are removed.

[53] The HFN received notice of the removal decision on July 13, 2004, and on July 19, 2004, gave notice to the Minister of Forests that it considered that the removal decision infringed its aboriginal rights and title. The HFN informed the Minister that accommodation of HFN rights could be achieved by respecting the HFN *Land Use Plan* and on August 12, 2004, Chief Sayers outlined a list of conditions that Weyerhaeuser would have to satisfy in order to gain HFN acceptance of the removal decision.

[54] Weyerhaeuser informed the HFN on August 20, 2004, that Weyerhaeuser no longer had an obligation to consult with them with respect to activities on the Removed Lands.

[55] On August 26, 2004, the Deputy Chief Forester amended the allowable annual cut for TFL 44, retroactive to July 9, 2004. In his *Rationale for AAC*

Adjustment Resulting from the Deletion of Private Lands (the “Amendment Rationale”), the Deputy Chief Forester stated:

I am satisfied that the assessment provided by Weyerhaeuser is a reasonable portrayal of the impact of reducing the THLB assumed in the 2003 AAC determination. Based on the assessment, my knowledge of the previous analysis, and on expert advice from Ministry staff, I hereby determine that the AAC for TFL 44 is 1 327 000 cubic metres, effective July 9, 2004

Within the AAC, I also conclude that harvesting in the Clayoquot Working Circle should not exceed 29 hectares per year.

[56] The evidence shows that the amendment was based on a Weyerhaeuser assessment and was simply mathematical; the allowable annual cut was reduced by the proportion that the Removed Lands bore to the total TFL area. Kenneth Baker, the Deputy Chief Forester at the time, deposed that the information and factors on which the original determination had been based 13 months earlier had not changed, that he had considered “concerns regarding identified wildlife, wildlife habitat and retention of old growth forests”, and that he decided on that basis that a proportional reduction was appropriate.

[57] The province confirmed in September, 2004, that it was ready to resume Stage Four treaty negotiations with the Hupacasath directly.

[58] Weyerhaeuser advised the HFN of the allowable annual cut amendment on September 14, 2004.

[59] In October 2004, Brascan began to negotiate with Weyerhaeuser for the purchase of all of Weyerhaeuser’s coastal forestry assets and operations. Brascan has produced evidence, which was uncontradicted, that the removal of the privately owned lands from TFL 44 was a critical consideration in its decision to proceed with the transaction. Its business plan was based on the premise that it would be able to conduct two different logging operations, through two different entities, under different management regimes for the Crown land than for the private land. Unlike lands in the TFL system, private timberlands can be

“harvested to market”, thus allowing private owners to harvest the species commanding the best prices in the market. A further benefit for private owners is that they are not subject to TFL restrictions on the export of logs that are surplus to the demands of domestic mills.

[60] The Tseshaht First Nation entered into a Forest and Range Agreement with the Minister of Forests on October 15, 2004, providing the Tseshaht with access to two non-replaceable licences to harvest timber on TFL 44, in areas forming part of the asserted traditional territory of both the Hupacasath and the Tseshaht.

[61] On November 16, 2004, the District Manager of the South Island Forest District sent the HFN the *Amendment Rationale* for the allowable annual cut amendment.

[62] The Supreme Court of Canada handed down its decisions on November 18, 2004, in ***Haida First Nation v. British Columbia (Minister of Forests)***, [2004] 3 S.C.R. 511, 2004 SCC 73 and ***Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)***, [2004] 3 S.C.R. 550, 2004 SCC 74. The Court held that although there is a duty on the Crown to consult with and accommodate the interests of aboriginal peoples, there is no obligation on third parties (such as Weyerhaeuser) to consult and accommodate, overturning the British Columbia Court of Appeal on that point.

[63] Brascan made a proposal to Weyerhaeuser on December 6, 2004, regarding the purchase of Weyerhaeuser’s coastal timber assets, including the Removed Lands. Weyerhaeuser accepted that proposal on December 14, 2004. The parties entered into an exclusivity agreement, which thereafter precluded Brascan from making inquiries of the Crown or of the HFN regarding the legal validity of the removal decision.

[64] This petition was filed on December 15, 2004, and Brascan learned of it on December 16, 2004.

[65] Weyerhaeuser and Brascan publicly announced the agreement for purchase and sale on February 17, 2005, and government approvals were obtained.

[66] The petitioners applied for an order enjoining the completion of the sale pending consultation and accommodation. Madam Justice Ross refused that application on March 11, 2005 (***Hupacasath First Nation v. British Columbia (Minister of Forests)***, [2005] 2 C.N.L.R. 138, 2005 BCSC 345), finding that although there was a triable issue and the potential for irreparable harm, the balance of convenience did not favour granting interim relief.

[67] On April 27, 2005, Weyerhaeuser was joined as a party to the petition by consent and an amended petition was filed.

[68] The sale to Brascan for the total purchase price of \$1.4 billion closed on May 30, 2005. The purchase included 258,000 hectares of privately owned timberlands, the annual harvesting rights to 3.6 million cubic metres of Crown timberlands, five coastal sawmills and two remanufacturing facilities.

[69] After receiving Weyerhaeuser's coastal assets, Brascan transferred the Removed Lands to Island Timberlands GP Ltd. to be held beneficially for Island Timberlands Limited Partnership ("Island Timberlands") and it transferred its interest in TFL 44 and the Crown land based operations to Cascadia Forest Products Ltd. ("Cascadia"). Island Timberlands is a limited partnership in which Brascan holds the majority interest and Cascadia is a wholly owned subsidiary of Brascan. (I was advised by counsel for Brascan on November 28, 2005 that Brascan has agreed to sell Cascadia to Western Forest Products Inc., a public company in which Brascan has an indirect non-controlling interest, subject to government approvals.)

[70] For convenience, however, I will refer to Brascan as both the owner of the Removed Lands and the holder of TFL 44.

[71] Brascan considers that Island Timberlands will be significantly more profitable than Cascadia because Island Timberlands will be able to operate outside the more restrictive conditions of the TFL.

[72] On May 30, 2005, Mr. Justice Goepel granted interim relief requiring Brascan to provide the petitioners with seven days notice of any intention to use the Removed Lands in a manner that will interfere with the exercise of an aboriginal right by the petitioners. At the conclusion of the hearing of this petition, I continued that order pending judgment.

III. ISSUES

[73] I will address the issues in the following sequence:

A. Duty to Consult

- (1) The Foundational Principles
- (2) The Legal Test
- (3) Knowledge of the Crown
- (4) Contemplated conduct affecting aboriginal rights
 - a. Could the HFN have aboriginal rights or title with respect to the Removed Lands?
 - b. Did the Crown contemplate conduct that might adversely affect HFN rights?
- (5) The Crown's duty
 - a. What was the nature and scope of the Crown's duty?
 - b. Did the Crown fulfill its duty to consult and accommodate?

(6) Amendment to the allowable annual cut

(7) Remedy

B. Compliance with Provincial Statutory Requirements

C. Summary of Conclusions

IV. ANALYSIS

A. Duty to Consult

(1) *The Foundational Principles*

[74] In *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at paras. 30-31, Lamer C.J.C., for the majority, described the nature and origin of the aboriginal rights protected under s. 35(1) of the **Constitution Act, 1982**:

In my view, the doctrine of aboriginal rights exists, and is recognized and affirmed by s. 35(1), because of one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional, status.

More specifically, what s. 35(1) does is provide the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose; the aboriginal rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown. [emphasis in original]

[75] In *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, the Supreme Court of Canada addressed a claim for aboriginal title over land in British Columbia. The Court held that aboriginal title is *sui generis* and began to sketch an outline of some of its characteristics, which include: it is held communally; it is

inalienable; and it cannot be transferred, sold or surrendered to anyone other than the Crown (paras. 113-15).

[76] The Court held that aboriginal rights cannot be extinguished by provincial laws of general application. It stated that constitutionally recognized aboriginal rights fall along a spectrum. At one end of the spectrum are those aboriginal rights which relate to practices, customs and traditions integral to the distinctive aboriginal culture of the group claiming the rights but where the degree of use and occupation of the land is insufficient to support a claim of aboriginal title (para. 138). At the other end of the spectrum is aboriginal title itself. The Court stated that s. 35(1) of the **Constitution Act, 1982**, whose purpose is to reconcile the prior presence of aboriginal peoples in Canada with the assertion of Crown sovereignty, allows for the possibility that the Crown may infringe aboriginal title so long as such infringement is justified (para. 150). In the context of assessing whether an infringement is consistent with the special fiduciary relationship between the Crown and aboriginal peoples, the Crown has a duty to consult the aboriginal people in question (para. 168).

[77] In **R. v. Marshall; R. v. Bernard**, [2005] 3 C.N.L.R. 214, 2005 SCC 43, the Supreme Court of Canada elaborated on what it had previously said about the nature of aboriginal title. The accused had argued that as Mi'kmaq Indians, they were not required to obtain provincial authorization to log because they have a right to log on Crown lands for commercial purposes pursuant to treaty or aboriginal title.

[78] The Court held that aboriginal title is one of the aboriginal rights and that, in order to prove aboriginal title, the claimant must establish aboriginal practices that indicate possession similar to that associated with title at common law. To establish title, claimants must prove “‘exclusive’ pre-sovereignty ‘occupation’” of the land (referring to **Delgamuukw** at para. 143) (para. 55). The Court said (at paras. 56-57) that “‘occupation’” means physical occupation and that “‘exclusive occupation’” means “‘the intention and capacity to retain exclusive control’”. The

latter is not negated by occasional acts of trespass or the presence of other aboriginal groups with consent. Shared exclusivity could result in joint title and non-exclusive occupation may establish aboriginal rights short of title.

[79] The Chief Justice wrote at para. 38:

Where title to lands formerly occupied by an aboriginal people has not been surrendered, a claim for aboriginal title to the land may be made under the common law. Aboriginal peoples used the land in many ways at the time of sovereignty. Some uses, like hunting and fishing, give rights to continue those practices in today's world: see *R. v. Van der Peet*, [1996] 2 S.C.R. 507; *R. v. Nikal*, [1996] 1 S.C.R. 1013. Aboriginal title, based on occupancy at the time of sovereignty, is one of these various aboriginal rights.

[80] Aboriginal rights refer to specific independent rights, such as the right to hunt or fish and they are not derivative of aboriginal title. This point is highlighted at para. 53:

Different aboriginal practices correspond to different modern rights. This Court has rejected the view of a dominant right to title to the land, from which other rights, like the right to hunt or fish, flow: *R. v. Adams*, [1996] 3 S.C.R. 101, at para. 26; *R. v. Côté*, [1996] 3 S.C.R. 139, at paras. 35-39. It is more accurate to speak of a variety of independent aboriginal rights.

[81] A claim to aboriginal title must be subject to a stringent test, and evidence to establish a claim to aboriginal title must correspond to the core element of a fee simple, that is, it must show “exclusivity” (para. 40). At para. 77 the Court stated:

... [t]he common law right to title is commensurate with exclusionary rights of control. That is what it means and has always meant. If the ancient aboriginal practices do not indicate that type of control, then title is not the appropriate right. To confer title in the absence of evidence of sufficiently regular and exclusive pre-sovereignty occupation, would transform the ancient right into a new and different right. It would also obliterate the distinction that this Court has consistently made between lesser aboriginal rights like the right to fish and the highest aboriginal right, the right to title to the land: *Adams*, *Côté*.

[82] The Court in *Marshall* left open the question of whether the granting of a fee simple by the Crown extinguishes aboriginal title.

[83] The Court of Appeal for British Columbia in *Skeetchestn Indian Band v. British Columbia (Registrar of Land Titles)* (2000), 80 B.C.L.R. (3d) 233, 2000 BCCA 525, concluded that the Registrar of Land Titles had acted correctly in refusing to register a certificate of pending litigation regarding the appellant First Nation's land claim on the basis that aboriginal title was not a registrable interest. Southin J.A. commented at para. 5:

Sooner or later, the question of whether those who hold certificates of indefeasible title, whether to ranch lands on Kamloops Lake or to a small lot with a house on it on Railway Avenue in the Village of Ashcroft or an office tower on Georgia Street in the City of Vancouver, are subject to claims of aboriginal right must be decided. If it is proper in some aspects of Indian claims to weigh in the balance in favour of the claimant the honour of the Crown, as I thought was right in my dissenting judgment in *Attorney General (British Columbia) v. Mount Currie Indian Band* (1991), 54 B.C.L.R. (2d) 156 (B.C.C.A.), should the honour of the Crown not also be weighed when determining whether a Crown grant in fee simple, at least one made before 17th April, 1982, assures to a person who obtained, founded on the grant, whether through the absolute fee system explained hereafter or directly, a certificate of indefeasible title, and his successors in title, the title for which he paid free of aboriginal claims?

Referring to *Delgamuukw*, Southin J.A. stated at para. 32:

It is for the Supreme Court of Canada to tell the courts of this Province what the implications of that judgment are for the holders of certificates of indefeasible title in a case where the issue directly arises, as it may do if the action brought by the appellants goes to trial.

[84] In concurring reasons, MacKenzie J.A. referred to the dangers of a piecemeal approach in deciding these fundamentally important and complex issues, at para. 81-82:

This submission highlights the complexity of the issues surrounding aboriginal rights in lands alienated by the Crown. Registration is only one aspect and not the most important. More central questions are

those that have been in the forefront of the Australian litigation - infringement, reconciliation and remedies. The issues may be even more complex in Canada because of the divided jurisdiction over land, and constitutional uncertainties as to the line between federal and provincial powers and responsibilities.

These broader issues are not before the court on this appeal but they underline the danger of a piecemeal approach when many implications may be hidden. I agree with Lamperson J. and Southin J.A. that this appeal from the Registrar is not the place to decide the larger questions.

[85] All parties to this proceeding agreed that, as in ***Skeetchestn***, it is unnecessary and would be inadvisable for this Court to reach a conclusion regarding the broader issues respecting aboriginal rights and title in lands alienated by the Crown.

[86] I note that in these Reasons I generally use “aboriginal rights” as a generic term which, in most contexts, includes aboriginal title.

(2) *The Legal Test*

[87] In ***Haida Nation*** and ***Taku River***, the Supreme Court of Canada made clear that the Crown’s duty to consult with and possibly accommodate the rights of aboriginal peoples exists prior to the final proof of aboriginal rights in court and prior to the signing of treaties.

[88] In ***Haida Nation***, the provincial Minister of Forests had made certain decisions regarding TFL 39, which covers Crown land in northern coastal British Columbia. The Court summarized the issue at para. 5-6:

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

This brings us to the issue before this Court. The government holds legal title to the land. Exercising that legal title, it has granted Weyerhaeuser the right to harvest the forests in Block 6 of the land.

But the Haida people also claim title to the land - title which they are in the process of trying to prove - and object to the harvesting of the forests on Block 6 as proposed in T.F.L. 39. In this situation, what duty if any does the government owe the Haida people? More concretely, is the government required to consult with them about decisions to harvest the forests and to accommodate their concerns about what if any forest in Block 6 should be harvested before they have proven their title to land and their Aboriginal rights? [emphasis in original]

[89] The Supreme Court referred to the finding by the chambers judge that the Haida had a strong claim to aboriginal title to the land, called Haida Gwaii. The Court also referred to the Haida argument that without consultation and accommodation, they might win their aboriginal title claim in the end, but find themselves deprived of the forests vital to their economy and their culture (para. 7).

[90] A summary of the Court's conclusion is found at para. 10 of the reasons for judgment of the Chief Justice:

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

[91] Chief Justice McLachlin held that, because the aboriginal interest is insufficiently specific, the duty to consult is not derived from the Crown acting as fiduciary (para. 18). Rather, the source of the duty is the honour of the Crown, which is always at stake in its dealings with aboriginal peoples (para. 16). This concept must be understood generously "in order to reflect the underlying realities from which it stems" (para. 17). The Court held:

In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably. Nothing less is required if we are to achieve "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown": *Delgamuukw, supra*, at para. 186, quoting *Van der Peet, supra*, at para. 31. (para. 17)

[92] The duty relates not only to the Crown's conduct in decision making about lands but also to the Crown's conduct in the treaty making and interpretation process (para. 19). It includes issues relating to claims to resources. At para. 22 Chief Justice McLachlin wrote:

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"....

[93] The source of the duty was summarized at para. 25:

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

[94] The duty arises not when aboriginal claims have been proved and resolved, but once claims affecting those interests are being seriously pursued in the process of treaty negotiation and proof. The Court stated:

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. (para. 27)

[95] The Court distinguished between what is sufficient to trigger the existence of the duty and what is to be considered in determining the scope or content of the duty. It held that:

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. (para. 37)

[96] The Court held that the content of the duty to consult and accommodate varies with the circumstances and 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 (para. 39).

[97] Thus, the Court said, there will be a spectrum (para. 43). Where, for example, the claim to title is weak, the aboriginal right limited, or the potential for infringement minor, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice. At the other end of the spectrum are the cases where a strong *prima facie* case for the aboriginal rights claim is established, the right and potential infringement is of high significance to the aboriginal people and the risk of non-compensable damage is high (para. 44). In such cases, “deep consultation”, aimed at finding a satisfactory interim solution, may be required. In discussing what is “meaningful consultation” the Court referred (at para. 46) to the New Zealand Minister of Justice’s *Guide for Consultation with Maori 1997* and to its statement that:

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...

[98] Emphasizing that the process does not give aboriginal groups a veto over what can be done with land pending final proof of the claim, the Chief Justice said that what is required is “a process of balancing interests, of give and take” (para. 48).

[99] After holding that third parties do not owe a duty to consult and accommodate, the Court rejected the argument that any duty to consult or accommodate rests solely with the federal government and held that the duty may also rest with provincial governments (paras. 52-59).

[100] Discussing the possible role of third parties in a consultation process, and stating that the honour of the Crown cannot be delegated, the Chief Justice wrote at para. 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.

[101] As to procedure, the matter may come to court by way of judicial review (para. 60). The existence or extent of the duty to consult or accommodate is a question of law reviewable on a correctness standard but it is typically premised on an assessment of the facts; thus, a degree of deference to the finding of fact of the initial adjudicator may be appropriate (para. 61). The examination of the process itself, the Court said, would likely be on a standard of reasonableness with the question being whether the regulatory scheme or government action “viewed as a whole, accommodates the collective aboriginal right in question” (para. 62).

[102] Thus, in summary, the Court stated at para. 63:

Should the government misconceive the seriousness of the claim or impact of the infringement, this question of law would likely be judged by correctness. Where the government is correct on these matters and acts on the appropriate standard, the decision will be set aside only if the government’s process is unreasonable. The focus, as discussed above, is not on the outcome, but on the process of consultation and accommodation.

[103] On the facts before it, the Court found that the province had knowledge of the potential existence of aboriginal rights or title and contemplated conduct that might adversely affect them, that it had not consulted with the Haida at all, and that

... the province has a duty to consult and perhaps accommodate on T.F.L. decisions. The T.F.L. decision reflects the strategic planning for utilization of the resource. Decisions made during strategic planning may have potentially serious impacts on Aboriginal right and title. (para. 76)

[104] The order approved by the Supreme Court contained a declaration that the provincial Crown had legally enforceable duties to the Haida people to consult with them in good faith and to endeavour to seek workable accommodations between the aboriginal interest of the Haida people on the one hand and the Crown’s objectives to manage the TFL in accordance with the public interest on the other hand.

[105] I pause to comment that although the ***Haida Nation*** case shares a significant aspect of the case before me, in that it arises from a Ministerial decision regarding a TFL, there is also a notable difference: it concerned Crown land, not privately owned land. Counsel for the respondents emphasized that distinction and one other: that in ***Haida Nation*** a claim to aboriginal title was advanced. I will return to these points later.

[106] In ***Taku River***, a mining company sought permission from the provincial government to reopen an old mine in British Columbia and to build a road through a portion of the Taku River Tlinget First Nation's (TRTFN) claimed traditional territory.

[107] The Supreme Court of Canada held that, on the principles discussed in ***Haida Nation***, the Crown was under a duty to consult with the TRTFN regarding the decision to reopen the mine. It further held that the duty had been complied with on the facts of the case. The province had conducted an environmental review process in which the TRTFN had, for the most part, participated fully, putting their views before the decision-makers. Steps had been taken to address the TRTFN concerns. The Court held that it was not necessary for the province to set up a separate aboriginal consultation process.

[108] In discussing the source of the duty on the Crown, the Court stated at para. 24:

The Province's submissions present an impoverished vision of the honour of the Crown and all that it implies. As discussed in the companion case of *Haida, supra*, the principle of the honour of the Crown grounds the Crown's duty to consult and if indicated accommodate Aboriginal peoples, even prior to proof of asserted Aboriginal rights and title. The duty of honour derives from the Crown's assertion of sovereignty in the face of prior Aboriginal occupation. It has been enshrined in s. 35(1) of the *Constitution Act, 1982*, which recognizes and affirms existing Aboriginal rights and titles. Section 35(1) has, as one of its purposes, negotiation of just settlement of Aboriginal claims. In all its dealings with Aboriginal peoples, the Crown must act honourably, in accordance with its historical and future relationship with the Aboriginal peoples in question. The Crown's

honour cannot be interpreted narrowly or technically, but must be given full effect in order to promote the process of reconciliation mandated by s. 35(1).

[109] Very recently (one week ago), the Supreme Court of Canada delivered its decision in ***Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)***, [2005] S.C.J. No. 71, 2005 SCC 69. I requested from the parties, and have received, their submissions as to its implications for the case before me.

[110] The issue in ***Mikisew*** arose when the federal government approved the construction of a winter road through the Mikisew Reserve, over the protests of the Mikisew. The Mikisew are under Treaty 8, which permits the Crown to “take up” land from time to time for purposes such as settlement, mining, lumbering and trading. Their reserve is in Wood Buffalo National Park, on Crown land.

[111] The Supreme Court held that the Crown had breached its duty of consultation. Binnie J. stated that, given that the Crown was proposing to build a fairly minor winter road on surrendered lands where the Mikisew hunting, fishing and trapping rights were expressly subject to the “taking up” limitation, the Crown’s duty lay at the lower end of the spectrum (para. 64). The Court quashed the Minister’s approval order and remitted the winter road project to the Minister to be dealt with in accordance with the Court’s Reasons.

[112] Much of the discussion in the case relates to the Crown’s duties in the context of defined and acknowledged treaty rights, and is not directly relevant to the case before me. However, the Court made some general statements about the duty of consultation which may have some bearing.

[113] In the opening paragraph, Binnie J. wrote:

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.

[114] Further, in para. 55, he commented:

... The duty to consult is, as stated in *Haida Nation*, triggered at a low threshold, but adverse impact is a matter of degree, as is the extent of the Crown's duty. ...

[115] With respect to the content of the duty to consult, the Court stated at para. 64 that the duty had both informational and response components. Thus, the Court held that the Crown should have given notice to the Mikisew and engaged directly with them, rather than doing so as an afterthought to a general public consultation with Park users; it should have provided information about the project addressing what the Crown knew to be Mikisew interests and what the Crown anticipated might be the potential adverse impact on those interests; and it should have solicited and listened carefully to the Mikisew concerns and attempted to minimize adverse impacts on their hunting, fishing and trapping rights.

[116] I note, however, as counsel for the respondents pointed out, that the content of the duty to consult could differ outside the context of a treaty rights case.

[117] In ***Musqueam v. British Columbia (Minister of Sustainable Resource Management)*** (2005), 37 B.C.L.R. (4th) 309, 2005 BCCA 128, the Musqueam Indian Band sought an order quashing a decision by the provincial Crown to sell the University of British Columbia Golf Course (which was on Crown land) to the University of British Columbia. The Musqueam argued that the respondents had not consulted in good faith concerning a possible accommodation of any infringement of the appellant's asserted aboriginal interests in the Golf Course land. The Crown conceded, and the Court held, that the Band had shown a strong claim of aboriginal title to the lands. The Court concluded that the Crown

had failed to consult meaningfully, and ordered that the authorization for the sale be suspended for two years to provide for proper consultation.

[118] Hall J.A. commented that the decision in ***Haida Nation*** pertains to a range of asserted aboriginal rights, including title:

Thus, provincial governments can justifiably infringe aboriginal title, but as the Supreme Court of Canada recently stated in *Haida*, if there is infringement or potential infringement of an aboriginal right - which of course includes aboriginal title - consultation is required with those affected with a view to reaching some accommodation pending final resolution of the validity of the rights claimed. (para. 87)

In summarizing his conclusions on why the Crown had failed in its duty here, Hall J.A. wrote (at paras. 94-96):

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.

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.

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.

[119] I will next briefly discuss what emerges from some of the recent trial-level decisions on the duty to consult.

[120] ***Gitxsan First Nation v. British Columbia (Minister of Forests)*** (2002), 10 B.C.L.R. (4th) 126, 2002 BCSC 1701 (***Gitxsan First Nation #1***) was decided prior to the Supreme Court of Canada decision in ***Haida Nation***. The claimant First Nations sought to set aside the respondent Minister of Forest's consent to a change in corporate control of Skeena Cellulose, which held a TFL and several forest licences over Crown land. The First Nations asserted rights and title to that land. Tysoe J. held that each of the petitioning First Nations had a good *prima facie* claim of aboriginal title and a strong *prima facie* claim of aboriginal rights with respect to at least part of the lands concerned. He noted at para. 72:

The claims for aboriginal rights are stronger than the claims for aboriginal title because they do not require an element of exclusivity, but each claim qualifies for a classification as a good or strong *prima facie* claim.

[121] Tysoe J. rejected the Crown's argument that a *prima facie* case could not be made out because there were overlapping claims to the lands, finding instead that in such a case, the court can "conclude that the competing groups have each established aboriginal rights in respect of the area" (at para. 74). He concluded that the government did have a duty to consult. In so doing, he rejected the Crown's argument that the change in ownership was "neutral" and did not require any consultation (para. 82). Tysoe J. did not quash the Minister's decision to

consent to the change in control but directed that the Minister be given an opportunity to fulfill the duty.

[122] The Gitanyow First Nation returned to court in 2004, arguing that the Minister had not provided adequate and meaningful consultation, and that the decision consenting to the change in control should be quashed. Following the Supreme Court of Canada decision in ***Haida Nation***, Tysoe J. declared that the Crown had not yet fulfilled its duty to consult. Rather than granting the further relief requested by the Gitanyow, he ordered the parties to resume negotiations: see (2004), 38 B.C.L.R. (4th) 57, 2004 BCSC 1734 (“***Gitxsan First Nation #2***”).

[123] Powers J. in ***Homalco Indian Band v. British Columbia (Minister of Agriculture, Food and Fisheries)*** (2004), 39 B.C.L.R. (4th) 263, 2005 BCSC 283, considered an application for judicial review of an amendment to a licence for a salmon farm in Bute Inlet, allowing the introduction of Atlantic salmon to the farm. A company called Marine Harvest held the licence for the salmon farm; the Homalco claimed aboriginal title and rights in that area. The Homalco argued that the introduction of Atlantic salmon could bring potentially serious adverse consequences for the wild salmon stocks, and indeed that the mere presence of a fish farm carried risks. Powers J. noted at para. 16 that the petitioner “correctly argues that the duty arises when the Crown makes decisions that have a serious impact on asserted Aboriginal rights and title” and found at para. 25 that:

1. There is a reasonable probability that the Homalco will be able to establish Aboriginal title to at least some parts of the Homalco Territory including portions of Bute Inlet in the vicinity of Church House...
2. There is a substantial probability that the Homalco will be able to establish Aboriginal rights to harvest wild Pacific salmon and other marine resources of the Homalco territory.

[124] The Court found that a duty to consult existed. In considerable measure the conclusion seemed to flow from the finding regarding the likelihood that the Homalco would be able to establish aboriginal rights to fish in the area they

claimed. The application for judicial review was adjourned. Until the consultation process was complete, the company was not to add additional Atlantic salmon to the site.

[125] At issue in **Musqueam Indian Band v. Richmond (City)** (2005), 12 M.P.L.R. (4th) 97, 2005 BCSC 1069 was the decision of the Lottery Corporation (a Provincial Crown corporation) to place a casino on Crown lands against which aboriginal title was asserted. The Court held that a duty to consult was triggered. Brown J. held that the Province was aware that the lands were the subject of a Musqueam claim, and that the placement of the casino might adversely affect the Musqueam's aboriginal title interests. The Court referred to the limited amount of Crown land available to meet the Musqueam First Nation's aboriginal title claims, and held that the Crown had a duty to consult and accommodate. Brown J. declined to set aside the decision to relocate the casino, taking into account the balance of convenience.

[126] In **Huu-Ay-Aht First Nation v. British Columbia (Minister of Forests)** [2005] 3 C.N.L.R. 74, 2005 BCSC 697 (under appeal), the issue was the Crown's application of the Forest and Range Agreement program. The program involved the allocation of forest tenures to First Nations following the enactment of the **Forest Revitalization Act**, S.B.C. 2003, c. 17, which took back 20% of the allowable annual cut from major replaceable forest licences and TFLs throughout the province. The Huu-Ay-Aht objected to the province's use of a population-based formula for the allocation of forest tenures. One of the Crown's arguments was that its duty to consult and accommodate aboriginal interests is not triggered by the Crown's general management of forestry permits and approvals; rather, it is only triggered by specific decisions that have the potential to infringe on s. 35 rights.

[127] Dillon J. said the following at para. 104:

...declaratory relief has been granted by this court in several cases involving First Nations disputes concerning the duty to consult. In

regards to forestry decisions, declaratory relief stems from the initial decisions to issue timber licences. In this case, the FRA initiative is a creature of statute, the *Forestry Revitalization Act* and the *Forest Act*, which enable the province to make specific agreements with First Nations regarding forest tenure. The FRA is the vehicle that the Ministry chose to deliver those specific agreements. The concept of 'decision' should not be strictly applied when there is legislative enablement for a government initiative that directly affects the constitutional rights of First Nations. This approach has been approved by the Supreme Court of Canada in *Haida* when it spoke of review of governmental action affecting the duty to consult. The petitioners are entitled to seek the declaratory relief under the *JRPA* that the FRA policy does not meet the Crown's constitutional obligation to consult the HFN.

[128] That the Crown held title to the land was taken as one factor among several in the Court's finding that the First Nation had a strong *prima facie* case (para. 120):

The HFN and the Crown are near the end of treaty negotiations with an agreement in principle that acknowledges rights related to forest resources and title to certain lands without legally recognizing HFN's rights or title. There have been two previous accommodation agreements (the IMA and IMEA) that, for six years, had provided a process for continuing consultation that had been honoured by both parties. On this basis alone, the HFN have shown a strong *prima facie* claim to title and rights related to forestry resources such that consultation with respect to ongoing operations is warranted. In addition, the Crown holds title to the land in question with the HFN claim based upon occupation of the lands before Crown sovereignty. Although there are overlapping claims over part of the Hahoothlee, a part is exclusively claimed by the HFN. The issue of exclusive possession is challenging but not insurmountable (see *Musqueam* at paras. 87-88). It certainly does not mean that no consultation should occur. The level of potential infringement of rights to timber resources is severe given the harvest rate contemplated by third parties over the next five years.

[129] The duty of consultation and accommodation was applied by the Superior Court of Quebec in ***Betsiamites First Nation v. Attorney General of Canada***, 2005 J.Q. No. 8173 (QL). That case dealt with the duty to consult and accommodate regarding timber supply and forest management agreements

granted to a private company planning logging operations in an area to which the Betsiamites First Nation (“BFN”) asserted aboriginal rights and title. The Court concluded that the Crown, which had conceded that BFN had rights relating to food, ritual and social purposes on the territory, was also aware of the potential existence of aboriginal title, as past negotiations had revealed the nature, extent and complexity of land claims. The parties had reached an advanced stage in treaty negotiations, having achieved an Agreement in Principle.

[130] Grenier J. held that the province of Quebec had violated its constitutional duty to consult the BFN, and ordered the defendant logging company to cease its operations until a judgment on the merits was rendered on the application for an interlocutory injunction. The decision is now on appeal.

[131] In addition to the judicial decisions I have referred to, two decisions of environmental tribunals have come to my attention. While these decisions do not have precedential value, their reasoning is of interest.

[132] In ***TimberWest Forest Corp v. British Columbia (Deputy Administrator, Pesticide Control Act)***, [2003] B.C.E.A. No 31, TimberWest appealed the Deputy Administrator’s decision to place a number of conditions on a Pest Management Plan (PMP) TimberWest had submitted for authorization. Under the PMP, TimberWest sought permission to use pesticides on its land (formerly part of the Railway Lands, like the Removed Lands in this case.) The Cowichan First Nation (CFN) claimed aboriginal rights and title to those lands. Before authorizing the PMP, the Deputy Administrator met with representatives of the CFN concerning the proposed PMP. When the final PMP was issued, it took into consideration the CFN’s asserted aboriginal rights by restricting the use of pesticides at sites of particular spiritual or ceremonial significance to the CFN.

[133] Before the Environmental Appeal Board, TimberWest argued that the PMP restrictions were based on irrelevant considerations, one of which was the Deputy Administrator’s consultation with the CFN. Based on the Court of Appeal decisions in ***Haida Nation***, (2000), 99 B.C.L.R. (3d) 209, 2002 BCCA 147, and

Taku River, (2000), 98 B.C.L.R. (3d) 16, 2002 BCCA 59, the Panel acknowledged that the Deputy Administrator had a duty to consult and accommodate with aboriginals in the circumstances, and held that aboriginal rights and title are not subordinate to the rights of a fee simple owner.

[134] The Panel also held that where the Crown performs a regulatory role, the infringement of an aboriginal right can occur whenever the Crown exercises its decision making powers, regardless of the tenure of lands affected, reasoning:

... limiting aboriginal people to challenging only the original grant of fee simple, rather than any subsequent Crown authorized use of the private land, would be contrary to the purpose of section 35 of the *Constitution Act, 1982* ... (para. 203)

[135] The Panel concluded that the Deputy Minister did have a duty to consult and accommodate CFN interests before issuing his authorization of the PMP, and therefore, that the CFN's claims of aboriginal rights and title were relevant considerations.

[136] In ***Penelakut First Nations Elders v. British Columbia (Regional Waste Management)***, [2005] B.C.W.L.D. 547, elders of the Penelakut First Nation appealed the Regional Waste Manager's decision to authorize the discharge of waste from a land-based fish hatchery on Salt Spring Island that was located on land leased from a third party. The Penelakut First Nation asserted aboriginal rights to harvest food and to visit a sacred burial site near the hatchery site. The Environmental Appeal Board Panel held that the Provincial Crown had a duty to consult and accommodate aboriginal peoples in those circumstances, and that the Crown had met its duty.

[137] To summarize the effect of the judicial authorities, they show a three-step process for considering an alleged failure of the Crown to consult with and accommodate aboriginal people.

[138] First, in determining whether a duty to consult arises, the court must assess whether the Crown has knowledge, real or constructive, of the potential existence

of the aboriginal rights. Second, the court must determine if the Crown contemplated conduct that might adversely affect those rights. If there is such knowledge and contemplated conduct, then the court must take the third step and consider the scope and content of the duty to consult and accommodate, and whether that duty has been met. Determining the scope and content of the duty necessitates a preliminary assessment of the strength of the case supporting the existence of the right, and a consideration of the seriousness of the potentially adverse effect upon the rights claimed.

(3) *Knowledge of the Crown*

[139] Did the Crown have knowledge, real or constructive, of the existence of potential aboriginal rights pertaining to the Removed Lands and to the surrounding Crown lands?

[140] The petitioners claim that most of the Removed Lands and a portion of Crown lands within TFL 44 are in their traditional territory. They rely on past negotiations and consultations with the Provincial Crown to prove that the Crown knew the extent and nature of their claim.

[141] As part of treaty negotiations, which have reached Stage Four, the HFN presented evidence to the Crown, including a “land selection” which encompasses the area in question. As well, the HFN had provided to the Crown a copy of their *Land Use Plan* for their claimed traditional territory.

[142] Between about 1994 and July 2004 there was consultation between the Crown and HFN with respect to logging plans in TFL 44, including the Removed Lands. During that period, the Crown was in a position to learn the details of the HFN position regarding the territory.

[143] The petitioners produced evidence from ethnographers and anthropologists indicating that Hupacasath people were present in the area in question at the time of first contact with Europeans. At least some of that evidence is in the public domain.

[144] The petitioners also argue that *R. v. NTC Smokehouse* (1993), 80 B.C.L.R. (2d) 158 (CA), [1996] 2 S.C.R. 672, shows previous judicial recognition of a Hupacasath aboriginal right to fish for salmon in the Somass River.

[145] In *NTC Smokehouse*, the defendant company was charged with selling fish allegedly caught illegally by Sheshaht (Tseshahat) and Opetchesaht (Hupacasath) people. The Provincial Court Judge at trial found that the “Sheshaht people” had established an aboriginal right to fish, without specifying whether the finding was meant to include or exclude the Hupacasath. The findings of fact at trial were upheld and adopted in both the British Columbia Court of Appeal and the Supreme Court of Canada. No level of court specifically addressed whether there was a basis for distinction between the Tseshahat and Hupacasath.

Wallace J.A. stated that one of the questions before the Court of Appeal was “[d]oes the Aboriginal right of the Sheshaht and Opetchesaht Bands to fish for food encompass the commercial sale of fish?” (at para. 34). At para. 45, Wallace J.A. wrote:

Section 839(1) of the *Criminal Code* provides that an appeal to this Court from the summary conviction appeal court may “be taken on any ground that involves a question of law alone”. Findings of fact and questions of mixed fact and law are not reviewable by the court. The nature and scope of the aboriginal rights of the Seshahat and Opetchesaht peoples in this case were determined as a question of fact on the basis of the traditional practices integral to the aboriginal society of the claimants' ancestors. Accordingly, the trial judge's ruling that the commercial sale of fish cannot be characterized as an aboriginal fishing right of the Seshahat and Opetchesaht Indian Bands should not be disturbed.

[146] In the Supreme Court of Canada, Lamer C.J.C. stated:

For the purposes of this analysis no distinction will be made between the cultures of the Sheshaht and Opetchesaht because no such distinction was made by the appellant in its factum nor in the decisions of the courts below. Further, the evidence presented at trial did not distinguish between the cultures and history of the two bands. Normally, because the determination of whether or not an aboriginal right exists is specific to the particular aboriginal group claiming the right, distinctions between aboriginal claimants will be significant and

important; however, in this case it does not appear, as a factual matter, that any significant distinctions exist between the Sheshaht and the Opetchesaht. (para. 23)

[147] There is a Tseshaht reserve at the mouth of the Somass River. The respondents argue that the right to fish for food was recognized basically as a communal right held by a larger community composed of both the Tseshaht and the Hupacasath bands and point out that the Tseshaht now dispute whether the Hupacasath have retained their aboriginal rights to fish in the area and may seek to prevent them from fishing there.

[148] I do not read **NTC Smokehouse** as constituting specific judicial determination that the HFN has an aboriginal right to fish in the Somass River, though it does show judicial recognition of such a right on the part of a larger Tseshaht/Hupacasath community, without distinction between the two groups.

[149] I note that the evidence tendered in the **NTC Smokehouse** case and the findings of fact of the trial judge were within the knowledge of the Provincial Crown, which appeared as intervener in both the Court of Appeal and Supreme Court of Canada actions.

[150] Given the treaty negotiations, the prior consultations, the publicly available information, and the evidence in **NTC Smokehouse**, I find that the Crown was aware or should have been aware, when it made the removal decision, of the HFN claims, and of the potential existence of aboriginal rights pertaining to the Removed Lands and the surrounding Crown lands in TFL 44.

(4) *Contemplated conduct affecting aboriginal rights*

[151] Did the Crown contemplate conduct that could adversely affect aboriginal rights?

[152] I will address this question in two stages. First, could the HFN have aboriginal rights (including possible aboriginal title) with respect to the privately owned land? Second, did the Crown contemplate conduct that might adversely

affect HFN aboriginal rights with respect to the Removed Lands or with respect to the Crown land in TFL 44?

(a) Could the HFN have aboriginal rights with respect to the Removed Lands?

[153] As a threshold issue, I must decide whether the honour of the Crown is at stake only when its dealings relate to Crown land. Does the fact that the Removed Lands are private lands mean that the honour of the Crown cannot be implicated and thus, that a duty to consult and accommodate cannot arise on these facts?

[154] I will first briefly summarize the parties' submissions on this point.

[155] Mr. Thompson for the Crown submitted that ***Haida Nation*** is premised on the fact that the Crown held legal title to the land and that the aboriginal group claimed aboriginal title to that land. He submitted that for claims to give rise to a duty to consult, they must be ones that are capable of realization. He urged that the petitioners in these proceedings do not challenge the original Crown grant or the fee simple title held now by Island Timberlands.

[156] The Crown's position is that aboriginal title and fee simple title are fundamentally incompatible, because the former, which ***Delgamuukw*** described at para. 117 as "the right to exclusive use and occupation of the land" cannot coexist with fee simple title, the highest form of tenure in Canadian law and the most substantial estate that can exist in land.

[157] Thus, Mr. Thompson argued, a claim to aboriginal title over private land is not realizable and no duty to consult can arise.

[158] The Crown referred to the comments of Mahoney J. in the case of ***Hamlet of Baker Lake v. The Queen***, [1980] 1 F.C. 518 at para. 102 (T.D.) (Q.L.):

The coexistence of an aboriginal title with the estate of the ordinary private landholder is readily recognized as an absurdity. The

communal right of aborigines to occupy it cannot be reconciled with the right of a private owner to peaceful enjoyment of his land.

[159] The Crown also relies on ***Skeetchesten*** and this statement by MacKenzie J.A. at para. 72:

The appellant's ultimate objective is stated to be reconciliation of the claimed aboriginal title with Kamlands title to the 6 Mile Ranch in some form of accommodation of interests. The appellant argues that the present use of the lands as a ranch is compatible with aboriginal title but an intensive resort development with hotels, condominiums and golf courses would be incompatible. This submission appears to have an inherent contradiction inasmuch as the claimed aboriginal title and the fee simple title each involve rights to exclusive possession which are mutually exclusive.

[160] In the Crown's view, if the petitioners were to challenge the fee simple owner's title, such a challenge would not succeed either because of the inherent incompatibility of fee simple and aboriginal title or because the infringement of aboriginal title would be justified.

[161] With respect to justification for infringement of aboriginal title, the Crown's position is that both requirements can be met: (a) the infringement is in furtherance of a legislative objective that is compelling, substantial and reconcilable with aboriginal rights and the broader community of which they are a part; and (b) it is consistent with the special fiduciary relationship between the Crown and aboriginal peoples: ***Delgamuukw***, paras. 161-162.

[162] The Crown also submits that aboriginal title to the Removed Lands may have been extinguished as a result of the Federal Crown grant in 1887 to the Esquimault and Nanaimo Railway (although the Crown urges that I should not reach a conclusion regarding extinction of title.)

[163] Further, the Crown's position is that the question of whether aboriginal title and fee simple title can co-exist is inappropriate for a petition on judicial review and should not be decided in this proceeding.

[164] Under the terms of the British Columbia Treaty Process, the petitioners will not be able to obtain title to any private lands, except on a willing seller/willing buyer basis, and the Crown relies on that fact as further support for its position that there is a fundamental incompatibility between aboriginal title and fee simple title. The Crown's position is that it does not recognize aboriginal title to lands that are privately held and that it does not have jurisdiction to provide privately held land if it is claimed.

[165] With respect to aboriginal rights short of title, Mr. Thompson argued that any aboriginal rights exercised by the HFN on the Removed Lands are at the sufferance of the private landowner, which can at any time prohibit access to its private property. He further submitted that aboriginal rights are subject to the right of the fee simple landowners to put their lands to uses that are visibly incompatible with the exercise of aboriginal rights, such as the harvesting of commercial timber.

[166] The Crown submits that a finding by this Court that the petitioners have established a *prima facie* case would "necessitate a finding that aboriginal rights and title not only exist on private land, ... but a finding that First Nations must be consulted by the Crown or even private landowners when exercising their rights as fee simple titleholders at common law." The Crown argued that "[s]uch a finding would constitute a step towards a challenge to the entire Torrens property system in British Columbia."

[167] Brascan's argument is consistent with that of the Crown. Brascan argues that the petitioners have not established a credible claim to aboriginal title in the Removed Lands. Mr. Clark pointed to the absence of authority for a duty to consult where the claim is for aboriginal title to privately owned land and emphasized that fee simple is the highest form of tenure in Canadian law and the most substantial estate which can exist in land. Brascan's position is that it is logically impossible for both aboriginal title and fee simple title to co-exist on the same parcel of land. Brascan also stresses that the petitioners are not challenging the fee simple title.

[168] The petitioners respond that the authorities do not exempt private land from the duty to consult, and that the authorities do not support the proposition that aboriginal rights and title are inapplicable on private lands. Mr. Grant for the petitioners argued that aboriginal rights and title can co-exist with fee simple title. Further, he submitted that, although the petitioners are not challenging the fee simple title in this proceeding, they have filed a writ claiming aboriginal title over their traditional territory, which includes the Removed Lands.

[169] Mr. Grant argued that Crown sovereignty continues over all lands, including those held in fee simple, and that the obligation to consult flows simply from s. 35 of the **Constitution Act, 1982**, and the previous occupation of lands by an aboriginal group.

[170] I will begin my analysis with a review of some of the relevant authorities on the possible co-existence of private land ownership with aboriginal title and rights.

[171] As I read the cases, it has not yet been decided what meaning, if any, aboriginal title continues to have once the land over which it is asserted has been granted in fee simple to a third party.

[172] **Skeetschten** holds that aboriginal title is not a registrable interest, but leaves open the larger question of whether aboriginal title can co-exist with fee simple title. Southin J.A. adopted the metaphor used by MacKenzie J.A. that an aboriginal title claim is “upstream” of the certificate of indefeasible title:

During argument, my colleague, Mr. Justice Mackenzie, encapsulated the Registrar's argument thus: "The claim of the appellant is upstream of the certificate of indefeasible title. The Registrar's duties are downstream of the certificate." (para. 4)

MacKenzie J.A. and Rowles J.A., after making the comment at para. 72 relied on by the Crown, that “the claimed aboriginal title and the fee simple title each involve rights to exclusive possession which are mutually exclusive”, adverted to the complexity of the issues surrounding aboriginal rights in lands alienated by the Crown and concluded that the court was bound by its earlier decision in **Re Uukw**

et al. v. The Queen in Right of British Columbia et al. (1987), 37 D.L.R. (4th) 408 (B.C.C.A.) regarding registrability of aboriginal land claims (para. 83).

[173] As for aboriginal rights short of aboriginal title, although there is some authority with respect to their continued existence relating to privately owned land, many questions remain open.

[174] In **Delgamuukw** at para. 36, the Supreme Court of Canada summarized the Reasons of Macfarlane J.A. in the Court of Appeal regarding aboriginal rights and extinguishment:

The purpose of the colonial instruments in question was to facilitate an orderly settlement of the province, and to give the Crown control over grants to third parties. It is not inevitable, upon a reading of the statutory scheme, that the aboriginal interest was to be disregarded. They did not foreclose the possibility of treaties or of co-existence of aboriginal and Crown interests. Similarly, even fee simple grants to third parties do not necessarily exclude aboriginal use. For example, uncultivated vacant land held in fee simple does not necessarily preclude the exercise of hunting rights. Moreover, it is clear that, at common law, two or more interests in land less than fee simple can co-exist. However, since the record was not sufficiently specific to permit the detailed analysis of such issues, Macfarlane J.A. suggested that these issues be dealt with in negotiation. He concluded that extinguishment by a particular grant needed to be determined on a case by case basis. [emphasis added]

[175] Lamer C.J.C. later considered whether provincial laws of general application could extinguish aboriginal rights, and concluded:

It follows that aboriginal rights are part of the core of Indianness at the heart of s. 91(24). Prior to 1982, as a result, they could not be extinguished by provincial laws of general application. (para. 181)

[176] The relationship between existing treaty rights and private property was considered in **R. v. Badger**, [1996] 1 S.C.R. 771. That case involved hunting offences under the Alberta **Wildlife Act**, S.A. 1984, c. W-9.1. Three accused, with rights under Treaty No. 8, were caught hunting on private land. On appeal, the Court considered whether status Indians under Treaty No. 8 had the right to hunt

for food on private land. The Court considered the text of Treaty No. 8, which provided for hunting, trapping and fishing "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" (para. 40).

[177] Cory J. considered the text of the treaty and the circumstances in which it was signed and concluded:

... the oral promises made by the Crown's representatives and the Indians' own oral history indicate that it was understood that land would be taken up and occupied in a way which precluded hunting when it was put to a visible use that was incompatible with hunting. (para. 58)

As to whether aboriginals had a treaty right of access to hunt on privately owned lands, he concluded they did not where the land is put to a "visible, incompatible use". He held at para. 66:

Where lands are privately owned, it must be determined on a case-by-case basis whether they are "other lands" to which Indians had a "right of access" under the Treaty. If the lands are occupied, that is, put to visible use which is incompatible with hunting, Indians will not have a right of access. Conversely, if privately owned land is unoccupied and not put to visible use, Indians, pursuant to Treaty No. 8, will have a right of access in order to hunt for food.

[178] Access to private land to practise aboriginal rights, as opposed to treaty rights, was considered in **R. v. Alphonse** (1993), 80 B.C.L.R. (2d) 17 (C.A.). That case concerned an appeal from charges under the **Wildlife Act**, S.B.C. 1982, c. 57, for hunting out of season on private, uncultivated land. The accused alleged that he was exercising an aboriginal hunting right at the time of his arrest. Macfarlane J.A. considered whether this defence was ineffective because Mr. Alphonse was hunting on private land.

[179] Macfarlane J.A. concluded that if legislation, such as the **Trespass Act**, R.S.B.C. 1979, c. 411, or the **Wildlife Act**, does not circumscribe the aboriginal rights in question, then those rights can be exercised. He dismissed the Crown's argument that consent of the owner of private land was required, and concluded:

Applying the Trespass Act to the circumstances of this case, there was no prohibition with respect to hunting on the lands in question. That being so, it was not unlawful to hunt on those lands. Thus, it was not unlawful to exercise an aboriginal right on those lands. (para. 34)

Lambert J.A., in separate and concurring reasons for judgment, held:

The second aspect of this question relates to whether the exercise by Mr. Alphonse of a hunting right incidental to his aboriginal title or of a separate hunting right over the traditional ancestral lands of the Shuswap people may have been regulated in such a way as to preclude that exercise on land owned by the Onward Cattle Co. Ltd. in fee simple. In my opinion there is nothing in the Wildlife Act, the Trespass Act, or any other Provincial legislation which, by referential incorporation as Federal legislation or otherwise, might be thought to have precluded the exercise by Mr. Alphonse of a right to shoot the mule deer on this private land. The land was uncultivated bush; it was not occupied by livestock; it was not surrounded by a fence or a natural boundary; and it was not posted with signs prohibiting trespass. Just as in *R. v. Bartleman* (1984), 55 B.C.L.R. 78 (B.C.C.A.), where such land was available for the exercise of treaty hunting rights over unoccupied lands, so in this case it was available for the exercise of aboriginal hunting rights. That is not to say that it would not have been available if it had been occupied by livestock or surrounded by a fence. Such a supposition raises a number of questions which it is not necessary to resolve in this appeal. (para. 111)

[180] Read together, ***Badger*** and ***Alphonse*** indicate that existing aboriginal and treaty rights, for example to hunt or fish, may be exercised on unoccupied private land if the activity is permitted by statute or common law and is not prohibited by the private landowner. With treaty rights, at least where a “tracts taken-up clause” is included in the relevant treaty, their exercise is precluded if the private land is occupied and visibly used for incompatible purposes. The exercise of aboriginal rights may also be precluded by visible, incompatible use, although the point does not appear to have been finally determined.

[181] I did not understand the petitioners to dispute that, whatever remains of aboriginal rights (short of title) with respect to private land, the owner of that land can preclude access as part of the owner’s rights to exclusive use and possession.

[182] I turn now to my analysis and conclusions regarding the respondents' argument that the private ownership of the land precludes a claim for aboriginal title and, correspondingly, the existence of a duty to consult.

[183] There are no judicial decisions directly on point, so far as the research of counsel or my own research has disclosed. (As described above, two B.C. Environmental Appeal Board cases have addressed the point, but neither has previously been referred to in a judicial decision as far as I am aware, the cases were not the subject of submissions before me, and in any event, they do not have precedential value.)

[184] The Supreme Court of Canada and B.C. Court of Appeal authorities on the duty to consult (***Delgamuukw***, ***Haida Nation***, ***Taku River***, ***Musqueam*** and ***Mikisew***) all involved Crown land, though they do not explicitly limit the duty to Crown land. The reasons in ***Haida Nation*** and ***Taku River*** do not emphasize Crown ownership of the land in question. Most of the discussion centres on the Crown as decision-maker rather than the Crown as landowner.

[185] The lower court cases decided since ***Haida Nation*** and ***Taku River*** have begun the development of the common law on duty to consult, as envisioned by the Supreme Court of Canada, and show a variety of circumstances in which the duty has been found to exist. Often the reasoning centres on Crown decision-making. However, all cases but one (***Homalco***) clearly involved Crown land.

[186] In ***Gitksan First Nation #1***, a change of corporate ownership of a company that held a TFL and forest licences over Crown land was challenged. In ***Huu-Ay-Aht***, it was the operation of the provincial Forest and Range Agreement program. ***Musqueam v. Richmond*** and ***Betsiamites*** both concerned directly the use of Crown land or resources.

[187] In ***Homalco***, the issue was the location and choice of fish stock for a fish farm operated by a private party. ***Homalco*** involved a decision whose effect was

possibly to endanger fish stocks in waters where the First Nation claimed an aboriginal right to fish, adjacent to Crown land where they claimed aboriginal title.

[188] Despite the absence of authority on point, direction can be found in the principles articulated by the Supreme Court of Canada.

[189] The Supreme Court has found that consultation and accommodation are required where a First Nation advances a factually credible claim to aboriginal rights. The rights claimed can be as limited as the right to enter upon the land to fish, hunt or visit a sacred site, or as extensive as the right to maintain exclusive possession (aboriginal title). It is not necessary for the claimant to show that the claim will succeed; only that it is a credible claim. The strength of the claim, if it passes the threshold of credibility, does not bear on the existence of the duty; rather, it is relevant to the content of the duty. The Court reiterated in ***Mikisew*** that the initial threshold is low, and that “[t]he flexibility lies not in the trigger (“might adversely affect it”) but in the variable content of the duty once triggered” (para. 34).

[190] The duty to consult exists because of the need to reconcile the pre-existence of aboriginal societies with the sovereignty of the Crown.

[191] The Crown is sovereign over all lands, including those held in fee simple. Certain decisions by the Crown, such as this decision to remove the lands from the TFL, may significantly affect land to which aboriginal peoples lay claim, even though the Crown is not the title-holder to the land. Crown sovereignty and its power to make decisions about land during the time (which may be lengthy) when claims of aboriginal rights have been advanced but not yet proved triggers the duty to consult. Crown ownership of the land is not a necessary condition for the existence of that power to make decisions.

[192] Although Crown sovereignty extends to all land, Crown decision-making power about the land does not. Here, the Minister had specific and significant control over activities on the land, could prevent it from being used for non-forestry

purposes, and could even prevent it from being alienated. These are unique and unusual circumstances.

[193] The respondents are asking me to decide at this stage, which is in effect an interim proceeding, that the removal decision could have no effect on aboriginal title. They urge, in general, that aboriginal title and fee simple title are fundamentally inconsistent and that it is logically impossible for them to co-exist on the same parcel of land, and in particular, that with respect to the Railway Lands aboriginal title was extinguished by the Federal Crown grant.

[194] Thus, they are asking me in fact to decide what they say I should refrain from deciding, by seeking a conclusion that the door is closed on aboriginal title claims when land is held in fee simple by a third party.

[195] The petitioners, on the other hand, are not seeking a ruling that aboriginal title continues to exist: only that it might. They are content that the door remain open, as it has been left by the higher courts. They assert aboriginal title without challenging the fee simple title in this proceeding, on the premise that this claim, under the existing state of the law, is sufficiently credible to found a duty to consult.

[196] Here, the Provincial Crown and the HFN are at Stage Four in treaty negotiations. Prior to the removal decision, the province consulted with the HFN regarding its actions within HFN claimed traditional territory as a whole. There is no evidence that the Provincial Crown made any distinction in this consultation process between the Crown land and the private land. When the Removed Lands were under TFL 44, the Crown had the power to restrict significantly the owner's use of those lands, and could refuse to permit the alienation of those lands. The TFL was registrable against title under the ***Land Title Act*** by way of notice. The decision to remove the land from the TFL was a decision with important ramifications for the future of that land.

[197] I do not accept the respondents' argument that this case is distinguishable from ***Haida Nation*** and ***Taku River***.

[198] First, I do not find it significant that the fee simple title is not attacked in this proceeding. Further, the petitioners are advancing a claim to aboriginal title in a separate proceeding.

[199] Second, I conclude that the principles articulated in ***Haida Nation*** and ***Taku River*** can apply outside the context of Crown land. The Crown's honour does not exist only when the Crown is a land-owner. The Crown's honour can be implicated in this kind of decision-making affecting private land. Here, the Crown's decision to permit removal of the lands from TFL 44 is one that could give rise to a duty to consult and accommodate. I refer back to the words of the Supreme Court in ***Haida Nation*** at para. 76: the province may have a duty to consult and perhaps accommodate on TFL decisions, which reflect the strategic planning for the utilization of the resource and which may potentially have serious impacts on aboriginal rights.

[200] I have concluded that the existence of a duty to consult, in these unique circumstances, is not precluded by the fact that these are private lands.

(b) Did the Crown contemplate conduct that might adversely affect HFN rights?

[201] The next step is to determine whether the Minister's decision to remove the land from TFL 44 in fact had the potential to affect adversely aboriginal rights or title asserted by the HFN.

[202] The petitioners argue that their ability to exercise their aboriginal rights with respect to the Removed Lands requires that they have access to and protection of the land's wildlife, fish and plant resources and the sacred sites integral to their way of life.

[203] The Removed Lands, when managed as part of TFL 44, were subject to the **Forest Act**, the **Forest Practices Code** and the **Forest and Range Practices Act**. They are no longer subject to that legislation. The petitioners urge that, as a result, the removal decision has significantly reduced the Crown's ability to control forestry activities on the removed lands; it terminates, for example, the landowner's obligations to submit a management plan, a timber supply analysis, and a 20-year plan and to be subject to an allowable annual cut.

[204] The HFN argues that the removal decision also purports to end the obligation of the Crown to consult with them regarding significant management decisions affecting the Removed Lands, pointing to past consultation and accommodation which led, for example, to protection of their sacred sites.

[205] The petitioners argue that the "management objectives" in the **Private Managed Forest Land Act**, S.B.C. 2003, c. 88, the legislation which now applies to the Removed Lands, are vague and non-specific, provide significantly reduced protection, and are easily avoided due to the regime's voluntary nature. The legislation permits landowners to withdraw their lands from the managed forest classification at will, subject only to the possible payment of an exit fee to the local taxing authority and the loss of a benefit in terms of property tax rates (ss. 17-19).

[206] They submit that the level of environmental protection on the Removed Lands has been reduced.

[207] They also point to the fact that the owner's powers over the Removed Lands have increased. For example, the owner can now subdivide and develop the lands for housing and sell the lands without the permission of the Minister.

[208] The petitioners concede that the HFN have always needed permission to go on the land since it became privately owned, but argue that previously there was a context in which permission was obtained, and a process under the terms of the TFL for managing the use of the land in consultation with them.

[209] The petitioners also argue that there is a potential adverse affect on their ability to exercise their aboriginal rights to resources on Crown land in TFL 44 because statutory and regulatory forest cover requirements for environmental purposes are often expressed as a proportion of the TFL's total area; thus, the reduction of the total area of TFL 44 reduces in absolute terms the minimum size of the areas which are protected.

[210] The Crown argues that even if a claim does exist, there is no possible adverse impact on, or infringement of, asserted aboriginal rights or title since the petitioners continue to have the same ability to access the lands for cultural and other purposes. It submits that the change in the regulatory regime has not resulted in lesser environmental protections and that the removed lands have never been available for land selection through treaty in any event.

[211] Further, the Crown points to the conditions regarding the Removed Lands imposed by the Minister and agreed to by Brascan, in support of the argument that if the Hupacasath have any claim, their interests were accounted for and protected by the Minister of Forests when the removal decision was implemented, well beyond what would actually have been required.

[212] The Crown's position is that it had an enforceable contract with Weyerhaeuser and that Brascan has subsequently indicated that it considers itself equally bound by the terms and conditions and will continue to manage the private lands in accordance with the provisions of the July 9 letter. It submits that Brascan has also agreed to be bound by the letter of agreement with the Ministry of Water, Land and Air Protection to protect ungulate winter ranges and other habitats and work to develop permanent protections for two years.

[213] The Crown argues that any failure by Brascan to continue to manage the lands under the **Private Managed Forest Land Act** would be a contractual breach and subject to remedy or penalty, and that federal legislation (the **Fisheries Act**, R.S.C. 1985, c. F-14, **Navigable Waters Protection Act**, R.S.C. 1985, c. N-22, **Species at Risk Act**, S.C. 2002, c. 29) and provincial legislation

(**Water Act**, R.S.B.C. 1996, C. 483, **Heritage Conversation Act**, R.S.B.C. 1996, c. 187, **Environmental Management Act**, S.B.C. 2003, c. 53) continues to apply. The Crown points to the conditions imposed by the Minister regarding water quality and fish habitat through management objectives under the **Private Managed Forest Land Act**.

[214] The Crown argues that it is significant that Weyerhaeuser and now Brascan have agreed to maintain International Standards Organization (ISO) and CSA certifications, which require engagement of aboriginal groups in forms of consultation. Brascan submits that these certifications carry a comprehensive set of standards, which are not easily met, and that certification is not lightly obtained. Brascan points to evidence showing that HFN representatives had in fact agreed that CSA certification was preferable to the TFL regime.

[215] The respondents both argue that the petitioners are not entitled to an unchanging regulatory regime. They submit that, while there may be fewer opportunities for judicial review applications because there will be fewer decisions made by government, in any event the entire forest industry is moving towards a “results based” rather than a codified and process-oriented management regime.

[216] As did the Crown, Brascan argues that there in fact will be no change in the ability of the petitioners to access the private lands. It says that sites and objects having historical or cultural value to an aboriginal people, including those located on private land, are protected under the **Heritage Conservation Act**.

[217] Brascan confirmed in argument that it will abide by the Minister’s conditions for the removal decision. In response to a question from the Court as to whether the agreement between the government and Weyerhaeuser is enforceable as between the government and Brascan, Mr. Clark for Brascan stated that there has to be good faith between government and industry. He said that government “calls the shots” and that Brascan will abide by the government’s conditions, because if it did not, it would find itself subject to regulation and law reform, and “back to where it started”.

[218] Brascan argues that it is maintaining many of Weyerhaeuser's policies and procedures with employees trained to be sensitive to aboriginal cultural issues, that it is in the business of timber harvesting for the long term and that the private lands in question are highly productive and can support in perpetuity large scale commercially viable harvesting on a sustainable basis.

[219] Brascan argues that there is no evidence of any concrete adverse effects from removal decision on the petitioners' asserted rights because both Weyerhaeuser and Brascan have complied fully with the Minister's conditions and the applicable legislation.

[220] In the alternative, Brascan argues that if the HFN did successfully establish aboriginal title in the removed lands, their only remedy could be against the Crown, and not against Brascan's title, because aboriginal title is an encumbrance on the Crown's underlying title and does not attach to fee simple title.

[221] I will now state my conclusions on the question whether the Crown contemplated conduct that might adversely affect Hupacasath aboriginal rights.

[222] The difference between the level of regulation of forestry activities on the land before removal from the TFL, under the **Forest Act** and the **Forest Practices Code**, and after removal under the **Private Managed Forest Land Act**, is significant enough, according to Brascan, that removal of the lands was a major factor in its decision to enter into the agreement to purchase Weyerhaeuser's coastal assets.

[223] The removal decision, by all accounts, results in a lower level of possible government intervention in the activities on the land than existed under the TFL regime. There is a reduced level of forestry management and a lesser degree of environmental over-sight. Access to the land by the Hupacasath becomes, in practical terms, less secure because of the withdrawal of the Crown from the picture. There will possibly be increased pressure on the resources on the Crown

land in the TFL as a result of the withdrawal of the Removed Lands. The lands may now be developed and re-sold.

[224] The conditions in the Minister's letter are not enforceable by the HFN, even if they are enforceable by the Minister.

[225] In agreeing to the removal of the lands, the Crown decided to relinquish control over the activities on the land, control that permitted a degree of protection of potential aboriginal rights over and above that which flows from the continued application of federal and provincial legislation.

[226] Further, it is undisputed that nothing formally prevents Brascan from ceasing its voluntary compliance with the **Private Managed Forest Land Act** regime at any time its operational requirements so dictate. The conditions in the Minister's letter to Weyerhaeuser, assuming that they are binding on Brascan, require maintenance of the current status of "managed forest" on the private property "[s]ubject to applicable law and Weyerhaeuser's operation, risk management and other needs." Similarly, the conditions state that "[v]ariable retention and stewardship zoning on old growth areas will be maintained indefinitely", which would seem to allow for a change at any time.

[227] Brascan's agreement to maintain current critical wildlife habitat areas for two years while a long-term plan is developed with the Ministry of Water, Land and Air Protection does not require that any ultimate agreement be reached.

[228] Although there is no evidence that the Hupacasath have experienced problems in exercising specific aboriginal rights on the land since the removal decision, the question is whether a greater potential now exists for such rights to be adversely affected than did before.

[229] The authorities reveal that the contemplated adverse effect need not be obvious. The test, as articulated by **Haida Nation**, and subsequently followed in a number of cases, focuses on conduct that has the potential to cause an adverse effect. In **Gitxsan First Nation #1**, Tysoe J. rejected the Crown's argument that

the transfer of a TFL and forest licences was a “neutral” decision that did not require any consultation (para. 82). He held that the potential for an adverse effect did result; the transfer changed the identity of the controlling mind of Skeena and the philosophy of the persons making the decisions associated with the licences and prevented the sale of the licences.

[230] The change from the regulatory regime before July 9, 2004, to the post-removal regime does have the potential to affect adversely aboriginal interests, despite the conditions imposed by the Minister, the continued application of federal and provincial legislation and the effect of the certification requirements. The Crown has relinquished its ability to protect undeclared aboriginal rights and to maintain the integrity of the treaty process.

[231] I find that the petitioners have established that the decision to remove the lands from management under the TFL regime has the potential to affect their ability to exercise aboriginal rights they may have on the Removed Lands (to fish, to hunt, to gather food, to harvest trees, to visit sacred places). I find that when the Minister decided to remove the lands from TFL 44, he contemplated conduct that had the potential to affect adversely the HFN’s aboriginal rights.

[232] I find as well that the Minister’s decision has the potential to affect the HFN’s aboriginal rights with respect to Crown land within their asserted traditional territory. Increased logging on the Removed Lands could have an impact on adjacent Crown land. Although the regulatory regime is not changed within TFL 44, activities such as logging and protection of old growth areas in TFL 44 may be altered as a result of the removal decision. The change has the potential to affect adversely the aboriginal rights asserted by the HFN.

[233] Thus, I find that the Minister contemplated conduct which he knew or ought to have known had the potential to affect adversely Hupacasath aboriginal rights.

(5) *The Crown's duty*

(a) What was the nature and scope of the Crown's duty?

[234] The scope of the duty is proportionate to a preliminary assessment of the strength of the case and to the seriousness of the potentially adverse effects upon the right or title claimed.

[235] Where the claim to title is weak, the aboriginal right limited, or the potential for infringement minor, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice. It is different when a strong *prima facie* case is established, the right and potential infringement is of high significance to the aboriginal peoples, and the risk of non-compensable damage is high: deep consultation, aimed at finding a satisfactory interim solution, may then be required: **Haida Nation**, paras. 43-44.

[236] While the petitioners' position is that they have shown a strong *prima facie* claim for aboriginal rights over all of their traditional territory, the Crown's position is that the claim is non-existent on the Removed Lands and weak, at best, on the Crown land.

[237] In assessing the strength of the HFN claim, I take into account both the evidence as to traditional use (by the HFN and others) and the fact that the Removed Lands are privately owned: thus, I consider in a preliminary way both the factual and legal strength of the claim.

[238] There was some dispute in argument about the extent to which the Deputy Chief Forester acknowledged the claims of the HFN in his rationale for the amendment to the allowable annual cut. I agree with the Crown that he did not acknowledge the validity of those claims, as opposed to the fact that they were being made.

[239] I also agree with the submission of the Crown that the fact that the petitioners were accepted into the B.C. Treaty Process does not in itself reveal

that they have a strong case since there was no evidence as to the criteria imposed for inclusion in the Treaty Process. However, the fact that negotiations are at Stage Four was a factor in my earlier conclusion that the Crown was or should have been aware of the nature and extent of the Hupacasath claim and the potential for adverse effect on aboriginal rights.

[240] The southern part of the asserted HFN traditional territory is subject to extensive overlapping claims by eight other First Nations, and the Crown specifically submitted that the strength of the HFN's claim was reduced in light of historical evidence that they were conquered by the Tseshaht. As stated above, I make no finding as to conquest. I also note that I have taken into account, in assessing the evidence on traditional use and occupation, the submissions of counsel regarding factors bearing on its weight.

[241] The respondents conceded that both the northern area of the traditional territory as a whole, and more specifically the northern area of the Removed Lands, are relatively free of overlap.

[242] In ***Gitxsan First Nation #1*** the Court noted, in responding to the Crown's argument that a *prima facie* case could not be made out because of overlapping claims, that:

... in the event that the overlapping claims result in a finding that aboriginal title to a disputed area has not been established, it is still possible for the Court to conclude that the competing groups have each established aboriginal rights in respect of the area. (para. 74)

[243] In its most recent pronouncement in ***Marshall***, the Supreme Court of Canada stated that aboriginal title requires the intention and capacity to retain exclusive control, that shared exclusivity could result in joint title and that aboriginal title is not negated by occasional acts of trespass or entry onto the land by consent (para. 57).

[244] Because of the private ownership of the land, and the position taken by the province in treaty negotiations, the prospect that the HFN will in the end obtain

exclusive possession of any of the Removed Lands or ownership of the resources on them seems remote.

[245] However, the Removed Lands are contiguous with Crown land, and the removal decision affects the Crown land claimed by the HFN as part of its traditional territory. The prospect exists that the HFN will obtain exclusive possession of some of that Crown land or its resources through treaty.

[246] Based on the evidence before me, including the uncontradicted evidence of the Hupacasath elders regarding traditional use of the territory they describe, for the purposes of this application my preliminary assessment of the strength of the case is as follows.

[247] I will first address the case regarding Crown land. I find that the HFN has shown a strong *prima facie* case for aboriginal rights including title with respect to the portion of their asserted traditional territory on the Crown land which is not subject to any overlapping claims. I reach no conclusions on the strength of the competing claims by other First Nations, but take those claims into account in concluding that the HFN *prima facie* case for aboriginal title to the portion of Crown land subject to overlap is weaker than for the other portion. Regarding the portion of their asserted traditional territory on Crown land subject to overlapping claims, the petitioners have shown a good *prima facie* case for aboriginal rights to hunt, fish, gather food, harvest trees and visit sacred sites. Since those rights do not require exclusivity, the existence of the overlapping claims does not in general weaken the petitioners' case.

[248] Second, with respect to the Removed Lands, I find that the petitioners have shown a *prima facie* case for aboriginal rights to hunt, fish, gather food, harvest trees and visit sacred sites on their asserted traditional territory, subject to the rights of the fee simple owner of that land to prohibit their access. Again, because the exercise of these aboriginal rights does not require exclusivity, I do not find that the existence of overlapping claims in general weakens the HFN case. I find that the petitioners have also shown a *prima facie* case for aboriginal title (if such

title has not been extinguished and continues to exist with respect to the Removed Lands), with respect to the portion of their traditional territory not subject to overlapping claims. As for the portion of the traditional territory on the Removed Lands subject to overlapping claims, given the requirement of exclusivity, I find they have shown a weak *prima facie* case.

[249] On the existing state of the law, the petitioners' aboriginal rights with respect to the Removed Lands are at best highly attenuated. Prior to the removal decision, the owners of the lands could have decided to exclude the Hupacasath from access to the lands at any time, subject to possible intervention by the Crown through its power to control activities on the land under the TFL. Their claimed aboriginal title, if it has not been extinguished, seems very unlikely to result in the Hupacasath obtaining exclusive possession of the Removed Lands in the future. The authorities indicate that the possible availability of the land to satisfy future land claims or treaty settlements is an important consideration in determining the extent of the Crown's duty.

[250] The extent of the Crown's duty is also proportionate to the seriousness of the potential adverse effect on the claimed aboriginal rights.

[251] I have described in the preceding part of these Reasons the potential adverse effects of the removal decision on HFN aboriginal rights.

[252] As a consequence of changes in activities on the Removed Lands, there might be some impact on fishing or hunting on the HFN claimed traditional territory outside the Removed Lands (and on Crown lands). I would say that the potential effect of the removal decision on the claimed aboriginal rights pertaining to the Crown land is modest.

[253] With respect to the Removed Lands themselves, the previous level of regulation of logging, wildlife protection and other activities on the land has been replaced by a different and much more forgiving regime. As well, the use of some of the lands could change altogether, for example through development for

housing. The potential effect of the removal decision on the claimed traditional territory in the Removed Lands is serious.

[254] Taking both the strength of the HFN claim and the seriousness of the potential adverse effects into account, I find that the duty to consult was at a moderate level with respect to the Crown lands, and at a lower level with respect to the Removed Lands.

(b) Did the Crown fulfill its duty to consult and accommodate?

[255] I turn to the question of whether the Crown's duty to consult was in fact fulfilled.

[256] Consultation requires good faith on both sides, which does not preclude hard bargaining. Aboriginal claimants must not frustrate the Crown's reasonable efforts, nor should they take unreasonable positions to thwart government in its consultation attempts: **Haida Nation** at para. 42. The standard is reasonableness, not perfection (para. 62). The right to be consulted is not a right to veto (para. 48). What is required is a process of balancing interests, of give and take (para. 48).

[257] The Crown argued that the strength of the *prima facie* case, if it exists, is so slight that at most the HFN was entitled to notice. Mr. Thompson submitted that the after-the-fact public notice released by the Crown on July 13, 2004 was sufficient notice and satisfies the test with respect to the honour of the Crown. He did not refer to any authority in support of his position that after-the-fact notice could suffice as consultation, and I am not persuaded by this submission, which seems inconsistent with the Supreme Court of Canada's pronouncements as to the meaning of consultation.

[258] The Crown conceded that there are remaining Crown lands which may be impacted, that consultation about these lands is ongoing and submitted that

because, in that context, the HFN will have a chance to be consulted about specific impacts flowing from the removal decision, nothing else is necessary.

[259] Both the Crown and Brascan argued that the WIWAG meetings and other interaction between the HFN and Weyerhaeuser fulfilled any consultation requirements on the Crown. The Crown pointed to the fact that the prevailing framework until November 2004 was the B.C. Court of Appeal decision in ***Haida Nation***, which required third party consultation.

[260] Brascan pointed to the statement by the Chief Justice in ***Haida Nation*** at para. 53 that “[t]he Crown may delegate procedural aspects of consultation to industry proponents seeking a particular development; this is not infrequently done in environmental assessments”, and argued that in effect Weyerhaeuser was carrying out the Crown’s obligations.

[261] However, there is no evidence that the Crown delegated the procedural (or any) aspects of consultation to Weyerhaeuser. The WIWAG process was not the Crown’s, whether directly or indirectly, and the WIWAG process did not involve consultation by the Crown about the pending removal decision.

[262] Most significantly, there is no evidence of any occasion when the Ministry either sought out or had the opportunity to hear the HFN’s views about the Weyerhaeuser proposal to remove the lands, or the HFN’s views about appropriate measures to accommodate aboriginal interests. Weyerhaeuser’s discussions with the petitioners were in a context of asymmetrical information. The HFN did not know that Weyerhaeuser had made formal application to remove the lands, what representations it had made, or what terms and conditions were under discussion. Nor could it be said that the HFN had an opportunity to express their interests and concerns to the Crown, or to ensure that their representations were seriously considered and, where possible, integrated into the proposed plan of action.

[263] The respondents both argued that the HFN's interests were in fact accommodated, beyond what would have been required, by the conditions imposed by the Minister. The Brascan submission put it this way:

The conditions to the Removal Letter are extensive, unusual and onerous. As will be discussed in more detail below, the conditions not only guarantee aboriginal access and notice, practices originally established on a voluntary basis by Weyerhaeuser, but they also protect aboriginal interests by imposing stringent environmental and forest practice requirements for the management of the lands. Environmental protection was further strengthened by Weyerhaeuser's concurrent agreement to protect ungulate winter ranges and a wildlife habitat area within the removed lands. The owners of privately owned timberlands are not normally required to adhere to such conditions or agreements.

[264] I do not find this to be an answer to the alleged breach of the duty to consult. While the Ministry and Weyerhaeuser may have turned their minds to what would protect aboriginal interests, the HFN have a position about what is necessary to do so and they should have been able to put their views and position forward to the Crown while the Crown was considering whether to accede to the request to remove the land.

[265] The Brascan submission emphasized that the courts do not insist on elaborate consultation or attempts at accommodation where it would be futile in light of inflexible or unreasonable positions taken by aboriginal claimants. Brascan argues that the petitioners have repeatedly asserted that their consent was required for the lands to be removed, and that they would refuse their support unless there was an acknowledgment of Hupacasath rights and title to Brascan's lands, control over resources on Brascan's lands, and agreements with respect to jobs and revenues for the HFN. Thus, Mr. Clark submitted, consultation and attempts at accommodation beyond what in fact took place would have been manifestly useless in the light of the petitioners' intransigence. He referred to **Heiltsuk Tribal Council v. British Columbia** (2003), 19 B.C.L.R. (4th) 107 at paras. 71-86, 103-118, 2003 BCSC 1422; **Halfway River First Nation v. British Columbia (Min. of Forests)** (1999), 64 B.C.L.R. (3d) 206 at para. 161 per

Finch J.A, 1999 BCCA 470; and **Lax Kw'Alaams Indian Band v. British Columbia**, 2004 BCSC 420 at para. 62.

[266] In **Halfway River**, Finch J.A. stated at para. 160-61:

The Crown's duty to consult imposes on it a positive obligation to reasonably ensure that aboriginal peoples are provided with all necessary information in a timely way so that they have an opportunity to express their interests and concerns, and to ensure that their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action... .

There is a reciprocal duty on aboriginal peoples to express their interests and concerns once they have had an opportunity to consider the information provided by the Crown, and to consult in good faith by whatever means are available to them. They cannot frustrate the consultation process by refusing to meet or participate, or by imposing unreasonable conditions... .

[267] There is no evidence that the HFN refused to meet or to participate. The evidence that the HFN took the position with Brascan that it needed HFN consent to “get the land out” because of their asserted aboriginal rights and title to the land, without more, does not persuade me that they did frustrate or would have frustrated a consultation process. There was no consultation process for them to frustrate.

[268] The Crown argued that there was a duty on the HFN to take steps to deal with the issue, after it received notice on February 12, 2004 at the WIWAG meeting of Weyerhaeuser’s application to remove the land, by approaching the Minister of Forests to discuss its concerns about the potential impact of removing the lands from the TFL. The Crown argued that consultation is a “two-way street” (referring to **Cheslatta Carrier Nation v. British Columbia (Environmental Assessment Act, Project Assessment Director)**, (1998), 53 B.C.L.R. (3d) 1 at para. 73 (S.C.) and to **Ryan v. British Columbia (Minister of Forests – District Manager)** (1994), 40 B.C.A.C. 91 (C.A.)).

[269] While there is no doubt the HFN knew that Weyerhaeuser was trying to persuade the Crown to remove the land, there is no evidence that HFN leaders knew that a formal application had been made, or that the Crown was considering it. I do not find that the failure of the HFN to make representations to the Crown in the February – July 2004 period disentitles them from now seeking review of the Crown’s failure to meet its duty to consult and accommodate.

[270] I do not find that what transpired in this case is comparable to what occurred in *Heiltsuk* or in *Lax Hw’Alaams* or that the HFN failed to meet their reciprocal duty to express their interests and concerns.

[271] Here, despite the previous history of consultation with the HFN about the management of TFL 44, the Crown did not attempt consultation at all. The Crown did not meet what Finch J.A. described as its “positive obligation”.

[272] I recognize that, as stated in *Taku River* at para. 40, the Crown does not have to develop a special or separate consultation process for aboriginal groups so long as the public consultation process takes aboriginal interests into account. However, the Crown did not conduct any public consultation process with respect to this decision and the participation of HFN representatives in WIWAG did not constitute consultation by the Crown.

[273] In summary, the Crown had a duty to consult with the HFN regarding the removal of the land from TFL 44, and regarding the consequences of the removal of that land on the remaining (Crown land) portion of TFL 44.

[274] The Crown’s duty with respect to alleged aboriginal rights on the Removed Land is at a low level and does not require “deep consultation”. It does require informed discussion between the Crown and the HFN in which the HFN have the opportunity to put forward their views and in which the Crown considers the HFN position in good faith and where possible integrates them into its plan of action. The Crown has not met that duty.

[275] The duty on the Crown with respect to the effect of the removal decision on aboriginal rights asserted on Crown land is higher, and requires something closer to “deep consultation”. On the evidence, the Crown did not meet that duty.

(6) *Amendment to the allowable annual cut*

[276] I must also consider whether the Crown met its duty to consult with respect to the decision of the Chief Forester to determine a new allowable annual cut for Crown lands remaining in TFL 44. Did the Crown contemplate that its amendment to the allowable annual cut had the potential to affect adversely HFN aboriginal rights in the Crown land that remained in the TFL area?

[277] The Crown was aware of the HFN claim to the Crown land under the TFL, and had consulted with the HFN in the past regarding decisions relating to the TFL, including the allowable annual cut. As set out above, my preliminary assessment is that the HFN *prima facie* claim to aboriginal rights on the Crown land is strong, particularly so with respect to land that is not subject to overlapping claims.

[278] The petitioners submit that the Chief Forester’s amendment decision has the direct (and the potentially adverse) effect of altering the rate at which timber harvesting will take place on lands over which they assert aboriginal rights. Further, they submit the adjustment has the indirect effect of altering the protective measures previously established in TFL 44. They argue the August 26, 2004, adjustment, which they say was made without reference to localized considerations, affects measures previously adopted to conserve wildlife and fish habitat, water quality, and biodiversity.

[279] The Crown submits that the adjustment in question does not have a potential adverse effect on the asserted aboriginal rights of the HFN, as it reduces the level of harvest on a wholly proportional basis. The Crown submits that the adjustment at worst leaves the Hupacasath in the same position they were in prior

to the removal decision, or in fact benefits them. The Crown submits that no duty to consult is triggered.

[280] The Crown also submits that the petitioners failed to respond on two occasions when the Crown contacted them to solicit approval of the original allowable annual cut determination for TFL 44 and that therefore the petitioners' claims of concern regarding the adjustment should be viewed with some scepticism.

[281] Given the Crown's knowledge of the HFN claim, the past history of consultation, and the potential for the allowable annual cut amendment to affect the claimed aboriginal rights, I find that the Crown had a duty to consult the HFN about that decision.

[282] As already described, the authorities show that the scope and content of the duty will be proportional to the strength of the claim and the seriousness of the potentially adverse effect upon the right or title claimed.

[283] Here, the decision reduces the rate of timber harvesting on the Crown land, proportionate to the change in total area in the TFL resulting from the removal of the lands. The HFN position, as I understand it, is that the decision is problematic with respect to their asserted aboriginal rights because the rate was not reduced more.

[284] The Crown points out that the allowable annual cut determination is a lengthy and complex process, taking at least 20 months and occurring every five years. Mr. Thompson also submitted that the Crown had to reduce the rate of timber harvesting in the TFL once the Removed Lands were out; otherwise, there would have been an unsustainable rate of harvesting.

[285] In all of the circumstances, it is fair to characterize the potentially adverse effect, if any, as minor. Under ***Haida Nation***, where potential infringement is minor, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice (para. 43).

[286] The HFN first received notice on July 13, 2004 that it was likely the Chief Forester would amend the allowable annual cut on, when a copy of the Minister of Forests' letter of July 9, 2004 was forwarded to them. That letter stated:

Allowable Annual Cut (AAC) Determination

Due to the significance of the private land deletion and its impact on the AAC determination for TFLs 39 and 44, I expect the chief forester will make a new AAC determination reflecting the reduction in size of the TFLs effective the date the private lands are removed

[287] More generally, the HFN were aware, or should have been aware, that the allowable annual cut would be changed if the "management assumptions" on which it was based changed. The original *Rationale for Allowable Annual Cut (AAC) Determination for Tree Farm Licence 44 effective August 1, 2003*, provided at p. 33:

...If additional significant new information is made available to me in respect of the management assumptions upon which I have predicated this decision, or First Nations' interests, then I am prepared to revisit this determination sooner than the five years required by legislation

[288] The HFN received notice of the allowable annual cut amendment from Weyerhaeuser, on September 14, 2004, and the *Amendment Rationale* from the Ministry of Forests on November 16, 2004.

[289] The HFN had notice that it was likely the allowable annual cut was going to be amended and knew, or should have known, that the Chief Forester had explicitly reserved the right to amend the allowable annual cut if the assumptions on which the original cut was based changed. There is no evidence that the HFN contacted the Chief Forester after the removal decision was made but before the allowable annual cut was adjusted to discuss how their aboriginal interests would be affected. At the same time, there is no indication that the Crown approached them or asked them for their views.

[290] I have concluded that in these circumstances, where the Crown gave notice and disclosed information regarding its decision, and where there is no evidence

that it failed to respond to concerns raised by the HFN, it fulfilled its duty to consult.

(7) *What remedy, if any, should be granted as a result of the breach of duty to consult and accommodate?*

[291] First, the petitioners sought declaratory relief.

[292] There will be a declaration that the Minister of Forests had, prior to the removal decision on July 9, 2004, and continues to have, a duty to consult with the Hupacasath in good faith and to endeavour to seek accommodation between their aboriginal rights and the objectives of the Crown to manage TFL 44 in accordance with the public interest, both aboriginal and non-aboriginal.

[293] There will be a declaration that making the removal decision on July 9, 2004 without consultation with the Hupacasath was inconsistent with the honour of the Crown in right of British Columbia in its dealings with the Hupacasath.

[294] There will be a declaration that the Chief Forester had, prior to the August 26, 2004 decision to amend the allowable annual cut for TFL 44, and continues to have a duty to meaningfully consult in good faith with the Hupacasath and to endeavour to seek accommodation between their aboriginal rights and the objectives of the Crown to manage TFL 44 in accordance with the public interest, both aboriginal and non-aboriginal.

[295] Second, the petitioners urge that unless this Court orders, in addition to declaratory relief, that the Minister's decision be quashed or suspended in its effect, any consultation would be a purely formal and empty exercise because the Minister has "stripped himself" of the ability to exercise statutory powers over the Removed Lands.

[296] The petitioners ask that I set aside or stay the effects of the removal decision, and refer the matter for reconsideration after further consultation with the petitioners and after the seeking of meaningful workable accommodation.

Mr. Grant for the petitioners referred to the Crown's conduct in this matter as "egregious" and described the possible impact on Hupacasath aboriginal rights of leaving the removal decision in place as very serious. In particular, he emphasized the right to fish and the right to carry on sacred practices on the land.

[297] The petitioners argue that Brascan was well aware of their position and of this petition when it completed the purchase of the Weyerhaeuser coastal assets and that it should not now be able to assert prejudice resulting from its reliance on the validity of the removal decision.

[298] The Crown argues that there is a duty on the HFN to take steps and advise the Crown of its concerns and that First Nations cannot frustrate the consultation process by refusing to meet or participate or by imposing unreasonable conditions, as set out in ***Halfway River*** at para. 161; thus, a remedy should be refused.

[299] As stated above, I do not find that construction of the facts to be accurate. It has not been established on the evidence that the HFN refused to meet, imposed unreasonable conditions or was intransigent.

[300] The Crown also argued that the petitioners did not commence this proceeding until over five months after the removal decision and that there has been a significant delay in filing materials, a factor for the exercise of discretion against granting relief.

[301] The petitioners notified the Minister of their position very shortly after they learned of the removal decision and have proceeded relatively expeditiously. I do not find that the remedy granted should be affected by alleged delay on their part.

[302] The Crown argued that remedies under judicial review are wholly discretionary and that the court may withhold a remedy for objective reasons, including a balancing of potential prejudices to parties who have relied on the Minister's consent in good faith. The Crown argued that private landowners have spent money and taken steps in reliance on the Minister's decision, a factor

weighing against setting it aside. It also urged that granting the relief sought by the petitioners would affect the public interest because it would “subvert public confidence in the finality of government decisions”.

[303] The Crown argues that setting aside the decision and restoring the Removed Lands to TFL 44 would serve no purpose since the petitioners are not challenging the fee simple title of Brascan and any aboriginal rights asserted are subject to the visible and incompatible use doctrine and can only be exercised at the sufferance of Brascan.

[304] The Crown argued that the impact on the public interest and third parties far outweighs the speculative prejudice alleged by the petitioners.

[305] Brascan joined in the Crown’s submission.

[306] In addition, Mr. Clark for Brascan argued that a key factor for Brascan in purchasing Weyerhaeuser’s property was the prospect of high quality, privately owned timberlands and that when Brascan learned that this petition had been filed on December 16, 2004, Brascan was already deeply committed and the essential terms of the proposed purchase were already in place. He argued that Brascan was justified in relying on the validity of the removal decision when it bought Weyerhaeuser’s assets, pointing to evidence of Brascan’s understanding about the background to the removal decision: namely, that similar previous removal decisions by the Minister had not been challenged and that Weyerhaeuser had had positive working relationships with First Nations and had informed HFN representatives of its quest to have the lands removed.

[307] Mr. Clark argued that the petitioners are really seeking the right to consent and approval, and that the Court should exercise its discretion against the remedies sought by the petitioners for three main reasons: (1) the immateriality of the alleged failure to consult and accommodate, especially in light of the practical futility of the remedies sought; (2) the serious and irremediable prejudice Brascan and many others would suffer if the remedies were granted; and (3) the public

interest in the validity and reliability of administrative decisions with respect to private land in British Columbia.

[308] In support of the assertion of prejudice, Mr. Clark tendered evidence in the form of an affidavit from Reid Carter, the Managing Partner of Brascan Timberlands Management LP.

[309] Mr. Carter deposed that Island Timberlands' operations are based in Nanaimo, employing about 285 people in operating the privately owned timberlands and the sale of logs, and holding agreements with independent logging contractors which employ about 450 – 500 people. He deposed that in forming Island Timberlands, Brascan represented to potential institutional partners the advantages of the privately owned timberlands. He swore that Brascan's estimate is that the profit margin on the sale of timber from the privately owned timberlands business is about \$25- \$30 per cubic metre higher than the margin attainable from the timber within TFL 44, and that Island Timberlands could face a loss of \$15-\$24 million annually if the Removed Lands are returned to TFL 44 because of this difference in margin. He stated that the value of the Brascan purchase from Weyerhaeuser would be seriously impacted by such an outcome.

[310] Mr. Carter stated opinions in his affidavit about the wide economic consequences of a reversal of the removal decision for Brascan, its shareholders, Island Timberlands, its investment partners and employees, and the surrounding communities. The petitioners objected to this opinion evidence, and I have disregarded it because Mr. Carter's qualifications to provide expert opinion evidence were not set out in the affidavit or otherwise provided to the Court

[311] I do take into account other aspects of Mr. Carter's evidence, including his statements that if the privately owned timberlands were returned to TFL 44 the forced co-mingling of two incompatible businesses would result and that Island Timberlands would need to reassess and reconfigure its business plans in a significant way possibly leading to reduced production and job losses.

[312] I also take into account the context in which Brascan made its decision to go forward with the purchase.

[313] On November 30, 2005, in conjunction with his submissions on the impact of the ***Mikisew*** case, counsel for Brascan also advanced arguments based on the increased prejudice to third parties that would flow from an order setting aside the removal decision, in the light of the recent sale of Cascadia to Western Forest Products Inc., and offered to provide affidavit evidence in support of those arguments. Counsel for the petitioners objected to this. I have not taken those recent submissions as to increased prejudice into account in reaching my conclusions.

[314] I am satisfied on the evidence before me that there would be significant prejudice to Island Timberlands and to Brascan if the Removal Decision were set aside or suspended in its effects.

[315] Finally, Mr. Clark argued that third parties are not responsible for the Crown's failure to consult or accommodate and indeed the honour of the Crown can weigh in favour of third parties, as stated by Madam Justice Southin in ***Skeetchestn*** at para. 5. He submitted that if there is to be any remedy, it should be to direct the Crown and the petitioners to engage in consultation and if necessary, arrive at appropriate accommodation measures that engage the resources of the Crown and not Brascan.

[316] Should the decision to permit the removal of lands from TFL 44 be quashed and set aside, or suspended in its effects?

[317] In the light of the substantial prejudice to third parties which could flow from quashing or suspending the removal decision, compared with the lesser prejudice which could befall the HFN if the removal decision is left in effect, I have concluded that the removal decision should not be quashed or set aside.

[318] However, I believe that a meaningful remedy can be granted pending the completion of consultation.

[319] Both of the respondents took the position that the conditions in the Minister's letter of July 9, 2004, amounted to more than reasonable accommodation of the HFN's interests. Counsel for the petitioners argued forcefully, however, that those conditions are not enforceable by the HFN and are imprecise in some respects.

[320] I have concluded that appropriate interim relief for the Crown's breach of its duty to consult and accommodate regarding the removal decision can be built upon the conditions in the Minister's letter.

[321] The following will be terms of this Court's order and will be in effect for two years from the date of entry of this order or until the province has completed consultations with the HFN, whichever is sooner:

1. Brascan will maintain the current status of "managed forest" on the Removed Lands and will keep the land under the ***Private Managed Forest Land Act***, subject to all of its provisions and regulations governing planning, soil conservation, harvesting rate and reforestation;
2. Brascan will maintain variable retention and stewardship zoning on old growth areas in the Removed Lands;
3. Brascan will fulfill its commitments in the Minister's letter regarding maintenance of water quality on the Removed Lands;
4. Brascan will maintain all current wildlife habitat areas on the Removed Lands;
5. Brascan will maintain ISO or CSA certifications and will continue to subject the Removed Lands to the public advisory process as per CSA standards;
6. Brascan will maintain current access for aboriginal groups to the Removed Lands;

7. Brascan will provide to the HFN seven days notice of any intention to conduct activities on the land which may interfere with the exercise of aboriginal rights asserted by the HFN.

[322] This order will apply to Brascan, Island Timberlands, and their successors in interest.

[323] The parties will exchange positions as to what kinds of activities might interfere with the exercise of aboriginal rights and if there is a failure to agree on a framework, the matter will go to mediation. The Crown will facilitate the operation of this term of the order, including, if requested by the petitioners and Brascan, providing the services of independent mediators at Crown expense.

[324] The petitioners also seek orders for disclosure of information relevant to the consultation.

[325] I will order that the Crown and the petitioners provide to each other such information as is reasonably necessary for the consultation to be completed. Counsel for the Crown suggested that there should be discussion between the parties as to the exact type and extent of the information to be provided, as in *Homalco* (at para. 124) and *Gitxsan First Nation #1* (at para. 113). I agree. I direct that the Crown and the petitioners attempt to agree on the information exchange. If they are unable to agree, the matter will go to mediation.

[326] As well, the Crown and the petitioners will attempt to agree on a consultation process and if they are unable to agree on a process, they will go to mediation. If mediation fails, they may seek further directions from the Court.

B. Compliance with Provincial Statutory Requirements

[327] In addition to the claims based on the Crown's duty to consult and accommodate, the HFN also claims that the decisions of both the Minister of Forests to remove the lands from TFL 44 and the Deputy Chief Forester to amend

the allowable annual cut did not comply with applicable statutes, and that therefore, this Court should quash or suspend those decisions.

[328] First, the petitioners argue that the Minister of Forests' decision to remove the private lands from TFL 44 did not comply with the requirements of the ***Forest Practices Code***, and its successor the ***Forest and Range Practices Act***, S.B.C. 2002 c. 69 [***FRPC***]. The HFN claims that the removal decision changes Resource Management Zones, thus invoking the comment and review requirements of s. 3(3) of the ***Forest Practices Code***.

[329] They also claim that the removal decision is invalid because it purports to cancel a wildlife habitat area (specifically, WHA #1-002) that only the Minister of Water, Land and Air Protection (WLAP) has the authority to repeal.

[330] Second, the petitioners submit that the adjustment to the annual allowable cut is invalid because the Deputy Chief Forester did not turn his mind to all the factors that must be considered to properly fulfill that officer's statutory decision-making function. They submit that under s. 8(8) of the ***Forest Act***, the Chief Forester is required to consider, among other things, what rate of timber production can be sustained in the area. They claim that the former deputy's proportional adjustment was purely mathematical and ignored the localized considerations that would need to be considered to meet the guiding objectives.

[331] I have considered the evidence, the authorities and the submissions of counsel and have concluded that the alleged statutory breaches in this case would not, even if they were established, warrant the exercise of my discretion to grant an order to quash or suspend the removal decision or the allowable annual cut amendment, given the balance of convenience and prejudice.

[332] Since I have granted relief to the petitioners on the basis of the breach of the Crown's duty to consult, it is unnecessary for me to decide the issues raised regarding breach of statutory duties.

C. Summary of Conclusions

[333] The Minister of Forests' decision to remove lands from TFL 44 gave rise to a duty on the Provincial Crown to consult the Hupacasath. The Crown failed to meet that duty.

[334] The Chief Forester's decision to amend the allowable annual cut for TFL 44 gave rise to a duty on the Provincial Crown to consult the Hupacasath. The Crown met that duty.

[335] The petitioners will have declaratory relief. I decline to order that the removal decision be quashed or suspended. Certain conditions regarding the use of the Removed Lands for up to two years, pending the completion of consultation and accommodation, are imposed as terms of this order. Where the parties fail to agree on matters regarding the consultation they will go to mediation.

[336] I find it unnecessary to decide the issues raised regarding the alleged breach of statutory duties.

[337] The petitioners have largely been successful, and will have their costs of these proceedings.

[338] I am not seized of this matter.

"Lynn Smith, J."
The Honourable Madam Justice Lynn Smith

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Huu-Ay-Aht First Nation et al. v. The
Minister of Forests et al.,***
2005 BCSC 697

Date: 20050510
Docket: L042292
Registry: Vancouver

Between:

**Huu-Ay-Aht First Nation by Chief Councillor
Robert Dennis on his own behalf and on behalf of the members
of the Huu-ay-aht First Nation**

Petitioners

And

**The Minister of Forests and Her Majesty The Queen
In Right of the Province of British Columbia**

Respondents

Before: The Honourable Madam Justice Dillon

Reasons for Judgment

Counsel for the Petitioners:

G. McDade, Q.C.
J. Tate

Counsel for the Respondents:

G. R. Thompson
K. J. Chapman

Date and Place of Trial/Hearing:

January 24-27, 2005 and
February 10-11, 2005
Vancouver, B.C.

I. NATURE OF APPLICATION

[1] This is an application by the petitioners, the Huu-ay-aht First Nation (the “HFN”), for:

(a) a declaration that the Crown as represented by the Ministry of Forests (the “MOF”) has a legally enforceable duty to the HFN to exercise its discretion pursuant to the **Forestry Revitalization Act**, S.B.C. 2003, c. 17 and section 47.3 of the **Forest Act**, R.S.B.C. 1996, c. 157, as amended by the **Forestry (First Nations Development) Amendment Act**, S.B.C. 2002, c. 44, in a manner consistent with the Crown’s duty to consult in good faith and to endeavour to seek workable economic accommodation between aboriginal rights and title interests of the HFN, on the one hand, and the short-term and long-term objectives of the Crown to manage forestry permits and approvals in HFN traditional territory in accordance with the public interest, both aboriginal and non-aboriginal;

(b) a declaration that in its application of the Forest and Range Agreement (“FRA”) program pursuant to the **Forestry Revitalization Act** and the **Forest Act**, the MOF as an agent of the Crown in right of British Columbia has an administrative duty to endeavour in good faith to reach accommodation agreements with the HFN that are responsive to the degree of infringement of the HFN aboriginal rights and title represented by forestry operations in HFN traditional territory;

(c) a declaration that application of a population-based formula to determine accommodation pursuant to the FRA programme does not constitute good faith consultation and accommodation in respect of the HFN aboriginal rights and title interests;

(d) a declaration that application of a population-based formula to determine accommodation arrangements pursuant to the FRA programme does not fulfill the administrative obligations of the Crown to provide accommodation for the aboriginal rights and title interests of the HFN;

(e) a declaration that application of a population-based formula to determine accommodation agreements for the HFN pursuant to the FRA programme has no rational connection with the legislative objectives of the FRA programme, including but not limited to, the objective of promoting economic development by addressing asserted aboriginal rights and title; and

- (f) an order in the nature of mandamus, directing the provincial Crown, through its agent the MOF, to negotiate with the HFN in good faith, including negotiating in a manner which takes into account the HFN's claim of aboriginal title and rights, and the infringement of that claim of title and rights in respect of decisions pursuant to the **Forestry Revitalization Act** and the **Forest Act** within the HFN territory;
 - (g) costs; and
 - (h) such further relief as this honourable court may seem just.
- [2] The HFN are not seeking injunctive relief.
- [3] In response to the formal relief sought by the petitioners, the respondents, the MOF and the province of British Columbia, oppose the relief by submitting that:
- (a) the relief sought is premature and is not appropriate for judicial review as set out in the **Judicial Review Procedure Act**, R.S.B.C. 1996, c. 241 ("**JRPA**");
 - (b) the Crown's legally enforceable duty to consult and accommodate aboriginal interests is not triggered by the Crown's general management of forestry permits and approvals. Rather, the Crown's duty is triggered by specific decisions that have the potential to infringe on s. 35 rights;
 - (c) the Crown does not owe a duty here because aboriginal rights and title have only been asserted, rather than defined or proven;
 - (d) the FRA initiative is only one component of the MOF's exercise of any constitutional and administrative law duties that arise with respect to protection of aboriginal rights. Thus, the petitioner's relief should be denied on the basis that it is inappropriate for the court to assess only one aspect of negotiations, rather than the overall process which has not yet been completed. In any event, the Crown submits that it has met any obligations it may have with respect to consultation with the HFN to date;
 - (e) the FRA initiative is an entirely voluntary interim measure, the Province engaged in good faith efforts to reach an agreement with the HFN, and has deposed to the fact that it intends to continue to fulfill its obligations with respect to consultation and accommodation should the HFN decide that they do not wish to enter a FRA;

(f) the petitioners seek a declaration that the application of a population-based formula to determine accommodation pursuant to the FRA initiative has no rational connection with the legislative objectives of the FRA initiative. The respondents submit that this relief should be denied on the basis that the FRA initiative is a policy initiative not directly authorized by statute and no such declaration can issue; and

(g) they are prepared to consult with the HFN on a decision by decision basis should the HFN wish to avail themselves of the accommodation offered under the FRA initiative. The respondents submit that it would be inappropriate to order the Crown to consult with the HFN with respect to forest operations within the HFN territory generally, as such a general claim is not sufficient to trigger the duty to consult. Rather, the duty is triggered by specific decisions or activities which have the potential to infringe aboriginal interests.

II. FACTS

a) **The Huu-ay-aht First Nation Claim of Aboriginal Title and Rights and the Alleged Infringement of Aboriginal Title**

[4] Prior to the assertion of British sovereignty, the HFN claim that “they occupied a traditional territory (the “Hahoothlee”) located on the western coast of Vancouver Island in and near Barclay Sound, Pachena Bay, and southern portions of Alberni inlet, including the watersheds of the Sarita River, Pachena River, Klanawa River and Coleman Creek.”

[5] The HFN are asserting that most of their traditional territory falls within a tree farm licence held by Weyerhaeuser (“TFL 44”). The Province has issued TFL 44, granted subsequent replacements of the licence pursuant to provincial forestry legislation, and directly authorized harvesting within the territory covered by TFL 44. The HFN are claiming that their aboriginal title and rights are being infringed by the logging taking place within their traditional territory pursuant to TFL 44. The HFN

claim that their rights and title were infringed from “March 2004 to January 18, 2005, when logging operations continued within HFN territory despite the fact that the Province has not consulted with the HFN about the level of forestry operations within the Hahoothlee and despite the fact that HFN title and rights interests have not been accommodated.” The HFN claim that such an infringement warrants economic accommodation and they “seek a forest tenure to take a fair allocation for the development of their lands, and revenue sharing until a treaty is determined.”

[6] The HFN consists of the members of the Huu-ay-aht Indian Band. The Huu-ay-aht Indian Band is the designated representative of its members pursuant to the **Indian Act**, R.S.C. 1985, c. I-5. The HFN consists of aboriginal peoples of Canada pursuant to section 32(2) of the **Constitution Act, 1982**, being Schedule B to the **Canada Act 1982** (U.K.), 1982, c. 11 [**Constitution Act, 1982**], and has approximately 570 members and thirteen reserves under the **Indian Act**.

[7] The HFN are engaged in negotiations towards a comprehensive treaty settlement within the British Columbia treaty process as part of the Maa-nulth Treaty Group. The Maa-nulth First Nations (the “MFN”) that comprise the Maa-nulth Treaty Group entered the treaty process in January 1994, as part of the Nuu-chah-nulth Tribal Council (the “NTC”). On March 10, 2001, a draft Agreement in Principle (the “AIP”) was initialled at the NTC treaty table. Each of the 12 First Nations that comprised the NTC undertook consultations and requests for ratification with their respective communities. Six of the NTC First Nations, including the HFN, ratified the AIP, and six did not. Five of the six First Nations, including the HFN, that ratified the AIP joined to form the MFN. The MFN is composed of the HFN, the Uchucklesaht

Tribe, the Ucluelet First Nation, the Toquaht Nation, and the Ka:'yu:t'h'/Chek:k'tles7et'h'.

[8] The MFN approached British Columbia and Canada to negotiate a final agreement based on the draft 2001 AIP and accordingly the MFN are now at their own treaty table as the Maa-nulth Treaty Group. The MFN signed the AIP on October 3, 2003. Among other things, the AIP provides that each MFN member will own forest resources on their land and will have exclusive authority to determine charges relating to the harvesting of forest resources on its land. However, the AIP does not provide any detail regarding forest resources as this is to be determined in the final agreement which takes place at the end of stage 5 of the treaty process. The AIP itself does not legally recognize aboriginal rights and title. The MFN are presently at stage 5 of the treaty process, namely negotiation towards a final agreement. In stage 5 of the treaty process, technical and legal issues are resolved to produce a final agreement that embodies the principles outlined in the AIP and formalizes the new relationship among the parties. Once signed and formally ratified, the final agreement becomes a treaty and legally recognizes aboriginal rights and title. Stage 6 of the treaty process is merely implementation of the agreement reached at in stage 5.

[9] The land component of the AIP includes up to 20,900 hectares of provincial Crown land and 2,105 hectares of existing Indian reserve land, which will include the existing HFN Indian reserve land and up to 6,500 hectares of additional lands. According to the Crown, the capital transfer provided by Canada is \$62.5 million.

The AIP outlines major components of a treaty, including rights to resources such as wildlife, fish and timber, culture and related self-government provisions.

[10] The Ditidaht and Tseshaht First Nations have asserted claims to territories which overlap with the territory claimed by the HFN. Nonetheless, the HFN claim that “since time immemorial they have had a special connection with forest resources in the Hahoothlee.” In the “Traditional Use Study, Final Report of the HFN” which was prepared for the HFN and the Ministry of Forests (with their approval) by a private company called Shoreline Archaeological Services, Inc., there is clear evidence of traditional use of forest resources within the Hahoothlee. The study found that forestry is the activity with the “seventh highest frequency” and reflects “the traditional independence the HFN had on natural resources.” The study found that the HFN have traditionally used forest resources “for the source of much of the material required for clothing, canoes, house building material, household implements and more.” Many of the HFN still use the forest resources for traditional activities. The study found that “the forestry activity frequency represents 5.6% of all activities and is included as an activity for 8% of the 905 archaeological sites studied.” However, the study noted that “it is estimated that only about 5% of the inland areas of the traditional territory of the HFN have been systematically surveyed for archaeological resources.”

[11] The HFN assert that approximately 95% of the HFN traditional territory is within the boundaries of TFL 44. A TFL is a large area based tenure granting the rights to manage the forest lands and to apply for cutting permits to harvest timber. MOF is responsible for the administration of TFLs and for dealing with all TFL

licenses. The present licensee of TFL 44 is Weyerhaeuser whose current forest development plan contemplates a further 5.4 million cubic metres of timber (“m3”) out of the Hahoothlee territory within the next 5 years. The estimated stumpage payable to the Province in relation to the anticipated volume of harvest of 5.4 million m3 over the next 5 years is in the range of \$143 million. The Province will receive additional revenues from income, property and sales tax. The HFN claim, and the respondents have not disputed, that between 1940 and 1996, approximately 35,000,000 m3 has been harvested from the Hahoothlee. Over 56% of old growth forests within the Hahoothlee were harvested from 1940 to 1996.

[12] The HFN has submitted that the rate of harvest proposed for the HFN territory far exceeds the geographic proportion of the annual allowable cut (“AAC”) for the entire TFL. The HFN maintain that a sustainable AAC in their territory would be limited to 225,000 m3 per year, whereas Weyerhaeuser plans to harvest approximately 1,000,000 m3 per year out of the Hahoothlee in each of the next 5 years. The HFN is claiming that much of this future harvesting will take place within areas of significant cultural importance to the HFN and that the removal of this economically valuable timber represents a serious, ongoing, and unaccommodated infringement of HFN’s aboriginal title and forestry rights.

b) Previous Accommodation Agreements

[13] As part of the effort to participate in the forestry processes within the Hahoothlee, in 1998 the HFN signed an Interim Measures Agreement (“IMA”) with the MOF. The term of the IMA was for 3 years, and provided, *inter alia*, for: (a) an

inter-governmental working relationship between the HFN and the MOF; (b) the establishment of a joint forest council to resolve issues of forest management, cultural heritage and economic development; (c) joint planning in relation to forestry activities in the HFN territory; (d) protection of cultural heritage resources; (e) the creation of economic development opportunities; and (f) dispute resolution processes. The IMA arose out of a conflict regarding harvest levels in TFL 44 and the HFN request for accommodation. It addressed economic development issues through direct funding from MOF and by engaging Forestry Renewal BC multi-year funding for forest restoration and enhancement. The IMA also established at section 11 that “the agreement does not define or limit the aboriginal rights, title and interests of the HFN” and that the map of the Hahoothlee which is used for the purposes of the IMA agreement is to “define the territorial scope of the application of this agreement only.”

[14] On March 5, 2001, the parties renewed the IMA through the Interim Measures Extension Agreement (“IMEA”), and included the Uchucklesaht First Nation as an additional party. Section 11 of the IMEA mirrored section 11 in the IMA. However, the IMEA included an agreement regarding a direct tenure award, which was not part of the original IMA. Recent amendments to the **Forest Act** had allowed MOF to enter into a direct tenure award agreement. In accordance with the direct tenure award agreement included in the IMEA and s. 47.3 of the **Forest Act**, the MOF invited the HFN and the Uchucklesaht to jointly apply for a timber sale licence for a volume of up to 265,000 m³. This licence agreement was dated January 28, 2003.

[15] On March 5, 2004, the IMEA expired. In the fall of 2003, the HFN attempted to negotiate a renewal of the IMA and IMEA. The HFN claim that the Province refused to enter into a renewal unless the HFN entered into a FRA. The MOF, on the other hand, claims that it was impossible for it to renew the IMEA in its current form due to significant changes in the mandate and structure of MOF during the period between 2002 and 2004. As of April 24, 2004, MOF was no longer involved in strategic planning, inventory, or restoration and enhancement priority setting and funding. The Ministry of Sustainable Resource Management is now responsible for economic sustainable development of Crown land. Further, new legislation, namely the **Forest and Range Practices Act**, S.B.C. 2002, c. 69, changed the operations planning and approvals process within the MOF. As a result of these changes, the MOF claims that the referral process under the IMEA did not reflect the provisions of the **Forest and Range Practices Act**.

[16] It is important to note that during the time in which the IMA and IMEA were in force, the HFN were satisfied with the terms and did not challenge any provincial decisions.

c) The Forest and Range Agreement Policy

[17] In March 2003, the MOF announced its forest revitalization plan. Part of that plan included the enactment of the **Forestry Revitalization Act** to take back 20% of the annual allowable cut from major replaceable forest licences and tree farm licences throughout the Province. This decision was made, in part, in order to provide volume for direct awards of forest tenures to First Nations. The 20% take-

back is to be re-allocated and divided so that 10% is sold through a market-based system, the British Columbia Timber Sales Program. Approximately 8% is to be used for First Nation tenure opportunities to address accommodation of potential aboriginal interests, and the remaining amount is to be used for small tenures. At the same time, the Province appropriated a total of \$95 million for forestry revenue sharing with First Nations throughout British Columbia over the period of 2003-2005. The Ministry claims that these initiatives have provided it with the means to provide significant interim economic accommodation to those First Nations that choose to negotiate forestry agreements with the Province.

[18] The FRA initiative was a component of the forest revitalization plan and was called the First Nations Forest Strategy (“FNFS”). The FNFS was enabled by the following events:

- Direct invitation tenures – In Spring 2002, the Province amended the **Forest Act** (creating s. 47.3) to allow the Minister of Forests to directly invite tenure applications from First Nations, without competition;
- Revenue sharing – In February 2003, the Province announced that it would begin to share forest revenues with First Nations; and
- Timber reallocation – In March 2003, the Province passed the **Forestry Revitalization Act** that resulted in major reallocation of AAC for major licences in the Province. This reallocated timber included volume for the FNFS as well as other initiatives associated with revitalizing British Columbia’s forest economy.

[19] Between 2002 and 2003, the MOF developed and began implementing the FRA programme which was a strategic policy approach to fulfilling the Province’s duty to consult with aboriginal peoples with respect to possible infringements of

potential aboriginal or treaty rights in the face of uncertainty surrounding First Nations' claims yet to be proven.

[20] The FRA programme is in fact a “fast-track” program in which the MOF and First Nations sign an agreement which gives the First Nation economic accommodation for forestry infringements within its territory. The FRA programme is a “fast-track” program because a First Nation is not required to prove the strength of their claim to an asserted territory. The FRA programme is based on an assumption that there is a potential that exists somewhere in the asserted traditional territory of each First Nation for a *prima facie* claim for title. The FRA programme is based on an offer of forest revenue sharing and tenure allocation in an amount calculated on the registered population of the Indian Band to whom the offer is made. The calculation is based on population alone and has no relation to the strength of a First Nation's claim of aboriginal title and rights, the amount of timber or timber harvesting in the First Nation's territory, or the seriousness of the potential infringement of title and rights. The MOF claims that they extensively reviewed a number of complex distribution models, including those considering values and amounts of timber harvested from specific areas, as well as regional approaches. The MOF claims that it ultimately chose the population-based approach because it had the fewest variations and disparities for an equitable distribution across the province.

[21] The MOF's “Strategic Policy on their Approaches to Accommodation”, dated July 31, 2003, sets out the MOF's policy on the FRA initiative. Section 2 of the policy reads:

In consideration of the provincial objective to create certainty on Crown lands and promote economic development by addressing asserted aboriginal rights and title, it is the policy of the Ministry of Forests to provide access to timber and revenue sharing through a negotiated agreement with a First Nation.

[22] Section 3 of the policy recognizes that aboriginal title, where it exists, has been determined by the courts to have an economic component:

Recent legal decisions (Haida, Skeena) have determined that an obligation of the Crown exists to seek to accommodate potential First Nation aboriginal rights and title interests when making forest management decisions.

[23] Section 4 of the policy reads:

Court decisions have increased the requirements for the Ministry of Forests to consult with First Nations on a wide-range of forest and range management decisions. The Courts have indicated that if First Nations have a reasonable probability of aboriginal title, then the Province is obligated to seek to accommodate the First Nation for unjustifiable infringements of that title.

Further, if there is the potential that somewhere in the asserted traditional territory the First Nation has a *prima facie* (“on the face of it”) aboriginal title claim, and forestry and range activities/approvals cover significant areas within that territory so as to make it likely that they may unjustifiably infringe on as yet unproven aboriginal title, there may be a need to provide accommodation in respect to that possible infringement, even though the areas where that aboriginal title is a real probability have not been ascertained.

...

The policy approach to implementing the accommodation strategy is to offer access to economic benefits (revenue sharing and access to timber) through negotiated agreements with individual First Nations. In exchange for the economic benefits, agreements will contain provisions that promote a stable operating environment for the forest and range section, including consultation procedures and terms indicating that the Province is providing workable accommodation of the First Nation’s economic interests arising from forest and range decisions.

[24] The eligibility requirements are produced at section 5:

The Province has introduced this initiative to respond to calls by the courts to seek to accommodate First Nations' interests in areas where First Nations have a reasonable probability of title. BC also wants to improve the provincial economy by enhancing operational stability. As such, there are two primary filters to determine eligibility for the initiative:

- (a) the First Nation must have bona fide claims of unresolved aboriginal rights and title; and
- (b) forestry and range activities (including timber harvesting, tenure transfers, AAC determinations and operational planning) must be likely to impact potential aboriginal rights and title in the First Nation's asserted traditional territory. If there is no appreciable forestry or range activity in the area (i.e. in urban areas) then aboriginal title is not likely being infringed by the forestry and range activity.

[25] At section 6, the FRA policy states that access to the revenue and timber volumes will be through a negotiated interim measures agreement between the MOF and the First Nation. The main components of this agreement are revenue sharing, tenure invitation (which will be non-replaceable and non-transferable), and volume. As defined in section 80.1 of the **Forest Act**, a "non-replaceable licence" means a licence that provides that a replacement for it must not be offered, and a "replaceable licence" means a licence for which a replacement licence must be offered under section 15 or 36.

[26] Within section 6, the provincial policy on revenue sharing states that:

The government has allocated funding in the Ministry of Forests' budget as follows: \$15 million in 2003/04; \$30 million in 2004/05; and, \$50 million in 2005/06... In 2005/06, the government will have allocated the full amount available for forestry revenue sharing with

First Nations in the pre-treaty environment. As a result, it is the policy of the Ministry of Forests that, should all First Nations participate in the initiative, each First Nation in the Province will receive an equitable share of the budgeted forestry revenue. The amount available for an individual First Nation will be set though a mandate provided by the Deputy Minister of Forests.

[27] Also within section 6, the provincial policy on volume states that “the Ministry of Forests is setting a target of 8% (about 5.6 million m³) of the provincial AAC to be held by First Nations.”

[28] Further, under section 6, the provincial policy states that:

The FRA will contain clauses that indicate the government is providing economic benefits to accommodate the economic aspect of the First Nation’s potential aboriginal title interests that may be infringed by the issuance of tenures and administrative or operational decisions made by statutory decision makers. As a result, the Ministry of Forests will, on an annual basis provide a list to the First Nation of the following administrative decisions that may affect the First Nations aboriginal interests during the term of the FRA:

- a) decisions that set or vary AAC for a timber supply area or a forest tenure;
- b) the issuance, consolidation, subdivision or amendment of a forest tenure;
- c) the replacement of forest tenures;
- d) the disposition of timber volumes arising from licence undercuts;
- e) AAC apportionment and reallocation decisions;
- f) timber sale licence conversion to other forms of tenure and timber licence term extensions;
- g) the reallocation of harvesting;
- h) the issuance of special use permits; and

- i) establishment of interpretive forest sites, recreation sites and recreation trails.

[29] The HFN submit that in order to obtain interim economic accommodation in relation to infringements of HFN title and rights, the Province is forcing the HFN to agree that its duty to consult has been met in relation to a long list of administrative decisions, each of which authorize the infringements of HFN title and rights.

Therefore, after entering into a FRA, the Ministry will make administrative decisions that affect the title and rights of the First Nation without consulting the First Nation.

[30] Under the FRA initiative, any First Nation which takes the view that the FRA would not provide a fair return may choose not to enter into the FRA and may continue to consult with the MOF to address accommodation for forestry activities in the asserted territory. Section 7 of the policy states:

In situations where an agreement cannot be reached, Ministry staff should continue to consult with First Nations in a manner consistent with the Ministry of Forests' Protection of Aboriginal Rights Policy. Any offer made to a First Nation, even if it ends up ultimately being rejected, will be made on a "with prejudice" basis. This means that if faced with litigation, the province will provide information to the court that an accommodation offer was made, and will inform the court of the terms of that offer. It is important that Ministry staff inform the First Nation of this fact.

[31] The Province has no program available to offer tenure or revenue sharing other than the FRA programme. Moreover, according to the FRA policy, the entire tenure volume and budget for revenue sharing available for First Nations through the forest revitalization legislation has been reserved to the FRA programme.

d) The FRA Drafts

[32] The first draft of the FRA which the parties drew up for discussion is dated November 4, 2003. It states that “the parties wish to enter into an interim measures agreement in relation to forest resource development and related economic benefits arising from this development within the Traditional Territory;” and, that “the parties have an interest in seeking interim workable accommodation of Huu-ay-aht’s and Uchucklesaht’s Aboriginal Interests where forest development activities are proposed with the Traditional Territory that may lead to the potential infringement of Huu-ay-aht’s and Uchucklesaht’s Aboriginal Interests.” At section 1.7, “Interim Workable Accommodation means accommodation of the potential infringement of Huu-ay-aht’s and Uchucklesaht’s Aboriginal Interests arising from or a result of forest and/or range development, prior to the full reconciliation of these interests through a land claim settlement.”

[33] The significant sections of the first draft of the FRA are:

- Section 3.1 invites the HFN to apply for a 265,000 m³ TSL as per the IMEA regarding a direct award tenure. The TSL is non-transferable, non-replaceable, and for a 5 year-term in TFL 44.
- Section 3.2 states that during the term of the FRA, the Government of British Columbia would share revenue with the HFN, being approximately \$280,000 annually.
- The timber and revenue sharing distribution is decided on a population-based, per capita approach. This approach is based on the population of rural, First Nation individuals.
- Section 4.2 states that “during the term of this Agreement, the Huu-ay-aht and Uchucklesaht agree that the Government of British Columbia has filled its duties to consult and seek interim workable accommodation with respect to the economic component of

potential infringements of Huu-ay-aht's and Uchucklesaht's Aboriginal Interests or proven aboriginal rights in the context of Operational Plan decisions that the Government of British Columbia will make." The same statement is at section 5.8 in reference to administrative decisions.

- The FRA is to terminate on the occurrence of the earliest of "five years from the date this Agreement is executed; or the coming into effect of a treaty; or the mutual agreement of the parties; or the Government of British Columbia cancels economic benefits under this Agreement pursuant to Section 9.0."

[34] The terms of this draft have remained relatively unchanged. For instance, after the first draft FRA was proposed by the Ministry, the HFN requested that an agreement in the form of an IMEA be substituted for the FRA. Thereafter, the Ministry simply changed the title, but not the substance of the second draft of the FRA to reflect the HFN's request. The Ministry changed the title of the draft FRA to "Interim Measures (Extension) Agreement", but simply renumbered the paragraphs rather than changing the substance of the agreement. Therefore, any changes that the government made were essentially window dressings.

[35] One change which is important to note is that the Ministry inserted section 16.9 into draft 5 of the FRA, which states:

The parties differ on the question of the existence or extent of any duty or duties of consultation and/or accommodation owed by the forest licensees to the Huu-ay-aht First Nation. Nothing in this Agreement, or the fact that the parties have entered into this Agreement, is intended to limit or prejudice the position that either Party may take in litigation or other negotiations on the existence or extent of any duty or duties of consultation and/or accommodation owed by forest licensees or other third parties to the Huu-ay-aht First Nation.

[36] The court will consider section 16.9 after discussing the negotiations which have taken place up to this litigation.

[37] The only term which actually changed in substance was with regard to forest tenure. Section 3.1 of the FRA changed on June 22, 2004, when MOF increased the tenure award offer from 30 m³ per person to an amount of 54 m³ per person. This would result in an annual award of 30,500 m³ annually for the 5 year term of the FRA agreement. However, the offer of 54 m³ per person was within the MOF's target according to the FNFS proposal. At paragraph 59 of Ministry official, Sharon Hadway's affidavit, she outlines the FNFS proposal:

59. The amount of available timber was intended to be fixed: in fact, under the FNFS proposal, both the targets of allocated timber and the quantum of funds available as revenue sharing were intended to be fixed. For the FRA Initiative MOF had available to it:

- (a) timber volume to be dedicated to First Nation direct awards in the amount of 3 million m³, that is 30 m³/person from the reallocation process with an upper target of 54 m³/person if volume from other sources is available to 'top up' the tenure opportunity from sources such as undercut.

[38] This target rate is reiterated in several internal MOF e-mails. For instance, in an internal e-mail sent from Ministry worker, Darrell Robb, on June 17, 2004, he states that "[m]y interest here is an outcome which is defensible to numerous parties. A defensible allocation of the undercut would meet the policy for FN tenure (i.e. 8% population, thus 54 m³ per capita), and is distributed in geographical areas."

[39] Although the specific target rate of 54 m³/person is not listed in the FRA policy, nor mentioned in any other government documents, there is a reference in

the FRA policy to “setting a target of 8% (about 5.6 million m³) of the provincial AAC to be held by First Nations”. This per-capita, population-based approach is expressly stated under “Revenue Sharing” in the FRA policy and is repeated under “Current Tenures held by the First Nation”. This target is further outlined in a MOF memorandum titled “Opening up new partnerships with First Nations”, dated March 26, 2003, where forest tenure was linked to the per-capita, population-based criteria: “[the] Government is proposing to allocate up to eight per cent, or about 5.5 million cubic metres, of the province’s total allowable annual cut to First Nations. This would be roughly equivalent to the proportion of First Nations people in the rural population.”

e) Negotiation of Accommodation Agreements

[40] As set out above, the parties initially met on November 4, 2003 to discuss a timber and revenue sharing agreement. The HFN sought to renew the existing IMEA, while the MOF proposed a FRA. At the November 4 meeting, the MOF presented a formal offer and first draft FRA which offered \$280,000 in revenue sharing annually for the term of the FRA and requested recognition of the existing 265,000 m³ Direct Award Agreement as a component of the FRA. The FRA offer was based upon the HFN membership number of 565 as taken from January 2003 information. As well, MOF offered to commit to the provision of an annual list of all proposed administrative decisions anticipated within that year and to continue to consult with HFN in regard to operational planning decisions in respect of existing forest tenures. The MOF sought agreement from the HFN that, in consideration of the economic benefits and consultation processes set out in the draft FRA, the

Government of British Columbia has fulfilled its duties to seek interim workable accommodation with respect to the economic component of potential infringements of HFN's potential aboriginal interests resulting from administrative decisions made by statutory decisions makers from time to time during the FRA. This FRA was intended to replace the existing IMEA that expired March 5, 2004.

[41] In a letter dated November 19, 2003, the Assistant Deputy Minister of Tenure and Revenue at MOF, Bob Friesen, wrote to Chief Counsellor Robert Dennis and Chief Counsellor Charlie Cootes Sr. to convey MOF's offer as articulated at the November 4 meeting. Through this offer, MOF sought to achieve a "pragmatic interim solution" to HFN's economic interests.

[42] On December 1, 2003, Chief Dennis wrote to the Assistant Deputy Minister advising that HFN wished to extend the IMEA rather than enter a FRA.

[43] On December 17, 2003, the HFN met with the provincial Treaty Negotiation Office ("TNO") as a member of the Maa-nulth Treaty Group. At the TNO meeting, the HFN requested the extension of the IMEA arrangement for forestry, including a revenue sharing and tenure component, as an alternative to the FRA offer. The HFN also asked for an accommodation of aboriginal title and rights interests that would be connected to the volume and value of ongoing logging within the Hahoothlee. However, the provincial policy provides that their agents, including the TNO, may not negotiate IMAs that commit to tenure or revenue sharing in excess of the FRA policy.

[44] On January 14, 2004, the HFN met with Premier Gordon Campbell in order to discuss the extension of the IMEA. HFN presented Premier Campbell with a briefing document titled “Investing in Certainty” which included a request to renew the IMEA which was set to expire on March 4, 2004. The HFN was unwilling to sacrifice the structures established under the IMEA and informed the premier that the FRA was not reasonably connected to the extent of forestry operations in HFN territory.

[45] By e-mail dated January 26, 2004, Tom Happynook of HFN responded to the FRA offer tabled by MOF. Mr. Happynook stated his appreciation for the extension of the offer of the FRA, but turned down the offer on that basis that “the FRA has the potential to create economic and political problems for our leadership and ultimately our Nation.” He then itemized HFN’s reasons for requesting an extension of the IMEA and offered to negotiate.

[46] In an internal MOF e-mail sent by MOF aboriginal affairs officer, Rhonda Morris, on January 27, 2004, the MOF confirmed its position that “we are not looking to renew IMAs except in the form of FRAs” and confirmed the per capita target range of 30 to 50 m³ per person:

MOF can not offer any more volume without creating a large discrepancy with regards to the amount of volume other neighbouring FNs are being offered. H/U [HFN], with their present direct award of 262,000 m³ over 5 years, is already at 45 m³/person target which is well within the volume target range we are working within – 30-50 m³/person.

[47] The MOF was prepared to review options suggested by HFN with respect to meeting with provincial officials, but only within the context of the resource

constraints faced by MOF. There were insufficient resources available to the MOF to continue the IMEA processes as a result of MOF district staff being stretched in terms of resources and thus no longer being able to commit to monthly joint forest council meetings.

[48] On February 5, 2004, Cindy Stern, the District Manager of the South Island Forest District, wrote to Chief Dennis and other chiefs and councils whose asserted traditional territories were within the South Island Forest District. Ms. Stern was writing to clarify the process undertaken by MOF in seeking to consult with First Nations who might have an interest in respect of forest development decisions and approvals. Ms. Stern indicated that the Maa-nulth First Nations had expressed a concern that the MOF, in seeking to consult with the Tseshaht First Nation on proposed forest development activities located within an expanded traditional territory, was in some way acknowledging or verifying the validity of territorial claims which might be disputed by other First Nations. Ms. Stern clarified that the MOF process was intended to be inclusive of First Nations who asserted some aboriginal interest in respect of areas where forest development decisions were contemplated. Ms. Stern further clarified that the discussions with respect to forest development proposals with First Nations were “not predicated in any way upon an acknowledgment, recognition or verification by the MOF that asserted claims necessarily had legal or factual validity”.

[49] On February 5, 2004, MOF staff met with representatives of the HFN to discuss the FRA initiative.

[50] On February 25, 2004, the MOF and HFN discussed the expiring IMEA and the proposed FRA via a conference call. As agreed during the call, the parties would meet on March 12, 2004 to review the effectiveness of the IMEA and to identify the essential components of the expiring IMEA and the proposed FRA with the mind to incorporate the components into one, new agreement respecting forest resource activities within the asserted traditional territories.

[51] On March 5, 2004, Assistant Deputy Minister Friesen wrote to Chief Dennis of the HFN and to Chief Cootes of the Uchucklesaht as a follow-up to the February 25, 2004 conference call.

[52] On March 12, 2004, the HFN met with Assistant Deputy Minister Friesen to discuss the extension of the IMEA. At this meeting, the Assistant Deputy advised that he had no authority to negotiate and was bound by the provincial FRA policy. MOF confirmed at this meeting that both the offer of revenue sharing and tenure under the FRA offer were based on a fixed per-capita formula derived from provincial targets, and were non-negotiable. The HFN again requested accommodation of aboriginal title and rights interests that would be connected to the volume and value of ongoing logging within the Hahoothlee.

[53] Chief Dennis sent a letter to the MOF dated March 19, 2004, stating that the Province was not taking a good faith approach to accommodation because the strictly limited pre-set population-based funding formula ignored the strength of the HFN claim, the high stage at which the HFN was in their treaty negotiations, and the quantity and value of timber proposed to be logged from HFN territory:

Further, we have now been advised by your Ministry officials that their ability to negotiate proper economic accommodations for loss of forests in our territory is strictly limited by a pre-set population-based funding formula, without regard to our particular circumstances, the strength of our title claim, our AIP Treaty status, or disproportionate quantity and value of timber proposed to be logged from our territory.

[54] Chief Dennis then advised that the HFN intended to prohibit any logging activity within their claimed territory if a renewed IMEA could not be negotiated prior to April 30, 2004.

[55] Chief Dennis sent a letter to Ms. Stern dated March 19, 2004, stating that until the IMEA is renewed, the HFN:

...will not be authorizing any new logging approvals in our territory without requiring that you undertake a full consultation and accommodation process...at present, there is no agreement in place with the Ministry of Forests that provides proper economic or cultural accommodation for on-going logging, or that provides appropriate process for reaching such accommodations...we must ask that you put all current Cutting Permits and other logging approval applications on hold until we have adequate time together to put a proper consultation and accommodation processes and economic mechanisms into place.

[56] On March 23, 2004, the HFN had a meeting with the Minister, the last such meeting provided for under the IMEA. The HFN used the meeting to reiterate the points made in the March 19, 2004 letter. The Minister indicated that the revenue available for distribution was fixed under the FRA initiative.

[57] In late March 2004, both MOF and TNO, through internal e-mails, were engaged in review of tenure opportunities and were assessing take back volumes as one potential source of volume to use for tenure at the final agreement stage of the treaty process. MOF and TNO were seeking replaceable tenure opportunities and,

in some cases, area based tenures; however, HFN were neither advised nor included in such discussions.

[58] On April 7, 2004, the Minister responded by letter to the HFN and stated that the Ministry was constrained from offering the HFN a greater proportion than the amounts fixed under the FRA policy. The Minister, when requested to discuss an alternative revenue sharing or tenure initiative refused:

...I am constrained within a fixed treasury board budget under the Forest Revitalization Plan. Giving the Huu-ay-aht a greater proportion of this fixed amount would mean giving other First Nations less, which I am not prepared to do.

[59] The Minister set out the factors that he had to consider regarding timber distribution and acknowledged that he was prepared to authorize discussions towards a revised, 5 year tenure opportunity. The Minister advised that “any timber volume for a new tenure opportunity would be acquired through the timber allocation process” and that “[a]s the timber reallocation process [was] ongoing, any invitation for a new tenure could not be extended until January 2006”. The Minister confirmed that this time frame corresponded “with the anticipated completion of the harvesting of the initial 265,000 m³ tenure held by the HFN and Uchucklesaht.” The Minister advised that, “[g]iven the constraints outlined above on the timber supply on southern Vancouver Island, [he] anticipated that any new tenure using volume from the reallocation process would be approximately 16,900 m³ annually for HFN.” This process indicates that the HFN would have to apply for tenure like any other First Nation and still be within the constraints of the population-based criteria.

[60] On April 16, 2004, Sharon Hadway assumed the role of lead negotiator for MOF with respect to the negotiations with HFN. On April 19, 2004, Ms. Hadway sent an e-mail to Chief Dennis in order to set the agenda for an April 21, 2004 meeting. The purpose of the meeting was “to provide a forum for frank and open disclosure to set the stage for a new agreement.” The parties were to explore ways to continue with workable aspects of the IMEA.

[61] On April 21, 2004, the HFN met with Ms. Morris from the MOF. At the meeting, the HFN again requested that any annual award should be based on the amount of harvesting from its territory. The MOF confirmed the population-based formula for revenue and tenure amounts under the FRA. Further, the MOF informed the HFN that any FRA could not be retroactive to the expiry of the IMEA, and that it would only come into effect in the quarter that the agreement was signed. This meant that the HFN were not covered by any agreement during the time that negotiations continued, and that forestry operations continued in the Hahoothlee, and continue presently with no accommodation of HFN title or rights.

[62] The HFN further requested that tenure offered as accommodation should also be replaceable, particularly given the fact that the TFL is a replaceable tenure. The HFN noted that under the stated objectives of the forestry revitalization reallocation process, 8% of AAC was to be re-allocated to First Nations, and 8% if applied to the approximately 1,000,000 m³ per year coming out of HFN territory would require an award in the range of 80,000 m³. The HFN proposed trying to reach agreement with the Province on harvesting activity within the Hahoothlee; however, the MOF was not prepared to discuss an award based upon the amount being logged. Further,

the HFN proposed that a draft FRA should explicitly state that it represented only partial accommodation of its interests. The MOF would not agree to “partial accommodation”. The MOF proposed that the FRA would explicitly represent an interim accommodation on the basis that all FRAs are a response to the uncertainties regarding the strength of a First Nation’s claim. There was no strength of claim analysis under the FRA process.

[63] On April 26, 2004, Ms. Hadway sent an e-mail to Greg McDade, counsel for the HFN. Ms. Hadway advised Mr. McDade that the MOF had reviewed HFN’s position that the benefits offered to the HFN in the negotiation process represented only partial or limited accommodation. Ms. Hadway advised that, although the MOF agreed that this agreement was a bit different because it was to be negotiated as a continuation of an IMEA, the Ministry would still be seeking acknowledgement that the benefits provided (revenue sharing and an additional tenure opportunity) would constitute interim workable accommodation for the term of the agreement. She also advised that MOF would be seeking to “include the provisions regarding cancellation and suspension of the benefits if litigation regarding the adequacy of the consultation process and benefits was pursued.” She stated that the Minister had “already made significant commitments beyond a standard FRA” for the benefit of the HFN and advised that if the HFN chose to pursue a replaceable tenure opportunity through the treaty process, MOF would support any discussions with TNO.

[64] On May 13, 2004, Ms. Hadway, Chief Dennis, Mr. McDade, and Len Mannix of MOF in Nanaimo, met to discuss the next draft FRA. MOF stated that the proposed FRA was intended by MOF to provide interim workable accommodation

and that MOF could not extend the IMEA. HFN once again stated that accommodation must have a connection to the amount of harvesting in traditional territory and the extent of the infringement. MOF said that it would not enter into an agreement based on the amount of logging in the territory.

[65] On May 27, 2004, Mr. McDade sent an e-mail to Ms. Hadway with an attached draft of an agreement and notes with respect to possible suggested language to be substituted, further to the May 13, 2004 discussions. Mr. McDade advised that the language proposed attempted to respect the Province's view that it had promised what money it currently had, and the HFN view that it not be necessarily required to accept that this was an acceptable amount.

[66] Another meeting was held on June 10, 2004, to further negotiate with respect to the draft FRA. On June 11, 2004, Ms. Hadway sent an e-mail to Mr. McDade and Chief Dennis attaching a further amended proposal, being draft 4, for a FRA. In the e-mail, Ms. Hadway stated that:

The benefits are not based on an objective analysis of the value of the accommodation owing...MOF is also not prepared to accept language in the agreement that states or implies that these benefits only provide partial accommodation, and that further benefits would be negotiated through the consultation process. The benefits that are offered through the Agreement are all of the economic accommodation that the Province has available to put on the table.

[67] Regardless of the above stated position, the MOF has argued before this court that they retain the ability under the legislative scheme to address any alleged infringement of First Nation interests outside of the FRA initiative pursuant to ss. 43.51 and 47.3 of the **Forest Act**. These sections enable the MOF to invite,

without competition, an application from a First Nation for a direct award, forest licence, woodlot licence, or timber sale licence in order to implement or further an agreement between the First Nation and the Province. The FRA initiative does not preclude First Nations from also participating in the competitive process for these opportunities. In addition, a First Nation may be issued, without competition, a timber sale licence for less than 2,000 m³ through s. 48(1)(g)(i) of the **Forest Act** or a small volume free use permit for traditional and cultural activities. However, according to the FRA policy, “[i]nvitations to First Nations under Section 43.51 and 47.3 of the **Forest Act** may only be made to implement or further a treaty-related measures, interim measures, or economic measures agreement”. Thus, a First Nation must have entered into an agreement with the Province in order to take advantage of these sections. Further, these sections of the **Forest Act** appear to be the reference to which the FNFS proposal was referring to as “top up tenure from other sources”. Therefore, if a First Nation has already reached the Province’s upper “top up” rate of 54 m³/person, then these sections of the **Forest Act** would not apply. Thus, the MOF has never offered the HFN anything outside of its target rate.

[68] On June 22, 2004, MOF increased the tenure award offer from 30 m³ per person to an amount of 54 m³ per person due to an additional source of volume in undercut volume (the difference between the AAC under the licences and the annual amount which was actually cut) in TFL 44 that was uncommitted and could be used to increase the size of the tenure opportunity for First Nations negotiating FRAs in TFL 44. This additional volume allowed MOF to increase the tenure award to its

upper target rate of 54 m³/person. This was possible in the case of the HFN as well as several other First Nations in TFL 44, including the Tseshaht and Ditidaht. This amount still remains within the MOF's FNFS policy.

[69] On June 24, 2004, Ms. Hadway wrote a letter to Chief Dennis setting out the MOF's commitment regarding the forest tenure opportunity and a response to the two main options for concluding an agreement as presented by the HFN:

- (a) MOF offered an increased tenure opportunity which it intended to locate within the Sarita River Valley;
- (b) HFN wanted the agreement to explicitly represent "partial accommodation" of their claim. MOF was prepared to expressly commit to recognition that the FRA was an interim measure and that it was not intended to address full reconciliation of the HFN's claim and to agree that nothing in the FRA, including the fact that the parties had entered into the FRA, would be used to limit or prejudice the position that either party might take in litigation or negotiations as to the existence of any duty of consultation or accommodation owed by forest licensees or other third parties to the HFN; and
- (c) MOF committed to contacting Weyerhaeuser with respect to the HFN proposal for a management approach that involved the HFN in the Sarita River Valley.

[70] Chief Dennis responded by a letter dated June 24, 2004, stating that the population-based economic accommodation offered did not relate to the strength of title and rights claim and was not sufficient to address the infringement of aboriginal rights and title that resulted from forest development activities. Chief Dennis indicated that the HFN might consider the offer if it were a replaceable licence with a volume of 50,000 m³ annually.

[71] On July 5, 2004, Ms. Hadway sent an e-mail to Mr. McDade and Chief Dennis, in response to their June 24, 2004 letter, advising that the MOF could not meet this tenure request as it had already put forward its best offer of 152,500 m³ over 5 years in a non-replaceable tenure. She added that the HFN might be able to acquire a replaceable tenure in a final treaty through negotiation in the treaty process.

[72] On July 5, 2004, Chief Dennis responded to Ms. Hadway's July 5, 2004 e-mail, stating that the HFN viewed the MOF proposal as a "take it or leave it response" and that he found it unacceptable that the forestry negotiations could only be achieved by licensee approval. Chief Dennis also said that he found it very "disturbing that government and industry benefit from ongoing forestry activity in our asserted territory and neither party provides any accommodation to Huu-ay-aht."

[73] On July 5, 2004, Chief Dennis also sent an email to Premier Campbell providing notice "that our Interim Measure Extension Agreement/Forest Range Agreement negotiations are not producing positive results to enable both parties to achieve an agreement." Chief Dennis then requested a meeting with the Premier and the MOF "to iron out the wrinkles."

[74] On July 12, 2004, Chief Dennis sent a letter to Ferd Hamre, Acting District Manager, South Island Forest District, MOF, advising that "[f]orestry operations within our territory involve a huge amount of annual extraction of timber resources, an infringement which is currently happening without any accommodation." Further, Chief Dennis stated:

The current Crown position precludes any possibility that we can recommend the approval of harvesting in cutblock 961420 to our membership, or agree to harvesting of any cutblock within our territory. The Crown is not meeting its legal duty of accommodation. On cutblock 961420 we need the information we have requested in our previous correspondence to embark upon any assessment of the impact of harvesting. We wish to make it clear through this letter that in addition to the need for this information, we will object to any approvals being issued on any cutblock, until such a time as MOF negotiates a fair agreement which provides for acceptable economic accommodation.

[75] On July 19, 2004, Ms. Hadway sent an e-mail to Mr. McDade and Chief Dennis advising that MOF's offer had not changed since its proposal of June 24, 2004. MOF was still prepared to offer revenue sharing of \$281,000 annually and the tenure opportunity of 54 m³ per person (152,500 m³ over 5 years) with an operating area situated in the Sarita River Valley. Ms. Hadway stated that the MOF "had proposed alternative language regarding clauses dealing with accommodation in an attempt to address the HFN concerns about those clauses." She also stated that "[a]s requested by HFN, MOF is having some further discussions with Weyerhaeuser regarding [Chief Dennis'] proposal of increasing the HFN role in the management of the Sarita River Valley through a partnership with Weyerhaeuser."

[76] On July 19, 2004, Chief Dennis responded to Ms. Hadway's e-mail, advising that he would ask Mr. McDade to review the alternative language issue and that he felt that he had responded to MOF's June 24, 2004 proposal. Chief Dennis advised that he felt that the HFN's counter-proposal had been rejected and that the HFN had requested the Premier's intervention on the FRA negotiations to assist with a resolution. Chief Dennis said that further negotiations would depend on the Sarita River Valley proposal.

[77] On July 27, 2004, Chief Dennis requested an update with respect to the HFN proposal for an area-focused tenure in the Sarita Valley. Ms. Hadway responded to Chief Dennis' e-mail, advising that she had provided an updated FRA proposal in her e-mail dated July 19, 2004, and that she was waiting for the HFN to respond to the proposed language. She stated that the MOF had discussions with Tom Holmes of Weyerhaeuser with respect to partnerships in the Sarita River Valley and had scheduled a second meeting for later in August.

[78] On August 24, 2004, at a further meeting with MOF, the HFN was advised that there continued to be no room to negotiate any change in the revenue or tenure formulas. The HFN were provided with the Province's fifth draft of the FRA, which the HFN did not accept. The HFN indicated that based on the draft, they had no choice but to pursue litigation. A draft writ was tabled and the meeting ended.

[79] HFN served the petition with respect to this matter on September 20, 2004. Further negotiations ceased.

[80] From the time the IMEA expired in March 2004 until January 18, 2005, logging operations have continued within HFN territory. Cutting permits have been granted in at least 9 cutblocks and road permits have been granted in at least a further 11 cutblocks within the Hahoothlee during this period, representing a total volume of approximately 600,000 m³ of harvest.

[81] In the "consultation process" which took place between the MOF and the HFN from November 2003 to the present, no other options besides the FRA were

presented to the HFN. For instance, in Ms. Hadway's June 11, 2004 email addressed to Greg McDade and Chief Dennis, she stated that:

The benefits that are offered through the Agreement [FRA] are all of the economic accommodation that the Province has available to put on the table...MOF is not prepared to approach the negotiation of the Agreement predicated on the assumption that the consultation process should be open-ended...

[82] Furthermore, at no time did the Ministry ever indicate that a more formal process was available, nor did they provide information as to how the HFN could enter into a more formal consultation process. In addition, considering section 16.9 of the fifth draft of the FRA, the Ministry is not limited by the agreement, i.e., they can still negotiate while litigation is taking place. The Ministry maintains that it has always been willing and able to enter into a formal consultation process with the HFN, yet to date they have taken no steps to do so.

[83] The Ministry has also argued that the formal consultation process is too long and that the HFN will have already entered into a treaty with the Government of British Columbia by the time that any formal consultation would ever be concluded. Yet, such an assertion has no substance because the MOF and the British Columbia Treaty Office have failed to communicate with each other in this regard.

[84] The Ministry put forward its FRA policy as the only form of economic accommodation available to a First Nation until a treaty is reached. In the FRA policy dated July 31, 2003, the Province recognizes that the FRA policy is in response to *Haida*. Section 3 of the policy states:

The courts have held that First Nations' aboriginal title and rights in respect of land and resource use are recognized and affirmed under Section 35 of the *Constitution Act, 1982*. Aboriginal title, where it exists, has been determined by the courts to have an economic aspect. Recent legal decisions (*Haida*, *Skeena*) have determined that an obligation of the Crown exists to seek to accommodate potential First Nation aboriginal rights and title interests when making forest management decisions.

...In response, the government of British Columbia has developed a framework to ensure the appropriate, consistent, and fair application of accommodation measures...

[85] At section 4, the policy further states that:

Court decisions have increased the requirements of the Ministry of Forests to consult with First Nations on a wide-range of forest and range management decisions.

...

The policy approach to implementing the accommodation strategy is to offer access to economic benefits (revenue sharing and access to timber) through negotiated agreements with individual First Nations. In exchange for the economic benefits, agreements will contain provisions that promote a stable operating environment for the forest and range section, including consultation procedures and terms indicating that the Province is providing workable accommodation of the First Nation's economic interests arising from forest and range decisions.

[86] The language in the FRA policy, i.e. that in response to ***Haida*** and other court decisions, the Province has developed the FRA process, leads to the logical conclusion that the FRA process is the consultation process regarding the economic aspects of aboriginal title and rights.

(f) Does the FRA Policy follow the Government’s Formal Consultation Policy?

[87] There are two formal consultation policies for consultation with First Nations. The first is the “Provincial Policy for Consultation with First Nations”, dated October 2002 (“Provincial Policy”); the second is the “Ministry [Ministry of Forests] Policy”, dated May 14, 2003.

[88] The purpose of the Provincial Policy is to “describe the Provincial approach to consultation with First Nations on aboriginal rights and/or title that have been asserted but have not been proven through a Court process”. According to this policy, the Province must follow the following steps:

- (1) Pre-consultation assessment: an initial assessment should evaluate whether a particular decision or activity will require consultation.
- (2) Stage 1: initiate consultation. Stage 1(a) requires decision makers to consider aboriginal interests identified or raised by potentially affected First Nations. The scope and depth of consultation required is proportional to the soundness of the aboriginal interests that are at issue. According to stage 1(b), more indepth consultation is required when a number of the following criteria are met: title to the land had been continuously held in the name of the Crown; land near or adjacent to a reserve or formal settlement or village sites; land in areas of traditional use or archaeological sites; land used for aboriginal activities; notice of an aboriginal interest/aboriginal rights and/or title from a First Nation, even where made to another Ministry or agency of the Crown; and land subject to a specific claim.
- (3) Stage 2: consider the impact of the decision on aboriginal interests. If the Province determines that there appears to be a likelihood that the decision may result in an infringement of those interests should they be proven subsequently to be existing aboriginal rights and/or title, the Province must go to stage 3.
- (4) Stage 3: consider whether any likely infringement of aboriginal interests could be justified in the event that those interests were proven

subsequently to be existing aboriginal rights and/or title. The nature and scope of the duty to consult will vary with the nature of the right, the circumstances, and with the nature and extent of the infringing action. Aboriginal title embodies both cultural and economic aspects. Addressing both is part of the justification of infringement of aboriginal rights. If the Province finds that the likely infringement of aboriginal interests, should those interests be proven subsequently to be existing aboriginal rights and/or title, appears not to be justifiable, the Province must go to stage 4.

(5) Stage 4: look for opportunities to accommodate aboriginal interests and/or negotiate resolution bearing in mind the potential for setting precedents that may impact other ministries or agencies. This step may involve the use of treaty related measures, interim measures, economic measures, programs, training, economic development opportunities, agreements or partnerships with industry or proponents, or other arrangements aimed at attempting to address and/or reach workable accommodations with respect to aboriginal interests, particularly where the scope of discretion to accommodate such interests under the statutory framework in question is limited. The range of activities that can be carried out in terms of coming to a negotiated resolution vary greatly from situation to situation, and according to agency statutory mandates, policies, programs, appropriations, and available statutory discretion.

[89] The MOF has not applied stage 1 to the negotiations with the HFN.

According to stage 1(a) of the Provincial Policy, the Province must consult in proportion to the soundness of the aboriginal interests that are at issue. According to stage 1(b), more indepth consultation is required when a First Nation has met a number of criteria. The HFN has met all criteria listed, including having a specific claim on the land that does not overlap with other First Nations claims to parts of the Hahoothlee.

[90] The MOF has not applied stage 3 which states again that “the nature and scope of the duty to consult will vary with the nature of the right, the circumstances, and with the nature and extent of the infringing action”. Regardless of the HFNs

continual request to enter negotiations on the basis of the strength of their claim and the nature of the infringement, the MOF have followed the FRA policy, and in particular, the per-capita, population-based criteria, in order to determine the extent of negotiations.

[91] The second formal consultation policy is the Ministry Policy. According to the Ministry Policy, the consultation process is to “include considerations on the degree to which the forestry decision impacts the landbase, and the degree to which the First Nation likely has aboriginal interests within the area under decision.” According to the Ministry Policy, the consultation process will:

- (1) identify First Nations potentially affected by proposed forest development decisions,
- (2) provide them with all relevant and reasonably available information regarding proposed forest development decisions,
- (3) request information from First Nations that will assist in the identification of, and provide the basis for claims of, aboriginal interests that may be impacted by proposed forest development decisions,
- (4) consider the degree to which the forestry decision impacts the landbase,
- (5) consider whether the aboriginal interests described by the First Nation will potentially be infringed by the proposed development activity or decision, and
- (6) consider the apparent strength of aboriginal interests in relation to forest development decisions, seeking to accommodate those interests where appropriate.

[92] The Ministry has met the first requirement in the consultation process; however, the other requirements do not appear to have been followed.

III. ANALYSIS

a) Can the Petitioner Proceed by Petition to Seek Declaratory Relief?

[93] This matter was commenced by petition under the **JRPA**. The respondent has argued that negotiation under the FRA initiative is not the exercise of a statutory power and so not amenable to judicial review. Further, it was submitted that consultations under the FRA programme are advisory in nature so do not fall under the **JRPA**. Finally, the respondent said that the FRA initiative was a strategic policy to provide incentive to First Nations to participate in a voluntary initiative where options are available and so is not reviewable under the **JRPA**. The petitioner says that the FRA initiative was created by statute, namely, the **Forestry Revitalization Act** and the **Forest Act** which called upon the province to make specific agreements with First Nations and that the vehicle for those agreements is the FRA. It is not a voluntary policy when no options are available.

[94] **Haida Nation v. British Columbia (Minister of Forests)** (2004), 245 D.L.R. (4th) 33, 2004 SCC 73 [**Haida**] and **Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)** (2004), 245 D.L.R. (4th) 193, 2004 SCC 74 [**Taku**] established that the principle of the honour of the Crown requires the Crown to consult and, if necessary, accommodate Aboriginal peoples prior to proof of asserted Aboriginal rights and title. This is a corollary of s. 35 of the **Constitution Act, 1982**, in which reconciliation of Aboriginal and Crown sovereignty implies a continuing process of negotiation which is different from the administrative duty of fairness that is triggered by an administrative decision that affects rights, privileges,

or interests (*Haida* at paras. 28-32). The obligation is a free standing enforceable legal and equitable duty (*Haida Nation v. British Columbia (Minister of Forests)* (2002), 99 B.C.L.R. (3d) 209 at para. 55, 2002 BCCA 147 [*Haida Nation* (2002)]; *Squamish Indian Band v. British Columbia (Minister of Sustainable Resource Management)* (2004), 34 B.C.L.R. (4th) 280, 2004 BCSC 1320 at para. 73 [*Squamish Nation*]). The courts may review government conduct to determine whether the Crown has discharged its duty to consult and accommodate pending claims resolution (*Haida* at para. 60). In its review, the court should not give narrow or technical construction to the duty, but must give full effect to the Crown's honour to promote the reconciliation process (*Taku* at para. 24). It is not a question, therefore, of review of a decision but whether a constitutional duty has been fulfilled (*Gitxsan Houses v. British Columbia (Minister of Forests)* (2002), 10 B.C.L.R. (4th) 126 at para. 65, 2002 BCSC 1701 [*Gitxsan Houses*]).

[95] The appropriate standards of review were discussed in *Haida* at paras. 60-63. Briefly stated, the existence or extent of the duty to consult or accommodate is a legal question requiring correctness. Government misconception of the seriousness of the claim or impact of the infringement is a question of law to be judged by correctness. When infused with an assessment of facts, the standard is reasonableness. The process itself is to be judged on the reasonableness standard with the essential question being whether the government action viewed as a whole accommodates the collective aboriginal right in question. The government's process must be reasonable. Hall J.A. admonished in *Musqueam Indian Band v. British Columbia (Minister of Sustainable Resources Management)*, 2005 BCCA 128 at

para. 96 [*Musqueam*] that there should be some 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 when the question is not purely a legal one.

[96] In *Haida Nation v. British Columbia (Minister of Forests)* (2004), 35 B.C.L.R. (4th) 189, 2004 BCSC 1243, the decision regarding the duty to consult stemmed from the original breach of the Crown's duty in issuing the forestry licence. Mr. Justice Kelleher said at paras. 36 and 37 that there did not have to be a discrete decision to trigger the duty to consult and relied upon *Haida Nation* (2002), to conclude that the obligation is not linked to ongoing decisions or breaches of the Crown. In *Haida Nation* (2002), Lambert J.A. commented at para. 34 that it was unnecessary on the facts of that case to consider whether a statutory power was being exercised when forests are managed and operations continue by third parties under a tree farm licence.

[97] A similar argument had been made by the Crown in *Squamish Nation* where it was argued that an application was premature where an interim agreement to change a shareholder and expand a ski area had been made pursuant to policy under the *Land Act*, R.S.B.C. 1996, c. 245. The court (at para. 93) found that the duty to meaningfully consult arose in relation to the earliest decisions that affected whether the proposal would go ahead because the Crown knew of the First Nation assertion of claims.

[98] In *Musqueam* at paras. 16-23, Madam Justice Southin considered that the *JRPA* was inapt to the claim in the nature of prohibition to quash a decision to proceed with the sale of certain lands and for declaratory relief with respect to the duty of consultation because there was no assertion that the transaction in issue was authorized by statute. The correct way to proceed was by action. Nonetheless, the learned justice allowed the matter to proceed as if by action. Neither of the two other justices appeared to have shared this view as neither commented on Madam Justice Southin's conclusions. Most of the cases on this subject have been commenced by petition (*Haida, Squamish Nation, Musqueam*, and *Gwasslam v. British Columbia (Minister of Forests)*, 2004 BCSC 1734 [*Gwasslam*]). In most of these cases, the 'decision' that led to the duty to consult was the original breach of Crown duty in issuance of the forestry licence in the first place.

[99] It is apparent that the courts have not been pedantic or overly restrictive in the type of action which it regards as a 'decision' when it comes to declaratory relief following review of whether the Crown has discharged its obligation to consult with First Nations. This is consistent with the view expressed by the learned authors, DeSmith, Woold & Jowell, *Judicial Review of Administrative Action*, 5th ed. (London: Sweet & Maxwell, 1995), at p.114:

In summary, it can be said that where an application is for an order of certiorari, logic may require that there be some "decision" or "determination" capable of being quashed. The court should not, however, be pedantic or overly restrictive in the type of action which it regards as a "decision". Further, where the only relief sought is a declaration there is no need, at least in challenges to primary legislation, for any "decision" to be identified other than the legislative instrument itself.

[Emphasis added]

[100] The Crown had also argued in ***Taku River Tlingit First Nation v. Tulsequah Chief Mine Project*** (2000), 77 B.C.L.R. (3d) 310, 2000 BCSC 1001 that advisory decisions do not fall within the jurisdiction of the ***JRPA***, citing the same cases that were cited before this court, ***Save Richmond Farmland Society v. Richmond (Township)*** (1988), 36 Admin. L.R. 45 (B.C.S.C.) [***Save Richmond***] and ***Benias v. Vancouver (City)*** (1983), 3 D.L.R. (4th) 511 (B.C.S.C.) [***Benais***]. Although the trial court refused to order declaratory relief because the Crown conduct was advisory in nature and so did not fall within the definition of the exercise of a statutory power, neither the Court of Appeal nor the Supreme Court of Canada followed the learned trial court justice on this point. Both ***Save Richmond*** and ***Benais*** are distinguishable as they discuss the issue of judicial review in light of decisions in the form of recommendations. The actions taken by the respondent in dealing with the HFN are not meant to be recommendations but are decisions regarding proposal for a formal contract regarding forestry operational and management decisions at present and into the future.

[101] In ***Operation Dismantle Inc. v. Canada***, [1985] 1 S.C.R. 441 at 459, 18 D.L.R. (4th) 481 [***Operation Dismantle*** cited to S.C.R.], the majority agreed that judicial review was available to scrutinize policy decisions of government for compatibility with the Constitution. A preventative declaratory judgment is available if a legal interest or right has been placed in jeopardy or uncertainty. The court said at p. 480:

Borchard, *Declaratory Judgments* (2nd ed. 1941), at p. 27, suggests that declaratory relief in cases which are not susceptible of any other relief is distinctive in that:

...no “injury” or “wrong” need have been actually committed or threatened in order to enable the plaintiff to invoke the judicial process; he need merely show that some legal interest or right of his has been placed in jeopardy or grave uncertainty, by denial, by the existence of a potentially injurious instrument, by some unforeseen event or catastrophe the effect of which gives rise to dispute, or by the assertion of a conflicting claim by the defendant...

[102] There is authority that applications for declaratory relief under the **Canadian Charter of Rights and Freedoms**, Part I of the **Constitution Act, 1982**, being Schedule B to the **Canada Act 1982** (U.K.) 1982, c. 11 [**Charter**] may be taken by petition when the constitutional rights of an individual are called into question (**R. v. S.B.** (1982), 40 B.C.L.R. 273, 142 D.L.R. (3d) 339 (S.C.), rev'd on other grounds (1983) 43 B.C.L.R. 247, 146 D.L.R. (3d) 69 (C.A.)). Madam Justice Allan discussed whether an action or petition should be brought when a party seeks declaratory relief related to section 15 **Charter** rights in **Auton (Guardian ad litem of) v. British Columbia (Minister of Health)** (1999), 32 C.P.C. (4th) 305 at paras. 23-32 and concluded that such matters could proceed either by petition or action. A petition was more appropriate to clarify the nature and extent of public duties due to the summary nature of the proceedings and the ability of the court under the **Rules of Court**, B.C. Reg. 221/90 to order more generous pre-trial procedures if warranted.

[103] In **Glacier View Lodge Society v. British Columbia (Ministry of Health)**, [1998] B.C.J. No. 852 (S.C.), aff'd (2000), 75 B.C.L.R. (3d) 373, 2000 BCCA 242, an issue arose as to whether the matter should proceed by action or judicial review when it concerned the exercise of statutory powers of amalgamation under the **Health Authorities Act**, R.S.B.C. 1996, c. 180. Shabbits J. held at paras. 22-24:

[22] Section 2 of the *Judicial Review Procedure Act* does provide that on an application for judicial review, the court may grant any relief that the applicant would be entitled to in any proceeding for a declaration or injunction or both in relation to the proposed exercise of a statutory power. That section is permissive. It does not require that declarations or injunctions relating to the proposed exercise of a statutory power be by way of a judicial review; it permits such relief in that kind of an application.

[23] It is my finding that this matter is governed by s. 13 of the *Judicial Review Procedure Act*, which provides that on an application of a party to a proceeding for a declaration or injunction, the court may direct that any issue about the proposed exercise of a statutory power be disposed of summarily, as if it were an application for judicial review. The Act provides that such direction may be made whether or not the proceeding includes a claim for other relief, as is the case with this proceeding.

[24] The matter then, is one entirely of discretion. In reaching this conclusion, I am mindful of the plaintiff's submission that it is not the manner in which the Minister may exercise a statutory power of decision that is in question, but rather the constitutionality of legislation. Notwithstanding that submission, it is the Minister's proposed exercise of a statutory power which has given rise to these proceedings, and that is a matter to which s. 13(1) of the *Judicial Review Procedure Act* relates.

[104] In conclusion, declaratory relief has been granted by this court in several cases involving First Nations disputes concerning the duty to consult. In regards to forestry decisions, declaratory relief stems from the initial decisions to issue timber licences. In this case, the FRA initiative is a creature of statute, the **Forestry Revitalization Act** and the **Forest Act**, which enable the province to make specific agreements with First Nations regarding forest tenure. The FRA is the vehicle that the Ministry chose to deliver those specific agreements. The concept of 'decision' should not be strictly applied when there is legislative enablement for a government initiative that directly affects the constitutional rights of First Nations. This approach has been approved by the Supreme Court of Canada in **Haida** when it spoke of

review of governmental action affecting the duty to consult. The petitioners are entitled to seek the declaratory relief under the *JRPA* that the FRA policy does not meet the Crown's constitutional obligation to consult the HFN.

b) Does the Duty to Consult and Accommodate the HFN Exist?

[105] 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” (*Haida* at paras. 35 and 64). “Knowledge of a credible but unproven claim suffices to trigger a duty to consult and accommodate” (*Haida* at para. 37). It is clear that this duty arises before an infringement occurs and is continuing (*Haida Nation* (2002) at paras. 42-43). Once the government has knowledge of an asserted Aboriginal title or right, it must consult as to how exploitation of the land should proceed (*Haida* at para. 74). In *Taku*, the duty was engaged because the Crown was aware of the claim through the treaty negotiation process.

[106] The Crown has had knowledge of the HFN claim since at least 1994 when it entered the treaty negotiation process as part of the Maa-nulth Treaty Group. The status of the HFN within the treaty negotiations is now at level 5 with a comprehensive agreement in principle that has been ratified by the HFN. Crown knowledge is obvious.

[107] The nature of infringement or exploitation sufficient to trigger the duty was considered in *Haida* when, in general terms, McLaughlin C.J.C. said that the Crown may continue to manage a resource subject to consultation with Aboriginal groups,

depending on the circumstances related to strength of claim. Unilateral exploitation is not honourable. In relation to tree farm licences, the court said at paras. 75-76:

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

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

[Emphasis added]

[108] In *Taku*, the Crown knew that re-opening of a mine had the potential to adversely affect the First Nation claim so to trigger the duty to consult.

[109] The Crown has argued here that McLaughlin C.J.C. meant that consultation should take place at the point of decision to grant or renew a licence and that there is no specific impugned conduct here that might adversely affect Aboriginal interest

so that it is premature to consider any consultation. An allegation of general continuing forest operations is insufficient and too broad to trigger the duty according to the Crown. This cannot be so.

[110] Tysoe J. considered the nature of the infringement in ***Gitxsan Houses*** after the Crown had there argued that the petitioners had not established a *prima facie* infringement. While that case and ***Haida*** involved replacement and transfer of tree farm licences, the court found that a broader view of potential infringement was contemplated within the duty. Lambert J.A. said in ***Haida Nation v. British Columbia (Minister of Forests)*** (2002), 5 B.C.L.R. (4th) 33, 2002 BCCA 462 at para. 91:

The provincial Crown may infringe on the aboriginal title and aboriginal rights of the Haida people if it can justify the infringement. The infringement would consist in establishing a legislative and administrative scheme under the *Forest Act*, granting Weyerhaeuser an exclusive right to harvest timber in the area covered by T.F.L. 39, renewing the issuance of T.F.L. 39, transferring T.F.L. 39 to Weyerhaeuser, approving management plans, and issuing cutting permits, all in furtherance of the same legislative scheme, and all in violation of the aboriginal title and aboriginal rights of the Haida people. The provincial Crown may justify its actions by meeting the tests for justification. Among the tests is a requirement that the Haida people be consulted before the infringement actions are taken. In this case, the Crown provincial did not consult the Haida people in any effective way at any stage of the furtherance of the legislative and administrative scheme, and so is in breach of its obligation of consultation at every stage where a justification test would require effective consultation.

[111] In ***Gitxsan Houses*** at para. 81, the court said that the Crown must ensure that its continuing duty is fulfilled before the infringement is perpetuated by a further transaction or dealing with the licence.

[112] The FRA assumes HFN forbearance on a number of forestry decisions that would be made over the five year term of the agreement as listed in paragraph 28 above. In the meantime, absent agreement, these decisions are being made regularly and cutting continues on the land without meaningful consultation or a process for it. The question posed by the Crown is how specific the infringement has to be before the duty is triggered. With respect, that is not the question. The obligation arises upon knowledge of a claim and when infringement is contemplated. It is an ongoing obligation once the knowledge component is established. It is a process. How the Crown deals with the continuing obligation is another factor. In this case, the Crown attempted to deal with the requirement to consult with a five year plan for agreement based upon population. It was rejected by the HFN. The Crown's suggestion that a challenge should then be made on a cutblock by cutblock basis would render this process futile from the point of view of HFN and represents a practical take it or leave it attitude on the part on the Crown in the absence of continuing consultation. When a series of operational decisions is certainly contemplated, the duty to consult is triggered if accommodation has not been previously accepted.

[113] The first step in the process is to discuss the process itself (*Gwasslam* at para. 8). The Crown is then obligated to design a process for consultation that meets the needs for discharge of this duty before operational decisions are made. While it is conceivable that a challenge could be made on a cutblock by cutblock basis, this is largely dependent on whether the Crown has fulfilled its duty in the meantime based on the content of the consultation that has or has not occurred.

c) **What is the Scope of the Duty to Consult?**

[114] The scope of the duty to consult is distinguished from knowledge sufficient to trigger a duty to consult. McLaughlin C.J.C. wrote at para. 37 of *Haida*:

[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.

[115] What the honour of the Crown requires “varies with the circumstances” (*Taku* at para. 25). It must be understood generously (*Haida* at para. 17). 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” (*Taku* at para. 29; *Haida* at para. 39). The duty is conditioned and informed by the nature and strength of First Nation claims (*Musqueam* at para. 92). This assessment will assist the Crown in determining the scope of the duty within the spectrum described by McLachlin C.J.C. at paras. 43-44 in *Haida*:

[43] Against this background, I turn to the kind of duties that may arise in different situations. In this respect, the concept of a spectrum may be helpful, not to suggest watertight legal compartments but rather to indicate what the honour of the Crown may require in particular circumstances. At one end of the spectrum lie cases where

the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice. "[C]onsultation' in its least technical definition is talking together for mutual understanding": T. Isaac and A. Knox, "The Crown's Duty to Consult Aboriginal People" (2003), 41 *Alta. L. Rev.* 49, at p. 61.

[44] At the other end of the spectrum lie cases where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required. While precise requirements will vary with the circumstances, the consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision. This list is neither exhaustive, nor mandatory for every case. The government may wish to adopt dispute resolution procedures like mediation or administrative regimes with impartial decision-makers in complex or difficult cases.

[116] To substantially address First Nation concerns, communication must be unique to the group addressed and not the same as with all stakeholders (*Gitksan Houses* at para. 88). The individual nature of the consultation is apparent from the requirement to consult and seek accommodation that is "proportional to the potential soundness of the claim for Aboriginal title and rights" (*Haida Nation* (2002) at para. 51). The requirement to approach each case individually is key here when the government has attempted to impose an overall policy upon all Aboriginal groups based upon population and seeks to justify this imposition by an assertion that this policy promotes equality and fairness to each Aboriginal person. This is not the criteria established by the courts and does not afford the individual consideration required to fulfill the duty as described by McLaughlin C.J.C. without more.

[117] The duty to consult may lead to a duty to accommodate by changing government plans or policy in response to Aboriginal concerns (*Haida* at para. 46; *Taku* at para. 42). Meaningful, good faith consultation requires willingness on the Crown to make changes based upon information that emerges during the consultation process (*Taku* at para. 29). Good faith on the part of the Crown means exhibition throughout consultation of a willingness to substantially address Aboriginal concerns as they are raised (*Haida* at para. 42). Hard bargaining is one thing; sharp dealing is quite another. The former is not offensive, but the latter is. Accommodation begins when policy gives way to Aboriginal interests.

[118] Evidence of acceptance into the treaty negotiation process is sufficient to establish a *prima facie* case in support of Aboriginal rights and title. In *Taku*, acceptance of the First Nation into the treaty negotiation process was sufficient to establish a strong *prima facie* case that placed the petitioners within the spectrum of the duty of consultation above minimum requirements of notice and disclosure of information and to a level of responsiveness to its concerns. In that case, traditional land usage by the First Nation was purposefully and expertly studied by the government as to the specific impact of a proposed mining road with many meetings, committees, hearings, preparation of written reports and extensions of time within the process provided by the *Environmental Assessment Act*, R.S.B.C. 1996, c. 119 as rep. by S.B.C. 2002, c. 43, s. 58. The Supreme Court of Canada found this process adequate to satisfy the honour of the Crown.

[119] In *Haida*, there was a *prima facie* case in support of Aboriginal title and a strong *prima facie* case for the Aboriginal right to harvest red cedar. Although there

had been consultation on forest development plans and cutting permits, there had been no specific consultation with respect to replacement of the tree farm licence. The ongoing consultation on operational planning did not substitute for consultation on replacement of the tree farm licence. In that case, the court found that there had been no consultation at all.

[120] In this case, the duty of consultation falls on the higher end of the spectrum. The HFN and the Crown are near the end of treaty negotiations with an agreement in principle that acknowledges rights related to forest resources and title to certain lands without legally recognizing HFN's rights or title. There have been two previous accommodation agreements (the IMA and IMEA) that, for six years, had provided a process for continuing consultation that had been honoured by both parties. On this basis alone, the HFN have shown a strong *prima facie* claim to title and rights related to forestry resources such that consultation with respect to ongoing operations is warranted. In addition, the Crown holds title to the land in question with the HFN claim based upon occupation of the lands before Crown sovereignty. Although there are overlapping claims over part of the Hahoothlee, a part is exclusively claimed by the HFN. The issue of exclusive possession is challenging but not insurmountable (see *Musqueam* at paras. 87-88). It certainly does not mean that no consultation should occur. The level of potential infringement of rights to timber resources is severe given the harvest rate contemplated by third parties over the next five years.

d) **Has the Crown Fulfilled its Duty to Consult and Accommodate the HFN?**

[121] Any consultation must be meaningful, although there is no duty to reach agreement (*Haida* at para. 10). To be meaningful, consideration must be given to the strength of claim and to the degree of potential infringement. In the earlier case of *R. v. Nikal*, [1996] 1 S.C.R. 1013 at para. 110, 133 D.L.R. (4th) 658, Cory J. said that every reasonable effort must be made to inform and consult in relation to resources to which Aboriginal claim has been made. It is a question of law whether the government misconceived the seriousness of the claim or impact of the infringement. The government must, therefore, be correct on these matters and act on the appropriate standard (*Haida* at para. 63). The process itself is to be examined on the standard of reasonableness (*Haida* at para. 62).

[122] A strong *prima facie* claim was said by Hall J.A. in *Musqueam* at para. 95 to give rise to deep consultation possibly entailing an opportunity to make submissions, formally participate in any decision making processes, and receive written submissions to demonstrate that Aboriginal concerns were addressed.

[123] To drop the processes established in the IMA and IMEA without consultation or notice and engage in an ad hoc series of meetings and correspondence fails to accomplish the first step in a consultation process. This is so, regardless that the term of these agreements was set to expire. The Crown had an obligation to introduce a new consultation process before the agreements expired. To suggest to this court that it should have been apparent to the HFN that negotiation of the FRA was not a formal consultation, but some sort of preliminary business discussion,

cannot withstand scrutiny in face of the Crown obligation for continuing, meaningful consultation. This is especially so when the Crown failed to follow its own process for consultation as set out in the Provincial Policy for Consultation with First Nations and the Ministry Policy, and when it was apparent early on that the HFN were not prepared to accept the business premise of the FRA. In my view, this was not reasonable. The Crown is obliged to establish a reasonable consultation process for future consultation with respect to economic accommodation for ongoing forest activity within the Hahoothlee. If this involves inclusion of other First Nations, so be it.

[124] Was the Crown's position here just hard bargaining? Or did it infringe on the honour of the Crown's duty of good faith? A good idea of bargaining can be gleaned from labour relations cases where, although not analogous, there is discussion of good and bad faith bargaining. For example, in *Iberia Airlines of Spain*, CLRB Decision No. 796 (Can.Lab.Rel.Bd.), "surface bargaining" was distinguished from hard bargaining. The employer had engaged in surface bargaining when its position of active bargaining at first glance seemed above reproach. However, on closer examination as revealed by the fact that the employer had never actually assessed the employees' demands, an intransigent position through passive resistant negotiation was revealed. Of course, labour negotiations assume an obligation to agree which is not the case here. However, the nature of good faith bargaining is instructive to the consultation process in which the Crown and the HFN were supposed to be engaged.

[125] This court considered the FRA initiative in **Gwasslam**. There, the ongoing degree of infringement of the claim of a right to timber resources was not significant (para. 21). Tysoe J. was clear that the scope of the duty to consult was proportionate to a preliminary assessment of the claim for Aboriginal rights or title and the seriousness of the potentially adverse effect upon the rights or title as claimed (paras. 45 and 50). He acknowledged that it might be commercially expedient for the government to fulfill the duty to consult and accommodate through a five-year FRA rather than each time it had a dealing with the tree farm licence. He also said that both the government and the First Nation had a business decision to make as to whether the offer contained in the FRA was sufficient accommodation for a five-year period. He did not, however, decide whether the Crown had fulfilled its duty to consult in the offering of the FRA. While he observed that the Crown's approach in the FRA was not unreasonable because there was no attempt to force the FRA upon the First Nation, he agreed that economic compensation would more logically be based upon the volume of trees harvested in the claimed territory rather than a population base (para. 57). In the end, the learned justice said that the parties should resume negotiations in relation to the FRA based upon the guidance provided in **Haida** and **Taku**.

[126] To fail to consider at all the strength of claim or degree of infringement represents a complete failure of consultation based on the criteria that are constitutionally required for meaningful consultation. While a population-based approach may be a quick and easy response to the duty to accommodate, it fails to take into account the individual nature of the HFN claim. In **Musqueam** at para. 91,

a practical interim compromise failed to meet the tests enunciated by the Supreme Court of Canada when it was not informed or conditioned by the strength of claim and degree of intervention analysis. In this case, the government did not misconceive the seriousness of the claim or impact of the infringement. It failed to consider them at all. The government acted incorrectly and must begin anew a proper consultation process based upon consideration of appropriate criteria.

[127] A proper consultation process considering appropriate criteria must involve active consideration of the specific interests of HFN. The conduct of the Crown from February 2004 through to the end of negotiations was intransigent. Although the government gave the appearance of willingness to consider HFN's responses, it fundamentally failed to do so. This is particularly apparent in correspondence of February 25, April 7, April 19, and April 26 and in the immediate aftermath of those correspondences. The government never wavered from its position as expressed in the FRA policy. The policy was always intended to be a form of IMA so changing the name on the HFN's FRA was within the policy. The amounts offered in revenue and tenure were always within the policy guidelines with the government starting at the lowest offer available. No effort was made to work with other ministries, particularly the Ministry of Sustainable Resources, to consider what options might be available throughout government to accommodate HFN concerns. No alternative was offered to the HFN despite repeated requests by the HFN for consideration of their specific situation. No formal consultation process was ever suggested. No continuing consultation occurred when the HFN did not accept the FRA. Logging continues. The government has failed to accord the HFN the status that a treaty

level 5 First Nation should receive. Presumably, this conduct would be considered in determining whether the infringement of HFN title and rights was justified.

[128] This is not to comment at all on the appropriateness or adequacy of the accommodation that might be achieved at the end of the consultation process. It may be that the substance of the offer of accommodation contained in the FRA may be sufficient accommodation. However, that would have to be determined not by a population based criteria, but by a strength of claim and degree of infringement assessment. That question is deferred until proper consultation has taken place. The fact that some First Nations have accepted the FRA offer indicates only that those groups made a business decision to accept the offer in a practical sense. It is not reflective of the sufficiency either of the consultation process or of the accommodation offered.

IV. CONCLUSION

[129] The petitioners shall have declaratory relief as set out in the petition. The petitioners are entitled to costs on the scale of 4.

“J. Dillon, J.”
The Honourable Madam Justice J. Dillon

Date: 20070720

Docket: T-1379-05

Citation: 2007 FC 763

Ottawa, Ontario, July 20, 2007

PRESENT: The Honourable Mr. Justice Blanchard

PRESENT:

**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

REASONS FOR ORDER AND ORDER

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1. Introduction

[1] This application for judicial review challenges the decision to approve a recommendation of a project involving oil and gas development in the Northwest Territories. The project, known as the Extension Project, proposed by Paramount Resources Ltd. (Paramount) is located in the Cameron Hills, over which the Ka'a'Gee Tu First Nation (KTFN) claims Aboriginal rights and treaty rights. The KTFN states that the project negatively impacts their established treaty rights and their asserted Aboriginal rights and consequently argues that the Crown had a duty to consult and accommodate before approving the project. In this application the KTFN claims that the Crown failed to meet its duty to consult and accommodate.

2. Background Facts

- *The Parties*

[2] The KTFN, a community of the Deh Cho First Nations (DCFN) who descend from the South Slavey people of the Dene Nation, and its Chief Lloyd Chicot are Applicants in this proceeding. On November 1, 1990, a sub-Band of the Fort Providence Band consisting of 36 members residing at Kakisa Lake formed the Kakisa Lake Band. In 1996, the Kakisa Lake Band Council resolved to be known as the Ka'a'Gee Tu First Nation. Currently there are approximately 55 people living at the Kakisa settlement on the east side of Kakisa Lake. There are now about 62 people on the KTFN Band list.

[3] Paramount, a Respondent in this application, is a Calgary based energy company that explores, develops, processes, transports and markets oil and gas. Paramount has explored and

developed oil and gas reserves in the Cameron Hills area since about 1979, after it acquired exploration licenses for approximately 80,800 acres in that area.

[4] The “Responsible Ministers” pursuant to section 111 of the *Mackenzie Valley Resource Management Act*, 1998 c. 25 (the Act) are the Minister of Indian and Northern Affairs Canada (INAC), the Minister of Fisheries and Oceans, the Minister of the Environment Canada and Natural Resources Government of the Northwest Territories.

- *The Geography*

[5] Cameron Hills is a remote area in the Northwest Territories just north of the Alberta border, consisting of a high plateau, which is south of Tathlina Lake and a collection of surrounding lower laying hills to the southwest and west of Tathlina Lake. Paramount’s development project is located on the high plateau. The plateau is inaccessible from the north, northwest and southeast sides, and is accessible only by a winter road when the ground is frozen, via the southwest side where the terrain is not as steep. The Cameron River flows in a northwesterly direction off the plateau and eventually into Tathlina Lake which is located about 10 kilometers north of the plateau. Kakisa Lake lies approximately 70 kilometers north of the Cameron Hills plateau, and Kakisa settlement is situated on the east side of that lake.

[6] The Applicants claim a deep spiritual and cultural connection, as well as an economic reliance on the Cameron Hills. In the words of Chief Chicot: “our culture, economy, spirituality and our way of life are intimately connected to our land, which supports and sustains us. Our land is the home of the Ka’a’Gee Tu people who are alive today as well as the home of our

ancestors and the home for all future generations of Ka'a'Gee Tu". Prior to the arrival of settlers to the area, the KTFN have harvested animals, fish, trees and water from the area, and many families continue to hunt and trap in the Cameron Hills area.

[7] The Applicants claim stewardship over the Cameron Hills area. However, other Aboriginal groups, including the Deh Cho members of the Deh Gah Got'ie, the Katlodeeche, the West Point and the Trout Lake First Nations; the Alberta First Nation Dene Tha'; the Fort Providence First Nation and the NWT Métis also claim Cameron Hills as part of their traditional territory. There is no consensus amongst these Aboriginal groups regarding this stewardship.

[8] There is no dispute amongst the parties in this application that the lands subject to Paramount's proposed development are also the lands over which the Applicants claim treaty rights and assert Aboriginal rights. There is no agreement, however, concerning the seriousness of the impact of Paramount's proposed project on these rights. While the Respondents agree that the Crown owed a duty to consult to the Applicants, there is no agreement on the scope or content of that duty. The Respondents take the position that the Crown discharged its duty to consult in the circumstances.

- *The Project*

[9] Oil and gas development in the Cameron Hills proceeded in phases. Exploration for oil and gas began in the early 1960s. Paramount obtained long term mineral rights in the early 1980s and by 2004 had been granted several exploration, discovery and production licenses.

Paramount's development in the Cameron Hills proceeded in three phases: the Drilling Project

(August 2000), the Gathering and Pipeline System Project (April 2001), and the Extension Project (August 2003). These three projects are collectively referred to as the Cameron Hills Development. The development proposed at the outset consisted of setting up a trans-border pipeline, central battery and gathering facilities. Once the construction of the Gathering and Pipeline System had been completed in August 2002, Paramount sought land use permits and water licenses to access new well sites and tie-in the new wells to the newly constructed gathering system. This aspect of the development came to be known as the Extension Project. It signalled the beginning of Paramount's production work in the Cameron Hills. The approval of the Extension Project is the decision being reviewed in this application.

[10] The Extension Project is significant in scope. Over time, the Project will include: drilling, testing and tie-in of up to 50 additional wells over a period of 10 years; oil and gas production over a 15 to 20 year period; excavation of 733 km of seismic lines; construction of temporary camps servicing up to 200 workers; the withdrawal of water from lakes; and the disposal of drill waste.

[11] Before turning to the issues in this application, which essentially concern the Crown's duty to consult, it is necessary to understand the context in which the impugned decision was made. To that end, I propose to review background information in respect to the applicable treaties, the Deh Cho comprehensive land claims process, the regulatory approval process under the Act and how this process was applied in the circumstances of this case.

- *Treaties 8 and 11*

[12] The Deh Cho First Nations fall within Treaty 8 and 11. Treaty 8 was signed on June 21, 1899, and Treaty 11 was signed on June 27, 1921 with an adherence agreement signed on July 17, 1922. At the time of the signing of Treaty 11, the KTFN was part of the community of Deh Cho First Nations and are consequently bound by that Treaty. Both Treaties contain cession of land and surrender of rights provisions. The Treaties also guarantee to its Aboriginal signatories the right to pursue “their usual vocations of hunting, trapping and fishing throughout the tract surrendered”. Both Treaties also provided for the creation of reserve lands. However, in the Northwest Territories (the NWT), no reserves have been set aside pursuant to Treaty 11, the treaty at issue in this application.

[13] The Crown in right of Canada and the Deh Cho First Nations disagree on whether Treaty 11 extinguished Aboriginal title. The Crown construes Treaty 11 as an extinguishment treaty while the Deh Cho and the Applicants understand Treaty 11 to be a peace and friendship treaty, whereby Aboriginal title was not surrendered. The Applicants contend that the Deh Cho did not allow reserve lands to be set aside pursuant to the Treaties because they did not want to submit to the Crown’s interpretation of the Treaties.

[14] While Aboriginal title in respect to the land under the treaties is disputed there is no dispute as to the existence of the Applicants’ treaty rights to hunt, fish and trap in the Cameron Hills area.

- *Deh Cho Process*

[15] In 1976 and 1977, on the basis that the land provisions of the Treaties had not been implemented, Canada accepted comprehensive land claims from the Dene and Métis of the Mackenzie Valley in the NWT. Ultimately, agreements were reached and implemented in respect of the Gwich'in, the Sahtu Dene and the Métis, all under Treaty 11, following which Canada passed the Act essentially to give effect to these agreements. The Act was amended in August 2005 to reflect the requirements of the land claims and self-government agreement between Canada and the Tlicho.

[16] The relevant outstanding comprehensive land claim relating to Treaty 11 is with respect to what is known as the Deh Cho region, which includes the Cameron Hills area. This claim was accepted for negotiation by the Crown in right of Canada in 1998. The negotiation process became known as the "Deh Cho Process". The parties to the negotiations are the Deh Cho First Nations, including the Applicants, the Government of Canada and the Government of the Northwest Territories. The process was to provide a forum for respectful interaction of Aboriginal and Crown titles and jurisdictions with the view of negotiating a final agreement.

[17] Although negotiations are ongoing in the Deh Cho Process, various agreements have been reached along the way, including the Interim Measures Agreement of 2003, which contemplates collaborative land use planning for the Deh Cho territory in accordance with Deh Cho principles of respect for land. This agreement establishes the Deh Cho Land Use Planning Committee which provides for the conservation, development and utilization of the land, waters and other resources. Under this agreement, Canada and the Deh Cho First Nations have

identified and negotiated the withdrawal of certain lands from disposal and mineral staking. Criteria agreed upon in identifying such lands include: lands used for the harvest of food and medicines; lands that are culturally and spiritually significant; lands which are ecologically sensitive as well as watersheds. Withdrawn lands remain subject to the continuing exercise of existing rights and interests.

- *Regulatory Approval Process*

[18] Oil and gas development in the Mackenzie Valley is complex involving several pieces of legislation and engaging several administrative bodies. The text of pertinent statutory provisions is attached to these reasons as Appendix A.

[19] Construction and operation of a pipeline and gathering system occurs under the authority of the National Energy Board (the NEB), pursuant to the *Canada Oil and Gas Operations Act*, R.S., 1985, c. O-7, and the *Canadian Petroleum Resources Act*, R.S., 1985, c. 36 (2nd Supp.). Following the Gwich'in and Métis Comprehensive Land Claim Agreements, the *Mackenzie Valley Resource Management Act* was enacted in 1998. It provides for two regulatory boards: the Mackenzie Valley Land and Water Board (the Land and Water Board) and the Mackenzie Valley Environmental Impact Review Board (the Review Board). These Boards are established pursuant to the Act as institutions of public government within an integrated and coordinated system of land and water management in the Mackenzie Valley.

[20] The Land and Water Board and the Review Board are established for the purpose of regulating all land and water uses, including deposits of waste, in the Mackenzie Valley. Bill

C-6, which preceded the legislation, took five years to complete, during which time there was considerable consultation with all affected groups, including affected First Nations who were funded to review the proposed Bill.

[21] Under the Act, the Land and Water Board is responsible for issuing land use permits and water licences in the unsettled land claim areas within the Mackenzie Valley. A developer must apply to the Land and Water Board for a land use permit and water licence where the proposed activity is to be carried out in the Mackenzie Valley. Section 60.1 of the Act specifically requires that the Land and Water Board gives consideration to “the well-being and way of life of the Aboriginal peoples of Canada” in making its decisions. The section provides as follows:

60.1 In exercising its powers, a board shall consider

(a) the importance of conservation to the well-being and way of life of the aboriginal peoples of Canada to whom section 35 of the *Constitution Act, 1982* applies and who use an area of the Mackenzie Valley; and

(b) any traditional knowledge and scientific information that is made available to it.

60.1 Dans l'exercice de ses pouvoirs, l'office tient compte, d'une part, de l'importance de préserver les ressources pour le bien-être et le mode de vie des peuples autochtones du Canada visés par l'article 35 de la *Loi constitutionnelle de 1982* et qui utilisent les ressources d'une région de la vallée du Mackenzie et, d'autre part, des connaissances traditionnelles et des renseignements scientifiques mis à sa disposition.

[22] Pursuant to subsection 63(2) of the Act, the Land and Water Board is required to notify affected communities and First Nations upon receipt of an application for a permit or license.

[23] Section 114 of the Act sets out the purpose of Part 5 of the Act, which is to establish a process comprising a preliminary screening, an environmental assessment and an environmental impact review. The Review Board is established as the main instrument in the Mackenzie Valley for the environmental assessment and the environmental impact review and is mandated with ensuring that the concerns of Aboriginal people and the general public are taken into account in the process.

[24] The guiding principles of Part 5, set out in section 115 of the Act, provide that the process shall have regard to the following: the protection of the environment from significant adverse effects of proposed developments; the protection of the social, cultural and economic well-being of the residents and communities in the Mackenzie Valley; and, the importance of conservation to the well-being and way of life of the Aboriginal peoples. Section 115.1 states specifically that the Review Board shall consider any traditional knowledge that is made available to it in exercising its powers.

[25] Community consultation is integral to the processes undertaken by both the Land and Water Board and the Review Board. Section 3 of the Act governs how this consultation is to be carried out:

3. Wherever in this Act reference is made, in relation to any matter, to a power or duty to consult, that power or duty shall be exercised

(a) by providing, to the party to be consulted,

3. Toute consultation effectuée sous le régime de la présente loi comprend l'envoi, à la partie à consulter, d'un avis suffisamment détaillé pour lui permettre de préparer ses arguments, l'octroi d'un délai suffisant pour ce faire et la possibilité de présenter à qui de

- (i) notice of the matter in sufficient form and detail to allow the party to prepare its views on the matter, droit ses vues sur la question; elle comprend enfin une étude approfondie et impartiale de ces vues.
- (ii) a reasonable period for the party to prepare those views, and
- (iii) an opportunity to present those views to the party having the power or duty to consult; and
- (b) by considering, fully and impartially, any views so presented.

[26] Both the Land and Water Board and the Review Board provide guidelines on how consultation is to be undertaken by developers when applications are made to the respective boards.

[27] The Act provides for a three stage review process: a preliminary screening, an environmental assessment and an environmental impact review. Developers must consult with affected parties before submitting an application, and the consultation should involve notice of the matter in sufficient detail, a reasonable period for the party consulted to prepare their views, and the opportunity to present those views to the developer. Once the Land and Water Board is satisfied pre-application community consultation has taken place, it performs the preliminary screening which involves determining whether the development might have a significant adverse impact on the environment. If development might have a significant adverse impact, then the Land and Water Board will refer the proposal to the Review Board for an environmental

assessment under section 125 of the Act. Otherwise the application will proceed to the permitting phase.

[28] Once an environmental assessment has been triggered by a referral from the Land and Water Board, the Review Board determine the scope of the environmental assessment and request a more detailed description of the development. Next, issues are identified by the Review Board and Terms of Reference (TOR) for the environmental assessment are determined. A draft version of the TOR is circulated to all parties for comments. After the TOR is finalized, the developer proceeds to prepare the Developer's Assessment Report (DAR). The DAR is circulated to all parties and undergoes a conformity check in which it is compared to the TOR. It then undergoes a Technical Review in which participants may present their views supported by facts and evidence in a forum that is open to the public. Questions arising from the Technical Review which require formal responses are issued by way of Information Requests (IRs), which may originate from any party, and are made accessible to everyone. The Review Board may order a hearing. Following the hearing, the Review Board will consider the DAR and the evidence and determine whether the development is likely to have significant adverse environmental impacts or be a cause of significant public concern. Under section 128, the Review Board may determine that no assessment need be performed, recommend that the approval of the proposal be made subject to the imposition of measures that the Review Board considers necessary to prevent an adverse impact, recommend the proposal be rejected without an environmental assessment, or, if the Review Board decides that the development is likely to cause significant public concern, order an environmental impact review. The decision of the

Review Board is subject to section 130 of the Act which essentially places the ultimate decision in the hands of the Ministers.

[29] Pursuant to section 130 of the Act, after having considered the environmental assessment report, the Ministers may order an environmental impact review even if the Review Board determined such a review need not be conducted (paragraph 130(1)(a)). Where the Review Board recommends the approval of a proposal subject to the imposition of certain measures or the rejection of a proposal because of its adverse impact on the environment, the Ministers may:

- (1) adopt the recommendation or refer it back to the Review Board for further consideration (subparagraph 130(1)(b)(ii)) or
- (2) after consulting the Review Board, reject the recommendation and order an environmental impact review of the proposal or adopt the recommendation with modifications

This latter option is known as the “consult to modify” process. The parties that participate in the consult to modify process are the representatives of the Responsible Ministers and representatives of the Review Board. The Act imposes no obligation on the Ministers to involve others in the process including the parties to the Environmental Assessment or Environmental Impact Review.

[30] The third stage, the environmental impact review, consists of a review of the environmental assessment by a panel of three or more members appointed by the Review Board. The Panel is vested with the powers of a review board and the Act sets out a comprehensive

process as to how the review is to be conducted. Pursuant to subsection 135(1) of the Act, after considering the report from the Review Panel, the Ministers may adopt the recommendations contained in the report with or without modifications, reject them or refer the proposal back to the Review Board.

- *Funding*

[31] The Applicants contend that throughout the Review Board process concerning the Cameron Hills development they participated in each environmental assessment process to the extent permitted by their limited resources.

[32] While the Applicants complain that their full and meaningful participation in the consultation process under the Act was compromised by lack of resources, the evidence indicates that funding was made available by the Crown to assist the Applicants.

[33] In fiscal year 2001-2002, the KTFN requested and received from INAC \$40,000 to assist with costs associated with an Oral Traditional Knowledge Research Project. This resulted in the production of a documentary film, which is in evidence, entitled “Straight from the Heart”. The film documents Elders speaking to KTFN regarding traditional knowledge, which included gathering stories, legends and knowledge of the land. The cost of the project was \$30,844 resulting in a \$9,166 surplus.

[34] In fiscal year 2002-2003, the KTFN requested and received from INAC the sum of \$40,000 to allow participation in land and resource management activities in the area. To this

end an Oil and Gas Coordinator was hired to address environmental concerns and act as spokesperson for the KTFN. The Government of the Northwest Territories (GNWT) also provided \$40,000 in funding for this purpose. A \$6,476 surplus resulted from the \$80,000 in grants for resource management activities provided in 2002-2003.

[35] In 2003-2004, the KTFN requested \$40,000 and received \$10,000 from INAC to continue funding the Oil and Gas Coordinator. The same funding was obtained in 2004-2005 for this purpose. Also, in 2004-2005, INAC provided \$10,000 for the completion of a community protocol for the Cameron Hills Oil and Gas Project.

[36] In summary, from 2001 to 2005, INAC and the GNWT provided a total of \$140,000 to the KTFN for their traditional knowledge project and for the services of the Oil and Gas Councillor. This represents \$30,000 less than the amount the KTFN requested. Of the total amount received, the record indicates that the KTFN had a \$15,642 surplus.

- *The First Two Phases of the Cameron Hills Development*

[37] Since 1992, Paramount obtained 14 production licenses (two issued in 1992, four in 2002, two in 2003 and six in 2004), and it holds 7 land use permits (LUP), 4 water licenses and 22 federal surface leases, all in the Cameron Hills. As mentioned, development proceeded in three phases: the Drilling Project, the Gathering and Pipeline Project, and the Extension Project.

[38] The Drilling Project involved 9 new wells and 7 existing wells in order to evaluate oil and gas reserves. The Gathering and Pipeline Project involved the construction of an extensive

trans-boundary pipeline and gathering system to connect Paramount's wells in the Cameron Hills to Alberta's pipeline system. This also included more than 60 km of pipelines, well-site facilities for 11 existing and 9 new wells, temporary construction camps to house up to 200 workers, a permanent camp for 20 workers, an airstrip and vehicle access routes to well-sites.

[39] Applications for land use permit and water licences for the Drilling Project were made to the Land and Water Board on August 29, 2000. The project was referred to the Review Board for an environmental assessment on November 20, 2000, and the Review Board issued its environmental assessment report on October 16, 2001. The Review Board recommended that land use permits and water licenses be issued on condition that the mitigating measures contained in Paramount's environmental report be respected. The Drilling Project was eventually allowed to proceed on this basis.

[40] The Applicants state that they were surprised to learn in 2001, when the Drilling Project was first before the Review Board, the full magnitude of Paramount's plans for the Cameron Hills area. They claim that they were not aware that the Federal Crown had previously issued Paramount extensive licenses in the Cameron Hills. The Applicants argue that the KTFN were facing a major industrial development without any meaningful input into the issuance of the original discovery and exploration licenses granted to Paramount.

[41] Paramount initiated the Gathering and Pipeline System Project in April 2001 by applying to the Land and Water Board for land use permits and water licenses. The KTFN were involved in the preliminary screening and environmental review processes for the Gathering and Pipeline

Project. Between June 22, 2000, and November 19, 2001, more than a dozen meetings were held and numerous phone calls were made with Paramount, discussing traditional knowledge, benefits of the project for the Kakisa community, concerns in respect to other Bands claiming stewardship over the Cameron Hills area as traditional territory, and mitigating measures for the environment. The KTFN's participation included a helicopter flyover of the proposed project and a three day excursion to the territory around Tathlina Lake for the purpose of discussing traditional knowledge.

[42] The project was referred to the Review Board for environmental assessment and on December 3, 2001, the Review Board issued its report on the Environment Assessment.

[43] Paramount's DAR prepared for the Gathering and Pipeline System Environmental Assessment concluded that the project would have no significant cumulative environmental impacts and was not expected to have an adverse effect on the pursuit of traditional activities. Both the KTFN and the GNWT disagreed. The Applicants questioned Paramount's ability to draw conclusions regarding impacts of its project on the Applicants in the absence of a proper Traditional Land Use Study. In its submissions to the Review Board, the GNWT argued that Paramount had underestimated the impact of the project on the boreal caribou population. In its Environmental Assessment Report for the Gathering and Pipeline Project, the Review Board found that the Applicants were "very actively involved in traditional land use ... most if not all residents participate in traditional land use in one manner or another". The Review Board accepted the GNWT data that "...Kakisa families derive 50-60%, and possibly more, of their annual food basket requirements from the land." Ultimately, the Review Board recommended

that with the implementation of 21 mitigating measures, the project "... is not likely in its opinion to have any significant adverse impact on the environment or to be a cause of significant public concern".

[44] Paramount expressed serious concern in respect to measures 13, 15, 16 and 17. I reproduce these recommendations in Appendix B to these reasons. These recommendations essentially provided that the project not proceed until Paramount: (1) has revised its Heritage Resource Plan to incorporate First Nation concerns; (2) has developed a compensation plan cooperatively with affected First Nations which address the effects on land and resources used beyond trapping; and (3) has provided INAC with proof that affected First Nations have approved of the Traditional Use Study and incorporated any mitigating measures arising from the Study into their development plan.

[45] The KTFN wrote to the Review Board and INAC urging support for the measures and asking that the necessary steps be taken to ensure that these conditions are fulfilled by Paramount before any construction begins on the ground. The KTFN noted that the report supported their position that Paramount's Traditional Use Study had not been completed and the Benefits Plan failed to meet some of its legislated requirements regarding compensation.

[46] From the beginning of the Cameron Hills development, the Applicants have expressed concerns regarding the project's actual impact on land, water and wildlife in the Cameron Hills area, affecting their rights to hunt fish and trap. From the outset, the KTFN consistently expressed two concerns: first, that a Traditional Land Use Study was required to provide baseline

data against which mitigating measures could be designed and damages caused by Paramount's development could be measured, and second, that an Impacts and Benefits Agreement which would include investments in the community and employment opportunities, be negotiated with the KTFN to address Paramount's infringement of their aboriginal title and treaty rights. In the Applicant's submission, neither of these objectives has been met.

[47] With respect to the Traditional Land Use Study, Paramount prepared a statutory Benefits Plan pursuant to subsection 5(2) of the *Canada Oil and Gas Operations Act*. Paramount concedes that the Benefits Plan was never intended to address specific benefits or impact on a particular community, but was a plan to address benefits to Canadians in general and people in the north in particular.

[48] The Applicants' contend that Paramount's Traditional Knowledge (TK) Study did not meet the requirements of a proper Traditional Land Use Study. They argue that the study was prepared without meaningful consultation and completed without their full or proper involvement or participation. They claim the study was deficient in that it did not consider or address how the KTFN occupied their territory, how their laws protected the land, water and wildlife, or how Paramount's operations truly impact their economy, culture, traditional way of life and well-being.

[49] Paramount argues that the availability of traditional knowledge of the KTFN to further assist in fashioning mitigating measures was limited by the KTFN itself. Paramount's TK study was prepared from information gathered from KTFN Elders and Chief Chicot himself, who

participated in the process. Paramount contends that after it prepared the study it made several attempts to request further input from the Applicants. None was forthcoming. Paramount's study was therefore submitted to the Review Board without the Applicants' further input.

[50] The Applicants agree that only a limited amount of traditional land use information was provided to Paramount and the Review Board. They explain that they did not want some of their sensitive traditional knowledge to become public, such as the location of trap lines. They further believed that Paramount "needs to recognize the aboriginal and treaty rights of the KTFN before the remaining information is shared as part of the ABA negotiations about infringing KTFN rights".

[51] The Applicants also contend that they were not involved in the process that led to the preparation of the benefits agreement by Paramount and there was no meaningful consultation about accommodating matters of real concern to their community. The Plan provided for compensating trappers "who can conclusively establish that they have sustained lower harvests directly attributable to Paramount's operations in the area." In the Applicants' view, Paramount's plan was unworkable for a number of reasons. First, precise records of their harvesting were not kept. Second, direct loss of trapping income is not the only impact warranting compensation or benefits. Third, the plan does not consider the fact that the Applicants' treaty rights and asserted Aboriginal rights are at stake.

[52] The consult to modify process was initiated by the Minister of INAC with respect to the Gathering and Pipeline Project Environmental Assessment Report on December 20, 2001. The

Ministers expressed concern with recommendations 13, 15, 16 and 17 in the Review Board's Environmental Assessment Report and proposed certain modifications and a deletion. The Review Board felt that other participants to the environmental assessment process should have the opportunity to make their concerns known in respect of the impugned measures to be discussed at the upcoming meeting between INAC, the NEB and the Review Board. As a result, all participants, including the KTFN, were sent a copy of the Review Board's December 24, 2001 letter to INAC wherein it expressed the view it would not object to these participants making their views known in respect to the proposed changes sought by the Ministers.

[53] In a letter to the Review Board dated January 3, 2002, INAC expressed the view that the provisions of the Act provide that only the federal Minister and the Responsible Ministers are to consult with the Review Board regarding its Report.

[54] The Review Board and the Ministers met in a closed meeting on January 4, 2002, despite the Applicants' protestation. After considering the evidence presented in the consult to modify process, the Review Board approved modifications to all of the impugned measures, and also deleted measure 17. On January 11, 2002, the Ministers issued a final decision that substantially modified recommendations 13, 15, 16 and deleted recommendation 17. I reproduce these modified recommendations in Appendix C to these reasons. In his decision letter, the Minister of INAC, writing on behalf of the Responsible Ministers under the Act, indicated that certain letters expressing the views of the Applicants were considered. I note, however, that certain other letters on behalf of the Applicants were not identified by the Minister.

[55] The Applicants perceived the Ministers' decision to be detrimental to their interests and, in particular, protested the deletion of recommendation 17 and modifications to the other recommended measures. The Applicants reiterated their position that they had not been consulted on this issue.

- *The Extension Project*

[56] In April 2003, Paramount brought an application to the Land and Water Board to amend some of the land use permits and water licenses issued with respect to its initial project. This aspect of the development came to be known as the Extension Project. It signalled the beginning of Paramount's production work in the Cameron Hills. The project initially involved approval for 5 additional wells but would eventually also include the drilling, testing and tie-in of up to 50 additional wells over a period of 10 years; the production of oil and gas for over 15-20 years; the excavation of 733 km of seismic lines; the construction of temporary camps servicing up to 200 workers; the withdrawal of water from lakes; and the disposal of drill waste.

[57] After receiving the application, the Land and Water Board conducted the requisite preliminary screening of the project. During this stage it consulted with 21 organizations, including the KTFN and the DCFN. The Land and Water Board found, as a result of its preliminary screening, that it was satisfied of the project's significant adverse impacts on the environment and that there was a clear indication of public concern. As a result the Land and Water Board referred Paramount's application to the Review Board for an environmental assessment pursuant to section 125 of the Act, and recommended that the Review Board consider joint public hearings with the Land and Water Board.

[58] The environmental assessment followed the process outlined earlier in these reasons. In June 2003, the draft TOR and a draft work plan were sent to the interested parties, including the Applicants. On July 21, 2003, the Applicants responded to the draft TOR and as a result of comments made by the KTFN the work plan was adjusted.

[59] On August 8, 2003, the Review Board issued the final TOR, setting out the scope of the environmental review. The Review Board determined the environmental assessment should be focused on the cumulative effects of drilling, testing and tie-in of up to 50 additional wells over the next 10 years indicated in Paramount's planned development and not just the 5 well sites actually applied for.

[60] On September 17, 2003, Paramount prepared and submitted its DAR to the Review Board which included an assessment of the impact of the 5 well sites applied for, plus the additional 48 under the planned development. The DAR also included a detailed summary of the public consultation process and the results of various studies that were undertaken for the purposes of the environmental assessment. The DAR also set out in an appendix a summary of the consultation and communication which had occurred between Paramount and the KTFN since May of 2000. The summary indicates extensive correspondence and a great number of meetings and exchanges between the parties.

[61] The second phase of the environmental assessment included two rounds of IRs. Many of these requests originated from the KTFN and were directed to both INAC and Paramount. Responses were provided, but not always to the satisfaction of the KTFN.

[62] A pre-hearing conference was held to address the hearing process and to set a draft agenda for the public hearing. A community meeting was held at Kakisa on February 17, 2004, between members of the KTFN, the Land and Water Board, the Review Board and Paramount to discuss related issues.

[63] A public hearing was held jointly by the Review Board and the Land and Water Board at Hay River on February 18 and 19, 2004. The Applicants participated in the hearing and had the opportunity to question Paramount and other parties involved in the environmental assessment.

[64] Following the public hearing, the parties were invited to submit technical reports to the Review Board. The KTFN did so on March 2, 2004 and on March 10, 2004 Paramount responded to the concerns raised in the technical report submitted by the KTFN. INAC, in a letter dated March 11, 2004, to the Review Board, also responded to concerns raised by the KTFN in its technical report and answered questions asked by the KTFN at the public hearing.

[65] During the Environmental Assessment Process the Applicants issued two Information Requests (IR 1.2.136 and IR 1.2.137) asking INAC to clarify how it intended to discharge its duty to consult and accommodate. INAC responded that the Land and Water Board and the Review Board are the primary vehicles for environmental assessment consultations with

Aboriginal groups and the general public, producing an opportunity for participation. INAC indicated that it would wait until the environmental assessment process was complete before making any decision regarding potential infringement and Aboriginal consultation regarding the project.

[66] INAC's understanding of the Crown's duty to consult in respect to an asserted Aboriginal right is expressed in its response to KTFN Information Request 1.2.31, which I reproduce below:

With respect to Aboriginal rights: the Crown may not unjustifiably infringe on rights protected by Section 35 of the *Constitution Act, 1982*, and **the onus is on the First National to prove that a right exists and that it would be unjustifiably infringed upon.** The Crown is unable to unilaterally determine what assertions a First Nation might make or what the ultimate outcome of that assertion may be. When responding to an assertion, and without limiting in any way the breadth or scope of the matters that Canada may consider, including the ethnographic, historical, traditional, and other evidence, Canada also takes into consideration expressions by the First Nations of consent or support for the proposed activity.

[Emphasis in original.]

[67] The Review Board issued its Report and its reasons on the environmental assessment on June 1, 2004. In its report the Review Board recognized the KTFN dependence on the Cameron Hills Area and made certain findings in respect to the projects potential impact on the Applicants' rights. I reproduce below certain applicable excerpts from the report.

The Cameron Hills is an important traditional use area for local First Nations. (p. vi)

There is no doubt, in the Review Board's opinion, that the evidence in this proceeding provides a firm foundation for the concerns expressed about this area, particularly in relation to the

possible effects of the proposed development on the traditional activities important to the [Ka'a'Gee Tu and other aboriginal communities]. (p. 14)

[The] Board concludes that the environmental consequence of the combined direct and indirect footprint of the Planned Development Case is *High* (potentially significant) for boreal caribou and marten. (p. 42)

The Review Board supports the communities' requests for a socio-economic agreement with Paramount. The Review Board also concurs with the GNWT on the effectiveness of socio-economic agreements to aid in assessing the impact on the social and the cultural aspects of northern development. (p. 51)

[68] Notwithstanding the above observations the Review Board concluded that "...with the implementation of the measures recommended in this Report of EA and the commitments made by Paramount Resources Ltd, ... the proposed development will not likely have a significant environmental impact or be cause for significant public concern and should proceed to the regulatory phase of approvals." The Review Board in its report issued 17 mitigating measures and suggestions. These measures and suggestions are attached as Appendix D to these reasons.

[69] The Report considered impacts on both the "Biophysical Environment" and "Socio-Economic and cultural environment".

[70] In respect to the Biophysical Environment, issues concerning air quality, water quality, wildlife and in particular the Boral Caribou and the cumulative impact of the project were considered.

[71] The Applicants raised concerns about water quality and its impact on fishing. The Review Board found that there was potential for significant adverse environmental impacts to water due to potential spills and sedimentation of waterways from erosion as a result of Paramount's operations in the Cameron Hills. The Review Board found that application of measures R-8 to R-11 and suggestion S-1 would mitigate these potential impacts.

[72] In relation to hunting and trapping, the Review Board concluded that the balance of the evidence did not suggest wildlife concerns, except in the case of the Boreal Caribou. It found that the measures concerning the Boreal Caribou proposed by the GNWT, supported by the Applicants, would mitigate the likelihood for significant adverse environmental impacts on the Boreal Caribou population. Additional concerns were raised regarding wolves and wolverines. The Review Board considered the evidence and concluded that the approach taken by Paramount was reasonable, and decided that wolves and wolverines should be explicitly considered in future environmental assessments in the area. Ultimately, the Review Board provided mitigation measures R-12 to R-14 and suggestions S-3 and S-4 in relation to wildlife.

[73] In respect to impacts on the socio-economic and cultural environment, the Review Board considered the difficulties surrounding an agreement on the Wildlife and Resources Harvesting Compensation Plan. It noted that the Aboriginal communities emphasized that compensation plans must address economic as well as cultural components and not merely the lost revenue from harvesting. The Review Board found that to prevent significant potential adverse socio-economic impacts on the environment relating to the viability of the Cameron Hills as a source

of harvesting and preserving harvesting opportunities over the long term, further mitigation was needed. It recommended measures R-15 and R-16 and suggestions S-5 and S-6.

[74] In a letter dated June 24, 2004, addressed to the Responsible Ministers, the KTFN provided its response to the Review Board's environmental report. In a subsequent letter dated July 7, 2004 to the Responsible Ministers and the Review Board, the KTFN sought to be included in the post-Report process under sections 130 and 131 of the Act. In their July 29, 2004 letter to INAC, the KTFN firmly stated their position that the "...closed door, post-Report process that shuts them out" clearly violates the principles of natural justice and fairness and by engaging in such a process the Crown is failing to discharge its duty to consult.

[75] In a letter to the KTFN dated August 26, 2004, the Minister of Fisheries and Oceans stated that he and the other Responsible Ministers would be making a decision pursuant to section 130 of the Act. This also represents the position adopted by INAC, which is repeatedly expressed in the record, namely that pursuant to the Act, only the Responsible Ministers and the Review Board may participate in the consult to modify process.

- *Consult to Modify Process for the Extension Project*

[76] Both the NEB and the Responsible Ministers had concerns about some of the mitigation measures set out by the Review Board. By letter dated August 19, 2004, addressed to the Review Board, the Minister of INAC on behalf of the Responsible Ministers initiated consultation with the Review Board, pursuant to subparagraph 130 (1)(b)(ii) of the Act. INAC informed the Review Board on November 17, 2004, that the Responsible Ministers wanted to address

recommended measures R7, R11, R12, R13, R15, and R16 in the Environmental Assessment Report. Proposed modifications with supporting rationale were submitted for the Review Board's consideration. In particular, the modifications proposed the deletion of recommendations R15 and R16.

[77] The Review Board decided to seek comments and input related to the Responsible Ministers' proposed modifications, from parties to the Environmental Assessment process, which included the Applicants.

[78] In response, the KTFN wrote to the Review Board on December 17, 2004, and provided comprehensive comments on the proposed modifications to the Review Board's recommended measures. In essence the KTFN reasserted views it had expressed in its June 14, 2004 letter to the Review Board. While the KTFN stated that certain proposed changes were generally acceptable, it strongly objected to the deletion of recommendations R15 and R16 and urged the Responsible Ministers to strengthen the recommended measures. Further, the KTFN submitted that the consult to modify process was not in keeping with the Crown's duty to consult as clarified by the Supreme Court of Canada in the recent decisions of *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511 and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550. The honour of the Crown was at stake in such matters and meaningful consultation must take place prior to the approval of projects that will infringe Aboriginal title and rights. In KTFN's submission to the Review Board, the consult to modify process and the substance of the proposed modifications represents an "an impoverished vision of the honour of the Crown".

[79] Following the release of the Supreme Court decisions in *Haida* and *Taku* and before the decision on the Extension Project was made, INAC conducted a “Crown Consultation Analysis” with the view of assessing whether consultation and accommodation performed to date had been adequate in addressing the potential infringements on an Aboriginal Treaty and/or upon asserted Aboriginal rights. The analysis concluded that adequate consultation had been conducted.

[80] Thereafter, the Applicants were excluded from the consult to modify process which continued for three months until March 15, 2005, when the Review Board adopted the revised recommendations.

[81] The Review Board, the Ministers and the NEB met on January 24, 2005, and decided that Canada would take the position that R-15 and R-16 would be substantially revised instead of deleted. On March 15, 2005, the Review Board forwarded final revised recommendations to the Ministers. The Applicants did not participate in this meeting and were not consulted in respect to the final recommendations.

[82] The KTFN wrote directly to the Minister of INAC on six different occasions between July 20, 2004 and April 27, 2005, asking INAC to respect its legal duty to consult before rendering a final decision. These letters went unanswered until May 17, 2005, at which time the Minister of INAC wrote to Chief Chicot and assured him that he would be contacted before a final decision was made. However, this commitment was not kept. INAC never met with the

KTFN to discuss the proposed modifications to the recommended measures or the final decision on the Extension Project.

[83] In her March 24, 2005 letter to the Minister of INAC, counsel for the KTFN addressed the modified recommendations that had been submitted to the Responsible Ministers for decision. In her submissions on behalf of the KTFN, counsel argued that the process that led to the modified recommendations failed to solicit the input of the KTFN and as a result its concerns were not heard. The KTFN submitted that the recommendations were substantially rewritten in secret and, as a consequence, fairness and justice were lost and the honour of the Crown impugned. The KTFN further submitted that the proposed modifications are in effect tantamount to a rejection of the original recommendations and as a result trigger the statutory requirement that an environmental impact review be ordered. Finally, it is argued that, in the circumstances, the Crown has not discharged its duty to consult and accommodate.

[84] The Minister of INAC, on behalf of the Responsible Ministers, by letter dated July 5, 2005, adopted the recommended mitigating measures of the Review Board with modifications. In the decision letter, the Minister stated that the decision was made after undertaking consultation with the Review Board and considering the Environmental Assessment Report and letters from various stakeholders, including the following letters; from the KTFN dated June 24 and August 10, 2004; and the letters from Counsel for the KTFN dated July 20, August 31, November 19, December 13, 2004, and March 24 and April 28, 2005.

[85] By letter dated July 20 and July 28, 2005, the Applicants wrote to the Land and Water Board informing it that the Ministers' decision was made in breach of the Federal Crown's duty to consult and accommodate and that there had yet to be proper consultation with the Applicants.

[86] Of the 17 recommended measures, 12 were modified during the consult to modify process. Six measures falling within the jurisdiction of the NEB were modified by the NEB. The NEB contends that these modifications were made after receipt of comments from Paramount, government departments and the Applicants.

[87] Six other measures falling within the jurisdictions of the Responsible Ministers were modified by the Responsible Ministers. R-15 and R-16 were not deleted as originally proposed but instead were modified. The modifications to R-15 removed the requirement for a compensation plan and enforcement to be determined through binding arbitration, and modifications to R-16 removed the requirement for a socio-economic agreement to be developed in consultation with affected communities. I reproduce below the two recommendations as modified:

R-15 The Review Board recommends that Paramount commit, in a letter to the Parties to the Environmental Assessment, to compensate the Ka'a'Gee Tu First Nation and other affected Aboriginal groups for any direct wildlife harvesting and resource harvesting losses suffered as a result of project activities, and to consider indirect losses on a case-by-case basis.

R-16 The Review Board recommends that Paramount report annually to the Government of the Northwest Territories and the other Parties to the Environmental Assessment documenting its performance in the provision of socio-economic benefits, such as employment and training opportunities for local residents, including a detailed ongoing community consultation plan

describing the steps it has taken and will take to improve its performance in those areas. The Government of the Northwest Territories will review this report with Paramount in collaboration with the other Parties to the Environmental Assessment.

[88] The Applicants challenge the Responsible Ministers' decision by filing the within application for judicial review on August 9, 2005, which was amended on February 23, 2006.

3. Issues

[89] The central issue in this application is whether the Crown failed to discharge its duty to consult in making the decision. The issue involves answering the following questions:

- (1) What is the content of the Crown's duty to consult and accommodate?
- (2) Did the Crown fulfil its duty in the circumstances of this case?
- (3) What is the appropriate remedy, in the event it is determined that the Crown failed to fulfill the duty to consult?

4. Standard of Review

[90] The applicable standard of review of government decisions which are challenged on the basis of allegations that the government failed to discharge its duty to consult and accommodate pending claims resolution was canvassed by the Supreme Court in *Haida*. In that case, Chief Justice McLachlin suggested that, absent a statutory process for such a review, general principles of administrative law were to be considered. Here, as in *Haida*, no specific review process has been established. At paragraphs 61 to 63 of the Court's reasons for decision, the Chief Justice wrote:

61. On questions of law, a decision-maker must generally be correct: for example, *Paul v. British Columbia (Forest Appeals Commission)*, 2003 SCC 55 (CanLII), [2003] 2 S.C.R. 585, 2003 SCC 55. On questions of fact or mixed fact and law, on the other hand, a reviewing body may owe a degree of deference to the decision-maker. The existence or extent of the duty to consult or accommodate is a legal question in the sense that it defines a legal duty. However, it is typically premised on an assessment of the facts. It follows that a degree of deference to the findings of fact of the initial adjudicator may be appropriate. The need for deference and its degree will depend on the nature of the question the tribunal was addressing and the extent to which the facts were within the expertise of the tribunal: *Law Society of New Brunswick v. Ryan*, 2003 SCC 20 (CanLII), [2003] 1 S.C.R. 247, 2003 SCC 20; *Paul*, supra. Absent error on legal issues, the tribunal may be in a better position to evaluate the issue than the reviewing court, and some degree of deference may be required. In such a case, the standard of review is likely to be reasonableness. To the extent that the issue is one of pure law, and can be isolated from the issues of fact, the standard is correctness. However, where the two are inextricably entwined, the standard will likely be reasonableness: *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748.

62. The process itself would likely fall to be examined on a standard of reasonableness. Perfect satisfaction is not required; the question is whether the regulatory scheme or government action “viewed as a whole, accommodates the collective aboriginal right in question”: Gladstone, supra, at para. 170. What is required is not perfection, but reasonableness. As stated in *Nikal*, supra, at para. 110, “in . . . information and consultation the concept of reasonableness must come into play. . . . So long as every reasonable effort is made to inform and to consult, such efforts would suffice.” The government is required to make reasonable efforts to inform and consult. This suffices to discharge the duty.

63. Should the government misconceive the seriousness of the claim or impact of the infringement, this question of law would likely be judged by correctness. Where the government is correct on these matters and acts on the appropriate standard, the decision will be set aside only if the government’s process is unreasonable. The focus, as discussed above, is not on the outcome, but on the process of consultation and accommodation.

[91] The above general principles find application here. A question as to the existence and content of the duty to consult and accommodate is a question of law reviewable on the standard of correctness. A question as to whether the Crown failed to discharge its duty to consult in making the decision typically involves assessing the facts of the case against the content of the duty. On findings of fact, deference to the decision maker may be warranted. The degree of deference to be afforded by a reviewing court depends on the nature of the question and the relative expertise of the decision maker in respect to the facts. Here, it is difficult to isolate the pure questions of law from the issues of fact. In essence, the central question is whether, as implemented, the mandated environmental assessment and regulatory processes are sufficient to discharge the Crown's duty to consult and accommodate in the circumstances. This is a mixed question of fact and law. Applying the reasoning set out above in *Haida*, it would therefore follow that absent error on legal issues, because of the factual component of the decision, the Ministers may be in a better position to evaluate the issue than the reviewing court, and as a result some degree of deference may be required.

[92] Further, Ministerial decisions in these circumstances are polycentric in nature, in the sense that they often involve the making of choices between competing interests. These factors militate towards a certain degree of deference in favour of the decision maker.

[93] Based on the above principles articulated in *Haida*, I find that the question of whether the regulatory process at issue and its implementation discharge the Crown's duty to consult and accommodate in the circumstances is to be examined on the standard of reasonableness.

Questions concerning the existence and content of the duty, to the extent such questions arise in this application, are to be reviewed on the standard of correctness.

5. The Law

[94] The duty to consult was first held to arise from the fiduciary duty owed by the Crown toward Aboriginal peoples (see *Guerin v. Canada*, [1984] 2 S.C.R. 335, 13 D.L.R. (4th) 321 and *R. v. Sparrow*, [1990] 1 S.C.R. 1075). In more recent cases, the Supreme Court has held that the duty to consult and accommodate is founded upon the honour of the Crown, which requires that the Crown, acting honourably, participate in processes of negotiation with the view to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake (see *Haida, supra*; *Taku, supra*, and *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] S.C.J. No. 71).

[95] In *Haida*, Chief Justice McLachlin sets out the circumstances which give rise to the duty to consult. At paragraph 35 of the reasons for decision, she wrote:

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 (Minister of Forests)*, [1997] 4 C.N.L.R. 45 (B.C.S.C), at p. 71, *per* Dorgan J.

[96] For the duty to arise there must, first, be either an existing or potentially existing Aboriginal right or title that might be adversely affected by the Crown's contemplated conduct. Second, the Crown must have knowledge (either subjective or objective) of this potentially

existing right or title and that the contemplated conduct might adversely affect those rights.

While the facts in *Haida* did not concern treaties, there is nothing in that decision which would indicate that the same principles would not find application in Treaty cases. Indeed in *Mikisew*, the Supreme Court essentially decided that the *Haida* principles apply to Treaties.

[97] While knowledge of a credible but unproven claim suffices to trigger a duty to consult and, if appropriate, accommodate, the content of the duty varies with the circumstances.

Precisely what is required of the government may vary with the strength of the claim and the impact of the contemplated government conduct on the rights at issue. However, at a minimum, it must be consistent with the honour of the Crown. At paragraph 37 of *Haida*, the Chief Justice wrote:

...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. Hence, unlike the question of whether there is or is not a duty to consult, which attracts a yes or no answer, the question of what this duty consists, is inherently variable. Both the strength of the right asserted and the seriousness of the potential impact on this right are the factors used to determine the content of the duty to consult.

[98] At paragraphs 43 to 45, the Chief Justice invokes the concept of a spectrum to assist in determining the kind of duties that may arise in different situations.

Against this background, I turn to the kind of duties that may arise in different situations. In this respect, the concept of a spectrum may be helpful, not to suggest watertight legal compartments but rather to indicate what the honour of the Crown may require in

particular circumstances. At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice. "[C]onsultation' in its least technical definition is talking together for mutual understanding": T. Isaac and A. Knox, "The Crown's Duty to Consult Aboriginal People" (2003), 41 *Alta. L. Rev.* 49, at p. 61.

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.

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

[99] The kind of duty and level of consultation will therefore vary in different circumstances.

6. Analysis

[100] Here, the Respondent, the Attorney General of Canada does not dispute that the Crown had an obligation to consult with the Applicants in advance of making the impugned decision. It is the Attorney General of Canada's contention that the consultation process engaged in was sufficient to discharge the Crown's duty to consult and accommodate in the circumstances of this case. Since it is agreed that the duty is triggered I will now turn to consider the content and scope of the duty to consult owed by the Crown to the KTFN in the circumstances. As indicated in *Haida*, the scope of the duty to consult and accommodate is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title and to the seriousness of the potentially adverse effects upon the right or title claimed. I will now deal with each of the above factors in turn.

[101] The existence of the Applicants' broad harvesting rights to hunt, trap and fish under Treaty 11 is not in dispute. Since these rights are not asserted rights but established rights, the analysis would usually now turn to consideration of the degree to which 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.

[108] I now turn to the seriousness of the potentially adverse effect of the intended Crown conduct upon the rights or title claimed.

[109] The Extension Project involves, among other work that I addressed earlier in these reasons, the drilling and testing of up to 50 additional wells over a 10 year period, reclamation work, 733 km of seismic lines and temporary camps to be set up to service the needs of up to 200 workers. Even at the preliminary screening stage, the Review Board was satisfied of the project's significant adverse impacts on the environment and that there was a clear indication of public

concern. To appreciate the significance of the potential impact the Extension Project would have on the lands at issue and on the harvesting rights of the Applicants, one need only consider the report which resulted from the Environmental Assessment Process under the Act. At page 14 of its report, the Review Board found that the evidence provided a “firm foundation for the concerns expressed about this area, particularly in relation to the possible effects of the proposed development on the traditional activities important to the Ka’a’Gee Tu and other aboriginal communities”.

[110] Paramount contends that there is little indication that any of the Applicants’ traditional activities actually occur on the plateau of the Cameron Hills, the site of Paramount’s activities in this Application. While this may be so, it remains that the Plateau is within the area over which the Applicants’ claim Aboriginal title. Further, as stated earlier in these reasons, the Review Board was satisfied on the evidence, that the combined direct and indirect footprint of the Planned Development would have a significant impact on the environment. Also, the Review Board did not distinguish the Plateau from other areas in the Cameron Hills. Rather, the Review Board recognized the Cameron Hills as an important traditional use area for local First Nations.

[111] The Review Board issued comprehensive Environmental Reports for both the Gathering and Pipeline Project and the Extension Project. These reports, which I have reviewed in some detail earlier in these reasons, discuss the potential impacts of oil and gas development on the lands, fish and wildlife in the affected territory and recommend numerous mitigating measures viewed by the Review Board as necessary to address and minimize the impact of the projects on the environment and therefore by extension on the Applicants’ Treaty and asserted rights. A

review of the evidence which led the Review Board to prepare its report on the Extension Project and recommend mitigating measures, leaves little doubt as to the significance of the potential impact on the Cameron Hills area and on the Applicants' Treaty and asserted rights.

[112] I am therefore satisfied that the extension project will have a significant and lasting impact on the Cameron Hills area and, consequently, on the lands over which the Applicants assert Aboriginal title. I am also satisfied that the project has the potential of having a significant impact on the Applicants' "broad harvesting rights to hunt, trap and fish".

[113] The Respondent, the Attorney General of Canada, cites *Mikisew* for the proposition that the Crown's duty, in the circumstances, lies at the lower end of the Spectrum. In *Mikise*, where established Treaty rights were also at issue, Mr. Justice Binnie on behalf of the Supreme Court wrote: "...given that the Crown is proposing to build a fairly minor winter road on *surrendered* lands where the *Mikisew* hunting, fishing and trapping rights are expressly subject to the 'taking up' limitation, I believe the Crown's duty lies at the lower end of the spectrum." Mr. Justice Binnie went on to describe the content of the duty at the lower end of the spectrum.

[114] Here, the Applicants also assert a claim of Aboriginal title, which was not the case in *Mikisew*. Further, oil and gas development in the Cameron Hills area, from its inception, and the Extension Project in particular, involve far more than the building of a minor road. In my view the project's physical scope and potential impact on the environment and the Applicants' established rights to hunt, fish and trap, and asserted aboriginal title, as discussed above, militate

in favour of the content of the Crown's duty to consult being greater than that found to be the case in *Mikisew*.

[115] Even in *Mikisew*, where Mr. Justice Binnie found the Crown's duty to consult to lie at the lower end of the spectrum, he nevertheless held that the Crown was required to attempt to minimize adverse impacts on the Mikisew hunting, fishing and trapping rights. At paragraph 64 of the Court's reasons, he described the content of the duty as follows:

...The Crown was required to provide notice to the Mikisew and to engage directly with them (and not, as seems to have been the case here, as an afterthought to a general public consultation with Park users. This engagement ought to have included the provision of information about the project addressing what the Crown knew to be Mikisew interests and what the Crown anticipated might be the potential adverse impact on those interests. The Crown was required to solicit and to listen carefully to the Mikisew concerns, and to attempt to minimize adverse impacts on the Mikisew hunting, fishing and trapping rights).

[116] Mr. Justice Binnie agreed with the following articulation of the duty to consult by Mr. Justice Finch, J.A., (now C.J.B.C.), in *Halfway River First Nation v. British Columbia (Ministry of Forests)* (1999), 178 D.L.R. (4th) 666 at paras. 159-160:

The fact that adequate notice of an intended decision may have been given does not mean that the requirement for adequate consultation has also been met.

The Crown's duty to consult imposes on it a positive obligation to reasonably ensure that aboriginal peoples are provided with all necessary information in a timely way so that they have an opportunity to express their interests and concerns, and to ensure that their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action.

[Emphasis added.]

[117] In my view, the contextual factors in this case, particularly the seriousness of the impact on the Aboriginal people, by the Crown's proposed course of action and the strength of the Applicants' asserted aboriginal claim, militate in favour of a more important role of consultation. The duty must in these circumstances involve formal participation in the decision-making process.

[118] The consultation process provided for under the Act is comprehensive and provides the opportunity for significant consultation between the developer and the affected Aboriginal groups. As noted above, the record indicates that the Applicants have had many opportunities to express their concerns in writing or at public meetings through submissions made by counsel on their behalf or by the Applicants directly. The record also establishes the Applicants were heavily involved in the process and that their involvement influenced the work and recommendations of the Review Board. In essence, the product of the consultation process is reflected in the Review Board's Environmental Assessment Reports. These reports, while not necessarily producing the results sought by the Applicants, do reflect the collective input of all of the parties involved, including the Applicants. The Environmental Assessment Report concerning the Extension Project clearly shows that many of the concerns of the Applicants were taken into account. While the Review Board ultimately endorsed the project, it did so only with significant mitigating measures and suggestions which were supported by the Applicants and which went a long way in addressing their main concerns.

[119] Up until this point, the process, in my view, provided an opportunity for the Applicants to express their interests and concerns, and ensured that these concerns were seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action. Up until this point in the process, I am satisfied that the Applicants benefited from formal participation in the decision-making process.

[120] The difficulty in this case arises when the Crown elected to avail itself of the “consult to modify process” provided for in the Act. Under the Act, where a recommendation approving a project is made by the Review Board and is subject to the imposition of measures considered necessary to prevent the significant adverse impact of the project, this process provides that the Responsible Ministers may agree to adopt the recommendation with modifications after consulting the Review Board. As a result of the consult to modify process, many of the Review Board’s recommendations were modified. Recommendations R-15 and R-16 were of particular importance to the Applicants, affecting the wildlife compensation plan and the socio-economic agreement. This occurred notwithstanding the firmly expressed and long held position of the Applicants that these recommendations were critical to them. The Applicants, apart from objecting to any change or deletion of these recommendations, had no opportunity for any input in respect to proposed changes to these recommendations. There may well have been other options that could have gone a long way in satisfying the Applicants’ objections. In the absence of consultations we will never know. The consult to modify process, in the circumstances of this case, essentially allowed the Crown to unilaterally change the outcome of what was arguably, until that point, a meaningful process of consultation. Implementation of the mitigating measures recommended by the Review Board may not have been sufficient to address all of the concerns

of the Applicants, but may have been sufficient to discharge the Crown's duty to consult and accommodate in the circumstances. This is so because the recommendations were the product of a process that provided the Aboriginals an opportunity for meaningful input whereby the Crown, through the Review Board, demonstrated an intention of substantially addressing their concerns. Clearly, this cannot be said of the consult to modify process. The new proposals which resulted from the consult to modify process were never submitted to the Applicants for their input. There was simply no consultation, let alone any meaningful consultation at this stage.

[121] It is not enough to rely on the process provided for in the Act. From the outset, representatives of the Crown defended the process under the Act as sufficient to discharge its duty to consult, essentially because it was provided for in the Act. I agree with the Applicants that the Crown's duty to consult cannot be boxed in by legislation. That is not to say that engaging in a statutory process may never discharge the duty to consult. In *Taku*, at paragraph 22, the Supreme Court found that the process engaged in by the Province of British Columbia under the *Environmental Protection Act* of that jurisdiction fulfilled the requirements of the Crown's duty to consult. The circumstances here are different. The powers granted to the Ministers under the Act must be exercised in a manner that fulfills the honour of the Crown. The manner in which the consult to modify process was implemented in this case, for reasons expressed herein, failed to fulfill the Crown's duty to consult and was inconsistent with the honour of the Crown.

[122] The Respondent, the Attorney General of Canada, argues that the role of the tribunal at the consult to modify stage of the process is a polycentric one, made in the exercise of judgment

that takes into account appropriate economic, social, political and other considerations and as a consequence a reviewing court should show deference to the tribunal's decision. Further, the Respondent, the Attorney General of Canada, argues that the consult to modify process is but one small part of the overall process and that prior to making a decision under section 130 of the Act, a full exploration of the proposal and its actual and long-term effects had occurred.

[123] It is true that the Review Board via a long hearing process which involved the KTFN undertook the task of investigating the Applicants' concerns and eventually made recommendations to address some of those concerns. However, by engaging the "consult to modify process" which resulted in a substantial revision of certain key recommendations of the Review Board, in particular Recommendations 15 and 16, without consulting the Applicants, the Ministers essentially decided not to rely on the investigative and fact finding role of the Review Board. It is not good enough for the Ministers, at this stage, to argue that as a consequence of prior consultation they were made aware of the concerns of the Applicants. The difficulty is that the Applicants were not made aware of subsequent proposals by the Ministers that changed the recommended mitigating measures of the Review Board. They could not provide their views or build on the proposed modifications because they were not part of the process. They were simply not consulted. The Ministers, in effect, commenced their own process of determining how to respond to the Applicants' concerns and that process made no provision for any input by the Applicants. The matter is further aggravated here by the significance of the changes made to recommendations of the Review Board, which the Ministers knew were important to the

Applicants. In my view, the Crown's duty to consult in respect to the new proposals which resulted from the consult to modify process was not met in the circumstances.

[124] I find the Crown failed to discharge its duty to consult in the circumstances of this case. In sum, the consult to modify process allowed for fundamental changes to be made to important recommendations which were the result of an earlier consultative process involving the Applicants and other stakeholders. These changes were made without input from the Applicants. It cannot be said, therefore, that the consult to modify process was conducted with the genuine intention of allowing the KTFN's concerns to be integrated into the final decision. At this stage the Applicants were essentially shut out of the process.

7. Other Issues

[125] The Applicants contend that the Ministers' meeting with Paramount on May 17, 2005, breached the rules of procedural fairness and gives rise to a reasonable apprehension of bias. It is argued that the Ministers, at that time, were aware that the parties had taken adversarial positions on whether recommendations in the Environmental Assessment Report on the Extension Project should be modified. It was therefore incumbent on the Ministers to ensure procedural fairness was met and to provide equal access to the Applicants.

[126] Paramount argues that the meetings in Ottawa were never about the consult to modify process, but were generally about Paramount's development and the delay in the regulatory process. Mr. Livingstone, on behalf of the Respondents, attests that while Paramount tabled a

“generic presentation about its development to Mimi Fortier” the meeting had nothing to do with the consult to modify process and that it was open to the Applicants to request a similar meeting.

[127] In my view, it is strongly advisable that representatives of Ministers should not hold meetings with any party to a proceeding, absent the adverse party or parties, in cases where a decision by the said Ministers is pending. I am nevertheless satisfied that the evidence here does not allow me to conclude that the impugned meeting resulted in a breach of procedural fairness or that the particular circumstances give rise to a reasonable apprehension of bias.

[128] The Applicants also argue that their full and meaningful participation in the consultation process under the Act was compromised by a lack of resources. The evidence indicates that the Crown did provide funding to allow the KTFN to participate in the consultation process. The financial resources advanced over the five year period were not every thing the Applicants had requested, but they were not insignificant. While the Applicants allege that the lack of resources impaired their ability to fully participate in the process, they fail to identify what additional resources would have been required to adequately address their needs, or to what end such additional resources would be used. Further, as mentioned, the evidence established that a surplus remained from the funds that were provided. Based on the evidence on the record, I am unable to determine whether the resources provided were sufficient to allow a meaningful participation in the process. In any event, given my above determination that the Crown in right of Canada has not discharged its duty to consult in the circumstances, resolution of the funding issue is not necessary in order to dispose of this application.

[129] Finally, the Applicants argue that Paramount's Traditional Knowledge study was prepared by Paramount without meaningful consultation and consequently fails to meet the requirements of a proper Traditional Land Use Study. On the evidence, I find that the Applicants have not justified their failure to participate in the consultative process for the purpose of developing a TK study. I am not persuaded that the concerns or excuses offered by the Applicants for not sharing TK information with Paramount or the Review Board have merit.

[130] I understand the main concern to be the protection of sensitive information concerning Traditional Knowledge of the Applicants becoming public. No evidence was adduced to suggest that other options were unavailable to protect against public dissemination of such sensitive information, while still participating in the process. In my view, since the Applicants have not justified their failure to participate, the Applicants cannot now complain that their concerns were not considered in the preparation of the TK study. While it may not be necessary to decide the issue, given my earlier determinative finding that the Crown breached its duty to consult, any future consultative process will require the Applicants' sharing their traditional knowledge and full meaningful participation in the consultation process.

8. Conclusion

[131] The Crown in right of Canada has failed to discharge its duty to consult and, if necessary, accommodate before making a final decision on the approval of the Extension Project. The Crown in right of Canada has a duty to consult with the KTFN in respect to modifications it proposes to bring to the recommendations of the Review Board pursuant to the Environmental Assessment Process concerning the Extension Project. Good faith consultation in the consult to

modify stage of the process is required and while there is no duty to reach an agreement, such consultation may well lead to an obligation to accommodate the concerns of the KTFN. The extent and nature of accommodation, if any, can only be ascertained after meaningful consultation at this final stage of the process.

9. Remedy

[132] The Applicants seek a remedy which provides for the following relief:

- (a) An order declaring that the decision is invalid and unlawful, quashing and setting aside the decision. Also a declaration that the Ministers breached their constitutional and legal duty to consult with and accommodate the Ka'a'Gee Tu before issuing the Ministers' decision.
- (b) An order directing the Ministers to consult through good faith negotiations with the Ka'a'Gee Tu and accommodate the Ka'a'Gee Tu's Treaty with respect to their concerns before allowing the Extension Project to proceed, with a direction that Paramount participate in the negotiations. These negotiations would be conducted with Court oversight.
- (c) An order restraining the Ministers and Paramount from taking any further steps in relation to the approval of the Extension Project, pending further order of the Court.
- (d) An order that the parties are at liberty to re-apply to this Court for further relief.
- (e) Costs.

[133] I am satisfied that the proper relief in the circumstances consists in a declaration that the Crown in right of Canada has breached its duty to consult and accommodate. As a consequence, I will order that in accord with the above reasons, the parties are to engage in a process of meaningful consultation with the view of taking into account the concerns of the KTFN and if necessary accommodate those concerns. The 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* and *Taku*.

[134] The Applicants will have their costs on the application.

ORDER

THIS COURT DECLARES that:

The Crown in right of Canada has breached its duty to consult with the Ka'a'Gee Tu First Nation before deciding to approve the Extension Project.

THIS COURT ORDERS that:

1. In accordance with the above reasons, the parties are to engage in a process of meaningful consultation with the view of taking into account the concerns of the KTFN and if necessary accommodate those concerns. The process is to be conducted with the aim of reconciliation in a manner that is consistent with the honour of the Crown and the principles articulated by the Supreme Court of Canada in *Haida* and *Taku*.
2. The Applicants will have their costs on the application, to be borne and shared by the Respondents in proportions to be agreed upon by them.
3. Failing such agreement, each Respondent may serve and file written submissions on the issue of the apportioning of the costs between Respondents, not to exceed 10 pages each

no later than August 20, 2007, with replies not to exceed 5 pages each to be served and filed no later than August 31, 2007. The Court will then determine, after consideration of the written submissions, the proportion of the costs to be borne by each Respondent.

“Edmond P. Blanchard”

Judge

APPENDIX A

Mackenzie Valley Resource Management Act, 1998 C-26
Loi sur la gestion des ressources de la vallée du Mackenzie 1998, ch. 26

3. Wherever in this Act reference is made, in relation to any matter, to a power or duty to consult, that power or duty shall be exercised

(a) by providing, to the party to be consulted,

(i) notice of the matter in sufficient form and detail to allow the party to prepare its views on the matter,

(ii) a reasonable period for the party to prepare those views, and

(iii) an opportunity to present those views to the party having the power or duty to consult; and

(b) by considering, fully and impartially, any views so presented.

60.1 In exercising its powers, a board shall consider

(a) the importance of conservation to the well-being and way of life of the aboriginal peoples of Canada to whom section 35 of the *Constitution Act, 1982* applies and who use an area of the Mackenzie Valley; and

(b) any traditional knowledge and scientific information that is made available to it.

63. (1) A board shall provide a copy of each application made to the board for a licence or permit to the owner of any land

3. Toute consultation effectuée sous le régime de la présente loi comprend l'envoi, à la partie à consulter, d'un avis suffisamment détaillé pour lui permettre de préparer ses arguments, l'octroi d'un délai suffisant pour ce faire et la possibilité de présenter à qui de droit ses vues sur la question; elle comprend enfin une étude approfondie et impartiale de ces vues.

60.1 Dans l'exercice de ses pouvoirs, l'office tient compte, d'une part, de l'importance de préserver les ressources pour le bien-être et le mode de vie des peuples autochtones du Canada visés par l'article 35 de la *Loi constitutionnelle de 1982* et qui utilisent les ressources d'une région de la vallée du Mackenzie et, d'autre part, des connaissances traditionnelles et des renseignements scientifiques mis à sa disposition.

63. (1) L'office adresse une copie de toute demande de permis dont il est saisi aux ministères et organismes compétents

to which the application relates and to appropriate departments and agencies of the federal and territorial governments.

Notice of applications

(2) A board shall notify affected communities and first nations of an application made to the board for a licence, permit or authorization and allow a reasonable period of time for them to make representations to the board with respect to the application.

Notice to Tlicho Government

(3) The Wekeezhii Land and Water Board shall notify the Tlicho Government of an application made to the Board for a licence, permit or authorization and allow a reasonable period of time for it to make representations to the Board with respect to the application.

Consultation with Tlicho Government

(4) The Wekeezhii Land and Water Board shall consult the Tlicho Government before issuing, amending or renewing any licence, permit or authorization for a use of Tlicho lands or waters on those lands or a deposit of waste on those lands or in those waters.

111. (1) The following definitions apply in this Part.

"designated regulatory agency"
« *organisme administratif désigné* »

"designated regulatory agency" means an agency named in the schedule, referred to in a land claim agreement as an

des gouvernements fédéral et territorial, ainsi qu'au propriétaire des terres visées.

Avis à la collectivité et à la première nation

(2) Il avise la collectivité et la première nation concernées de toute demande de permis ou d'autorisation dont il est saisi et leur accorde un délai suffisant pour lui présenter des observations à cet égard.

Avis au gouvernement tlicho

(3) L'Office des terres et des eaux du Wekeezhii avise de plus le gouvernement tlicho de toute demande de permis ou d'autorisation dont il est saisi et lui accorde un délai suffisant pour lui présenter des observations à cet égard.

Consultation du gouvernement tlicho

(4) L'Office des terres et des eaux du Wekeezhii consulte le gouvernement tlicho avant de délivrer, modifier ou renouveler un permis ou une autorisation relativement à l'utilisation des terres tlichos ou des eaux qui s'y trouvent ou au dépôt de déchets dans ces lieux.

111. (1) Les définitions qui suivent s'appliquent à la présente partie.

« *autorité administrative* »
"regulatory authority"

« *autorité administrative* » Personne ou organisme chargé, au titre de toute règle de droit fédérale ou territoriale, de délivrer les permis ou autres autorisations

independent regulatory agency.	relativement à un projet de développement. Sont exclus les administrations locales et les organismes administratifs désignés.
"development" « <i>projet de développement</i> »	
"development" means any undertaking, or any part or extension of an undertaking, that is carried out on land or water and includes an acquisition of lands pursuant to the <i>Historic Sites and Monuments Act</i> and measures carried out by a department or agency of government leading to the establishment of a park subject to the <i>Canada National Parks Act</i> or the establishment of a park under a territorial law.	« étude d'impact » "environmental impact review" «étude d'impact » Examen d'un projet de développement effectué par une formation de l'Office en vertu de l'article 132.
"environmental assessment" « <i>évaluation environnementale</i> »	« évaluation environnementale » "environmental assessment" « évaluation environnementale » Examen d'un projet de développement effectué par l'Office en vertu de l'article 126.
"environmental assessment" means an examination of a proposal for a development undertaken by the Review Board pursuant to section 126.	« examen préalable » "preliminary screening" «examen préalable » Examen d'un projet de développement effectué en vertu de l'article 124.
"environmental impact review" « <i>étude d'impact</i> »	« mesures correctives ou d'atténuation » "mitigative or remedial measure"
"environmental impact review" means an examination of a proposal for a development undertaken by a review panel established under section 132.	« mesures correctives ou d'atténuation » Mesures visant la limitation, la réduction ou l'élimination des répercussions négatives sur l'environnement. Sont notamment visées les mesures de rétablissement.
"follow-up program" « <i>programme de suivi</i> »	« ministre compétent » "responsible minister"
"follow-up program" means a program for evaluating	« ministre compétent » Le ministre du gouvernement fédéral ou du gouvernement territorial ayant compétence, sous le régime des règles de droit fédérales ou territoriales, selon le cas, en ce qui touche le projet de
(a) the soundness of an environmental assessment or environmental impact review of a proposal for a development; and	
(b) the effectiveness of the mitigative or remedial measures imposed as	

conditions of approval of the proposal.	développement en cause.
"impact on the environment" « <i>répercussions environnementales</i> » ou « <i>répercussions sur l'environnement</i> »	« Office » "Review Board"
"impact on the environment" means any effect on land, water, air or any other component of the environment, as well as on wildlife harvesting, and includes any effect on the social and cultural environment or on heritage resources.	« Office » L'Office d'examen des répercussions environnementales de la vallée du Mackenzie constitué en vertu du paragraphe 112(1).
"mitigative or remedial measure" « <i>mesures correctives ou d'atténuation</i> »	« organisme administratif désigné » "designated regulatory agency"
"mitigative or remedial measure" means a measure for the control, reduction or elimination of an adverse impact of a development on the environment, including a restorative measure.	« organisme administratif désigné » Organisme mentionné à l'annexe. « Organisme administratif autonome » dans l'accord de revendication.
"preliminary screening" « <i>examen préalable</i> »	« programme de suivi » "follow-up program"
"preliminary screening" means an examination of a proposal for a development undertaken pursuant to section 124.	« programme de suivi » Programme visant à vérifier, d'une part, le bien-fondé des conclusions de l'évaluation environnementale ou de l'étude d'impact, selon le cas, et, d'autre part, l'efficacité des mesures correctives ou d'atténuation auxquelles est assujéti le projet de développement.
"regulatory authority" « <i>autorité administrative</i> »	« projet de développement » "development"
"regulatory authority" , in relation to a development, means a body or person responsible for issuing a licence, permit or other authorization required for the development under any federal or territorial law, but does not include a designated regulatory agency or a local government.	« projet de développement » Ouvrage ou activité — ou toute partie ou extension de ceux-ci — devant être réalisé sur la terre ou sur l'eau. Y sont assimilées la prise de mesures, par un ministère ou un organisme gouvernemental, en vue de la constitution de parcs régis par la <i>Loi sur les parcs nationaux du Canada</i> ou de la constitution de parcs en vertu d'une règle de droit territoriale ainsi que l'acquisition de terres sous le régime de la <i>Loi sur les lieux et monuments historiques</i> .
"responsible minister" « <i>ministre compétent</i> »	
"responsible minister" , in relation to a proposal for a development, means any	

minister of the Crown in right of Canada or of the territorial government having jurisdiction in relation to the development under federal or territorial law.

"Review Board"
« Office »

"Review Board" means the Mackenzie Valley Environmental Impact Review Board established by subsection 112(1)

« répercussions environnementales » ou « répercussions sur l'environnement » "impact on the environment"

« répercussions environnementales » ou « répercussions sur l'environnement » Les répercussions sur le sol, l'eau et l'air et toute autre composante de l'environnement, ainsi que sur l'exploitation des ressources fauniques. Y sont assimilées les répercussions sur l'environnement social et culturel et sur les ressources patrimoniales.

Application

(2) This Part applies in respect of developments to be carried out wholly or partly within the Mackenzie Valley and, except for section 142, does not apply in respect of developments wholly outside the Mackenzie Valley.
1998, c. 25, s. 111; 2000, c. 32, s. 55; 2005, c. 1, s. 65.

114. The purpose of this Part is to establish a process comprising a preliminary screening, an environmental assessment and an environmental impact review in relation to proposals for developments, and

(a) to establish the Review Board as the main instrument in the Mackenzie Valley for the environmental assessment and environmental impact review of developments;

(b) to ensure that the impact on the environment of proposed developments receives careful consideration before actions are taken in connection with them; and

Champ d'application

(2) La présente partie s'applique aux projets de développement devant être réalisés en tout ou en partie dans la vallée du Mackenzie et ne s'applique pas, à l'exception de l'article 142, aux projets devant être réalisés entièrement à l'extérieur de celle-ci.
1998, ch. 25, art. 111; 2000, ch. 32, art. 55; 2005, ch. 1, art. 65.

114. La présente partie a pour objet d'instaurer un processus comprenant un examen préalable, une évaluation environnementale et une étude d'impact relativement aux projets de développement et, ce faisant :

a) de faire de l'Office l'outil primordial, dans la vallée du Mackenzie, en ce qui concerne l'évaluation environnementale et l'étude d'impact de ces projets;

b) de veiller à ce que la prise de mesures à l'égard de tout projet de développement découle d'un jugement éclairé quant à ses répercussions environnementales;

c) de veiller à ce qu'il soit tenu compte,

(c) to ensure that the concerns of aboriginal people and the general public are taken into account in that process.

dans le cadre du processus, des préoccupations des autochtones et du public en général.

115. The process established by this Part shall be carried out in a timely and expeditious manner and shall have regard to

115. Le processus mis en place par la présente partie est suivi avec célérité, compte tenu des points suivants :

(a) the protection of the environment from the significant adverse impacts of proposed developments;

a) la protection de l'environnement contre les répercussions négatives importantes du projet de développement;

(b) the protection of the social, cultural and economic well-being of residents and communities in the Mackenzie Valley; and

b) le maintien du bien-être social, culturel et économique des habitants et des collectivités de la vallée du Mackenzie;

(c) the importance of conservation to the well-being and way of life of the aboriginal peoples of Canada to whom section 35 of the *Constitution Act, 1982* applies and who use an area of the Mackenzie Valley.

c) l'importance de préserver les ressources pour le bien-être et le mode de vie des peuples autochtones du Canada visés par l'article 35 de la *Loi constitutionnelle de 1982* et qui utilisent les ressources d'une région de la vallée du Mackenzie.

1998, c. 25, s. 115; 2005, c. 1, s. 67.

1998, ch. 25, art. 115; 2005, ch. 1, art. 67.

Considerations

Éléments à considérer

115.1 In exercising its powers, the Review Board shall consider any traditional knowledge and scientific information that is made available to it.

115.1 Dans l'exercice de ses pouvoirs, l'Office tient compte des connaissances traditionnelles et des renseignements scientifiques mis à sa disposition.

2005, c. 1, s. 68.

2005, ch. 1, art. 68.

125. (1) Except as provided by subsection (2), a body that conducts a preliminary screening of a proposal shall

125. (1) Sauf dans les cas visés au paragraphe (2), l'organe chargé de l'examen préalable indique, dans un rapport d'examen adressé à l'Office, si, à son avis, le projet est susceptible soit d'avoir des répercussions négatives importantes sur l'environnement, soit

(a) determine and report to the Review Board whether, in its opinion, the development might have a significant

adverse impact on the environment or might be a cause of public concern; and

(b) where it so determines in the affirmative, refer the proposal to the Review Board for an environmental assessment.

Within local government territory

(2) Where a proposed development is wholly within the boundaries of a local government, a body that conducts a preliminary screening of the proposal shall

(a) determine and report to the Review Board whether, in its opinion, the development is likely to have a significant adverse impact on air, water or renewable resources or might be a cause of public concern; and

(b) where it so determines in the affirmative, refer the proposal to the Review Board for an environmental assessment.

Assessment by Review Board

128. (1) On completing an environmental assessment of a proposal for a development, the Review Board shall,

(a) where the development is not likely in its opinion to have any significant adverse impact on the environment or to be a cause of significant public concern, determine that an environmental impact review of the proposal need not be conducted;

(b) where the development is likely in its opinion to have a significant adverse impact on the environment,

d'être la cause de préoccupations pour le public. Dans l'affirmative, il renvoie l'affaire à l'Office pour qu'il procède à une évaluation environnementale.

Territoire d'une administration locale

(2) Dans le cas d'un projet devant être entièrement réalisé dans le territoire d'une administration locale, le rapport indique si, de l'avis de l'organe chargé de l'examen préalable, le projet soit aura vraisemblablement des répercussions négatives importantes sur l'air, l'eau ou les ressources renouvelables, soit est susceptible d'être la cause de préoccupations pour le public. Dans l'affirmative, l'affaire fait l'objet du même renvoi.

Résultat de l'évaluation environnementale

128. (1) Au terme de l'évaluation environnementale, l'Office :

a) s'il conclut que le projet n'aura vraisemblablement pas de répercussions négatives importantes sur l'environnement ou ne sera vraisemblablement pas la cause de préoccupations importantes pour le public, déclare que l'étude d'impact n'est pas nécessaire;

b) s'il conclut que le projet aura vraisemblablement des répercussions négatives importantes sur

(i) order that an environmental impact review of the proposal be conducted, subject to paragraph 130(1)(c), or

(ii) recommend that the approval of the proposal be made subject to the imposition of such measures as it considers necessary to prevent the significant adverse impact;

(c) where the development is likely in its opinion to be a cause of significant public concern, order that an environmental impact review of the proposal be conducted, subject to paragraph 130(1)(c); and

(d) where the development is likely in its opinion to cause an adverse impact on the environment so significant that it cannot be justified, recommend that the proposal be rejected without an environmental impact review.

Report to ministers, agencies and Tlicho Government

(2) The Review Board shall make a report of an environmental assessment to

(a) the federal Minister, who shall distribute it to every responsible minister;

(b) any designated regulatory agency from which a licence, permit or other authorization is required for the carrying out of the development; and

(c) if the development is to be carried out wholly or partly on Tlicho lands, the Tlicho Government.

Copies of report

l'environnement :

(i) soit ordonne, sous réserve de la décision ministérielle prise au titre de l'alinéa 130(1)c), la réalisation d'une étude d'impact,

(ii) soit recommande que le projet ne soit approuvé que si la prise de mesures de nature, à son avis, à éviter ces répercussions est ordonnée;

c) s'il conclut que le projet sera vraisemblablement la cause de préoccupations importantes pour le public, ordonne, sous réserve de la décision ministérielle prise au titre de l'alinéa 130(1)c), la réalisation d'une étude d'impact;

d) s'il conclut que le projet aura vraisemblablement des répercussions négatives si importantes sur l'environnement qu'il est injustifiable, en recommande le rejet, sans étude d'impact.

Rapport de l'Office

(2) L'Office adresse son rapport d'évaluation, d'une part, au ministre fédéral, qui est tenu de le transmettre à tout ministre compétent, et, d'autre part, à l'organisme administratif désigné chargé de délivrer les permis ou autres autorisations nécessaires à la réalisation du projet. Il adresse également le rapport au gouvernement tlicho s'il s'agit d'un projet devant être réalisé — même en partie — sur les terres tlichos.

Copie

(3) L'Office adresse une copie du rapport au promoteur du projet de développement,

(3) The Review Board shall provide a copy of its report to any body that conducted a preliminary screening of the proposal, to any body that referred the proposal to the Review Board under subsection 126(2) and to the person or body that proposes to carry out the development.

Areas identified

(4) The Review Board shall identify in its report any area within or outside the Mackenzie Valley in which the development is likely, in its opinion, to have a significant adverse impact or to be a cause of significant public concern and specify the extent to which that area is affected.

1998, c. 25, s. 128; 2005, c. 1, s. 78.

130. (1) After considering the report of an environmental assessment, the federal Minister and the responsible ministers to whom the report was distributed may agree

(a) to order an environmental impact review of a proposal, notwithstanding a determination under paragraph 128(1)(a);

(b) where a recommendation is made under subparagraph 128(1)(b)(ii) or paragraph 128(1)(d),

(i) to adopt the recommendation or refer it back to the Review Board for further consideration, or

(ii) after consulting the Review Board, to adopt the recommendation with modifications or reject it and order an environmental impact review of the proposal; or

(c) irrespective of the determination in

à l'organe en ayant effectué l'examen préalable et, en cas de renvoi effectué en vertu du paragraphe 126(2), au ministère, à l'organisme, à la première nation, au gouvernement tlicho ou à l'administration locale concernée.

Régions touchées

(4) Dans son rapport, l'Office précise la région — même située à l'extérieur de la vallée du Mackenzie — dans laquelle, à son avis, le projet aura vraisemblablement les répercussions visées à l'alinéa (1)b) ou sera vraisemblablement la cause des préoccupations visées à l'alinéa (1)c), ainsi que la mesure dans laquelle la région sera ainsi touchée.

1998, ch. 25, art. 128; 2005, ch. 1, art. 78.

130. (1) Au terme de leur étude du rapport d'évaluation environnementale, le ministre fédéral et les ministres compétents auxquels le rapport a été transmis peuvent, d'un commun accord :

a) ordonner la réalisation d'une étude d'impact malgré la déclaration contraire faite en vertu de l'alinéa 128(1)a);

b) accepter la recommandation faite par l'Office en vertu du sous-alinéa 128(1)b)(ii) ou de l'alinéa 128(1)d), la lui renvoyer pour réexamen ou après avoir consulté ce dernier soit l'accepter avec certaines modifications, soit la rejeter et ordonner la réalisation d'une étude d'impact;

c) dans les cas où, à leur avis, l'intérêt national l'exige et après avoir consulté le ministre de l'Environnement, saisir celui-ci de l'affaire, quelles que soient les conclusions du rapport, pour qu'un

the report, to refer the proposal to the Minister of the Environment, following consultation with that Minister, for the purpose of a joint review under the *Canadian Environmental Assessment Act*, where the federal Minister and the responsible ministers determine that it is in the national interest to do so.

examen conjoint soit effectué sous le régime de la *Loi canadienne sur l'évaluation environnementale*.

Consultation

(1.1) Before making an order under paragraph (1)(a) or a referral under paragraph (1)(c), the federal Minister and the responsible ministers shall consult the Tlicho Government if the development is to be carried out wholly or partly on Tlicho lands.

Consultation du gouvernement tlicho

(1.1) Avant de prendre la mesure visée aux alinéas (1)a) ou c), le ministre fédéral et les ministres compétents consultent le gouvernement tlicho si le projet de développement doit être réalisé — même en partie — sur les terres tlichos.

Areas identified

(2) Where an environmental impact review of a proposal is ordered under subsection (1), the federal Minister and responsible ministers shall identify any area within or outside the Mackenzie Valley in which the development is likely, in their opinion, to have a significant adverse impact or to be a cause of significant public concern and specify the extent to which that area is affected.

Régions touchées

(2) Dans les cas où ils ordonnent la réalisation d'une étude d'impact, le ministre fédéral et les ministres compétents précisent la région — même située à l'extérieur de la vallée du Mackenzie — dans laquelle, à leur avis, le projet aura vraisemblablement des répercussions négatives importantes ou sera vraisemblablement la cause de préoccupations importantes pour le public, ainsi que la mesure dans laquelle la région sera ainsi touchée.

Additional information

(3) If the federal Minister and responsible ministers consider any new information that was not before the Review Board, or any matter of public concern not referred to in the Review Board's reasons, the new information or matter shall be identified in the decision made under this section and in any consultation under paragraph (1)(b).

Renseignements supplémentaires

(3) Le ministre fédéral et les ministres compétents sont tenus d'indiquer, au soutien de la décision ou dans le cadre des consultations visées à l'alinéa (1)b), les renseignements dont il a été tenu compte et qui étaient inconnus de l'Office, ainsi que les questions d'intérêt public qui ont été étudiées et qui n'ont pas été soulevées par ce dernier.

Distribution of decision

(4) The federal Minister shall distribute a decision made under this section to the Review Board and to every first nation, local government, regulatory authority and department and agency of the federal or territorial government affected by the decision.

Effect of decision

(5) The federal Minister and responsible ministers shall carry out a decision made under this section to the extent of their respective authorities. A first nation, local government, regulatory authority or department or agency of the federal or territorial government affected by a decision made under this section shall act in conformity with the decision to the extent of their respective authorities. 1998, c. 25, s. 130; 2005, c. 1, s. 80.

Decision by designated Agency

131. (1) A designated regulatory agency shall, after considering a report of the Review Board containing a recommendation made under subparagraph 128(1)(b)(ii) or paragraph 128(1)(d),

(a) adopt the recommendation or refer it back to the Review Board for further consideration; or

(b) after consulting the Review Board, adopt the recommendation with modifications or reject it and order an environmental impact review of the proposal.

Communication de la décision

(4) Le ministre fédéral est chargé de communiquer la décision ainsi rendue à l'Office, aux premières nations, administrations locales et autorités administratives touchées par celle-ci et aux ministères et organismes des gouvernements fédéral et territorial concernés.

Mise en œuvre

(5) Ces premières nations, administrations locales, autorités administratives, ministères et organismes sont tenus de se conformer à la décision ministérielle dans la mesure de leur compétence. La mise en œuvre de celle-ci incombe au ministre fédéral et aux ministres compétents. 1998, ch. 25, art. 130; 2005, ch. 1, art. 80.

Organisme administrative désigné

131. (1) Au terme de son étude du rapport d'évaluation environnementale, l'organisme administratif désigné accepte la recommandation faite par l'Office en vertu du sous-alinéa 128(1)(b)(ii) ou de l'alinéa 128(1)(d), la lui renvoie pour réexamen ou après avoir consulté ce dernier soit l'accepte avec certaines modifications, soit la rejette et ordonne la réalisation d'une étude d'impact.

Effect of decision

(2) A designated regulatory agency shall carry out, to the extent of its authority, any recommendation that it adopts.

Areas identified

(3) Where an environmental impact review of a proposal is ordered under subsection (1), the designated regulatory agency shall identify any area within or outside the Mackenzie Valley in which the development is likely, in its opinion, to have a significant adverse impact or to be a cause of significant public concern and specify the extent to which that area is affected.

Additional information

(4) If a designated regulatory agency considers any new information that was not before the Review Board, or any matter of public concern that was not referred to in the Review Board's reasons, the new information or matter shall be identified in the decision made under this section and in any consultation under paragraph (1)(b).

Decision by Tlicho Government

131.1 (1) If a development is to be carried out wholly or partly on Tlicho lands, the Tlicho Government shall, after considering a report of the Review Board containing a recommendation made under subparagraph 128(1)(b)(ii),

(a) adopt the recommendation or refer it back to the Review Board for further consideration; or

(b) after consulting the Review Board, adopt the recommendation with

Mise en oeuvre

(2) L'organisme administratif désigné est tenu, dans la mesure de sa compétence, de mettre en oeuvre toute recommandation qu'il accepte.

Régions touchées

(3) Dans les cas où il ordonne la réalisation d'une étude d'impact, l'organisme administratif désigné précise la région — même située à l'extérieur de la vallée du Mackenzie — dans laquelle, à son avis, le projet aura vraisemblablement des répercussions négatives importantes ou sera vraisemblablement la cause de préoccupations importantes pour le public, ainsi que la mesure dans laquelle la région sera ainsi touchée.

Renseignements supplémentaires

(4) L'organisme administratif désigné est tenu d'indiquer, au soutien de sa décision ou dans le cadre des consultations visées au paragraphe (1), les renseignements dont il tient compte et qui étaient inconnus de l'Office, ainsi que les questions d'intérêt public qu'il a étudiées et qui n'ont pas été soulevées par ce dernier.

Décision du gouvernement tlicho

131.1 (1) Lorsque le projet de développement doit être réalisé — même en partie — sur les terres tlichos, le gouvernement tlicho, au terme de son étude du rapport d'évaluation environnementale, accepte la recommandation faite par l'Office en vertu du sous-alinéa 128(1)(b)(ii), la lui renvoie pour réexamen ou, après l'avoir consulté, soit l'accepte avec modifications, soit la rejette.

modifications or reject it.

Effect of decision

(2) The Tlicho Government shall carry out, to the extent of its authority, any recommendation that it adopts.

Additional information

(3) If the Tlicho Government considers any new information that was not before the Review Board, or any matter of public concern that was not referred to in the Review Board's reasons, the new information or matter shall be identified in the decision made under this section and in any consultation under paragraph (1)(b).

2005, c. 1, s. 81.

Conservation

131.2 In making a decision under paragraph 130(1)(b) or subsection 131(1) or 131.1(1), the federal Minister and the responsible ministers, a designated regulatory agency or the Tlicho Government, as the case may be, shall consider the importance of the conservation of the lands, waters and wildlife of the Mackenzie Valley on which the development might have an impact.

2005, c. 1, s. 81.

Consideration of report by ministers

135. (1) After considering the report of a review panel, the federal Minister and responsible ministers to whom the report was distributed may agree to

(a) adopt the recommendation of the review panel or refer it back to the

Mise en œuvre

(2) Le gouvernement tlicho est tenu, dans la mesure de sa compétence, de mettre en œuvre toute recommandation qu'il accepte.

Renseignements supplémentaires

(3) Il est tenu d'indiquer, au soutien de sa décision ou dans le cadre des consultations visées au paragraphe (1), les renseignements dont il tient compte et qui étaient inconnus de l'Office, ainsi que les questions d'intérêt public qu'il a étudiées et qui n'ont pas été soulevées par ce dernier. 2005, ch. 1, art. 81.

Préservation des terres, des eaux et de la faune

131.2 Pour la prise de toute décision en vertu de l'alinéa 130(1)b) ou des paragraphes 131(1) ou 131.1(1), le ministre fédéral et les ministres compétents, l'organisme administratif désigné ou le gouvernement tlicho, selon le cas, tiennent compte de l'importance de préserver les terres, les eaux et la faune de la vallée du Mackenzie qui peuvent être touchées par le projet de développement.

2005, ch. 1, art. 81.

Décision ministérielle

135. (1) Au terme de son étude du rapport visé au paragraphe 134(2), le ministre fédéral et les ministres compétents auxquels ce document a été transmis peuvent, d'un commun accord, parvenir à l'une des décisions suivantes :

panel for further consideration; or

(b) after consulting the review panel, adopt the recommendation with modifications or reject it.

a) ils acceptent la recommandation de la formation de l'Office ou la lui renvoient pour réexamen;

b) après avoir consulté cette dernière, ils l'acceptent avec certaines modifications ou la rejettent.

Additional information

(2) If the federal Minister and responsible ministers consider any new information that was not before the review panel, or any matter of public concern not referred to in the panel's reasons, the new information or the matter shall be identified in the decision made under this section and in their consultations under paragraph (1)(b).

Renseignements supplémentaires

(2) Le ministre fédéral et les ministres compétents sont tenus d'indiquer, au soutien de la décision ou dans le cadre des consultations visées à l'alinéa (1)b), les renseignements dont il a été tenu compte et qui étaient inconnus de la formation, ainsi que les questions d'intérêt public qui ont été étudiées et qui n'ont pas été soulevées par celle-ci.

Canada Oil and Gas Operations Act/ Loi sur les opérations pétrolières au Canada

5(2) Before authorizing any work or activity under paragraph (1)(b), the National Energy Board shall require the submission of a plan satisfactory to the National Energy Board for the employment of Canadians and for providing Canadian manufacturers, consultants, contractors and service companies with a full and fair opportunity to participate on a competitive basis in the supply of goods and services used in that work or activity.

5(2) Avant d'autoriser les activités prévues à l'alinéa (1)b), l'Office national de l'énergie exige la soumission d'un programme qu'il juge acceptable, prévoyant dans l'exécution de celles-ci l'embauche de Canadiens et offrant aux fabricants, conseillers, entrepreneurs et compagnies de services canadiens la juste possibilité de participer, compte tenu de leur compétitivité, à la fourniture des biens et services utilisés lors de ces activités.

APPENDIX B

Recommended Mitigating Measures R-13, R-15, R-16 and R-17
From the Environmental Assessment Report concerning the
Gathering and Pipeline Project

The MVEIRB produced the following Recommendations with respect to the Gathering and Pipeline Project in the original Environmental Assessment Report, dated October 16, 2001:

- R-13 INAC ensures that Paramount discusses its proposed compensation plan with the affected communities and the GNWT. Paramount should widen the scope of the compensation plan as required to ensure that reasonable and credible land and resource use impacts caused by the development and identified by the communities are eligible for compensation.
- R-14 The MVLWB and the NEB ensure that Paramount includes mitigative measures in the TK study to address impacts identified by the TK study. The MVLWB and the NEB should obtain copies of the completed TK study from Paramount along with evidence of community approval of the study. The MVLWB and the NEB should ensure that authorization terms and conditions are amended as appropriate to address any impacts identified by the study that have not already been addressed with existing terms and conditions.
- R-15 INAC and Paramount amend the Benefits Plan approved by INAC on September 25, 2001 to include the revised compensation plan developed as a result of Review Board Measure #13 or that a separate compensation plan be developed to address these concerns. Should Paramount and the communities be unable to come to an agreement on the contents of the revised compensation plan, then INAC should make the final decision and proceed with its approval of the amended Benefits Plan.
- R-16 INAC ensures that the amended Benefits Plan requires Paramount to provide copies of the Annual Reports required by the Benefits Plan to the GNWT, the Review Board, the MVLWB and the local communities in addition to INAC. The scope of the Annual Reports should be expanded beyond what is currently required. The Annual Reports should detail consultations undertaken with the local communities, discuss what concerns were raised by the communities, describe how Paramount has addressed or intends to address these concerns and discuss what actions Paramount will take to enhance positive socio-economic impacts and mitigate negative socio-economic impacts.

R-17 The MVLWB, the NEB and INAC do not take any irreversible steps in relation to this development until INAC has accepted this recommendation for an amended Benefits Plan. When complete, a copy of the amended Plan should be provided to each of the potentially impacted communities and to the Review Board, the MVLWB, the NEB, INAC and the GNWT.

APPENDIX C

Modified Recommendations R-13, R-15, R-16 and R-17 Following the Consult to Modify Process in respect To the Gathering and Pipeline Project

INAC initiated a consult to modify process to change these recommendations. The final recommendations issued January 11, 2002, significantly modified recommendations R-13 to R-16 and deleted R-17. The modified recommendations follow:

- R-13 (as modified) Paramount is to discuss, develop and implement a wildlife and resource harvesting compensation plan with potentially affected First Nation communities – Deh Gah Go'tie First Nation, Fort Providence Métis, Ka'a'Gee Tu First Nation, K'atlodeeche First Nation and West Point First Nation. The scope of the plan is to include compensation for hunting, trapping, fishing and other resource harvesting activity losses resulting from the development as agreed to by Paramount and the communities. Paramount is to commence the consultations as soon as possible, with a draft plan submitted to the communities within 60 days of EA Report acceptance by the INAC Minister and a final plan submitted to the communities within 90 days of EA Report acceptance. The plan is to apply retroactively to impacts arising from the start of construction of the gathering facilities and pipeline. If requested by Paramount or any of the communities, the GNWT and INAC are to facilitate the discussions on the plan.
- R-14 (as modified) The MVLWB and/or the NEB should ensure that the affected aboriginal communities have been provided a copy of the TK study and an opportunity to comment on the study and Paramount's proposed mitigative measures. The MVLWB and/or the NEB should ensure that Paramount implements appropriate mitigative measures to address impacts throughout the life span of the development.
- R-15 (as modified) Paramount and the communities are to cooperate to the fullest extent possible in developing the wildlife and resource harvesting compensation plan. If the parties are unable to come to an agreement on the contents of the plan within the 90 day period, an independent arbitrator shall be jointly appointed within 30 days by the GNWT and INAC. The arbitration process shall conclude within 30 days of the appointment of the arbitrator.

- R-16 (as modified) Following review and acceptance of Paramount's Cameron Hills Annual Report, INAC will provide copies of the Report to the GNWT, the Review Board, the MVLWB and the potentially affected First Nations communities. The scope of the Annual Report should detail consultations undertaken with the local communities, discuss concerns raised by the communities, describe how Paramount has addressed or intends to address these concerns and discuss what actions Paramount will take to enhance positive socio-economic impacts.
- R-17 (as modified) This measure has been deleted.

APPENDIX D

SUMMARY OF RECOMMENDATIONS AND SUGGESTIONS Report of Environmental Assessment and Reasons for Decision EA03-005 Paramount Resources Limited Cameron Hills Extension

Recommendations

- R-1 The Review Board recommends that regulatory authorities include in their authorizations those items set out in the Developer's commitments, outlined in Appendix A, that are within their jurisdiction.
- R-2 The Review Board recommends that Paramount prepare a report within 12 months and thereafter, annually, until the developments on the SDL are abandoned and restored, for distribution in plain language to the parties in this EA. This report will outline the implementation status of each commitment made during the course of this EA, as set out in Appendix A.
- R-3 The Review Board recommends that prior to the issuance of any further licenses or permits Paramount install a meteorological station (at minimum must monitor wind speed, wind direction and temperature) in the Cameron Hills SDL to gather baseline data related to its development. Meteorological data will be provided annually to air quality staff of GNWT-RWED and Environment Canada along with a detailed re-modeling of Paramount's various development scenarios to ensure onsite meteorological conditions are reflected in the modeled outputs.
- R-4 The Review Board recommends that Paramount install a continuous gas analysis monitoring system to track ambient air quality (at minimum 1 hour SO₂ and NO₂) and provide the data to the general public via website, to be updated no less than monthly if a live connection is not available. Annual reports on the status of the air quality at Cameron Hills will be provided by Paramount to all potentially affected communities and government in a plain language document throughout the life of the Paramount operations at Cameron Hills.
- R-5 The Review Board recommends that Paramount install an amine fuel sweetening unit at the Central Battery (H-03) location prior to bringing any further wells online or pipe in sweet fuel from outside Cameron Hills, as per Paramount's original development plan.

- R-6 The Review Board recommends that any further combustion engines being installed for line heaters and pumpjacks at the Cameron Hills operation must use the sweetened fuel or an alternate source of no sulphur fuel.
- R-7 The Review Board recommends that the Government of Canada (INAC and Environment Canada) and the Government of the Northwest Territories implement recommendation 7 from the Ranger-Chevron EA by June 2005.
- R-8 The Review Board recommends that Paramount modify its spill reporting procedures for the Paramount Cameron Hills developments to include notice of spill occurrences to potentially affected communities. Spills must be reported according to the NWT Spill Reporting Procedures.
- R-9 The Review Board recommends that Paramount continue to monitor all work sites for erosion, and take appropriate measures in advance to avoid such problems. The Review Board recommends appropriate erosion mitigation measures be identified in advance and authorized by the NEB and INAC inspectors, and that any remediation of sites be documented and reported to regulators and the Ka'a'Gee Tu First Nation on a quarterly basis.
- R-10 The Review Board recommends that Paramount, in the case of an isolated water crossing, maintain downstream water flow at pre-in-stream work levels. All in-stream work must be completed as expediently as possible to mitigate disruption of fish movements.
- R-11 The Review Board recommends that the Department of Fisheries and Oceans conduct regular site visits to the Cameron Hills to inspect for determine if any impacts to fish or fish habitat. Reports of these inspections must be made publicly available via DFO and also be sent directly to the Ka'a'Gee Tu First Nation, in a plain language version.
- R-12 The Review Board recommends that RWED will, within the next six months, initiate the formation of a Deh Cho Boreal Caribou Working Group (DCBCWG). The Working Group will, among other things, consider: habitat identification, range plan development, thresholds, monitoring systems, adaptive mitigation, research programs and cumulative effects models. In addition, it will coordinate its activities with similar working groups in Alberta and British Columbia.
- R-13 The Review Board recommends that the MVLWB adopt an average linear disturbance target of 1.8 km per km squared as a boreal caribou disturbance threshold for the entire Cameron Hills, NT area, in order to prevent significant adverse environmental impacts on boreal caribou populations whose range includes the Paramount SDL and surrounding area. This shall be considered in all future land use applications for the area.

- R-14 The Review Board recommends that paramount locate at least 50% of all proposed and planned development In the Cameron Hills SDL, as described In Paramount's Developer's Assessment Report, on areas that are currently disturbed (as of the date of Ministerial approval of this Report of Environmental Assessment). This requirement should be included as a condition in land use permit MV2002A0046.
- R-15 The Review Board recommends that Paramount and the other parties to the unfinished Cameron Hills Wildlife and Resources Harvesting Compensation Plan developed in response to measures 13 and 15 of EA01-005 complete the compensation plan. If a compensation plan cannot be completed by these parties within 90 days of the federal Minister's acceptance of this report, this matter will proceed to binding arbitration, pursuant to the NWT Arbitration Act. A letter signed by the parties, indicating agreement to the compensation plan or in the case of arbitration, the arbitrator's decision must be filed with NEB and MVLWB prior to the commencement of Paramount's operations under land use permit MV2002A0046.
- R-16 The Review Board recommends that the GNWT develop a socio-economic agreement with Paramount in consultation with affected communities before operations proceed under the land use permit MV2002A0046. The socio-economic agreement is to address issues such as employment targets, educational and training opportunities for local residents and a detailed ongoing community consultation plan.
- R-17 The Review Board recommends the KTFN be notified directly if any heritage resources are suspected or encountered during Paramount's activities in the Cameron Hills.

Suggestions

- S-1 The Review Board suggests that a member of the K'a'Gee Tu First Nation be invited by DFO to accompany its inspectors while conducting inspections in the Cameron Hills operations area.
- S-2 The Review Board suggests the agencies responsible for water resource management and protection increase their monitoring and enforcement efforts commensurate with the increase in the scope of Paramount's development in the Cameron Hills area.
- S-3 The Review Board suggests that the MVLWB and NEB specify low-impact seismic lines (currently =4.5 m wide average, maximum =5 m wide, maximum line of sight =200 m) as the current standard for geophysical programs in boreal caribou habitat, as outlined in the MVEIRB 2003 draft document: Reference Bulletin - Preliminary Screening of Seismic Operations in the Mackenzie Valley.
- S-4 The Review Board suggests that RWED determine the need for cooperative research to document the impacts of the Cameron Hills development on marten, wolf, and wolverine populations.
- S-5 The Review Board suggests that the discussion and drafting of the community investment plan be resumed between the KTFN and Paramount, with a target date of completion and implementation of November 30, 2004.
- S-6 The Review Board suggests that Paramount continue discussions with the Hay River Health and Social Services with regards to services (emergency or other) that may be utilized by the company in certain instances.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-1379-05

STYLE OF CAUSE: 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 v. THE ATTORNEY GENERAL OF CANADA and PARAMOUNT RESOURCES LTD.

PLACE OF HEARING: Vancouver, B.C.

DATE OF HEARING: January 23, 2007

REASONS FOR ORDER AND ORDER: Blanchard J.

DATED: July 20, 2007

APPEARANCES:

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Ms. Donna Tomljanovic	FOR THE RESPONDENT ATTORNEY GENERAL
Mr. Everett Bunnell Q.C. Ms. Jung Lee	FOR THE RESPONDENT PARAMOUNT
Ms. Vickie Giannacopoulos Mr. Ronald M. Kruhlak	FOR THE RESPONDENT MACKENZIE VALLEY

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FOR THE RESPONDENT
MACKENZIE VALLEY

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Klahoose First Nation v. Sunshine
Coast Forest District (District Manager)***
2008 BCSC 1642

Date: 20081128
Docket: S082076
Registry: Vancouver

Between:

**Chief Ken Brown, on his own behalf and on behalf of
members of the Klahoose First Nation**

Petitioner

And

**Brian Hawrys, in his capacity as District Manager – Sunshine Coast
Forest District
and Hayes Forest Services Limited**

Respondents

Before: The Honourable Mr. Justice Grauer

Reasons for Judgment

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Date and Place of Hearing:

June 16-18, 2008
Vancouver, B.C.

Further Written Submissions:

September 10, 17, 24, 30; and
October 3 and 6, 2008

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A. Introduction

[1] "A culture," said W. H. Auden, "is no better than its woods."¹ This petition concerns the woods of the Toba River watershed in the traditional territory of the Klahoose First Nation.

[2] The petitioner Ken Brown is the Chief Councillor of the Klahoose First Nation ("Klahoose"). He brings this petition on behalf of all members of Klahoose for judicial review of the decision of the respondent Brian Hawrys, district manager of the Sunshine Coast Forest District (the "district manager"), approving a Forest Stewardship Plan ("FSP") submitted by the respondent Hayes Forest Services Limited ("Hayes"). This impugned decision was made on February 15, 2008.

[3] The FSP relates to a Forest Development Unit ("FDU") that constitutes a small portion of Tree Farm License 10 ("TFL 10"). TFL 10, including the area subject to the FSP, is within Klahoose traditional territory, to which area the Klahoose assert aboriginal title.

[4] The petitioner takes the position that the district manager owed a constitutional and legal duty to consult with Klahoose in good faith, and to endeavour to seek accommodations, prior to approving the FSP for TFL 10, and further, that the district manager failed to comply with this duty. The petitioner seeks a declaration that the FSP approval decision was unlawful, and an order in the nature of *certiorari* quashing it and setting aside the FSP. Alternatively, the respondent seeks an order:

- (i) directing the district manager to consult in good faith, and to endeavour to seek accommodation, in relation to the final FSP, subject to the supervision of this Court;
- (ii) in the nature of an injunction restraining the district manager from issuing any further permits, authorizations or approvals to Hayes in relation to forestry operations pursuant to the final FSP, without the prior agreement of Klahoose or further order of this Court; and
- (iii) in the nature of an injunction restraining Hayes from carrying out any forestry operations pursuant to the final FSP, without a prior agreement of Klahoose or further order of this Court.

[5] For his part, the respondent district manager (to whom I shall henceforth refer as the "Crown") acknowledges that the Crown had a duty to consult with Klahoose and to seek to accommodate its asserted aboriginal rights in a manner that balanced societal and aboriginal interests with any Crown decision relating to the FSP submitted by Hayes. The district manager submits that the Crown discharged that duty in the circumstances of this case.

[6] The respondent Hayes, licensee of TFL 10, takes the position that the consultation conducted in relation to the approval of the FSP met the required tests as set out in ***Haida Nation v. British Columbia (Minister of Forests)***, [2004] 3 S.C.R. 511, or if it did not, it is because Klahoose did not meet its own consultation obligations. Hayes further takes the position that as the relief sought is discretionary, it should be denied because the prejudice to Hayes arising from quashing the approval of the FSP far outweighs any prejudice to Klahoose if the FSP approval is not quashed, and moreover the conduct of Klahoose disentitles them to the discretionary relief sought.

[7] The respondents, in short, take the position that they bent over backwards in attempts to consult and accommodate Klahoose, but received very little cooperation in return.

[8] I will begin by reviewing the statutory and administrative framework applicable to the Tree Farm Licence and Forest Stewardship Plan at issue here. I will then review the law concerning the duty of the Crown to consult and accommodate, before turning to the facts of this case in order to apply the appropriate legal principles. For ease of reference, I attach at the end of this judgment a glossary of the acronyms and abbreviations used throughout.

B. The Legislative and Administrative Framework

[9] A tree farm licence is a form of tenure agreement pursuant to s. 12 of the ***Forest Act***, R.S.B.C. 1996, c. 157. It provides the holder rights to carry out forest management on a specific area of Crown land. The right is geographically specific, and amounts to an exclusive right to manage and harvest timber in the TFL area. The annual allowable cut for each TFL is determined by the Chief Forester every five to 10 years pursuant to s. 8 of the ***Forest Act***.

[10] TFL holders are required to fulfill certain operational planning and forest management obligations which include the requirement to prepare a forest stewardship plan (a type of operational plan) in accordance with sections 3 and 5 of the ***Forest and Range Practices Act***, S.B.C. 2002, c. 69 (the "FRPA"). These FSPs are submitted for

approval to the district manager pursuant to s. 16 of the FRPA. These sections provide in part as follows:

Forest stewardship plan required

- 3(1) Before the holder of
- (a) a major licence,
 - (b) a timber sale licence that requires its holder to prepare a forest stewardship plan,
 - (c) a community forest agreement,
 - (c.1) a community salvage licence, or
 - (d) a pulpwood agreement

harvests timber or constructs a road on land to which the agreement or licence applies, then, subject to section 4 (2), the holder must prepare, and obtain the minister's approval of, a forest stewardship plan that includes a forest development unit that entirely contains the area on which

- (e) the timber is to be harvested, and
- (f) the roads are to be constructed.

...

Content of forest stewardship plan

- 5(1) A forest stewardship plan must
- (a) include a map that
 - (i) uses a scale and format satisfactory to the minister, and
 - (ii) shows the boundaries of all forest development units,
 - (b) specify intended results or strategies, each in relation to
 - (i) objectives set by government, and
 - (ii) other objectives that are established under this Act or the regulations and that pertain to all or part of the area subject to the plan, and

(c) conform to prescribed requirements.

(1.1) The results and strategies referred to in subsection (1)(b) must be consistent to the prescribed extent with objectives set by government and with the other objectives referred to in section 5(1)(b).

(2) A forest stewardship plan must be consistent with timber harvesting rights granted by the government for any of the following to which the plan applies:

- (a) the timber supply area;
- (b) the community forest agreement area;
- (c) the tree farm licence area;
- (d) the pulpwood area.

(3) A forest stewardship plan or an amendment to a forest stewardship plan must be signed by the person required to prepare the plan, if an individual or, if a corporation, by an individual or the individuals authorized to sign on behalf of the corporation.

...

Approval of forest stewardship plan, woodlot licence plan or amendment

16(1) The minister must approve a forest stewardship plan or an amendment to a forest stewardship plan if it conforms to section 5.

(1.01) A forest stewardship plan or an amendment to a forest stewardship plan conforms to section 5 if

- (a) a person with prescribed qualifications certifies that it conforms to section 5 in relation to prescribed subject matter, and
- (b) the minister is satisfied that it conforms to section 5 in relation to subject matter not prescribed for the purpose of paragraph (a).

[11] An FSP is a landscape-level planning document which outlines the strategies and results by which the licensee (here Hayes) proposes to conduct its operations within a specified area in order to achieve government objectives. The specified area is

the Forest Development Unit, or FDU. The FSP must be consistent with the objectives of local land-use plans or other objectives such as those set by the Ministry of Environment for species at risk. Where land-use plans are not yet in place, there are legally binding objectives for high-priority biodiversity values such as old-growth, management of streamside areas, maximum cut block size, retention of coarse woody debris and wildlife trees. These objectives are set out in the ***Forest Planning and Practices Regulation***, B.C. Reg. 14/2004, ("FPPR") as well as additional regulations such as the ***General Government Actions Regulation***, B.C. Reg. 582/2004.

[12] Where an FSP incorporates the default result or strategy stated in the FPPR for the relevant values, then approval of those results or strategies is not required by the district manager. Where no default result or strategy is prescribed by the regulations, then approval is necessary.

[13] Approval of an FSP is an initial step in the legislative process leading to timber harvesting in an FDU within a TFL, although it does not itself provide the licensee with authority to harvest timber. The position of the Crown is that approval of an FSP in and of itself has little on-the-ground impact on the exercise of aboriginal rights.

[14] Notwithstanding that position, s. 77.1(1) of the FRPA provides as follows:

Power of intervention: first nations

77.1(1) If an operational plan [which includes an FSP] for an area is approved and the minister subsequently concludes, on the basis of information that was not known to the person who granted the approval, that carrying out a forest practice or range practice under the plan will continue or result in a potential unjustifiable infringement of an aboriginal right or title in respect of the area, the minister

- (a) must notify the holder of the plan of the previously unavailable information, and
- (b) by order given to the holder of the plan, may vary or suspend to the extent the minister considers necessary one or more of the following:
 - (i) the operational plan;
 - (ii) a forest practice or range practice;
 - (iii) a cutting permit;
 - (iv) a road permit.

[15] Once a license holder has an approved FSP in place, it may submit applications for cutting permits or road permits to the Minister of Forests and Range. The authorization of these permits is regulated under the ***Forest Act*** in conjunction with the terms of the TFL itself. A cutting permit or road permit authorized by the district manager is required before commencing to harvest the timber in the FDU covered by the FSP. Hayes is in the process of seeking cutting permits to allow it to commence harvesting timber in the FSP by the spring of 2009.

[16] It is important to understand that the right to harvest timber comes from the TFL itself. The FSP is part of the process required for the licence holder to move from having that right to exercising that right. The final step is the cutting permit.

C. The Duty to Consult and Accommodate

[17] As noted, the respondents do not contest that the Crown had a duty to consult with Klahoose and to seek to accommodate its asserted aboriginal rights in a manner that balanced societal and aboriginal interests with any Crown decision relating to the

FSP submitted by Hayes. What is at issue is the scope of that duty in the particular circumstances of this case.

[18] I observe that, as will be discussed in more detail below, there is no evidence in the record before me as to what assessment, if any, the Crown made concerning the scope of its duty to consult in this case, other than acknowledging that it had such a duty. Yet, as pointed out by Neilson J., as she then was, in ***Wii'litswx v. British Columbia (Minister of Forests)***, 2008 BCSC 1139, the Crown is obliged to make such an assessment.

[19] The Crown's duty to consult with Klahoose in this case arises from two sources. The first is the Constitution. The second is an Interim Agreement on Forest and Range Opportunities ("FRO") between Klahoose and the province, negotiated through much of 2007, and signed on behalf of the Government of British Columbia on January 23, 2008. Under the FRO, the province provides interim economic accommodation to Klahoose related to provincially authorized forestry operations in Klahoose traditional territory. It also contains an interim consultation protocol.

[20] I will review the constitutional duty to consult first, and then I will set out the relevant parts of the FRO. The FRO will have to be considered again in the context of the steps actually taken among the parties to consult in this particular case.

1. The Constitutional Duty to Consult

[21] The applicable principles begin with s. 35 of the ***Constitution Act, 1982***, which provides as follows:

35(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

[22] The historical foundation for the duty to consult and accommodate was described by McLachlin C.J.C. in the ***Haida*** case, *supra* at paras. 25-27:

[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.

[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?

[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.

[23] The Chief Justice next considered the scope and content of the duty to consult and accommodate, explaining 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. [para. 39]

[24] McLachlin C.J.C. then made the following observations:

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

[43] Against this background, I turned to the kind of duties that may arise in different situations. In this respect, the concept of the spectrum may be helpful, not to suggest watertight legal compartments but rather to indicate what the honour of the Crown may require in personal circumstances. At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice....

[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 a reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake. Pending settlement, the Crown is bound by its honour to balance societal and Aboriginal interests in making decisions that may affect Aboriginal claims. The Crown may be required to make decisions in the face of disagreement as to the adequacy of its response to Aboriginal concerns. Balance and compromise will then be necessary.

[25] In paras. 47-48, the Chief Justice went on to discuss the stage of accommodation:

[47] When the consultation process suggests amendment of Crown policy, we arrive at the stage of accommodation. Thus the effect of good-faith consultation may be to reveal a duty to accommodate. Where a strong prima facie case exists for the claim, and the consequence 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 a final resolution of the underlying claim. Accommodation is achieved through consultation, as this Court recognized in *R. v. Marshall*, [1999] 3 S.C.R. 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 of veto over what can be done with land pending final proof of the claim.... Rather, what is required is a process of balancing interests, of give and take.

[26] To determine the extent of the Crown's constitutional duty to consult, then, I must first carry out a preliminary assessment of the strength of the case supporting the existence of the right or title asserted by Klahoose. I must also assess the seriousness of the potentially adverse effect of the FSP on the right or title claimed by Klahoose. On the basis of these assessments, I must determine where on the spectrum of strength of case and adversity of effect this case lies, and come to a conclusion concerning to what

depth of consultation Klahoose was entitled in relation to the decision to approve the FSP. In this regard I note that while the scope of the duty to consult will vary with the circumstances, it "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.": **Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)**, [2004] 3 S.C.R. 550.

2. The Consultation Protocol

[27] The *Interim Agreement on Forest Opportunities* between the Klahoose First Nation and Her Majesty the Queen and Right of the Province of British Columbia begins with the following recitals:

WHEREAS:

- A. British Columbia and the First Nations Leadership Council, representing the Assembly of First Nations-BC Region, First Nations Summit, and the Union of BC Indian Chiefs ("Leadership Council") have entered into a New Relationship in which they are committed to reconciliation of Aboriginal and Crown titles and jurisdiction, and have agreed to implement a government-to-government relationship based on respect, recognition and accommodation of Aboriginal title and rights.
- B. This Agreement is in the spirit and vision of the "New Relationship".
- C. Work is underway regarding the implementation of the New Relationship and that this Agreement may need to be amended in the future to reflect the outcomes of that work.
- D. The Klahoose First Nation has a relationship to the land that is important to its culture and the maintenance of its community, governance and economy.
- E. The Klahoose First Nation has Aboriginal Interests within its Traditional Territory.

The Parties wish to enter into an interim measures agreement in relation to forest resource development within the Traditional Territory.

- F. British Columbia intends to consult and to seek an Interim Accommodation with the Klahoose First Nation on forest resource development activities proposed within the Klahoose First Nation Traditional Territory that may lead to an infringement of the Klahoose First Nation's Aboriginal Interests.
- G. The Klahoose First Nation intends to participate in any consultation with British Columbia or a licensee, in relation to forest resource development activities proposed within the Klahoose First Nation's Traditional Territory that may lead to an infringement of the Klahoose First Nation's Aboriginal Interests.
- H. British Columbia and the Klahoose First Nation wish to resolve issues relating to forest resource development where possible through negotiation as opposed to litigation.

[28] Of interest, the agreement defines "Operational Plan" as including a Forest Stewardship Plan that has a potential effect in the Klahoose First Nation's Traditional Territory, and "Operational Decision" as meaning "a decision that is made by a person with respect to the statutory approval of an Operational Plan that has potential effect in the Klahoose First Nation's Traditional Territory"

[29] "Aboriginal Interests" are defined to mean "aboriginal rights and/or aboriginal title", while "Traditional Territory" is defined to mean the traditional territory as asserted by the Klahoose First Nation, which includes the entirety of the Toba River watershed, and all of TFL 10.

[30] Article 4 of the agreement provides, in part, as follows:

4.0 Consultation and Accommodation Regarding Operational and Administrative Decisions and Plans

- 4.1 The Klahoose First Nation is entitled to full consultation with respect to all potential infringements of their Aboriginal Interests arising from any Operational or Administrative Decisions or Plans affecting the Klahoose First Nation's Aboriginal Interests, regardless of benefits provided under this agreement
- 4.2 During the term of this Agreement, subject to the terms and the intent of this Agreement being met and adhered to by British Columbia, the Klahoose First Nation agrees that British Columbia will have provided an Interim Accommodation with respect to the economic component of potential infringements of the Klahoose First Nation's Aboriginal Interests as an interim measure as a result of forest and range activities occurring within their Traditional Territory

[Klahoose agrees that the government has met its duty to provide interim accommodation with respect to the economic component.]

...

- 4.5 Nothing in this Agreement restricts the ability of Klahoose First Nation to seek additional accommodation for impact on its Aboriginal Interests from forest resources development within its Traditional Territory.
- 4.6 The Parties agree to develop consultation processes to address both Operational and Administrative Decisions and Operational Plans, which may affect the Klahoose First Nation's Aboriginal Interests within their Traditional Territory. Appendix B contains an interim consultation process that will apply until the parties have developed the consultation processes noted above, or in the event that they are unable to otherwise agree on any other such process(es).
- 4.7 In developing such consultation processes, the Parties further agree to address consultation on Administrative Decisions, Operational Decisions and Operational Plans through participation of the Klahoose First Nation in strategic level planning and policy development processes.

[31] By its terms, the FRO took effect on January 23, 2008, for a term of five years. The Interim Consultation Protocol (the "Protocol") is set out in Appendix B to the agreement, and provides as follows:

1. Scope and Purpose

- 1.1 The government of British Columbia agrees to consult with the Klahoose First Nation on those Operational Decisions, Operational Plans and Administrative Decisions (Decisions) which may affect the Aboriginal Interests of the Klahoose First Nation in accordance with the process set out in this consultation protocol, except for the Economic component of those interests which the parties agree are addressed to the extent set out in section 3.0 of the Forest and Range Opportunities Agreement.
- 1.2 This Protocol fulfills section 4.6 of the Interim Agreement on Forest and Range Opportunities (FRO) and will apply to all Operational and Administrative Decisions made by the Ministry of Forests and Range (MFR) which may affect the Klahoose First Nation's Aboriginal Interests within their Traditional Territory.
- 1.3 This Protocol applies to the provincial Crown lands in the Traditional Territory as defined in the FRO, including any Administrative Decisions that would result in private lands being deleted from a Tree Farm License.

2. Definitions

- 2.1 The definitions set out in section 1 of the FRO apply where those defined terms are used in this Protocol, and for greater certainty, will continue to apply in this Protocol after the expiry or termination of the FRO unless the Parties to this Protocol otherwise agree;
- 2.2 "Response Period" means a period of up to 60 days from the initiation of the process set out in section 3.2 of this Protocol, where the initiation date is the date on which Klahoose First Nation receives information regarding the proposed Administrative Decision or Timber Supply Review process, or a copy of the Operational Plan for review. Where an emergency operation arises and/or expedited salvage has to occur, MFR will communicate the nature of the emergency to

the Klahoose and, if required, a shortened initial Response Period, that is consistent with The *Forest and Range Practices Act* (FRPA) emergency public review requirements.

- 2.3 A reference to the "Ministry of Forests and Range" or "MFR" in this Protocol includes, as appropriate, a reference to a Minister, Deputy Minister, Regional Executive Director, Timber Sales Manager, District Manager or any of their designates.

3. Consultation Process

- 3.1 General

The parties acknowledge that the scope of the duty to consult and, where appropriate, accommodate, will respect and meet the standards set out in the SCC *Haida* Decision and acknowledge that the duty exists on a spectrum and is proportionate to a preliminary assessment of the strength of the Aboriginal Interest(s) and to the seriousness of the potential effect.

- 3.1.1 Notification of initiation of consultation with appropriate information will be sent to: Chief Councillor Ken Brown. Any replies to MFR consultation by the Klahoose First Nation will be sent to Allan Shaw unless otherwise agreed by the Parties.
 - 3.1.2 During the term of the FRO, Klahoose First Nation agrees to fully participate in the consultation process as set out in this consultation protocol, and thereafter as the Parties may agree.
 - 3.1.3 MFR agrees that Klahoose may request further information and/or meetings with MFR, the licensee or another Provincial agency with relevant information or expertise, as part of the consultation process under this protocol. Klahoose agrees that, in the event it does require further information or meeting, it will make best efforts to ensure that such request does not unreasonably delay the consultation process.
 - 3.1.4 MFR agrees to initiate the consultation process at the earliest practical opportunity to provide the Klahoose First Nation with a reasonable opportunity to engage in the consultation process before a decision is made concerning the forestry activity;
 - 3.1.5 Klahoose agrees to provide a response to a notification pursuant to clause 3.1.1 within the Response Period. In that response Klahoose will

indicate whether it has sufficient information to provide Klahoose's input regard the subject matter of the consultation, or whether additional information and/or meetings with MFR, other Provincial agencies and/or the licensee are required. If so the parties will agree on a further time period in which to conduct consultation.

- 3.1.6 Where no response is received within the Response Period, MFR may conclude that Klahoose First Nation does not intend to respond or participate in the consultation process and a decision by MFR will proceed.
- 3.1.7 This Protocol and its processes are not intended to constrain MFR or Licensee's relationship with Klahoose First Nation and other opportunities may be taken to enhance the relationship.
- 3.1.8 The Parties acknowledge that FDP/FSP will be consistent with approved land use plans when higher-level plan objectives have been established.

3.2 Information Sharing

The parties agree that information sharing constitutes the beginning of the consultation process.

- 3.2.1 MFR or the Licensee will
 - 3.2.1.1 Send a notification letter advising Klahoose First Nation of the proposed Decision required and the relevant response period.
 - 3.2.1.2 Provide maps and other information relevant to the proposed Decision to Klahoose First Nation.
 - 3.2.1.3 Offer to meet with Klahoose First Nation to discuss information regarding the proposed decision, Aboriginal Interests and cultural heritage resources, and how these interests may be affected by the proposed Decision and to discuss practical means for addressing the interest and concerns raised.
 - 3.2.1.4 For operational plans, provide to Klahoose First Nation a copy of the plan submitted to the District Manager for a Decision, a description of how the Aboriginal Interests and cultural heritage resources have been considered, and will provide an opportunity

for Klahoose First Nation to provide further comments.

3.2.1.5 For Administrative Decisions, meeting at mutually agreed to times throughout the year to provide an opportunity for Klahoose First Nation to make known to representatives of the government of British Columbia their concerns and comments relative to the effects of the Administrative Decision(s) within the Traditional Territory.

3.2.1.6 The Klahoose First Nation may develop suggested information sharing practices that may be adopted by licensees when reviewing Forest Stewardship Plans with Klahoose First Nation.

3.2.2 Klahoose First Nation or their designate will

3.2.2.1 Agree to participate in the consultation process initiated by MFR or the Licensee;

3.2.2.2. Be responsible for conducting their own internal review of the information provided by MFR or the Licensee as part of the information sharing as outlined in section 3.2.1;

3.2.2.3 Provide information to MFR or Licensee regarding the scope and nature of Aboriginal Interests or cultural heritage resources and how these Interests or resources may be impacted by the proposed decision through written submission or meeting with MFR or as mutually agreed to under section 3.1.5.

3.3 Further Consultation and Accommodation As Appropriate

3.3.1 Where appropriate, further consultation meetings may occur to discuss First Nation issues identified in section 3.2.2.3 and potential measures to address those concerns, as appropriate

3.4 Decision

3.4.1 Where Klahoose First Nation requests additional relevant information, the decision maker will make reasonable efforts to provide available information from the Licensee or through MFR, recognizing that the decision maker may not have access to certain

licensee information. MFR will nonetheless encourage and recommend that the Licensee provide information that is requested by Klahoose where it is practical for the Licensee to do so.

3.4.2 Decision maker will make the Decision considering all the relevant information provided by Klahoose First Nation during the consultation process

3.4.2.1 For Aboriginal Interests raised during the review of Administrative Decisions that cannot be addressed at the Administrative Decision stage the decision maker will provide the Aboriginal Interest information to the appropriate decision maker for consideration in further operational decisions.

3.4.2.2 Prior to issuing a road permit, cutting permit or proposed timber sale, the decision maker will consider any existing or new information regarding Aboriginal Interests and impacts on Aboriginal Interest that is provided by Klahoose First Nation, and will ensure that consultation process has been adequate.

3.4.2.3 MFR will communicate the results of the decision to Klahoose First Nation in writing after the decision is made.

[32] It will be observed that the Consultation Protocol incorporates the standards set out in the *Haida* case, *supra*. Counsel for Klahoose submitted that the Protocol goes further by setting out what is, in effect, a minimum level of consultation required of the Crown. I agree, but would add that the Protocol sets minimum standards for both parties. It does not change the analysis one must go through in assessing the scope of the constitutional duty to consult, as discussed above, but it does provide a useful yardstick.

D. The Standard of Review

[33] As Madam Justice Neilson observed in *Wii'litswx*, *supra* at paras. 11-13, the subject of judicial review in a case such as this is not really the district manager's decision to approve the FSP. Rather, what must be reviewed is the conduct of the Crown with respect to the fulfillment of its duty to consult Klahoose and to accommodate Klahoose's interests in the course of making that decision.

[34] As mandated in the *Haida* case, *supra*, the *extent* of the duty to consult or accommodate is a question of law to be judged on the standard of correctness, although it is capable of becoming an issue of mixed law and fact to the extent that the appropriate standard becomes that of reasonableness. The *adequacy* of the consultation process is governed by a standard of reasonableness. With respect to this second aspect, I propose to follow the lead of Neilson J. (see *Wii'litswx*, *supra* at paras. 16-17) and address first the adequacy of the process of consultation, and secondly, the adequacy of any resulting accommodations.

E. Strength of Claim: The Klahoose in the Toba River Watershed

[35] Where title to lands formerly occupied by a First Nation has not been surrendered, as is the case here with the Klahoose traditional territory, a claim for aboriginal title to the land may be made under the common law. Aboriginal peoples used the land in many ways at the time of sovereignty. Some uses, like hunting and fishing, have given rise to the right to continue those practices in today's world. Aboriginal title, which is based on occupancy of the land at the time of British

sovereignty, is one of these various aboriginal rights: see **R. v. Marshall**; **R. v. Bernard**, [2005] 2 S.C.R. 220 ("**Marshall-Bernard**"); **R v. Van der Peet**, [1996] 2 S.C.R. 507.

[36] It is, of course, not for me in this proceeding to decide the validity of Klahoose's claim to aboriginal title and rights over its traditional territory. I must simply do my best on the evidence to assess, on a preliminary basis, the apparent strength of the case supporting the existence of Klahoose's asserted right or title.

[37] In doing so, I bear in mind the test for the establishment of title set out in **Delgamuukw v. British Columbia**, [1997] 3 S.C.R. 1010, which requires claimants to prove exclusive pre-sovereignty occupation of the land by their forebears: **Marshall-Bernard**, *supra* at para. 55. As noted by the Chief Justice in **Marshall-Bernard**, *supra* at para. 58:

It follows from the requirement of exclusive occupation that exploiting the land, rivers or seaside for hunting, fishing or other resources may translate into aboriginal title to the land if the activity was sufficiently regular and exclusive to comport with title at common law. However, more typically, seasonal hunting and fishing rights exercised in a particular area will translate to a hunting or fishing right. This is plain from this Court's decisions in *Van der Peet*, *Nikal*, *Adams* and *Côté*. In those cases, aboriginal peoples asserted and proved ancestral utilization of particular sites for fishing and harvesting the products of the sea. Their forebears had come back to the same place to fish or harvest each year since time immemorial. However, *the season over, they left, and the land could be traversed and used by anyone*. These facts gave rise not to aboriginal title, but to aboriginal hunting and fishing rights. [Emphasis added.]

[38] With these principles in mind, my review of the evidence discloses the following.

[39] The Klahoose are a Coast Salish people who constitute an "Indian Band" under the ***Indian Act***, R.S.C. 1985, c. I-5, with approximately 300 members. Their traditional territory covers lands and waters in the northern Gulf Islands area of the coast of British Columbia. It includes a portion of Quadra Island, Cortes Island, the Redonda Islands, and the Desolation Sound area. Its main village is on Klahoose Indian Reserve #7 ("IR #7"), at Squirrel Cove on Quadra Island.

[40] This territory was outlined in a map attached to the territorial claim (Statement of Intent) submitted by Klahoose on August 29, 1994, to the treaty negotiation process administered by the B.C. Treaty Commission.

[41] The backbone of the territory, its central axis, is formed by the Toba Inlet and the Toba River Valley. The Toba River watershed constitutes and indeed defines a substantial portion of Klahoose traditional territory.

[42] The territory's largest Indian Reserve, Klahoose IR #1, is located at the mouth of the Toba River where it enters Toba Inlet, and extends approximately 7 km up the Toba River Valley. It is not presently occupied.

[43] Kathy Francis is the Chief Treaty Negotiator and a Band Councillor for the Klahoose First Nation. She has previously served as Chief Councillor. As Chief Treaty Negotiator, she has had to learn and understand Klahoose oral history, and has personally studied the oral history as passed on by Klahoose elders for that purpose. These elders include Joe Mitchell, Sue Pielle and Rose Barnes.

[44] According to Ms. Francis, the Toba River watershed has always been an area of central importance to the Klahoose. Historically, the nation's primary village site was located near the mouth of the Toba River. The village, Tl'émtil'ems ("many houses") forms part of the area established as Klahoose IR #1, and was last occupied in the 1950s.

[45] In addition to this main village site, the Klahoose maintained smaller villages and housing sites all along the Toba River upstream (east) of IR #1 and along the north shore of Toba Inlet near the Tahumming River, west of IR #1. There have been no permanent residents in the watershed since 1979. There are a number of burial sites and pictographs in the area.

[46] Ms. Francis deposes that the Klahoose have always relied on the lands, waters and resources of the Toba River watershed to support themselves culturally, economically and spiritually. They harvested and managed the resources of the watershed for domestic and trading purposes, including harvesting cedar and spruce for dwellings, canoes, weapons, household items, clothing, etc.; hunting and trapping deer, mountain goats, bears, squirrels, lynx, raccoons and other animals; fishing for salmon, groundfish, prawns, eulachons, trout and other species at various locations throughout the watershed and the shoreline of Toba Inlet; gathering shellfish and other marine resources such as kelp; maintaining defensive positions against raiding parties; and creating food caches and places to store other harvested resources. The watershed and Toba Inlet were also the main traveling routes for trading with neighbouring nations and for traveling to other places within Klahoose territory.

[47] According to Klahoose oral history, there are battle sites within the Toba River watershed where the Klahoose defended their territory from incursions by other nations, including the Tsilhqot'in people who attacked from the Interior through the mountains at the headwaters of the watershed, and the Kwakiutl and Haida people who would raid by canoe up Toba Inlet.

[48] Ms. Francis deposed that while the location of Klahoose villages changed over time, members continued to hunt, fish, trap and harvest forest resources from the watershed throughout the 20th century. During the time when Klahoose children were being sent to residential schools, Klahoose members would leave Squirrel Cove with their children, and go to the Toba River watershed to hide them away.

[49] Ms. Francis noted that there has never been a comprehensive survey or study to locate all the Klahoose cultural and archaeological sites in the Toba River watershed. Counsel for the petitioner advised me that there was "rock solid" evidence to come, presumably in the treaty negotiation process. It was not available to me.

[50] In addition to the oral history related by Ms. Francis, there was available to me a report dated February 27, 2007, prepared by Tracy Bulman of the Aboriginal Research Division, Legal Services Branch, Ministry of the Attorney General, for the Ministry's Aboriginal Law Group, entitled **Klahoose First Nation**, and subtitled *Research in support of a preliminary assessment of strength of claim for the Klahoose First Nation* (the "research report"). This report corroborated much of what Ms. Francis related by way of oral history, although according to Ms. Francis, its author did not conduct any

interviews with Klahoose elders or members, or otherwise seek any input from the Klahoose.

[51] With respect to the traditional use of land and resources, the research report notes that fishing was an integral part of Klahoose culture and livelihood, with salmon by far the most important fish in this respect. Pacific herring was also important. There was evidence that shellfish were gathered by the Klahoose year-round, and that deer were the most frequently hunted land mammals. Socially, economically and ritually, the most prestigious animals hunted on the mainland were mountain goats, which required a highly specialized skill. The ranking family of the Klahoose were great goat hunters who enjoyed a special prerogative to use the mountain goat head mask during winter ceremonials. Mountain goat hunting, of course, took place in the upland areas of the mountainous Toba River watershed.

[52] The research report also noted evidence that plant gathering was another important source of nourishment, and that specific gathering sites "belonged" to certain families with possession of these rights passing to the eldest son.

[53] Red cedar was used extensively to make everything from canoes to house planks, barbecuing sticks, salmon spreaders, drying racks, fish traps and bowls.

[54] There were different kinds of housing built by the Klahoose, depending on the season and on a family's wealth. Shed housing was built by the wealthy at their summer campgrounds, while poorer families used this sort of housing year-round. Generally, wealthier families used cedar planks in the walls and poorer families used

bark slabs. Winter housing was constructed in different formats, with only the framework being permanent. Family crests were carved on the winter houses and 40 foot high totem poles were erected in front in commemoration of the dead. Underground houses were made with pits approximately 10 feet deep, where protection was thought necessary.

[55] Social organization consisted of groups of extended families which came together to form winter villages. One of the defining features of Klahoose social, political and economic organization was the exclusive control over particular hunting and gathering sites within their territory. Title to hunting and gathering sites was usually retained within a given family, and was passed from headman to headman (usually from father to son). Permission to hunt and gather in traditional family-owned sites was sought by others who wished to use those areas. Access to, and use of, particular sites could be gained through marriage, but ownership was inherited. Family ownership and control of summer resorts and hunting and gathering sites was a foundation of Klahoose society.

[56] The research report quotes ethnographic sources as indicating that at the time of contact, the Klahoose lived primarily in the protected waters in and around Toba Inlet. Sources identify 17 former Klahoose village sites located in the area of Toba Inlet and the Toba River Valley. These include Náath'úwem, approximately 10 miles upstream from the mouth of the Toba River, which contained plank houses built partially underground due to fear of Tsilhqot'in raiding parties, Xwéthéyin, on the mouth of the Little Toba River, where spring salmon spawned, and Nísh7uuthin on the east side of

the Toba River, where cranberries were gathered. The report goes on to note the following:

Although the ethnographic sources do not reveal evidence of specific upland sites traditionally used by the Klahoose, it is very likely that intensive aboriginal use occurred in these areas. The variety of animals, plants and foods that were hunted and gathered by the Klahoose speaks to the fact that they regularly utilized upland areas. There are very likely many traditional sites that were simply not recorded because white men did not travel to those areas to observe the Klahoose there. The material culture recorded by Barnett suffices as evidence that the Klahoose did indeed utilize upland locations. There is a high probability these areas fell within [Klahoose traditional territory].

[57] Interestingly, it appears that it was not until the coming of the Europeans brought an end to raids into Klahoose territory from the Tsilhqot'in and the Kwakiutl that the Klahoose expanded their territory out of the Toba River and Inlet into the Strait of Georgia. A permanent settlement at Squirrel Cove on Cortes Island was not established until the mid to late 1800s.

[58] On the basis of the evidence before me, I find that Klahoose has established on a balance of probability the following:

- a strong *prima facie* case for aboriginal rights, and an arguable case for aboriginal title, throughout the entirety of the Toba River watershed, including all of TFL 10;
- a strong *prima facie* case for aboriginal title to the shores of the upper reaches of Toba Inlet, and to the floor of the Toba River Valley;

- a reasonable *prima facie* case for aboriginal title to the upland areas immediately surrounding the Toba River Valley and the valleys of Toba River tributaries, including those portions that make up the FDU covered by the FSP.

[59] In this regard I note that it is exactly those upland areas on either side of the floor of the Toba River Valley, through which flow the tributaries that feed the river, and which include the mountain goats' winter range, where the evidence suggests that the Klahoose had exclusive use and occupation of the kind discussed in the ***Marshall-Bernard*** case, as opposed to seasonal use that left the land open to all comers in the off-season.

F. Potential Adverse Effect: Klahoose Territory and TFL 10

[60] TFL 10 covers almost the entirety of the Toba River watershed. The FDU covered by the FSP in question is, of course, within TFL 10. It covers a much smaller area from the headwaters of Toba Inlet, south of IR #1, and thence east beyond IR #1 another 12 km or so up the Toba River Valley to the junction of the Toba and Little Toba Rivers. This is the very heart of Klahoose traditional territory.

[61] TFL 10 was originally issued by the provincial Crown to Timberland Development Co. in 1951. Its original boundaries included not only the entire Toba River watershed, but also areas located on the north and south sides of Toba Inlet. It was subsequently partitioned so that those parts outside of the Toba River watershed were severed from the licence area.

[62] In 1982, TFL 10 was acquired by Weldwood of Canada. At that time, Weldwood held a permit, issued under the ***Indian Act***, to use a road that runs through Klahoose IR #1. Logging in the Toba River watershed was accessed through a series of logging roads all of which led down to this main road passing through IR #1. All logging in the watershed area had to pass through IR #1 in order to get to water that was deep enough to permit the offloading of logs into booms in Toba Inlet. Without access through IR #1, logging in the watershed was impracticable.

[63] Weldwood's road use permit expired in 1988. Klahoose advised Weldwood that they would not issue a long-term permit renewal for access through IR #1. Instead, Klahoose offered a permit for a one-year term subject to Weldwood assisting Klahoose in paying for an environmental impact assessment of Weldwood's forestry activities in the watershed. Weldwood refused that offer, and their permit was not renewed. As a result, there have been no commercial forestry operations in the Toba River watershed since 1988, a period of 20 years.

[64] Klahoose proceeded with a study of the watershed that looked at the cumulative impact of Weldwood's logging, as well as other existing or proposed uses of the watershed, such as big game hunting and proposed bulk water exports. As a result of this study, Klahoose concluded that the forest in the watershed had been harvested at an unsustainably high rate, and needed time to regenerate. In the meantime, the roads and bridges that constituted the logging road network in the watershed began to deteriorate as they were no longer maintained by Weldwood.

[65] In 1994, Weldwood transferred its interest in TFL 10 to International Forest Products Ltd. ("Interfor"). Interfor was able to carry on with logging on those parts of TFL 10 that were outside of the Toba watershed and which were severed. Like Weldwood, however, Interfor was unable to carry out forestry activities within the watershed area because of the lack of any access through IR #1.

[66] Both Weldwood and Interfor offered substantial annual payments for the right to use the road through IR #1. Klahoose declined these offers in the absence of agreements that provided for co-management with Klahoose, which agreements were not forthcoming.

[67] In June of 2006, the respondent Hayes purchased the watershed portion of TFL 10 from Interfor for a nominal sum. It did so with full knowledge of the problem arising from the lack of access through IR #1. Indeed Hayes had been involved in the area for some time, acting as the contractor responsible for providing forestry services to both Weldwood and Interfor in relation to TFL 10. The situation nevertheless has remained the same: the Toba River watershed has remained free of commercial forestry operations for 20 years.

[68] In these circumstances, I have no hesitation in concluding that the potential adverse effect upon the aboriginal interests of the Klahoose of approving a Forest Stewardship Plan for a Forest Development Unit that is set in the heartland of Klahoose traditional territory is serious indeed. It matters not that the FSP is but one step in the process of moving from obtaining the right to harvest timber granted by the TFL, to exercising it. Any step in that process carries the potential of adversely affecting

Klahoose aboriginal interests to a serious degree. This is clearly contemplated by the scheme set out in the FRO and Protocol.

G. Conclusion on the Scope of the Duty to Consult

[69] It follows from my findings concerning the strength of Klahoose's claim and the seriousness of the potential adverse effect of the FSP on Klahoose's aboriginal interests that the extent of the Crown's duty to consult and accommodate falls towards the higher end of the spectrum described by the Chief Justice of Canada in *Haida*.

[70] Bearing in mind the need for flexibility and individuality in determining what the expected level of consultation required of the Crown in this particular case, I will now review in some detail the history of dealings among the parties in relation to this FSP.

H. Klahoose Interaction with Hayes and the Crown

[71] As contractor responsible for providing forestry services to both Weldwood and Interfor in relation to TFL 10, Hayes had been involved in meetings with representatives of the Klahoose since 2001, by which time two things were apparent: first, the system of roads and bridges within the Toba watershed had deteriorated and would have to be replaced before any further harvesting could take place there; and second, there was by this time a viable volume of timber available within the watershed that had not yet been accessed.

[72] As a leading independent forest services provider in British Columbia, Hayes values its relationship with First Nations, whom it regards as potential customers for its forest services, and potential joint venture partners in forest resource development and

harvest. In 2001, Hayes had a number of meetings with representatives of Klahoose to discuss opportunities in the Toba watershed to be leveraged from negotiation of a renewed access agreement. Klahoose made it clear that its aim was to develop a long-term vision for the future, based on a balance between social, cultural and economic needs based on the resources that lie within its territories.

[73] Nothing came of these discussions, and they were not meaningfully renewed until Hayes had reached agreement in principle with Interfor to purchase TFL 10. According to Hayes, it formed the view that the best way to advance forestry operations within the Toba watershed was to include Klahoose directly in some kind of joint venture. This was raised with Klahoose on June 16, 2006, and was discussed at meetings between Hayes and Klahoose on October 5 (Duncan) and November 2, 2006 (Squirrel Cove).

[74] At that time, Klahoose was engaged in negotiations with Plutonic Power Corporation regarding the construction and operation of a run-of-the-river independent power project at Montrose Creek and East Toba River, further up the Toba River Valley to the northeast of where the FDU is now situated. Part of the Hayes proposal in 2006 noted the opportunity to take advantage of the fact that Plutonic needed to build roads to access the proposed facilities, which could also be used for logging if they were built to the appropriate standards.

[75] Klahoose then concentrated on its negotiations with Plutonic. These negotiations, which included Klahoose's involvement in the review, design and

assessment stages of the project, were concluded in early 2007. In April of 2007, the petitioner Ken Brown was elected Chief Councillor.

[76] On May 15, 2007, Chief Brown wrote to the Minister of Forests and Range protesting the lack of consultation and accommodation in relation to the transfer of TFL 10 from Interfor to Hayes. Among the points made by Chief Brown were the following:

The area of TFL #10 is located entirely within the Klahoose traditional territory to which the Klahoose claim aboriginal rights and title.

The Klahoose First Nation has not and will not permit Hayes or any other company access to the Toba Valley through our reserve for the purpose of logging TFL #10.

The TFL has been inactive for the last 20 years due to Klahoose closing access to it through our reserve. It is the intent of the Klahoose First Nation to secure the TFL in order to conduct a sustainable logging operation that will benefit our people in perpetuity.

[77] Unaware of this correspondence, Hayes met with Klahoose in Campbell River on May 17, 2007, expecting a continuation of discussions regarding joint venturing opportunities with respect to forestry operations in the Toba River watershed. Chief Brown opened the meeting, however, by advising that Klahoose was not prepared to negotiate with Hayes regarding forestry operations in TFL 10. He expressed the view that Klahoose had their own internal capacity to operate TFL 10, and as it formed part of their traditional territory, it was their intention to conduct any and all future forestry operations within it. To that end, Klahoose was interested in acquiring TFL 10 from Hayes, but had no interest in discussions concerning access for Hayes, or pursuit of a business relationship with Hayes. With respect to access, Klahoose maintained the same position as they had with Interfor and Weldwood.

[78] Thereafter, a stalemate developed. In essence, Klahoose maintained the position that nobody but the Klahoose First Nation would harvest timber in their traditional territory under TFL 10, that it would oppose any efforts by Hayes to harvest timber in the Toba River Valley, that it would continue to deny access through IR #1, that TFL 10 was therefore of no commercial value to Hayes, and that the purchase of TFL 10 by Klahoose was the only viable option.

[79] Hayes maintained that it was open to any reasonable offer for TFL 10, but that any such offer would have to take into account both Hayes' ownership, and its contract to provide forestry services for the TFL. In the absence of a reasonable offer, Hayes intended to work diligently to develop the commercial value of TFL 10, and to pursue other access options.

[80] I sense that the parties had rather different views as to the appropriate value of TFL 10.

[81] I pause to observe that, while Klahoose's expressed desire to have exclusive control of the harvesting of timber in the Toba River watershed is both understandable and commendable, Klahoose has no legal right or entitlement to such control (pending the conclusion of a treaty) in the absence of acquiring the rights under TFL 10 from Hayes. On the other hand, Klahoose is entirely within its rights to deny access to the watershed through IR #1 to Hayes or anyone else.

[82] In the meantime, beginning in May of 2007, Klahoose began negotiating the terms of its FRO with the Ministry of Forests and Range.

[83] Then on July 3, 2007, Hayes submitted its forest stewardship plan (the "draft FSP") for TFL 10 to the ministry. By letter dated July 5, 2007, Hayes provided a copy of the draft FSP submission to Chief Brown, noting:

In our June 15 letter, we advised that we intended to proceed with exploring our options and working to build the commercial value of the TFL. We further committed to both keeping you informed on our progress, and to remaining prepared to carefully review and consider any offer in respect of the TFL from Klahoose. We remain open to your suggestion as to a reasonable time for you to prepare an offer to purchase the TFL.

In the interim period, we have decided to submit a limited area forest stewardship plan (FSP) for the TFL. We have enclosed a copy of our submission for your convenience. The public review and comment period for this FSP will be July 9, 2007 to September 6, 2007 inclusive. As you are likely aware, the FSP may be changed as a result of written comments received during the review and comment period.

We would be pleased to meet with you to discuss the FSP and invite you to contact us at your convenience.

For greater certainty, notwithstanding that we are submitting an FSP for approval, we remain committed to working with you to pursue a sale and purchase of the TFL.

[84] On July 17, 2007, the Ministry through Chuck Anderson of the Sunshine Coast Forest District ("SCFD") wrote to Chief Brown concerning Hayes' FSP, and it is here that we come to the start of the "record" (the information) that was before the Crown when it came to make the impugned decision approving the FSP. The letter included the following reference:

Under Section 21 of the Forest Planning and Practices Regulation, FSP proponents must make reasonable efforts to meet with First Nations groups that may be affected by the plan to discuss the plan.

As with Forest Development Plans, government has an obligation to consult with First Nations that may be affected by a FSP. It is our expectation that for First Nations that are signatory to an agreement that

stipulates a consultation timeframe based on submission of operational plans to them [i.e. an FRO], the consultation period will commence upon receipt of the FSP from the plan proponent. For First Nations that do not have such agreements, consultation will be deemed to begin with notice of a FSP provided by the plan proponent.

We would like to meet with you to discuss the FSP and any potential affect the FSP may have on your aboriginal interests. We are willing to participate in meetings between yourselves and the licensee and/or will meet with you separately. We are also willing to meet with you to further explain the FSP process.

[85] In September and October of 2007, there were meetings between Klahoose and the Ministry concerning the negotiation of the FRO. The draft FSP was not discussed. Meanwhile, exchanges between Klahoose and Hayes included entering into a confidentiality agreement regarding the receipt of information concerning TFL 10, and Klahoose's expression of dismay that Hayes would be actively working to ramp up operations in an area that Klahoose wished to protect against the threat of unsustainable logging, accompanied by a further warning that no access would be permitted through IR #1.

[86] On October 9, 2007, Klahoose wrote to the Ministry to the attention of Jim Gowriluk, Regional Executive Director, Coast Regional Office, raising concerns about, among other things, the draft FSP. Klahoose expressed the position that consultation was not possible as there was "inadequate information available upon which meaningful consultation could occur", and further raised the concern that the planning and inventory information upon which the draft FSP was based was significantly out of date and not representative of current conditions within TFL 10 (there having been no logging for 20 years). The letter, which was copied to Hayes, went on to state:

This problem is compounded by the fact that the FSP is proposed to apply to only a small portion of Toba Valley. The Toba Valley watershed is, and always has been, of central importance to Klahoose. It lies at the heart of Klahoose territory, and has been protected by Klahoose from development for several decades. The proposed initiation of industrial logging in the watershed must be addressed in a manner that permits Klahoose to evaluate the implications of the operations for our title, rights and interests throughout the watershed, an approach that is directly frustrated by the compartmentalized approach to FSP planning taken by Hayes.

....

In conclusion, after decades of conflict with MOF and the various licensees of TFL 10, Klahoose is actively trying to acquire this tenure and, in doing so, resolve conflicts and pursue economically and environmentally sustainable forestry. From our perspective this will create a real forward-looking solution that results in a win-win for all. In the interim, we are expecting that the Crown meet its lawful obligations to us before purporting to take steps to operationalize this long inactive tenure without adequate consultation.

[87] On October 15, 2007, Hayes faxed a letter to Chief Brown requesting a meeting to discuss the Klahoose letter to the Ministry of October 9. In anticipation of the meeting, Hayes requested advice as to what additional information Klahoose required, the precise area to which Klahoose claimed title, and what Klahoose meant by "sustainable forest management".

[88] By letter dated November 1, 2007, Chuck Anderson of the SCFD wrote to Chief Brown requesting a meeting to discuss the FSP and any potential effects it may have upon Klahoose's aboriginal interests. There was no reference to Chief Brown's letter of October 9, which Mr. Anderson presumably had not seen.

[89] The Ministry responded by letter dated November 27, 2007, from Mr. Gowriluk of the Coast Forest Region, who indicated that the Ministry intended to consult with the Klahoose First Nation on the proposed FSP for TFL 10, and that the Sunshine Coast

Forest District had initiated such consultation through its July 17, 2007 letter.

Mr. Gowriluk advised that the SCFD remained open to meet with Klahoose representatives to discuss the FSP and any potential effect it may have on their aboriginal interests. Mr. Gowriluk also thought it would be appropriate to meet to discuss the ways in which the Ministry and the licensee may be able to provide further information about the proposed operations under the FSP over time, and asked Chief Brown to contact Al Shaw, tenures officer, SCFD, to arrange a meeting.

[90] Klahoose responded by letter of December 6, 2007, to Mr. Shaw of the SCFD, enclosing a copy of the earlier correspondence to Mr. Gowriluk. Chief Brown wrote:

As the enclosed correspondence indicates, the proposed FSP relates to an area of central importance to the Klahoose First Nation. We have serious reservations about sufficiency and accuracy of the information contained in, or relied on in preparing, the FSP. As well, we are concerned that the FSP indicates a "piecemeal" approach to resource planning in our territory. Any decision to restart industrial forestry in TFL 10 must be made on the basis of reliable and sufficient information, that enables us to assess and understand what is proposed, as well as evaluate the implications of Hayes' activities for our aboriginal title and rights. These conditions are not presently in place.

We are prepared to meet with you and other MOF representatives to discuss our concerns. We wish to be clear that this meeting will be a first step in the consultation process, and that we expect MOF to honour its obligations to meaningfully consult with and accommodate Klahoose prior to making a decision on the draft FSP.

[91] In the meantime, on November 28, 2007, Hayes had submitted a revised draft of the FSP to the Ministry for approval. Neither it nor any subsequent redraft was copied to Klahoose before the final approval.

[92] On December 13, 2007, Klahoose and the Ministry reached a final agreement on the FRO, including the interim consultation protocol. Chief Brown signed the FRO on behalf of Klahoose on December 14, 2007, and it became effective when signed by the Minister on January 23, 2008.

[93] On December 17, 2007, a meeting took place between Klahoose and Hayes. The Ministry was not involved, and both sides were accompanied by legal counsel. The main subject was the desire of Klahoose to acquire TFL 10 from Hayes, and Klahoose proposed a 90 day "cooling off" period, during which Hayes would not carry out any activities in TFL 10, and Klahoose could obtain the appropriate information it needed to present an offer. Hayes declined this proposal, but said that it would carefully consider any reasonable offer. Klahoose was upset that Hayes was continuing to operationalize the area in view of Klahoose's concerns, and also took exception to a suggestion from Hayes that it would look into using barge access up the Toba River in lieu of road access. The meeting ended with the parties remaining at stalemate.

[94] On December 18, 2007, Klahoose met with Al Shaw and Chuck Anderson of the SCFD. Klahoose takes the position that this meeting was, in essence, the start of the consultation process. Klahoose expressed a number of concerns about the draft FSP (they had not seen the latest draft). These concerns were based on three principal objections: the piecemeal approach (the FSP covered only a small part of TFL 10 consisting, as noted, of the heart of Klahoose traditional territory), the lack of up-to-date information, and the lack of on-the-ground specifics. In their mind, these deficiencies prevented them from understanding adequately how the whole TFL, across which

Klahoose had obvious interests, would be affected, and how Hayes' plans would impact such matters as the salmon fishery habitat in the watershed, the wildlife habitats and old growth, and the protection of Klahoose cultural heritage resources.

[95] Mr. Shaw and Mr. Anderson noted in response that under the legislation and regulations, the draft FSP did not have to set out much of the information Klahoose sought, and was not required to cover the entire TFL. They pointed out that there would be other steps before harvesting could commence where further consultation would take place.

[96] At the conclusion of the meeting, it was agreed that Klahoose would provide a written statement of its concerns, and information about Klahoose traditional use in the watershed, by early January, 2008. Immediately following the meeting, counsel for Klahoose wrote to the Ministry (Mr. Shaw) to request clarification on certain points, including the Minister's ability "to meaningfully consider and act on information provided by Klahoose in relation to various aspects of the draft FSP, [given that] the scheme requires the Minister to approve the FSP where an RPF [Registered Professional Forester] employed by Hayes has certified its contents." Information concerning the treatment of cultural resources was also requested.

[97] The Ministry (Chuck Anderson) e-mailed Klahoose later on December 18, 2007, to provide some of the information that Klahoose had sought, and Mr. Shaw also wrote on December 21, 2007. In his letter, Mr. Shaw confirmed that although cultural heritage resources were one of the elements that had to be the subject of a result or strategy in the proposed FSP, and therefore required district manager review and approval, the

FPPR excluded from this process those cultural heritage resources that were regulated under the *Heritage Conversation Act*. Mr. Shaw went on to say:

When making a determination of whether or not the result or strategy for cultural heritage resources is consistent with the objective for cultural heritage resources, the decision-maker will consider any cultural heritage resource information provided by the First Nations. The decision could be that the result or strategy is consistent or it could provide further direction to the plan holder or it could be decided that it is not consistent with the objective and not approved as such.

[98] The written statement promised by Klahoose at the meeting of December 18, 2007, was provided in the form of an eight-page letter dated and faxed January 9, 2008, from Klahoose's legal counsel, Mr. Howard, to Mr. Shaw of the SCFD. It was not copied to Hayes.

[99] In his letter, Mr. Howard took the position that the Ministry should not approve the draft FSP, based on three arguments. The first was that the Ministry lacked the authority to approve the draft FSP because Klahoose has aboriginal title and rights to the lands, waters and resources contained within TFL 10, thus British Columbia lacked jurisdiction. This was based upon comments made by Vickers J. in ***Tsilhqot'in Nation v. British Columbia***, 2007 BCSC 1700. Mr. Howard then described Klahoose use and occupation in the area of the proposed FSP.

[100] The second argument was that the FSP review and approval process breached the honour of the Crown by failing to meet the Crown's duty to consult, which Mr. Howard put at the high end of the ***Haida*** spectrum (as do I). This argument was based upon two propositions: that the legislative scheme set out in the FRPA and the FPPR contained inherent barriers that precluded meaningful consultation, and that there

had been insufficient information provided to Klahoose to enable meaningful consultation. The alleged barriers in the legislative scheme consisted of a lack of power on the part of the district manager to make changes to the draft FSP where the default result or strategy set out in the FPPR had been adopted for particular values, and the statutory objective set out in sections 5 through 9.2 of the FPPR that gave priority to supply of timber over non-commercial forest values and attributes that would support the continued exercise of Klahoose title and rights. In short, Mr. Howard maintained that the scheme did not permit sufficient flexibility to make consultation meaningful.

[101] With respect to the need for information, Mr. Howard stated that the province had consistently failed to answer Klahoose's requests for information regarding Hayes' proposed operations, in the absence of which it was not feasible for Klahoose to assess whether the management strategies and results stated in the FSP would protect or minimally impair Klahoose's title and rights. In addition, Klahoose wanted further information regarding the reliability of the inventory data for the FSP area which Klahoose understood was several decades old and therefore unreliable, and further information regarding the relationship between the draft FSP and Hayes' annual allowable cut ("AAC") for TFL 10.

[102] The third argument was that the content of the draft FSP was deficient, in that it failed to meaningfully address and accommodate impacts to Klahoose, and failed to achieve the objectives set by government. Mr. Howard was particularly critical of the proposed strategies relating to Cultural Heritage Resources, Wildlife, Wildlife and Biodiversity Landscape and Stand Level, and Access Management.

[103] Mr. Howard concluded as follows:

The approval of the draft FSP as it presently stands cannot be reconciled with MOF's constitutional duties and powers. Accordingly, the draft FSP should be rejected.

MOF should advise Hayes that it is not prepared to entertain a substantially similar FSP application, until the underlying problem with Hayes' approach to the management of TFL 10 are addressed. In particular:

- The problem of out-of-date forest inventory and habitat data must be addressed.
- Hayes must present a plan that applies to all of TFL 10, which is the management unit that has applied since the TFL was first created.
- Hayes must demonstrate that it can access the TFL and remove the timber it will harvest.

In the event that MOF nonetheless continues its review of this draft FSP, Klahoose expects MOF to comply with the letter and the spirit of the Forest and Range Opportunities Agreement ("FRO") agreed to between Klahoose and the Ministry of forests ("MOF"), and provide further information requested below in preparation for further meetings with Klahoose, as provided in Appendix B to the FRO:

- The inventory and habitat data relied on by Hayes and MOF in preparing and reviewing the draft FSP.
- How the AAC for TFL 10 will be harvested in light of the limited area proposed for the FSP.
- Hayes' plan for accessing the FDU area.
- An explanation of the stream classification system used by Hayes and information identifying the Stream class of each of the streams within the FDU.
- An explanation of how Hayes calculated the identified wildlife habitat and adopted the proportional target for the FDU area.

[104] Mr. Shaw deposed that upon receipt of this letter, he reviewed it with the district manager, the respondent Brian Hawrys. He then proceeded with a more detailed review of the letter and spent several weeks researching the issues, including reading the research report concerning the Klahoose First Nation strength of claim (referred to in paragraph 50, *supra*). On the basis of his research, Mr. Shaw determined the locations of former Klahoose village sites in the Toba River Valley, and noted that they appeared to be within the area included in the FSP, and reported this to Mr. Hawrys.

[105] I pause to point out that the research report was prepared "*in support of a preliminary assessment of strength of claim for the Klahoose First Nation*" [emphasis added], and consists of a survey of such "historical, ethno-historical and archaeological data as is readily available and potentially useful...". The report does not in fact purport to make any preliminary assessment of the strength of claim.

[106] Further, Mr. Shaw had discussions with Chuck Anderson, as a result of which between January 14 and 16, 2008, Mr. Anderson on behalf of the Ministry contacted Hayes to request certain changes to the "cultural heritage resources" strategies of the FSP. Hayes revised the FSP again, as a result of those discussions, and submitted the further revised FSP for approval on January 18, 2008. That January 18 draft was subsequently approved by the district manager on, as we have seen, February 15, 2008. Neither the nature of the changes requested by the Ministry, nor the actual revisions, were discussed with Klahoose beforehand.

[107] Clause 3.6.1 of the FSP, relating to Cultural Heritage Resources had originally read in part as follows:

The Licensee carrying out timber harvesting and road construction subject to this FSP adopts as a result or strategy the following:

1. Timber harvesting and road construction will not cause a Cultural Heritage Resource that is, in the context of a traditional use by an aboriginal people, based on input from an aboriginal people and, in consultation with the aboriginal people determined to be:
 - a) important;
 - b) valuable;
 - c) scarce; **and**
 - d) of continued and/or historical importance

to become unavailable for its continuing extent of use by an aboriginal people... [emphasis added].

[108] In the final draft, the conjunction "and" in 1(c) was changed to "or". Changes were also made to the old growth management strategy and the wildlife strategy.

[109] On February 1 and 5, 2008, Mr. Shaw and other representatives of the Ministry met with legal counsel for the Ministry of the Attorney General to discuss the issues raised by Mr. Howard in his January 9 letter, and the strength of claim research report. As a result of those meetings, the Ministry concluded that it would be prudent to raise with Hayes the possibility of setting aside an area within the FDU encompassing the likely village sites within the Toba River Valley floor. On February 11, 2008, Mr. Hawryns sent an e-mail to Mr. Anderson "for the file" stating that:

Over the last couple of weeks I have had a number of conversations with Donald Hayes. I have advised there is a strength of claim analysis that identifies one or possibly two village sites within the FDU. Donald was previously unaware of such sites but quickly described such sites as "no go zones" and wants to incorporate such information into future planning. As my previous e-mail indicated Hayes will meet as often as necessary with Klahoose as Hayes develop more specific plans.

[110] My own review of the research report suggests that four village sites had been identified within the FDU.

[111] Mr. Shaw and his colleagues met with Hayes to discuss this on February 12, 2008, as a result of which meeting, Hayes wrote to Mr. Hawrys on February 14, 2008 (the day before Mr. Hawrys approved the FSP), stating as follows:

We are writing to you further to our FSP application for TFL 10. Since the time we submitted the FSP, we have been advised of a possible Klahoose village site or sites within a part of or adjacent to the FDU.

In accordance with section 3.6.1 on page 10 of our FSP, we have concluded that Hayes should make accommodation with respect to potential harvesting and road construction within the sites in the immediately adjacent area (the "Sites") until such time that the Sites can be more fully explored in the context of a traditional use of the Klahoose and their importance, value, scarcity or continued and/or historical importance.

Accordingly, attached please find a map which indicates an "accommodation" area (the "Area"). The boundaries of the Area have been set to capture the majority of the valley floor within the FDU. The Toba River in itself is excluded from the Area as is any private land within the boundaries of the area. A minor portion of the North Valley floor has been excluded from the Area because of existing licenses of occupation and development activities related to the Plutonic project.

Hayes will not harvest timber or carry out road construction within the Area until this matter is more fully explored. Operations in these areas shall be limited to incidental use including use of existing roads and infrastructure or roads and infrastructure built subsequently by others (if any).

[112] The "Temporary Accommodation Area" thus designated covers the narrow floor of the Toba River Valley essentially from the eastern edge of IR #1 to a little east of the river's confluence with the Little Toba River. No attempt was made to review this with Klahoose either in concept or in final form prior to the approval of the FSP.

[113] In the meantime, Mr. Howard had written to Mr. Hawrys on February 12, noting that his letter of January 9 to Mr. Shaw remained unanswered. He emphasized the Klahoose sought a meaningful consultation regarding Hayes' proposed operations in the TFL as a whole, and again raised concerns about the lack of attention to the access that was available to Hayes.

[114] Klahoose learned of the Temporary Accommodation Area from Mr. Shaw who wrote to Mr. Howard on February 15, 2008, to respond to Mr. Howard's letter of January 9, and to advise of the approval of the FSP.

[115] Mr. Shaw noted that Mr. Howard had outlined a number of aboriginal rights that Klahoose practised adjacent to and within the proposed FSP area, and announced that in light of that information, the FSP holder had agreed to the Temporary Accommodation Area, a map of which was attached. Mr. Shaw pointed out that the FSP included an information sharing process whereby Klahoose would have an opportunity to review site-specific information regarding proposed harvesting and road building activities, in response to which it could provide detailed information with respect to potential impacts on asserted aboriginal rights.

[116] Mr. Shaw disagreed with Mr. Howard's point that the legislation contained barriers to consultation, stating:

The Forest Planning and Practices Regulation (FPPR) does obligate a plan proponent to make efforts to meet with First Nations to discuss the plan. MoFR still has the duty to consult and in fact has undertaken a process to consult with Klahoose regarding this plan, and as a result of consultation and consideration of the possible strength of claims of Klahoose in the FDU area has worked with the licensee to effect a

commitment to forgo harvesting in the valley bottom area as an accommodation while the nature of that claim is more fully considered over time.

[117] This, of course, was news to Klahoose. After responding to a number of other matters raised by Mr. Howard, Mr. Shaw concluded as follows:

In conclusion, although there are elements of the plan that are defaults and therefore would be deemed to meet the approval test, this does not preclude the requirement for First Nation consultation and determining if there needs to be any mitigated action taken on a site-specific basis to avoid or minimize potential infringement of an aboriginal interest. Given the nature of required FSP content and your concern that there isn't enough detailed information, this will be best accomplished at the operational level when more detailed information will be available and prior to the issuance of cutting permits.

[118] On February 15, 2008, Hayes wrote to Chief Brown to advise that the FSP had been approved, stating:

We want to take this opportunity to assure you that we will comply with the terms of the FSP which we believe addresses the concerns you have expressed to us. We'll continue to consult you in respect of the TFL and are available to meet with you to discuss our operations at any reasonable time you may request.

We take this opportunity to once again reach out to you and ask you if you might reconsider our proposal to work cooperatively in the TFL and create a business venture together. We continue to be open to considering any reasonable proposal in this respect.

[119] Nowhere in the materials is there any indication of to what conclusion Mr. Shaw, Mr. Hawrys or anyone else within the Ministry came concerning the strength of the case supporting the existence of Klahoose's right or title, or the seriousness of the potentially adverse effect upon it. As noted in *Haida*, *supra* at para. 39, such an analysis would be necessary to establish the scope of the Crown's duty to consult. There is no evidence

of the analysis having been undertaken here, although I infer that the Ministry paid at least some attention to the concept when it concluded that it would be prudent for some alterations to be made to the FSP, and for the Temporary Accommodation Area to be put in place.

[120] Since then, Klahoose gave notice to the Ministry and Hayes of its intention to bring these proceedings, while Hayes gave notice of its intention to apply for a cutting permit, and of its application to the Integrated Land Management Bureau for authority to build and operate a "barge grid" (a barge docking and loading facility) on the Toba River. Klahoose takes the position that this was the type information it sought in vain from Hayes and the Ministry in order to be able to assess the implications of Hayes' operations for its aboriginal title and rights. Klahoose further takes the position that such a development would pose a risk of serious harm to the river and the fisheries upon which Klahoose relies. Hayes then advised Klahoose that it would be submitting an FSP amendment, essentially expanding the boundaries of the FSP from the original FDU to the entire area of TFL 10. As far as I am aware, all of these matters remain pending.

I. Adequacy of Consultation

[121] For the reasons articulated above, I have concluded that the scope of the Crown's duty to consult with and accommodate Klahoose in this case lay at the high end of the spectrum described by the Chief Justice of Canada in the *Haida* case. Whether the representatives of the Ministry of Forests and Range who dealt with this

matter came to the same conclusion is unknown to me. If they did not, they were in my respectful view incorrect.

[122] Regardless, the issue now becomes whether the consultation process that in fact took place, as outlined in the previous section, was adequate in view of the scope of the duty. This involves considering, first, the adequacy of the process of consultation, and secondly, the adequacy of any resulting accommodations. I reiterate the words of McLachlin CJC in *Haida, supra* at para. 44, where the Chief Justice noted that at the high end of the spectrum, "deep consultation, aimed at finding a satisfactory interim solution, may be required". Such consultation could include such matters as formal participation in the decision-making process.

[123] I have come to the conclusion that neither the process of consultation, nor the resulting accommodation, was adequate in this case.

[124] With respect to the process, I find it difficult even to describe it as "consultation". While some information was indeed supplied by the Ministry in response to requests from Klahoose, much meaningful information was not. Indeed, Mr. Howard's letter of January 9 received no response at all until the approval had in fact taken place. In the meantime, Klahoose was not provided with revised drafts of the FSP as they were submitted to the Ministry, was not shown any operational information despite repeated requests, was given no information concerning access plans and plans for the remainder of the tree farm licence, and was not permitted to participate in any of the discussions between the Ministry and Hayes concerning suggested accommodations.

[125] Hayes has criticized what it describes as the "minimal information provided by the Klahoose in this case" to support its claim for aboriginal rights, and has argued that Klahoose cannot now assert that the consultation was based on an incorrect assessment of the strength of its claim, and was therefore inadequate, when it did not provide information that would allow such an assessment during the time that the FSP was under consideration.

[126] I reject that submission. It is true that the evidence provided by Klahoose was not as extensive as that which appears to have been provided in cases such as ***Haida*** and ***Leighton v. Canada (Minister of Transport)***, 2006 FC 1129. No doubt the information will continue to be developed. But the information concerning the basis for Klahoose's assertion of aboriginal rights and title that was summarized in Mr. Howard's letter to the Ministry of January 9, 2008, was surely not intended to be the final word. It will be recalled that the Ministry's reaction to that letter was to carry out research, none of which was shared with Klahoose, including a review of the research report. It is as though the Ministry had not given any thought to the issue of strength of claim before this. But instead of consulting with Klahoose about the results of that research, the Ministry dealt hastily with Hayes to make revisions to the FSP of which Klahoose was unaware, and then swiftly approved it. The Ministry never did articulate an assessment of Klahoose's strength of claim. It certainly never discussed it with Klahoose.

[127] In these circumstances, I find that Klahoose is entitled to rely on the evidence introduced at this hearing (which is essentially an expansion of what was summarized

by Mr. Howard in his letter of January 9), together with the province's research report, in asserting that the consultation was inadequate in view of the strength of its claim.

[128] In many other instances, the Ministry's response to Klahoose's requests for information consisted of advice that the licensee was not required to provide such information when submitting an FSP for approval, or that the more appropriate time for deal with such requests would be in the context of operational decisions such as applications for cutting permits, when opportunities for further consultation would arise.

[129] I do not consider that to be an adequate response. The relationship of an FSP to the harvesting of timber or construction of a road (the two acts which have the potential for negative impact on the landscape) is made clear by s. 3(1) of the FRPA. Where the duty to consult is deep, it is not an answer to say that there will be further opportunities for consultation when the process that may lead to harm is further advanced, or that the information sought, while important, is not part of the process at this stage.

[130] This is implicit in both s. 77.1(1) of the FRPA, which provides wide powers of intervention by the Ministry after an FSP is approved, and the consultation protocol in the FRO. Moreover, it is consistent with the approach taken by the Supreme Court of Canada in the ***Haida*** case where the failure of the province to consult in relation to the replacement of a TFL was considered a breach of the Crown's duty, notwithstanding that the Crown had consulted and continued to consult before authorizing any cutting permits or other operational plans. The Court noted that, "Decisions made during strategic planning may have potentially serious impacts on Aboriginal right and title" (*supra* at para. 76).

[131] Finally, it is consistent with the observations of the Court of Appeal for British Columbia that the constitutional duty to consult and accommodate is "upstream" of the statutes under which the ministerial power has been exercised, so that the district manager is not able to follow a statute, regulation or policy in such a way as to offend the Constitution: see ***Halfway River First Nation v. British Columbia (Ministry of Forests)***, 1999 BCCA 470, 178 D.L.R. (4th) 666 at para. 177, and ***Musqueam Indian Band v. British Columbia (Minister of Sustainable Resource Management)***, 2005 BCCA 128 at para. 19.

[132] As I noted earlier in these reasons, the respondents have taken the position that the actions of Klahoose over the course of the FSP approval process indicated a failure on the First Nation's part to fulfill its reciprocal obligation to carry out its end of the consultation. Both the ***Haida*** case and the FRO Interim Consultation Protocol make it clear that the obligation is indeed reciprocal. Hayes points to requests made of Klahoose to clarify what information it required, and Hayes' expressions of an ongoing willingness to respond.

[133] I am unable to agree with this characterization of Klahoose's behaviour. Klahoose and Hayes were involved not only in the process of approving the FSP, but also in negotiations for the purchase of the TFL. Those negotiations were hard-nosed. Each side attempted to build a position of strength: Klahoose through its continued denial of access to the watershed through IR #1, and Hayes through its avowed intent to build the value of the TFL by bringing it into commercial operation. They were both entitled to those positions.

[134] I find no evidence in the record, however, that Klahoose attempted to frustrate the consultation process by refusing to meet or participate in meetings, or by imposing unreasonable conditions; see ***Halfway River First Nation***, *supra* at para. 161. While making it clear it did not want Hayes or anyone else to log the area, Klahoose never took the position that it would not participate in any consultation process which would have that result. What Klahoose insisted on was information that related to the whole of the TFL, as opposed to a piecemeal approach, and operational information that would permit it adequately to assess the impact. I do not consider that to be unreasonable; see ***Tzeachten First Nation v. Canada (Attorney General)***, 2008 FC 928 at para. 64-69.

[135] That is not to say that Hayes was in any way unreasonable. Indeed, some of the information requested by Klahoose in Mr. Howard's letter to the Ministry of January 9 was provided by Hayes in a letter to Mr. Shaw of the SCFD dated January 18, 2008. The record does not indicate, however, any transmission of that information from Mr. Shaw to Klahoose before the approval occurred. It must be remembered, of course, that the duty to consult and accommodate belongs to the Crown. It is not Hayes' duty.

[136] Turning to the Temporary Accommodation Area that was agreed to between the Ministry and Hayes, setting aside a temporary no-go zone on the Toba River valley floor, I am satisfied that it was a genuine attempt by both the Ministry and Hayes to respond to concerns raised by Klahoose, and to accommodate them. It demonstrates the sort of step that can be taken in this process of attempting to find a satisfactory

interim solution. The problem is that Klahoose was not involved in the process.

Nobody asked Klahoose whether it was satisfactory. Klahoose had no input into it at all.

[137] In these circumstances, I am unable to accept the respondents' submission that the accommodations made in this case were adequate

[138] It follows that I find that the Crown, through the Ministry of Forests and Range, failed to fulfill its duty to engage in appropriately deep consultation with Klahoose, and to accommodate Klahoose's interests adequately, in the course of reviewing and approving Hayes' FSP.

J. Remedy

[139] I described the remedies sought by the petitioner in paragraph 4 of these reasons. In essence, Klahoose seeks an order quashing the FSP approval in order to ensure that a meaningful process of consultation and accommodation takes place, beginning anew from a proper starting point.

[140] The Crown submits that if I should find, as I have, that the Ministry, through the district manager, did not meet its duty of consultation and accommodation concerning the FSP decision, then the appropriate remedy would be a declaration to that effect, with liberty to the parties to apply with respect to any question relating to the duty. In the Crown's submission, an order quashing the FSP would, at the very least, create substantial uncertainty regarding the rights of tenure holders under the ***Forest Act*** and would, potentially, prejudice their abilities to initiate and/or continue timber harvesting operations. The Crown argues that setting aside the FSP at this stage would do little to

advance the goal of effecting reconciliation of the interests of the Crown and Klahoose. Hayes supports that position, noting that it has already invested considerable resources in moving the TFL towards commercial operation, as it is entitled to do.

[141] Those concerns were considered by MacKenzie J., as he then was, in ***Klahoose First Nation v. British Columbia (Minister of Forests)*** (1995), 13 B.C.L.R. (3d) 60, but that case concerned a very different situation, and was decided almost a decade before ***Haida***.

[142] In the circumstances before me, it is difficult to see how the district manager's decision approving the FSP can stand given that it was taken without meeting what I have found to have been the Crown's constitutional duties. Because of that failure, there was inadequate accommodation, and the decision therefore did not appropriately balance societal and aboriginal interests.

[143] Nevertheless, I am cognizant of my obligation to be flexible and to approach this case individually: ***Haida***, *supra* at para. 45. In that context, I note the following relevant factors.

[144] First, Hayes is the lawful holder of TFL 10 until such time as it comes up for renewal, or Hayes transfers the licence to another party. This tree farm license gives it the right to harvest timber in the Toba River watershed, which right is not in issue in this proceeding. It does not give Hayes any right to access through IR #1.

[145] Second, Klahoose is not entitled to a veto in relation to the granting of an FSP to Hayes.

[146] Third, one of the objections of Klahoose to the FSP was the piecemeal approach taken by Hayes by focusing on an FDU that covered only a small part of TFL 10, whereas Klahoose's interests run throughout the entire watershed that TFL covers. On February 29, 2008, Hayes submitted an application to amend its FSP by expanding the proposed FDU over the entirety of TFL 10. This would, among other things, enable the AAC to be harvested over a larger area, and would go some distance to meeting Klahoose's piecemeal approach objection.

[147] Fourth, since the FSP was approved on February 15, 2008 (if not before as maintained by Klahoose), Hayes has developed a good deal of the operational information that Klahoose had sought, including access plans and maps showing detailed cutblock layouts.

[148] Fifth, I anticipate that both Klahoose and Hayes may have developed further archaeological and ethno-historical data in recent months.

[149] Sixth, the world has changed significantly since the hearing of this petition in June of 2008.

[150] In these circumstances, I conclude that rather than setting aside the impugned FSP, the appropriate remedy would be to order a stay of all further activity and operations occurring under it, with the exception of the amendment application to extend the FDU to the entirety of TFL 10. That application, in my mind, should now be considered by the district manager as a new FSP (which is how I understand the application for such an amendment is approached in any event), in accordance with

what I have found to be the Crown's duty of deep consultation, aimed at finding a satisfactory interim solution.

[151] Such a solution would, one hopes, permit appropriate harvesting of timber resources while adequately protecting the economic, cultural, spiritual and social interests of Klahoose in the Toba River watershed. Klahoose's interest, after all, has not been to eliminate forestry operations in the watershed, but rather to ensure that they are sustainable, environmentally sound and consistent with a long-term vision for the future. Klahoose's desire to have complete control of forestry operations in TFL 10 is not an outcome that can be forced through this process. Although it is an attractive solution, it must be achieved, if at all, through other means.

[152] The consideration of the application to amend the FSP would, I expect, involve an appropriate sharing of information, including information that may not be statutorily required in relation to an FSP, such as operational and access information. It would also involve Klahoose directly in the decision-making process concerning any accommodation of Klahoose's rights.

[153] I invite the parties to prepare a form of Order setting out the appropriate declaratory and injunctive relief in accordance with these reasons. If the parties believe that further submissions are necessary, they may arrange a date with the registry.

[154] I am inclined to award costs to the petitioner and to the respondent Hayes against the respondent Crown, on scale C, but the parties are at liberty to speak to costs if there are factors presently unknown to me that ought to be taken into account.

"GRAUER, J."

December 2, 2008 – **Revised Judgment**

Corrigendum to the Reasons for Judgment issued advising that at paragraph 114, the phrase "**Mr. Howard's letter of 9**" should read "**Mr. Howard's letter of January 9**".

¹ As quoted in Ronald Wright: *A Short History of Progress* (Toronto, 2004)

GLOSSARY

AAC	Allowable Annual Cut
FDU	Forestry Development Unit
FPPR	Forest Planning and Practices Regulation
FRO	Forest and Range Opportunities Agreement
FRPA	Forest and Range Practices Act
FSP	Forest Stewardship Plan
Hayes	Hayes Forest Services Limited
IR	(Klahoose) Indian Reserve
Klahoose	Klahoose First Nation
Ministry) MOF) MoFR)	Ministry of Forests and Range
Research report	<i><u>Klahoose First Nation: Research in support of a preliminary assessment of strength of claim for the Klahoose First Nation</u></i> (February 27, 2007)
RPF	Registered Professional Forester
SCFD	Sunshine Coast Forest District
TFL	Tree Farm Licence

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Kwkwetlem First Nation v. British Columbia (Utilities Commission)***,
2009 BCCA 68

Date: 20090218
Docket: CA035864; CA035928

Docket: CA035864

In the Matter of the *Utilities Commission Act*, R.S.B.C. 1996, c. 473
and the Application by the British Columbia Transmission Corporation
for a Certificate of Public Convenience and Necessity for the
Interior to Lower Mainland Project

Between:

The Kwkwetlem First Nation

Appellant
(Applicant/Intervenor)

And

**British Columbia Transmission Corporation,
British Columbia Hydro and Power Authority, and
British Columbia Utilities Commission**

Respondents

- and -

Docket: CA035928

In the Matter of the *Utilities Commission Act*, R.S.B.C. 1996, c. 473,
and the Application by the British Columbia Transmission Corporation
for a Certificate of Public Convenience and Necessity for the
Interior To Lower Mainland Project

Between:

**Nlaka'pamux Nation Tribal Council,
Okanagan Nation Alliance and Upper Nicola Indian Band**

Appellants
(Applicants/Intervenors)

And

**British Columbia Utilities Commission,
British Columbia Transmission Corporation, and
British Columbia Hydro and Power Authority**

Respondents

Before: The Honourable Mr. Justice Donald
The Honourable Madam Justice Huddart
The Honourable Mr. Justice Bauman

G. J. McDade, Q.C. Counsel for the Appellant,
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K. B. Bergner Counsel for the Respondent,
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A. W. Carpenter Counsel for the Respondent,
British Columbia Transmission Corporation

Place and Date of Hearing: Vancouver, British Columbia
November 26 and 27, 2008

Place and Date of Judgment: Vancouver, British Columbia
February 18, 2009

Written Reasons by:
The Honourable Madam Justice Huddart

Concurred in by:
The Honourable Mr. Justice Donald
The Honourable Mr. Justice Bauman

Reasons for Judgment of the Honourable Madam Justice Huddart:

[1] This appeal under s. 101 of the *Utilities Commission Act*, R.S.B.C. 1996, c. 473, questions the approach of the British Columbia Utilities Commission (“the Commission”) to the application of the principles of the Crown’s duty to consult about and, if necessary, accommodate asserted Aboriginal interests on an application under s. 45 of that *Act*, for a certificate of public convenience and necessity (“CPCN”) for a transmission line project proposed by the respondent, British Columbia Transmission Corporation (“BCTC”).

[2] The line is said by its proponents to be necessary because the lower mainland’s current energy supply will soon be insufficient to meet the needs of its growing population: the bulk of the province’s electrical energy is generated in the interior of the province while the bulk of the electrical load is located at the coast. BCTC’s preferred plan to remedy this problem is to build a new 500 kilovolt alternating current transmission line from the Nicola substation near Merritt to the Meridian substation in Coquitlam, a distance of about 246 kilometres (the “ILM Project”). It requires transmission work at both the Nicola and Meridian substations and the construction of a series capacitor station at the midpoint of the line.

[3] The proposed line originates, terminates, or passes through the traditional territory of each of the four appellants. Most of the line will follow an existing right of way, although parts will need widening. About 40 kilometres of new right of way will be required in the Fraser Canyon and Fraser Valley. The respondents agree the ILM Project has the potential to affect Aboriginal interests, including title,

requires a CPCN, and has been designated a reviewable project under the *Environmental Assessment Act*, S.B.C. 2002, c. 43.

[4] The Nlaka'pamux Nation Tribal Council represents the collective interests of the Nlaka'pamux Nation of which there are seven member bands. Their territory is generally situated in the lower portion of the Fraser River watershed and across portions of the Thompson River watershed. Their neighbour, the Okanagan Nation, consists of seven member bands whose collective interests are represented by the Okanagan Nation Alliance. The Upper Nicola Indian Band, one of the member bands of the Okanagan Nation, is uniquely affected by the ILM Project as it asserts particular stewardship rights in the area around Merritt where the Nicola substation is located. The Kwikwetlem First Nation is a relatively small band whose territory encompasses the Coquitlam River watershed and adjacent lands and waterways. Its territory, largely taken up by the development of a hydro dam and the urban centres, Port Coquitlam and Coquitlam, contains the Meridian substation, the terminus of the proposed transmission line.

[5] The appellants all registered with the Commission as intervenors on BCTC's s. 45 application and asked to lead evidence at an oral hearing about whether the Crown had fulfilled its duty to consult before seeking a CPCN for the ILM Project. Their essential complaint is that the Commission's refusal to permit them to lead evidence about the consultation process in that proceeding effectively precludes consideration of alternatives to the ILM Project as a solution to the lower mainland's anticipated energy shortage.

[6] The question arises in an appeal from a decision by which the Commission determined it need not consider the adequacy of the Crown's consultation and accommodation efforts with First Nations when determining whether public convenience and necessity require the proposed extension of the province's transmission system: *Re British Columbia Transmission Corporation Application for a Certificate of Public Convenience and Necessity for the Interior to Lower Mainland Transmission Project*, First Nations Scoping Issue, B.C.U.C Letter Decision No. L-6-08, 5 March 2008 (the "scoping decision"). In the Commission's view, it could and should defer any assessment of whether the Crown's duty of consultation and accommodation with regard to the ILM Project had been fulfilled to the ministers with power to decide whether to issue an environmental assessment certificate under s. 17(3) of the *Environmental Assessment Act* (an "EAC").

[7] The Commission based its scoping decision on two earlier decisions concerning CPCN applications: *In the Matter of British Columbia Transmission Corporation, An Application for a Certificate of Public Convenience and Necessity for the Vancouver Island Transmission Reinforcement Project*, B.C.U.C. Decision, 7 July 2006, Commission Order No. C-4-06 ("VITR") and *In the Matter of British Columbia Hydro and Power Authority, Application for a Certificate of Public Convenience and Necessity for Revelstoke Unit 5*, B.C.U.C. Decision, 12 July 2007, Commission Order No. C-8-07 ("Revelstoke"). It is the reasoning in *VITR*, amplified in *Revelstoke* and the scoping decision, this Court is asked to review.

[8] As a quasi-judicial tribunal with authority to decide questions of law on applications under its governing statute, the Commission has the jurisdiction and

capacity to decide the constitutional question of whether the duty to consult exists and if so, whether that duty has been met with regard to the subject matter before it: *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)*, 2009 BCCA 67 at paras. 35 to 50. The question on this appeal is whether the Commission also has the obligation to consider and decide whether that duty has been discharged on an application for a CPCN under s. 45 of the *Utilities Commission Act* as it did on the application under s. 71 in *Carrier Sekani*.

[9] The Commission is a regulatory agency of the provincial government which operates under and administers that *Act*. Its primary responsibility is the supervision of British Columbia's natural gas and electricity utilities “to achieve a balance in the public interest between monopoly, where monopoly is accepted as necessary, and protection to the consumer provided by competition”, subject to the government’s direction on energy policy. At the heart of its regulatory function is the grant of monopoly through certification of public convenience and necessity. (See *British Columbia Hydro & Power Authority v. British Columbia (Utilities Commission)* (1996), 20 B.C.L.R. (3d) 106, 36 Admin L.R. (2d) 249, at paras. 46 and 48.)

[10] BCTC is a Crown corporation, incorporated under the *Business Corporations Act*, S.B.C. 2002, c. 57. In undertaking the ILM Project, it is supported by another Crown corporation, the British Columbia Hydro and Power Authority (“BC Hydro”), incorporated under the *Hydro and Power Authority Act*, R.S.B.C. 1996, c. 212. Under power granted to BCTC by the *Transmission Corporation Act*, S.B.C. 2003, c. 44, and a series of agreements with BC Hydro, BCTC is responsible for

operating and managing BC Hydro's transmission lines, which form the majority of British Columbia's electrical transmission system. Planning for and building enhancements or extensions to the transmission system, and obtaining the regulatory approvals they require, are included in BCTC's responsibilities; BC Hydro retains responsibility for consultation with First Nations regarding them. Like the appellants, BC Hydro registered as an intervenor on BCTC's application for a CPCN for the ILM Project.

The Issues

[11] It is common ground that the ILM Project has the potential to affect adversely the asserted rights and title of the appellants, that its proposal invoked the Crown's consultation and accommodation duty, and that the Crown's duty with regard to the ILM Project has not yet been fully discharged. The broad issue raised by the scoping decision under appeal is the role of the Commission in assessing the adequacy of the Crown's consultation efforts before granting a CPCN for a project that may adversely affect Aboriginal title. The narrower issue is whether the Commission's decision to defer that assessment to the ministers is reasonable.

[12] In granting leave, Levine J.A. defined the issue as "whether [the Commission] may issue a CPCN without considering whether the Crown's duty to consult and accommodate First Nations, to that stage of the approval process has been met": *Kwikwetlem First Nation v. British Columbia Utilities Commission*, 2008 BCCA 208. It may be thought this issue was settled when this Court stated at para. 51 in *Carrier Sekani*:

Not only has the Commission the ability to decide the consultation issue, it is the only appropriate forum to decide the issue in a timely way. Furthermore, the honour of the Crown obliges it to do so. As a body to which powers have been delegated by the Crown, it must not deny the appellant timely access to a decision-maker with authority over the subject matter.

[13] The Commission's constitutional duty was to consider whether the Crown's constitutional duty of consultation had been fulfilled with respect to the subject matter of the application. Thus, before it certified the ILM Project as necessary and convenient in the public interest, it was required to determine when the Crown's duty to consult with regard to that project arose, the scope of that duty, and whether it was fulfilled. The Commission did not look at its task that way or undertake that analysis. It decided that the government had put in place a process for consultation and accommodation with First Nations that required a ministerial decision as to whether the Crown had fulfilled these legal obligations before the ILM Project could proceed and that the Commission should defer to that process.

[14] As I will explain, I am persuaded the reasons expressed at paras. 52 to 57 for the conclusion reached at para. 51 in *Carrier Sekani* apply with equal force to an application for a CPCN and the Commission erred in law when it refused to consider the appellant's challenge to the consultation process developed by BC Hydro. However, in anticipation of that potential conclusion, the respondents asked this Court to step back from a narrow view having regard only to the Commission's mandate, and to find that, in this case, the Commission both acknowledged and fulfilled its constitutional duty when it deferred consideration of the adequacy of BC Hydro's consultation and accommodation efforts to the ministers' review on the

EAC application. In my view, the nature and effect of the CPCN decision obliged the Commission to assess the adequacy of the consultation and accommodation efforts of BC Hydro on the issues relevant to the s. 45 proceeding. The Commission's refusal to consider whether the honour of the Crown was maintained to the point of its decision was based on a misunderstanding of the import of the relevant jurisprudence and was unreasonable.

[15] I would remit the scoping decision to the Commission for reconsideration in accordance with this Court's opinion, once certified, and direct that the effect of the CPCN be suspended for the purpose of determining whether the Crown's duty to consult and accommodate the appellants had been met up to that decision point. (See *Utilities Commission Act*, ss. 99 and 101(5).)

The Relevant Statutory Regimes

The CPCN Process

Utilities Commission Act

45. (1) Except as otherwise provided, after September 11, 1980, a person must not begin the construction or operation of a public utility plant or system, or an extension of either, without first obtaining from the commission a certificate that public convenience and necessity require or will require the construction or operation.

...

(3) Nothing in subsection (2) [deemed CPCN for pre-1980 projects] authorizes the construction or operation of an extension that is a reviewable project under the *Environmental Assessment Act*.

...

(6) A public utility must file with the commission at least once each year a statement in a form prescribed by the commission of the extensions to its facilities that it plans to construct.

(7) Except as otherwise provided, a privilege, concession or franchise granted to a public utility by a municipality or other public authority after September 11, 1980 is not valid unless approved by the commission.

(8) The commission must not give its approval unless it determines that the privilege, concession or franchise proposed is necessary for the public convenience and properly conserves the public interest.

(9) In giving its approval, the commission

(a) must grant a certificate of public convenience and necessity, and

(b) may impose conditions about

(i) the duration and termination of the privilege, concession or franchise, or

(ii) construction, equipment, maintenance, rates or service,

as the public convenience and interest reasonably require.

46. (1) An applicant for a certificate of public convenience and necessity must file with the commission information, material, evidence and documents that the commission prescribes.

...

(3) Subject to subsections (3.1) and (3.2), the commission may issue or refuse to issue the certificate, or may issue a certificate of public convenience and necessity for the construction or operation of a part only of the proposed facility, line, plant, system or extension, or for the partial exercise only of a right or privilege, and may attach to the exercise of the right or privilege granted by the certificate, terms, including conditions about the duration of the right or privilege under this Act as, in its judgment, the public convenience or necessity may require.

(3.1) In deciding whether to issue a certificate under subsection (3), the commission must consider

(a) the government's energy objectives,

(b) the most recent long-term resource plan filed by the public utility under section 44.1, if any, and

(c) whether the application for the certificate is consistent with the requirements imposed on the public utility under sections 64.01 [achieving electricity self-sufficiency by 2016] and 64.02 [achieving the goal that 90% of electricity be generated from clean or renewable resources], if applicable.

(3.2) Section (3.1) does not apply if the commission considers that the matters addressed in the application for the certificate were determined to be in the public interest in the course of considering a long-term resource plan under section 44.1.

...

99. The commission may reconsider, vary or rescind a decision, order, rule or regulation made by it, and may rehear an application before deciding it.

...

101. (1) An appeal lies from a decision or order of the commission to the Court of Appeal with leave of a justice of that court.

...

(5) On the determination of the questions involved in the appeal, the Court of Appeal must certify its opinion to the commission, and an order of the commission must conform to that opinion.

[16] The Commission issues *CPCN Application Guidelines* to assist public utilities and others in the preparation of CPCN applications. The preface to the guidelines issued March 2004 includes this advice:

The scope of the information requirement for a specific application will depend on the nature of the project and the issues that it raises. Project proponents are encouraged to initiate discussions with appropriate government agencies and the public very early in the project planning stage in order to obtain an appreciation of the issues to be addressed prior to the filing of the application.

CPCN Applications may be supported by resource plans and/or action plans prepared pursuant to the Resource Planning Guidelines issued in December 2003. The resource plan and/or action plans may deal with significant aspects of project

justification, particularly the need for the project and the assessment of the costs and benefits of the project and alternatives.

According to the *Guidelines*, the application should include the following:

2. Project Description:

...

(iv) identification and preliminary assessment of any impacts by the project on the physical, biological and social environments or on the public, including First Nations; proposals for reducing negative impacts and obtaining the maximum benefits from positive impacts; and the cost to the project of implementing the proposals;

...

3. Project Justification

...

(ii) a study comparing the costs, benefits and associated risks of the project and alternatives, which estimates the value of all of the costs and benefits of each option or, where not quantifiable, identifies the cost or benefit and states that it cannot be quantified;

(iii) a statement identifying any significant risks to successful completion of the project;

...

4. Public Consultation

(i) a description of the Applicant's public information and consultation program, including the names of groups, agencies or individuals consulted, as well as a summary of the issues and concerns discussed, mitigation proposals explored, decisions taken, and items to be resolved.

...

6. Other Applications and Approvals

- (i) a list of all approvals, permits, licences or authorizations required under federal, provincial and municipal law; and
- (ii) a summary of the material conditions that are anticipated in the approvals and confirmation that the costs of complying with these conditions are included in the cost estimate of the Application.

The EAC Process

Environmental Assessment Act

- 8. (1) Despite any other enactment, a person must not
 - (a) undertake or carry on any activity that is a reviewable project,
 - ...unless
 - (c) the person first obtains an environmental assessment certificate for the project, or
 - ...
- 9. (1) Despite any other enactment, a minister who administers another enactment or an employee or agent of the government or of a municipality or regional district, must not issue an approval under another enactment for a person to
 - (a) undertake or carry on an activity that is a reviewable project,
 - ...unless satisfied that
 - (c) the person has a valid environmental assessment certificate for the reviewable project, or
 - ...
- (2) Despite any other enactment, an approval under another enactment is without effect if it is issued contrary to subsection (1).

10. (1) The executive director by order

...

(c) if the executive director considers that a reviewable project may have a significant adverse environmental, economic, social, heritage or health effect, taking into account practical means of preventing or reducing to an acceptable level any potential adverse effects of the project, may determine that

(i) an environmental assessment certificate is required for the project, and

(ii) the proponent may not proceed with the project without an assessment .

...

11. (1) If the executive director makes a determination set out in section 10 (1) (c) for a reviewable project, the executive director must also determine by order

(a) the scope of the required assessment of the reviewable project, and

(b) the procedures and methods for conducting the assessment, including for conducting a review of the proponent's application under section 16, as part of the assessment.

(2) The executive director's discretion under subsection (1) includes but is not limited to the discretion to specify by order one or more of the following:

...

(f) the persons and organizations, including but not limited to the public, first nations, government agencies and, if warranted in the executive director's opinion, neighbouring jurisdictions, to be consulted by the proponent or the Environmental Assessment Office during the assessment, and the means by which the persons and organizations are to be provided with notice of the assessment, access to information during the assessment and opportunities to be consulted;

(g) the opportunities for the persons and organizations specified under paragraph (f), and for the proponent, to provide comments during the assessment of the reviewable project;

(3) The assessment of the potential effects of a reviewable project must take into account and reflect government policy identified for the executive director, during the course of the assessment, by a government agency or organization responsible for the identified policy area.

...

16. (1) The proponent of a reviewable project for which an environmental assessment certificate is required under section 10 (1) (c) may apply for an environmental assessment certificate by applying in writing to the executive director and paying the prescribed fee, if any, in the prescribed manner.

(2) An application for an environmental assessment certificate must contain the information that the executive director requires.

(3) The executive director must not accept the application for review unless he or she has determined that it contains the required information.

...

17. (1) On completion of an assessment of a reviewable project ... the executive director ... must refer the proponent's application for an environmental assessment certificate to the ministers for a decision under subsection (3).

(2) A referral under subsection (1) must be accompanied by

- (a) an assessment report prepared by the executive director ...,
- (b) the recommendations, if any, of the executive director, ..., and
- (c) reasons for the recommendations, if any, of the executive director,

(3) On receipt of a referral under subsection (1), the ministers

- (a) must consider the assessment report and any recommendations accompanying the assessment report,
- (b) may consider any other matters that they consider relevant to the public interest in making their decision on the application, and
- (c) must
 - (i) issue an environmental assessment certificate to the proponent, and attach any conditions to the certificate that the ministers consider necessary,
 - (ii) refuse to issue the certificate to the proponent, or
 - (iii) order that further assessment be carried out, in accordance with the scope, procedures and methods specified by the ministers.

(4) The executive director must deliver to the proponent the decision and the environmental assessment certificate, if granted.

...

30. (1) At any time during the assessment of a reviewable project under this Act, and before a decision under section 17(3) about the proponent's application for an environmental assessment certificate ..., the minister by order may suspend the assessment until the outcome of any investigation, inquiry, hearing or other process that

(a) is being or will be conducted by any of the following or any combination of the following:

- (i) the government of British Columbia, including any agency, board or commission of British Columbia;
- (ii) the government of Canada;
- (iii) a municipality or regional district in British Columbia;
- (iv) a jurisdiction bordering on British Columbia;
- (v) another organization, and

(b) is material, in the opinion of the minister, to the assessment, under this Act, of the reviewable project.

(2) If a time limit is in effect under this Act at the time that an assessment is suspended under subsection (1), the minister may suspend the time limit until the assessment resumes.

[17] The *Guide to the Environmental Assessment Process* published by the Environmental Assessment Office ("EAO") outlines the general framework for a typical environmental assessment. Key to that process are an order issued under s. 11 of the *Act* determining the scope of the assessment and the procedures and methods to be used for that particular project, and the terms of reference, which define the information the proponent must provide in its application. Once the executive director (or a delegate) accepts the application for review (s. 16), he has 180 days to complete the review, prepare an assessment report and refer the application to the designated ministers. As noted in the *Guide* at page 18,

“Government agency, First Nation and public review of the application, any formal public comment period, and opportunities for the proponent to respond to issues raised, are normally scheduled within the 180 days.”

[18] The assessment report documents the findings of the assessment, including the issues raised and how they have been or could be addressed. It may be accompanied by recommendations, with reasons, of the executive director. Currently, the responsible ministers are the Minister of the Environment and the minister designated as responsible for the category of the reviewable project, in this case, the Minister of Energy, Mines and Petroleum Resources. After the application is referred to them, they have 45 days to decide whether to issue an EAC or require further assessment (s. 17). At that stage, the *Guide* notes at page 20, the ministers must consider whether the province has fulfilled its legal obligations to First Nations.

[19] The parties’ disagreement about the nature and effect of these processes and their interplay is at the root of this appeal. However, they agree that both a CPCN and EAC are required before the ILM Project can proceed. They do not suggest that either s. 9 of the *Environmental Assessment Act* or s. 45(3) of the *Utilities Commission Act* requires the EAC to be issued before the CPCN can be considered and issued. The wording of those statutes suggests otherwise. While s. 30 of the *Environmental Assessment Act* permits the ministers to suspend the EAC assessment until a CPCN is issued, there is no comparable provision in the *Utilities Commission Act*.

[20] The Commission, like the respondents, takes the view the CPCN process should be completed before an application for an EAC is made. In the appellants' view, this practical approach is possible only if the Commission is required to ensure the Crown has fulfilled its duty to consult about and, if necessary, accommodate their interests during the preliminary planning stage before it grants a CPCN for a specific project.

Relevant Background

[21] This brief summary of events (taken from the CPCN application) is intended only to help in understanding the procedural issue before this Court. The appellants do not accept the respondents' descriptions of their consultation efforts as "statements of facts". This evidence could not be tested because of the scoping decision.

[22] BC Hydro began its consultation efforts when it contacted First Nations in August 2006; in Kwikwetlem's case, by telephone on 16 August 2006. At that time BCTC was considering four options: upgrade the existing infrastructure, build a new transmission line, non-wire options such as local energy generation and conservation, and doing nothing. Both the upgrade and the new line would require a CPCN; only the new line required an EAC. From August to October 2006, BC Hydro met with 46 First Nations and Tribal Councils to provide an overview of these options (including four potential routes for a new line) and the required regulatory processes.

[23] Recognizing a new transmission line would require an EAC, and that consultation with First Nations would be required for both that option and the alternative upgrade, BCTC began the pre-application stage of the EAC process by filing a project description with the EAO on 4 December 2006. Two weeks later, the executive director of the EAO issued an order under s. 10(1)(c) of the *Environmental Assessment Act* stating that the proposed new transmission line was a reviewable project, required an EAC, and could not proceed without an assessment. Meanwhile, BC Hydro continued its efforts to consult with Aboriginal groups through the spring of 2007 by holding three more “Rounds of Consultation” and the first round of “Community Open Houses”.

[24] In February 2007, the EAO held an initial Technical Working Group meeting attended by 26 Aboriginal Groups where an overview of the ILM Project and the environmental assessment process was provided together with draft Terms of Reference on which comment was invited. In March, the EAO provided a draft of its procedural order issued pursuant to s. 11 of the *Environmental Assessment Act* and draft technical discipline Work Plans to 60 First Nations and 7 Tribal Councils for comment.

[25] In May 2007, BCTC made its decision to pursue the ILM Project as its preferred option to increase the province’s transmission capacity. On 31 May 2007, the executive director issued a s. 11 procedural order, establishing a formal consultation process for the ILM Project. At para. 4.1 of that order, it set out the scope of the assessment it required:

4.1 The scope of assessment for the Project will include consideration of the potential for:

4.1.1 potential adverse environmental, social, economic, health and heritage effects and practical means to prevent or reduce to an acceptable level any such potential adverse effects; and,

4.1.2 potential adverse effects on First Nation's Aboriginal interests, and to the extent appropriate, ways to avoid, mitigate or otherwise accommodate such potential adverse effects.

[26] In Schedule B, the order identified 60 First Nations and 7 Tribal Councils with whom consultation was required. At recital F, it stated that the project area lay in their "asserted traditional territories", and at recital G, that BCTC had "held discussions or attempted to hold discussions" with them "with respect to their interests in the Project, including potential effects" on their "potential Aboriginal interests".

[27] The order also affirmed that the Project Assessment Director had established a Working Group which was to contain representation from First Nations as well as federal, provincial and local government agencies (paras. 7.1, 7.2). The order contained directives that the proponent meet with the Working Group (para. 7.2), consult with First Nations (para. 9.1), and seek advice from First Nations on the means of that consultation (para. 9.2).

[28] The order specified BCTC was to include a summary of its consultation efforts to date and a proposal for future consultation with First Nations and the comments of First Nations on both in its EAC application (paras. 13.1 and 13.2). In

para. 15.5 the order required BCTC to provide a written report on the potential adverse effects of the project, including those on First Nations' Aboriginal interests, and its intentions as to how it would address those issues. The order also stated that, based on these submissions, the Project Assessment Director might require BCTC (or the EAO) to undertake further measures to ensure adequate consultation occurred during the review of the EAC application (paras. 13.3, 13.4, 15.6). Finally, the order stated that the Project Assessment Director would consult with BCTC, First Nations and other members of the Working Group in his preparation of the draft assessment report, "as a basis for a decision by Ministers" under s. 17(3) of the *Act*.

[29] On 6 June 2007, BC Hydro sent a letter to the 67 First Nations and Tribal Councils identified by the EAO, notifying them of BCTC's decision to seek approvals for a new transmission line. That letter included this explanation:

In deciding to pursue the new transmission line alternative, BCTC believes that it has selected the alternative that is the most effective and energy efficient solution to increase the province's transmission capacity. BCTC will be required to present its assessment of the alternatives in its application for the approval for the Interior to Lower Mainland Transmission Project (ILM Project) to the British Columbia Utilities Commission (BCUC). The BCUC has the final decision-making authority on whether to approve BCTC's recommended solution and may choose an alternative solution, or combination of solutions.

[30] In June, BC Hydro held a second round of Community Open Houses. In August, it began discussions with Aboriginal Groups about the collection of traditional land use information. On 17 September, BCTC filed draft Terms of Reference and a Screening Level Environmental Report for the ILM Project with the

EAO. (The Terms of Reference were approved by the EAO on 23 May 2008 after the Commission released the scoping decision.)

[31] On 5 November 2007, BCTC filed its application for a CPCN for the ILM Project with the Commission and provided a copy to each of the appellants and other identified First Nations and Tribal Councils. The appellants and two others (Sto:lo Nation Chiefs Council and Boston Bar First Nation) registered as intervenors. In its application, BCTC identified the alternative solutions it had considered and rejected. It also included three routing options other than that of the ILM Project.

[32] At a procedural conference held 20 December 2007, the Commission established a process for deciding whether it should consider the adequacy of consultation and accommodation efforts as part of its determination whether to grant a CPCN (the “scoping issue”). That process was to include written submissions from the applicant (BCTC) and intervenors (including BC Hydro).

[33] Five First Nations and Tribal Councils responded to BCTC’s invitation to express their interest in making submissions regarding the scoping issue. In early 2008, the Commission received written submissions from BCTC, BC Hydro, the four appellants, and two other intervenors.

[34] On 21 February 2008, four days before the scheduled Oral Phase of Argument on the scoping issue, the Commission Secretary advised BCTC and the intervenors that the oral hearing would not be held, and that the Commission agreed with BC Hydro and BCTC that it “should not consider the adequacy of

consultation and accommodation efforts on the ILM Project as part of its determinations in deciding whether to grant a CPCN for the ILM Project” for reasons it expected to issue by 7 March 2008. Its reasons for the scoping decision under appeal followed on 5 March 2008.

The Scoping Decision

[35] The Commission’s focus in this decision was on its role in assessing the adequacy of the Crown’s consultation with regard to the ILM Project it was asked to certify as necessary and convenient in the public interest. The Commission found it could and should rely on the environmental assessment process to ensure the Crown fulfilled its duties to First Nations at all stages of the ILM Project, as it had in *VITR* and *Revelstoke*.

[36] The Commission Secretary explained (at p. 2-3):

In both the *VITR* Decision and the *Revelstoke* Decision, the Commission relied on the Environmental Assessment Office (“EAO”) process and as concluded in the *VITR* Decision:

The government has legislated regulatory approvals that must be obtained before *VITR* proceeds. Pursuant to Section 8 of the EAA, BCTC requires an EAC for *VITR*. Given the Section 11 Procedural Order and the Terms of Reference for *VITR*, the Commission Panel is satisfied that a process is in place for consultation and, if necessary, accommodation. In the circumstances of *VITR*, the EAO approval, if granted, will follow some time after this decision. Through this legislation, the government has ensured that the project will not proceed until consultation and, if necessary, accommodation has also concluded. The Commission Panel concludes that it should not look beyond, and can rely on, this regulatory scheme established by the government (p. 48).

In the *Revelstoke* Unit 5 Decision, the Commission Panel said:

The Provincial and Federal Governments have created legislation, the Environmental Assessment Act and the Canadian Environmental Assessment Act, which ensure that regulatory approvals must be obtained before Revelstoke Unit 5 can proceed and that the project will not proceed until consultation and, if necessary, accommodation has been completed (p.34).

In the instant case, BCTC, pursuant to the Environmental Assessment Act, requires an Environmental Assessment Certificate (“EAC”) for the ILM Project. BCTC has said that it anticipates submitting its EAC application in the fall of 2008, assuming a CPCN is issued in the summer of 2008. Given the Section 11 Procedural Order ... and the draft Terms of Reference ... the Commission Panel is also satisfied that a process is in place for consultation and, if necessary, accommodation.

Prior to issuing an EAC, Provincial Ministers must consider whether the Crown has fulfilled legal obligations to First Nations (Guide to Environmental Assessment Process, Step 8 and Environmental Assessment Act, Section 17.) Given the statutory requirement for an EAC and the process established by the Section 11 Procedural Order, the Commission Panel concludes that it should not look beyond, and can rely on, this regulatory scheme established by the government. Accordingly, the Commission Panel does not intend to conduct a separate inquiry into the adequacy of consultation and accommodation in this proceeding.

[37] In support of its position, the Commission relied on the following passage from *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, at para. 51 (also quoted at p. 47 of the *VITR* decision):

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.

[38] To the appellants’ submissions that consultation and accommodation were continuing obligations that might arise throughout a series of decisions, and

therefore, should start at the earliest possible stage and not be anticipated or deferred, the Commission responded (at p. 4):

The Commission Panel believes that a distinction needs to be drawn between circumstances such as those in the *Gitxsan Houses v. British Columbia (Minister of Forests)* (2002), 10 B.C.L.R. (4th) 126 (S.C.) and the *Haida* cases where a decision or a series of decisions are made each having their own impacts, and the circumstances in the instant case where a single project requires at least two different regulatory approvals before there are impacts on Aboriginal rights and title. ... [T]he EAC requirement ensures that if the duty to consult has not been met and, where necessary, adequate accommodation has not been provided, then the project will not proceed, and there will be no impacts on Aboriginal rights and title. In this manner, meaningful consultation is ensured, and the honour of the Crown will be upheld. In other words, the honour of the Crown does not require consultation on every step of a regulatory scheme, provided, as in the instant case, that meaningful consultation is ensured before there are impacts on Aboriginal rights and title.

[39] The Commission summarized its analysis (at p. 5):

... The CPCN can be thought of as the regulatory step that selects the most cost-effective project amongst alternatives, and also approves the scope, design, and cost estimates of the most cost-effective project. The first opportunity to consider the adequacy of consultation and accommodation is after the project is selected and is sufficiently defined so as to make accommodation discussions meaningful, that is, impacts need to be identified. And it is only after impacts can be identified, that consultation and accommodation can be concluded. This does not mean that BCTC and BC Hydro should begin consulting with First Nations after a CPCN has been granted and the ILM Project has been further defined; it only means that the Commission can and should rely on the EAO to now or in the future make determinations with respect to the duty to consult and, if necessary, accommodate.

[40] The Commission then turned briefly to the evidence it would receive and consider in assessing potential costs and risks to the ILM Project. It noted that the potential costs of accommodation were relevant to the cost-effectiveness analysis

and that First Nations were entitled to full and fair participation in the proceeding on that and other relevant issues. It refused to adjourn the proceeding until the process of consultation and accommodation was completed, anticipating (at p. 5 of the scoping decision) that an adequate record could be developed from which it could “assess cost estimates and potential risks to the project arising from the duty to consult, and where necessary, accommodate.” It acknowledged that one of the risks was the possibility that the environmental process might not result in an EAC or might require changes in the ILM Project requiring BCTC to seek a new or amended CPCN.

[41] After this Court granted leave to appeal the scoping decision, the Commission issued the CPCN, providing its reasons for decision on 5 August 2008: *In the Matter of British Columbia Transmission Corporation Application for a Certificate of Public Convenience and Necessity for the Interior to Lower Mainland Transmission Project*, B.C.U.C. Decision, 5 August 2008, Commission Order No. C-4-08 (the “CPCN decision”). At page 96 of those reasons, it concluded:

The Commission Panel concludes that building a new transmission line, specifically 5L83, is the preferred alternative for reinforcement of the ILM grid from the NIC [Nicola substation] side, and concludes that UEC [the upgrade option] is uneconomic when compared to building a fifth line, 5L83, that provides higher transfer capability and lower losses.

[42] The CPCN decision has not been appealed. In its reasons, the Commission affirmed the scoping decision, noting at p. 32:

... although the issue of whether BCTC had met its duty to consult and accommodate First Nations was ruled out of scope, the impacts on First Nations and risks to project costs were still well within scope. The First Nations were encouraged to be active participants in the ILM proceeding, but chose not to lead or elicit evidence.

[43] From comments later in its reasons, it appears the Commission may have expected that the appellants would lead evidence about the potential adverse effects of the different options on their rights despite its refusal to consider their dissatisfaction with the consultation process. That is not a conclusion that would have been readily apparent from the scoping decision.

[44] On 1 October 2008, BCTC filed its application for an EAC for the ILM Project. The environmental assessment process is ongoing, although Kwikwetlem has refused to participate in it “without substantial changes to the process”. In their view, the EAO has no proper statutory mandate for consultation, no appropriate budget, and no sufficient ability to alter the project to meet the Crown’s accommodation duties.

Discussion

[45] The respondents accept that the duty to consult is engaged by the ministerial decision to grant an EAC that would allow the ILM Project to proceed. This is the reason BC Hydro has consulted with First Nations since August 2006. BCTC submits it is fully committed to ensuring that consultation and, if necessary, accommodation, with First Nations is carried out in a manner that upholds the honour of the Crown. They also acknowledge the ministers have a constitutional duty to assess the adequacy of the Crown’s consultation and accommodation

efforts in their review of the ILM Project under the *Environmental Assessment Act*, and have the authority to deny the EAC and thereby terminate the project if they determine the honour of the Crown was not maintained in the process leading to the application and the grant of the EAC. Their point is that the Commission had no comparable duty to consider and decide whether the Crown's duty to consult was fulfilled at the CPCN stage of the regulatory approval process for the ILM Project.

[46] The respondents limit their submission to the factual circumstances of this case, where neither the proponent nor an intervenor suggested an alternative solution to the public need identified by BCTC. They acknowledge that the Commission may receive information about alternatives as part of its cost-effectiveness analysis and in some cases, may consider alternative proposed projects (see, for example, *VITR, In the Matter of BC Gas Utility Ltd. Southern Crossing Pipeline Project Application for a Certificate of Public Convenience and Necessity*, B.C.U.C. Decision, 21 May 1999, Commission Order No. G-51-99). Nevertheless, in BC Hydro's view, in this case, the CPCN represents only the Commission's opinion that the ILM Project is "suitable for inclusion in the plant or system of the public utility with the result that costs of the proposed facilities may be recovered in rates." Thus, it argues, by itself, the Commission's grant of a CPCN can have no effect on Aboriginal interests.

[47] At the core of this dispute are different understandings of the regulatory processes and their interplay. In particular, the parties disagree on whether the CPCN "fixes" the essential structure of the project such that, practically speaking,

BCTC's preferred option cannot be revisited, whatever consultation may occur in the EAC process. In support of their argument that the CPCN has this effect, the appellants point first, to the Commission's own words that the CPCN process is "the regulatory step that selects the most cost-effective project amongst alternatives, and also approves the scope, design, and cost estimates of the most cost-effective project" (scoping decision at p. 5, affirmed in the CPCN decision); second, to the advice given to First Nations by BC Hydro in its letter of 6 June 2007; and third, to the *Concurrent Approval Regulation* B.C. Reg. 371/2002, s. 3(2)(a), which makes a CPCN ineligible for concurrent review with an EAC.

[48] BCTC responded that the Commission's statement was "a poor choice of language", on an application presenting only one project for approval, albeit one with huge flexibility, but one the Commission had no power to modify without being asked to do so by its proponent. It also acknowledged that BC Hydro's letter could have expressed the intention and effect of its application more clearly. In BCTC's view, its application was for certification of a new transmission line from Merritt to Coquitlam with a range of potential routing options for the Commission to consider in deciding cost-effect issues, but not a specific configuration because those details might be influenced by the ongoing EAC consultation process.

[49] On this issue, I agree with the appellants and accept the Commission's stated understanding of its role as applicable not only generally on CPCN applications but on this particular application. In this case, the Commission reviewed the alternatives BCTC had considered and affirmed its choice as preferable. The gist of the scoping decision was that, in this case, the certified

project could have no effect on Aboriginal interests until it received an EAC. Thus, the EAC process could test the adequacy of the Crown's consultation efforts on the ILM Project. Because the EAC process required the ministers to assess those efforts, the Commission was under no such obligation before issuing a CPCN for that project.

[50] The appellants dispute this reasoning. In their view, the current EAC process was not designed to meet the requirements of the duty to consult and accommodate Aboriginal interests and cannot be so adapted.

[51] Functionally, the environmental assessment process is not the same process considered in *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550. The legislation analyzed in *Taku River* was repealed in 2002 and replaced with the current statutory regime. According to Kwikwetlem, the repeal resulted in a "systemic stripping out" of First Nations participation in the EAC process. The only explicit mentions of "first nations" in the current *Environmental Assessment Act* are found in s. 11(2)(f) and s. 50(2)(e); the latter authorizes a regulation listing those required to be consulted under the former. To date no regulation has been established.

[52] BCTC responds that the EAC process can be, and in this case has been, adapted to include the nature of the project itself and alternatives to it in the ministerial review.

[53] The most significant differences between the former and the current *Act* are the omission of a purposes section, changes to the criteria for the grant of an EAC,

and the absence of provisions mandating participation of First Nations. The notion that the interests of First Nations are entitled to special protection does not arise in the current *Act*. As well, the word “cultural” has been omitted from the list of effects to be considered in the assessment process. Perhaps most importantly, the EAO is no longer required to establish a project committee. Under the former *Act*, both the formation of such a committee and First Nations participation in it were mandated. Chief Justice McLachlin wrote in *Taku River*, at para. 8, that “[t]he project committee becomes the primary engine driving the assessment process.”

[54] It may be that First Nations’ interests are left to be dealt with under the government’s *Provincial Policy for Consultation with First Nations*, which directs the terms of the operational guidelines of government actors. McLachlin C.J.C. referred to this policy in *Haida*, noting at para. 51, it “may guard against unstructured discretion and provide a guide for decision-makers.” Those directions are not before this Court and were not mentioned by any counsel. I do not know to what extent the EAC process complies with them. If they are relevant to an environmental assessment process, they are also relevant to the CPCN process. The Commission did not mention them in the scoping decision.

[55] As I read the two governing statutes, they mandate discrete processes whereby two decision-makers make two different decisions at two different stages of one important provincially-controlled project. Neither is subsidiary or duplicative of the other. They are better seen the way the respondents treat them and the Commission understands them, as sequential processes that can be coordinated. The CPCN defines the activity that becomes the project to be reviewed by ministers

before they grant an EAC. Each decision-maker makes a decision in the public interest, taking into account factors relevant to the question on which they are required to form an opinion.

[56] Information developed for the purpose of the CPCN application and the opinion expressed by the Commission are likely to be relevant to the EAC application, just as information gathered at the pre-application stage of the EAC process may be relevant to the CPCN hearing. That interplay does not mean the effect of their decision on Aboriginal interests is the same. Nor does it make a ministerial review of the Crown's duty to consult with regard to the definition of the project a necessarily satisfactory alternative to an assessment of that duty at an earlier stage by the Commission charged with opining as to whether a public utility system enhancement is necessary in the public interest.

[57] The current *Environmental Assessment Act* provides a process designed to obtain sufficient information from the proponent of a reviewable project about any "adverse effects" of that project to permit an intelligent decision by the responsible ministers as to whether to grant an EAC for that project. I see the ministerial review as a wrap-up decision, where two ministers have unconstrained discretion to prevent a proposed activity, public or private, for profit or not-for-profit, that has potential "adverse effects" from going forward. The *Act* does not specify effects on whom or what. It can be inferred from the provisions of s. 10(1)(c) that the ministers are to consider any "significant adverse environmental, economic, social, heritage or health effect" revealed by the assessment. In this case, potential adverse effects

on the appellants' asserted Aboriginal rights and title are undoubtedly included, although not identified in the current *Act*.

[58] Where the activity being considered is a Crown project with the potential to affect Aboriginal interests, as it is in this case, because the responsible ministers are constitutionally required to consider whether the proponent has maintained the Crown's honour, all counsel assert they may refuse the EAC, not only by reason of any listed adverse effect, but also for failure of the Crown to meet its consultation and accommodation duty. The procedural order issued under s. 11 of the *Act* acknowledges this aspect of the ministerial responsibility with respect to the ILM Project.

[59] By contrast, certification under s. 45 of the *Utilities Commission Act* is the vital first step toward the building of the transmission line across territory to which First Nations assert title and stewardship rights, one that, for practical reasons, BCTC, BC Hydro and the Commission consider necessarily precedes acceptance of an application for the required ministers' EAC. The legislature has delegated the discretion to opine as to the need and desirability for the construction of additional power transmission capacity to the Commission. Only the Commission can grant permission to enhance a power transmission line.

[60] In these circumstances, in my view, the appellants were not only entitled to be consulted and accommodated with regard to the choice of the ILM Project by BCTC, they were also entitled to have their challenge to the adequacy of that consultation and accommodation assessed by the Commission before it certified

BCTC's proposal for extending the power transmission system as being in the public interest. It was not enough for the Commission to say to First Nations: we will hear evidence about the rights you assert and how the ILM Project might affect them.

[61] This is not to say the Commission, in formulating its opinion as to whether to grant a CPCN, will decide BC Hydro's efforts did not maintain the honour of the Crown. It is to say that the Commission is required to assess those efforts to determine whether the Crown's honour was maintained in its dealings with First Nations regarding the potential effects of the proposed project.

[62] 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.

[63] The certification decision is the first important decision in the process of constructing a power transmission line. It is the formulation of the opinion as to whether a line should be built to satisfy an anticipated need, rather than to upgrade

an existing facility, find or develop alternative local power sources, or reduce demand by price increases or other means of rationing scarce resources.

[64] If, as BCTC submits, the Commission's decision is to be read as having acknowledged its constitutional obligation by determining the existence of a duty to consult, the scope of that duty, and its fulfillment up to that stage of the ILM Project, it was unreasonable.

[65] Where a decision-maker is called upon to approve a Crown activity that gives rise to the duty to consult, the first task of the decision-maker in assessing the adequacy of that duty, is to determine its scope and content in that particular case. Only when the scope of the duty to consult has been determined, can a decision-maker decide whether that duty has been fulfilled. In *Haida*, the Supreme Court of Canada clearly stated there is no one model of consultation; the Crown's obligations will vary with the individual circumstances of the case. Neither explicitly nor implicitly did the Commission attempt to define its obligations in this case. As it had in the two earlier cases, *VITR* and *Revelstoke*, it simply deferred to the ministers with ultimate responsibility for deciding whether to grant the project an EAC.

Summary

[66] BC Hydro's duty to consult and, where necessary, accommodate First Nations' interests arose when BCTC became aware that the means it was considering to maintain an adequate supply of power to consumers in the lower mainland had the potential to affect Aboriginal rights and title. BC Hydro

acknowledged that duty by initiating contact with First Nations in August 2006. The duty continued while several alternative solutions were considered. The process was given substance by the holding of information meetings over the following months and some structure by the s. 11 procedural order issued by the EAO in May 2007.

[67] When BCTC settled on the ILM Project in May 2007 and applied for a CPCN for that project in November of that year, it effectively gave the Commission two choices – accept or reject its application. As BCTC argued, supported by BC Hydro as an intervenor, it effectively ended its own consideration of alternatives and foreclosed any consideration by the Commission of alternative solutions to the anticipated energy supply problem. The decision to certify a new line as necessary in the public interest has the potential to profoundly affect the appellants' Aboriginal interests. Like the existing line (installed without consent or consultation), the new line will pass over land to which the appellants claim stewardship rights and Aboriginal title. (For an understanding of that concept see *Osoyoos Indian Band v. Oliver (Town)*, 2001 SCC 85, [2001] 3 S.C.R. 746, at paras. 41 to 46.) To suggest, as the respondents now do, that the appellants were free to put forward evidence during the s. 45 proceeding as to the adverse impacts of the ILM Project on their interests, and to have BC Hydro's consultation efforts with regard to those impacts evaluated by the ministers a year or two later, is to miss the point of the duty to consult.

[68] Consultation requires an interactive process with efforts by both the Crown actor and the potentially affected First Nations to reconcile what may be competing

interests. It is not just a process of gathering and exchanging information. It may require the Crown to make changes to its proposed action based on information obtained through consultations. It may require accommodation: *Haida*, at paras. 46-47.

[69] The crucial question is whether conduct that may result in adverse effects on Aboriginal rights or title will be considered during the CPCN process and not during the EAC process. That is the case here; the duty to consult with regard to the CPCN process is acknowledged. It follows that the Commission has the obligation to inquire into the adequacy of consultation before granting a CPCN. Even if the EAC process could theoretically be adapted to ensure the ministerial review includes a consideration of the adequacy of the consultation at the CPCN application stage, practically-speaking, the advantage would be to the proponent who has obtained a certification of its project as necessary and in the public interest. Moreover, the Commission cannot determine whether such an adapted process meets the duty whose scope it is in the best, if not only, position to determine unless it determines the scope of that duty. A cost/benefit analysis of one or more projects does not appear in the ministers' mandate.

[70] If consultation is to be meaningful, it must take place when the project is being defined and continue until the project is completed. The pre-application stage of the EAC process in this case appears to have synchronized well with BCTC's practice of first seeking a CPCN and not making formal application for an EAC until a CPCN is granted. The question the Commission must decide is whether the consultation efforts up to the point of its decision were adequate.

[71] For these reasons, I would order that the Commission reconsider the scoping decision in the terms I set out above at para. 15.

“The Honourable Madam Justice Huddart”

I agree:

“The Honourable Mr. Justice Donald”

I agree:

“The Honourable Mr. Justice Bauman”

COURT OF APPEAL FOR THE YUKON TERRITORY

Citation: ***Little Salmon/Carmacks First Nation v. Yukon (Minister of Energy, Mines and Resources)***,
2008 YKCA 13

Date: 20080815
Docket: CA07-YU584

Between:

Little Salmon/Carmacks First Nation and Johnny Sam and Eddie Skookum on behalf of themselves and all other members of the Little Salmon/Carmacks First Nation

Respondents
(Petitioners)

And

David Beckman, in his capacity as Director, Agriculture Branch, Department of Energy, Mines and Resources, The Minister of Energy, Mines and Resources, The Yukon Government and Larry Paulsen

Appellants/Respondents
(Respondents)

And

Attorney General of Canada and Council of Yukon First Nations and Kwanlin Dün First Nation

Intervenors

Before: The Honourable Madam Justice Newbury
The Honourable Madam Justice Kirkpatrick
The Honourable Mr. Justice Tysoe

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The Minister of Energy, Mines and
Resources and
The Yukon Government

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Counsel for the Respondents,
Little Salmon/Carmacks First Nation
and Johnny Sam and Eddie Skookum

	on behalf of themselves and all other members of the Little Salmon/Carmacks First Nation
C. Brobby	Counsel for the Respondent, Larry Paulsen
S. Duncan	Counsel for the Intervenor, Attorney General of Canada
J. Coady and D. Joe	Counsel for the Intervenor, Council of Yukon First Nations
J. Arvay, Q.C.	Counsel for the Intervenor, Kwanlin Dün First Nation
Place and Date of Hearing:	Whitehorse, Yukon Territory 2 and 3 June 2008
Place and Date of Judgment:	Vancouver, B.C. 15 August 2008

Written Reasons by:

The Honourable Madam Justice Kirkpatrick

Concurred in by:

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Tysoe

Reasons for Judgment of the Honourable Madam Justice Kirkpatrick:

INTRODUCTION

[1] The central issue in this appeal is whether a duty to consult and, where possible, accommodate First Nations' concerns and interests applies in the context of a modern, comprehensive land claims agreement.

[2] The issue had not previously been decided until the chambers judge, in reasons indexed as 2007 YKSC 28, concluded that a duty to consult and accommodate does apply to the final agreement signed by the Little Salmon/Carmacks First Nation ("Little Salmon/Carmacks"), Canada, and Yukon on 21 July 1997 (the "Final Agreement" or the "Agreement"). The chambers judge found that Yukon failed to comply with a legal duty to consult and, where possible, accommodate Little Salmon/Carmacks in respect of an application by Larry Paulsen for an agricultural grant of Crown land located in the traditional territory of the First Nation and the trapline of Johnny Sam, a member of Little Salmon/Carmacks.

BACKGROUND

[3] The conclusion of the Final Agreement in July 1997 was the fulfillment of a long, intensively negotiated process which began in 1973 when Chief Elijah Smith's delegation to Ottawa requested commencement of land claims negotiations. Those negotiations ultimately led, in 1989, to a comprehensive land claims agreement in principle with the then known Council of Yukon Indians (now the Council of Yukon First Nations (the "Council")). Following further extensive negotiations, the Council,

Canada, and Yukon signed in 1993 an umbrella final agreement (the "Umbrella Agreement").

[4] The Umbrella Agreement is a lengthy and detailed document that sets out the exchange of undefined aboriginal claims, rights, titles and interests for defined treaty rights in respect of land tenure and quantum of settlement land, access to non-settlement or Crown lands, fish and wildlife harvesting, heritage resources, financial compensation and participation in the management of public resources. The Umbrella Agreement is the foundation on which each First Nation treaty in Yukon is built. Each treaty contains all of the provisions of the Umbrella Agreement as well as specific provisions that may vary depending on the individual First Nation.

[5] Little Salmon/Carmacks finalized the Final Agreement and a Self-Government Agreement in 1996. The ratification of the agreements took place over five days in April 1997. After signing in July 1997, the Final Agreement came into effect in October of that year pursuant to federal and territorial legislation: ***Yukon First Nations Land Claims Settlement Act***, S.C. 1994, c. 34 and ***Yukon First Nations Self-Government Act***, S.C. 1994, c. 35; and ***An Act Approving Yukon Land Claim Final Agreements***, R.S.Y. 2002, c. 240 and the ***First Nations (Yukon) Self-Government Act***, R.S.Y. 2002, c. 90.

[6] On 5 November 2001, Mr. Paulsen submitted an application for an agricultural land grant of approximately 65 hectares of Yukon Crown land. Mr. Paulsen proposed to grow hay and other livestock feed, raise livestock, harvest timber, and construct fences, a house, a barn, storage buildings and corrals.

[7] The land is within the boundaries of Mr. Sam's trapping concession issued to him under the ***Wildlife Act***, R.S.Y. 2002, c. 229, which grants to Mr. Sam the exclusive right to trap commercially in the area. Mr. Sam has held the trapping concession since 1957. Prior to that time, the concession was held by his father.

[8] Under section 6.2 of the Final Agreement, excerpted below, all Little Salmon/Carmacks members have the right of access to Crown land for subsistence harvesting in their traditional territory, except where the Crown land is subject to an agreement for sale, such as would be the case if Mr. Paulsen's application were approved and the land grant made.

[9] The area of Mr. Sam's trapline is 21,435 hectares. The 65 hectares represented by Mr. Paulsen's application is approximately one-third of one per cent of the trapline area. In recent years, Mr. Sam has held a trapping licence for two seasons: 1998 to 1999, and 2000 to 2001.

[10] Applications for land grants are subject to several levels of review pursuant to the 1991 Yukon Agriculture Policy, which appears not to have been the subject of legislation or regulation. They are first required to be reviewed by the Agriculture Branch of the Yukon Department of Energy, Mines and Resources and by the Agriculture Land Application Review Committee ("ALARC"). Another level of review is conducted by the Land Application Review Committee ("LARC"). Members of LARC include Yukon government and federal and municipal government agencies as well as Yukon First Nations, including Little Salmon/Carmacks. Pursuant to the LARC terms of reference, Yukon First Nations governments participate as members

of LARC "in the review of applications and land management matters that may affect land and resource management within their respective traditional territories".

[11] Mr. Paulsen's application was reviewed at the Agriculture Branch and ALARC review level between November 2001 through February 2004. During that review, recommendations were made to reconfigure the boundaries of the land grant to address potential heritage and archaeological sites near the river and arability issues. However, for reasons that are unclear, Little Salmon/Carmacks was not notified of the initial review and hence had no opportunity to raise any concerns it might have had.

[12] Mr. Paulsen's application was recommended for advancement to the LARC review stage on 24 February 2004. The role of LARC in the land management process is described by the LARC terms of reference as facilitating inter-departmental and inter-governmental coordination by screening, reviewing, and consulting on, among other things, grants of rights and tenure to Yukon lands. Land applications are circulated to several branches of the Yukon government and the appropriate First Nation government and municipal government whose land and resource management interests might be affected by the application if approved.

[13] LARC gave notice of Mr. Paulsen's application by advertising in local newspapers on 26 March 2004, mailing of application material to all residents living within one kilometre of the parcel, and mailing, on 28 April 2004, a letter and package of information to Little Salmon/Carmacks, the Selkirk First Nation, and the Carmacks Renewable Resources Council. The letter and package invited

comments on the application within 30 days. The package also included notice of the 13 August 2004 meeting date.

[14] Mr. Sam learned of the application through Little Salmon/Carmacks and he asked it to act on his behalf.

[15] A reminder notice of the LARC review of Mr. Paulsen's application was sent by e-mail on 16 July 2004 to Little Salmon/Carmacks, Selkirk First Nation and the Carmacks Renewable Resources Council. The e-mail reiterated the invitation for comments on the application.

[16] Little Salmon/Carmacks expressed its concerns with respect to the Paulsen application by letter dated 27 July 2004:

Trapping

Agriculture Application #746 is within Trapline concession #143, held by a Little Salmon Carmacks First Nation elder. This trapline has a great percentage of its area burnt from forest fires. Previous burns between 1960 and 1989 began to impact this trapline, and the Minto burn of 1995 further affected a significant section of the remaining trappable area. The only area left for this trapper is the small strip of land between the Klondike Highway and the Yukon River. This strip is considered to be suitable land for farming as described in YTG's Agriculture State of the Industry 2000-2001 report. As a result of the report, there has been several agriculture land applications requesting land in the area for raising livestock and building houses. The combination of agricultural and timber harvesting impacts on this already-damaged trapline would certainly be a significant deterrent to the ability of the trapper to continue his traditional pursuits.

Site Specifics and Trapline Cabins

There are two site specifics (personal traditional use areas considered to be LSCFN Settlement Lands) in the area in question: S-4B and S-127B. Both of these locations are in close proximity to the point source timber permit application. The impact on these sites and their users

would be the loss of animals to hunt in the area. S-4B is also the site of Concession #143's base camp and trapper's cabin. (Mr. Roger Rondeau's cabin is in S-127B and he has expressed that he has no concerns with the application.)

Cultural Sites

There are potential areas of heritage and cultural interest which may be impacted by point source timber harvesting. An historic First Nation's trail follows the ridge in the area. At present these sites have not been researched or identified; there would need to be an archaeological survey carried out in order to confirm the presence, or lack thereof, of any such sites.

[17] Susan Davis, Director of Little Salmon/Carmacks' Lands Department, normally attends LARC meetings but was unable to attend the LARC meeting of 13 August 2004, at which Mr. Paulsen's application was considered. Little Salmon/Carmacks did not ask for an adjournment of the review of the Paulsen application. Little Salmon/Carmacks was later provided with the minutes of the 13 August meeting, which reflect a discussion of the First Nation's concerns as raised in its 27 July 2004 letter:

Little Salmon Carmacks First Nation express concern that the application is within Trapline Concession Number 143, held by an elder. Forestfire burns have impacted this trapline, and the only area left is a small strip of land between the Klondike Highway and the Yukon River, which is considered to be suitable land for farming. As a result of the report, there have been several agriculture land applications requesting land in the area for raising livestock and building houses. The combination of agriculture and timber harvesting impacts on this already damaged trapline would be a significant deterrent to the ability of the trapper to continue his traditional pursuits. There are two site specifics, personal/traditional use areas considered to be LSCFN settlement lands in the area in question, S-4B and S-127B. Both of these locations are in close proximity to the point source timber permit application. The impact on these sites and users would be the loss of animals to hunt in the area. S-4B is also the site of Concession 143's base camp and trapper cabin.

Little Salmon Carmacks First Nation also notes that Mr. Roger Rondeau also has a cabin on the site, and he has no concerns with the application.

Other LSCFN concerns related [*sic*] to cultural sites: There are potential areas of heritage and cultural interests which may be impacted by point source timber harvesting. An historic First Nation trail follows the ridge in the area. [A]t present these sites have not been researched or identified, and there would need to be an archaeological survey carried out in order to confirm the presence [*sic*] or lack thereof of any such sites.

Environment advised they walked the site and discovered an old trap on top of the bluff, facing the Yukon River. The owner of Trapline #143 will have the right to seek compensation. An appropriate 30-metre setback is recommended from the bluff. There was evidence of bears and moose. There will be some loss of wildlife habitat in the area, but it is not significant.

[18] At the end of the meeting, LARC recommended approval in principle of Mr. Paulsen's application.

[19] Little Salmon/Carmacks continued to express opposition. Its Lands Department met with Agricultural Branch staff on 8 September 2004 and repeated its view that its concerns with respect to agricultural land applications were not being taken seriously. At the time, the Agriculture Branch was in the process of revising the Yukon Agriculture Policy. Branch staff advised Little Salmon/Carmacks that the LARC process was used for consultation but that they understood that there was no requirement under the Final Agreement to consult with Little Salmon/Carmacks in respect of agricultural land applications and the Branch was doing so as a matter of courtesy. The Paulsen application was not the specific focus of the meeting.

[20] On 18 October 2004, the Director of the Agriculture Branch informed Mr. Paulsen that LARC had recommended approval in principle of his application subject to certain requirements. As Little Salmon/Carmacks was only advised of the approval in the summer of 2005, when Susan Davis made inquiries of Branch staff as to the status of the application, the First Nation continued to express its opposition to the application by letters to the Lands Branch from Mr. Sam and from Chief Skookum post-October 2004.

[21] The position of Yukon was expressed in a letter of 30 January 2004 from the Deputy Minister to Chief Skookum:

In the case of dispositions of Crown land in the Traditional Territory of a First Nation with Final and Self-Government Agreements, there is no legal obligation to consult with the First Nation. Aboriginal rights in respect of that Crown land are no longer asserted, and the Final and Self-Government Agreements do not set out an obligation to consult. Also, there is no other applicable legislation that establishes a legal consultation requirement.

The Yukon Government consults with First Nations regarding dispositions because it is good practice when conducting public business to liaise with other governments. First Nations are consulted about land applications because they are owners of significant amounts of Settlement Land and would be interested in what occurs on nearby Crown land. We believe it is good practice to consult on land applications with First Nations and other publics in the nearby territory because the information and interests that are brought to our attention result in better-informed decisions.

The Land Application Review Committee (LARC), the Land Use Advisory Committee (LUAC) and other similar processes are the mechanisms used to effect these consultations. These processes allow First Nation governments to provide views and recommendations, which can be taken into consideration prior to a decision. As well, views of the local municipal government, non-government organizations and private citizens can be provided and taken into consideration.

[...]

In closing, we look forward to continued participation of the Little Salmon/Carmacks First Nation in these important committees and value your continued input in the interests of practicing good government-to-government relations.

[Emphasis added.]

[22] Little Salmon/Carmacks endeavoured to appeal the LARC decision in August 2005. However, under the LARC terms of reference, only applicants (in this case, Mr. Paulsen) and intervenors (which Little Salmon/Carmacks, as a member of LARC, was not) were entitled to appeal the decision.

[23] Little Salmon/Carmacks continued to express its view that it was important for it to work with Yukon to develop procedures that would provide effective consultation and accommodation measures for land decisions in its traditional territory. The First Nation considered it necessary to oppose the Paulsen application because it believed its aboriginal rights and interests were threatened. Having exhausted its attempts to persuade Yukon, Little Salmon/Carmacks filed a petition in the Supreme Court on 30 May 2006. The petition sought, among other relief, a declaration that the honour of the Crown required the Yukon government to consult with Little Salmon/Carmacks and make all reasonable efforts to accommodate their rights and interests that stood to be adversely affected by the Paulsen application.

[24] As noted by the chambers judge, no transfer of land has taken place. The parties agreed to wait for the Court's decision before completing the land transfer.

SUPREME COURT DECISION

[25] The chambers judge addressed five issues:

1. Does the common law duty to consult and, where appropriate, to accommodate apply to the Final Agreement?
2. If so, was the duty triggered in this case?
3. If so, what is the scope of that duty?
4. Was the duty met in this case?
5. Should the Court exercise its discretion to quash the decision to approve the Paulsen application for agricultural land?

[26] As to the first issue – whether the duty to consult applies to the Final Agreement – the chambers judge applied the recent Supreme Court of Canada decision in ***Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)***, [2005] 3 S.C.R. 388, 2005 SCC 69 at para. 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.

[27] He also considered the meaning of the "honour of the Crown" as that phrase was developed by the Supreme Court of Canada in ***Haida Nation v. British Columbia (Minister of Forests)***, [2004] 3 S.C.R. 511, 2004 SCC 73.

[28] The chambers judge held:

[66] I conclude that the duty to consult and accommodate arises from the concept of honour of the Crown and is an implied term of

every treaty. The court clearly states that "the honour of the Crown also infuses every treaty and the performance of every treaty obligation". It is a corollary of section 35 of the *Constitution Act, 1982*. It is also significant that the duty arises in the *Mikisew Cree* case even where the Crown had the right "to take up" land because consultation is required in advance of interference with existing treaty rights.

[29] The chambers judge then considered whether the terms of the Final Agreement precluded the application of the duty to consult. He specifically referred to sections 2.2.4 and 2.6.5 of the Final Agreement, which state:

2.2.4 Subject to 2.5.0, 5.9.0, 5.10.1 and 25.2.0, Settlement Agreements shall not affect the ability of aboriginal people of the Yukon to exercise, or benefit from, any existing or future constitutional rights for aboriginal people that may be applicable to them.

2.6.5 Nothing in a Settlement Agreement shall be construed to preclude any party from advocating before the courts any position on the existence, nature or scope of any fiduciary or other relationship between the Crown and the Yukon First Nations.

Section 2.5.0 is described in the Final Agreement as the "certainty" clause, excerpted below, pursuant to which Little Salmon/Carmacks, among other things, surrendered to Canada "all their aboriginal claims, rights, titles, and interests, in and to" non-settlement land, including their traditional territory.

[30] The chambers judge then concluded:

[80] It may be that the parties to the Final Agreement did not contemplate the common law duty as it is expressed in the *Mikisew Cree* case. However, in section 2.2.4, the parties did contemplate and expressly permit the First Nation "to exercise, or benefit from, any existing or future constitutional rights for aboriginal people that may be applicable to them".

[81] Section 2.2.4 is "subject to 2.5.0" which I interpret to mean that the Certainty clause is paramount to the ability of the First Nation to

benefit from a future constitutional right such as the duty to consult and accommodate. But there is a considerable difference between the meaning of the Certainty clause and the ability of aboriginal people to benefit from "any existing or future constitutional rights for aboriginal people that may be applicable to them". The Certainty clause means that aboriginal title has been released in the traditional territory of the First Nation in exchange for specified rights in the Final Agreement. Thus, Yukon First Nations cannot reverse that release of aboriginal rights or renegotiate the Final Agreement based upon a future expansive interpretation of aboriginal title. It does not mean that "existing or future constitutional rights" are released and I interpret this to include interpretative principles based on the honour of the Crown and the interpretation of section 35 of the *Constitution Act, 1982*. Thus, in the context of this Final Agreement, the right of Yukon aboriginal people to exercise and benefit from existing and future constitutional rights is expressly incorporated into the Final Agreement by the parties themselves. To that extent, the Final Agreement has built in some flexibility to accommodate future constitutional rights as the law develops so as to avoid the pitfall of having an agreement that becomes chipped in stone or rigid in its interpretation.

[82] The duty to consult and accommodate is a constitutional treaty obligation based on the honour of the Crown and section 35 of the *Constitution Act, 1982*. It infuses every treaty. It is not based on an aboriginal right which the First Nation has ceded pursuant to 2.5.0 in its Traditional Territory. It is a principle of treaty interpretation to ensure that the treaty rights exchanged for aboriginal title are respected. Its purpose is to avoid the indifference and lack of respect that can be destructive of the process of reconciliation that the Final Agreement is meant to address.

[31] The chambers judge rejected Yukon's submission that the Final Agreement did not require consultation in respect to transfers of Crown land in Little Salmon/Carmacks' traditional territory:

[85] There is no doubt that the Final Agreement did not specify that the duty to consult applied to transfers of land in the Traditional Territory. By the same token, it did not provide for any process for the transfer of Crown land. In that sense, there is very little distinction between *Mikisew Cree* where the treaty was silent on the process of "taking up land" and the court imposed the duty to consult and accommodate as treaty rights were at stake. In my view, when this

Final Agreement is silent, it is appropriate to apply the duty to consult and accommodate when the right to transfer land has an impact on treaty rights.

[32] The chambers judge then concluded that the duty to consult was triggered in this case:

[96] The granting of the Paulsen application immediately removes approximately 65 hectares of Crown land from the right to hunt wildlife for subsistence. It also has the effect of removing 65 hectares from the workable portion of the trapline of Johnny Sam. While these impacts may be considered insignificant by some, they go to the heart of what the First Nation sought to protect in its Final Agreement – its culture and way of life, as expressed in its right to harvest. The fact that Johnny Sam can apply for compensation recognizes an economic interest. It does not address the cultural significance or the adverse affect [*sic*] on hunting rights of the First Nation.

[33] The chambers judge concluded that the scope of the duty to consult in this case was "deep consultation" – providing notice, a complete informational package and the results of whatever environmental screening is required not only to the First Nation but also to the affected trapper, Mr. Sam. The chambers judge found that this duty to consult had not been met. Although he determined that the informational component of the duty was to a certain extent satisfied, he found that it did not include Mr. Sam except indirectly through his First Nation. The chambers judge reasoned that the duty was not met in part because the Yukon government denied the existence of a legal duty to consult and the LARC process was not sufficiently directed at satisfying the duty to consult.

[34] Ultimately, the chambers judge decided to quash the decision to approve the Paulsen application:

[128] What is required is that the Yukon Government accept its legal duty to engage in a meaningful consultation directly with the First Nation and Johnny Sam. There must be a dialogue on a government-to-government basis and not simply a courtesy consultation. That discussion must include the impact on the hunting and trapping rights, the Settlement Lands and the Fish and Wildlife Management plan. A good starting point would be the issues set out in the First Nation's letter of appeal dated July 27, 2005. There is no obligation to reach agreement and the First Nation does not have a veto. There is a mutual obligation to have a meaningful consultation to determine what accommodation can be made. A written decision on the Paulsen application must address the rights of the First Nation under the Final Agreement, how those rights are impacted and where it is possible to accommodate them.

ISSUES ON APPEAL

[35] Yukon appeals from the Supreme Court order on the ground that the chambers judge erred in law in finding that a duty to consult and accommodate applies to the Final Agreement and to the right of Yukon to transfer Crown land, either as an implied term of the agreement or as a common law duty.

[36] In the alternative, if a duty to consult is applicable to the Final Agreement, Yukon says that the chambers judge erred in finding that such a duty was also owed to an individual, Mr. Sam, and that the scope of the duty was "deep consultation", and in finding that the duty was not met by the process followed in this case.

DISCUSSION

[37] The determination of whether the duty to consult and, where possible, accommodate First Nations' rights and interests, in the context of a modern land claims and fish and wildlife treaty must necessarily begin with an examination of the

treaty itself. As the Supreme Court of Canada stated in ***R. v. Badger***, [1996] 1

S.C.R. 771 at para. 76:

[...] Treaty rights, on the other hand [i.e., as opposed to aboriginal rights], are those contained in official agreements between the Crown and the native peoples. Treaties are analogous to contracts, albeit of a very solemn and special, public nature. They create enforceable obligations based on the mutual consent of the parties. It follows that the scope of treaty rights will be determined by their wording, which must be interpreted in accordance with the principles enunciated by this Court.

[38] One such interpretive principle is the honour of the Crown as articulated at para. 41 of ***Badger***.

[...] 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.
[...]

[39] ***Badger*** involved hunting rights under Treaty 8 – the same historic treaty at issue in ***Mikisew*** – and the question of whether the Alberta licensing scheme infringed upon the treaty right. (There were other issues: the impact of the Natural Resources Transfer Agreement, 1930 upon Treaty 8 and whether the existing right to hunt for food could be exercised on privately owned land.)

The Final Agreement

[40] During the many years leading up to the execution of the Final Agreement, Canada provided funding through repayable loans for Little Salmon/Carmacks to hire legal advisors and other experts. The First Nation in this case was represented

by highly competent and experienced counsel. The evidence shows that Little Salmon/Carmacks members took an active interest in the negotiations, including elders whose opinions were accorded great deference. The final legal drafting took place over a year and each of the parties was required to agree to the legal text that was to be ratified.

[41] The Final Agreement does not address all aspects of the continuing relationship between Canada, Yukon and Little Salmon/Carmacks. In substance, it addresses issues relating to land, fish and wildlife resources, management of other resources, and financial compensation. By the agreement, Little Salmon/Carmacks surrendered all undefined aboriginal rights, title and interests in its traditional territory in return for which it received:

- title to 2,589 square kilometres of "settlement land";
- financial compensation of \$34,179,210;
- potential for royalty sharing;
- economic development measures;
- rights of access to Crown land (except that disposed of by agreement for sale, surface license, or lease);
- special management areas;
- protection of access to settlement land;
- rights to harvest fish and wildlife;
- rights to harvest forest resources;
- rights to representation and involvement in land use planning and resource management.

[42] A review of the 435 page Final Agreement reveals that it must necessarily have been the product of extensive, informed, and sophisticated negotiation. As with any agreement of similar magnitude, disputes as to interpretation and application will inevitably arise. This is particularly so given that the Final Agreement is essentially the template for all of the ten final agreements negotiated to date in Yukon. It is important to note that, in this case, no one alleges a breach of the terms of the Agreement. Rather, we are concerned with whether a duty to consult is either an implied term of the Agreement or a duty that applies notwithstanding the specific terms of the Agreement.

[43] As I have earlier observed, no transfer of land has yet taken place. In ***Mikisew***, Binnie J. explained at para. 59 that “[w]here [...] the Court is dealing with a *proposed* 'taking up' it is not correct (even if it is concluded that the proposed measure *if implemented* would infringe [...] treaty [...] rights) to move directly to a *Sparrow* analysis.” [Emphasis in original.] In ***Mikisew***, the Minister of Canadian Heritage had approved the winter road at issue and had announced on the Parks Canada website that authorization was given to build the winter road. The Mikisew applied to the Federal Court to set aside the Minister’s approval and an interlocutory injunction against construction of the winter road was issued. A similar suspended state of affairs exists in the case at bar. As no transfer of land has been made, this is not a case that calls for a ***Sparrow*** analysis of infringement and justification. The task for the Court, as outlined in ***Mikisew***, is to consider the process by which Mr. Paulsen’s land grant is to be made, and whether that process is compatible with the honour of the Crown.

[44] Certain of the terms of the Final Agreement are of particular significance on this appeal:

The recitals to the Agreement include:

the Constitution Act, 1982, recognizes and affirms the existing aboriginal rights and treaty rights of the aboriginal peoples of Canada, and treaty rights include rights acquired by way of land claims agreements;

[Emphasis in original.]

the parties to this Agreement wish to achieve certainty with respect to the ownership and use of lands and other resources of the Little Salmon/Carmacks First Nation Traditional Territory;

[Emphasis added.]

the parties wish to achieve certainty with respect to their relationships to each other; [...].

"Settlement agreement" means a final agreement.

2.2.1 Settlement Agreements shall be land claims agreements within the meaning of section 35 of the Constitution Act, 1982.

2.2.4 Subject to 2.5.0, 5.9.0, 5.10.1 and 25.2.0, Settlement Agreements shall not affect the ability of aboriginal people of the Yukon to exercise, or benefit from, any existing or future constitutional rights for aboriginal people that may be applicable to them.

[Emphasis added.]

2.2.15 Settlement Agreements shall be the entire agreement between the parties thereto and there shall be no representation, warranty, collateral agreement or condition affecting those Agreements except as expressed in them.

[the "entire agreement" clause]

[Emphasis added.]

2.5.0 Certainty

2.5.1 In consideration of the promises, terms, conditions and provisos in a Yukon First Nation's Final Agreement:

- 2.5.1.1 subject to 5.14.0, that Yukon First Nation and all persons who are eligible to be Yukon Indian People it represents, as of the Effective Date of that Yukon First Nation's Final Agreement, cede, release and surrender to Her Majesty the Queen in Right of Canada, all their aboriginal claims, rights, titles, and interests, in and to,
- (a) Non-Settlement Land and all other land and water including the Mines and Minerals within the sovereignty or jurisdiction of Canada, except the Northwest Territories, British Columbia and Settlement Land,
 - (b) the Mines and Minerals within all Settlement Land, and
 - (c) Fee Simple Settlement Land;
- 2.5.1.2 that Yukon First Nation and all persons eligible to be Yukon Indian People it represents, as of the Effective Date of that Yukon First Nation's Final Agreement, cede, release and surrender to Her Majesty the Queen in Right of Canada all their aboriginal claims, rights, titles and interests in and to Category A and Category B Settlement Land and waters therein, to the extent that those claims, rights, titles and interests are inconsistent or in conflict with any provision of a Settlement Agreement [...]

2.6.0 Interpretation of Settlement Agreements and Application of Law

2.6.1 The provisions of the Umbrella Final Agreement, the specific provisions of the Yukon First Nation Final Agreement and Transboundary Agreement applicable to each Yukon First Nation shall be read together.

2.6.2 Settlement Legislation shall provide that:

- 2.6.2.1 subject to 2.6.2.2 to 2.6.2.5, all federal, territorial and municipal Law shall apply to Yukon Indian People, Yukon First Nations and Settlement Land;

- 2.6.2.2 where there is any inconsistency or conflict between any federal, territorial or municipal Law and a Settlement Agreement, the Settlement Agreement shall prevail to the extent of the inconsistency or conflict;

[...]

2.6.5 Nothing in a Settlement Agreement shall be construed to preclude any party from advocating before the courts any position on the existence, nature or scope of any fiduciary or other relationship between the Crown and the Yukon First Nations.

[Emphasis added.]

6.2.0 Access to Crown Land

6.2.1 A Yukon Indian Person has and a Yukon First Nation has a right of access without the consent of Government to enter, cross and stay on Crown Land and to use Crown Land incidental to such access for a reasonable period of time for all non-commercial purposes if:

- 6.2.1.1 the access is of a casual and insignificant nature; or
- 6.2.1.2 the access is for the purpose of Harvesting Fish and Wildlife in accordance with Chapter 16 – Fish and Wildlife.

[Emphasis added.]

[...]

6.2.3 A right of access in 6.2.1 or 6.2.2 does not apply to Crown Land:

- 6.2.3.1 which is subject to an agreement for sale or a surface licence or lease except,
- (a) to the extent the surface licence or lease permits public access, or
- (b) where the holder of the interest allows access; [...]

16.4.0 Yukon Indian People

[...]

16.4.2 Yukon Indian People shall have the right to harvest for Subsistence within their Traditional Territory, and with the consent of another Yukon First Nation in that Yukon First Nation's Traditional

Territory, all species of Fish and Wildlife for themselves and their families at all seasons of the year and in any numbers on Settlement Land and on Crown Land to which they have a right of access pursuant to 6.2.0, subject only to limitations prescribed pursuant to Settlement Agreements.

[Emphasis added.]

Section 16.2.0 defines "subsistence":

"Subsistence" means:

- (a) the use of Edible Fish or Wildlife Products by a Yukon Indian Person for sustenance and for food for traditional ceremonial purposes including potlatches; and
- (b) the use by a Yukon Indian Person of Non-Edible By-Products of harvests under (a) for such domestic purposes as clothing, shelter or medicine, and for domestic, spiritual and cultural purposes; but
- (c) except for traditional production of handicrafts and implements by a Yukon Indian Person, does not include commercial uses of Edible Fish or Wildlife Products or Non-Edible By-Products.

[Emphasis added.]

Section 16.11, headed Trapline Management and Use, sets out a detailed and comprehensive scheme for the regulation and management of furbearing animals, and includes, at section 16.11.3, a detailed allocation formula.

Section 16.11.13 provides:

16.11.13 Yukon Indian People holding traplines whose Furbearer Harvesting opportunities will be diminished due to other resource development activities shall be compensated. Government shall establish a process following the Effective Date of the Yukon First Nation's Final Agreement for compensation, including designation of the Persons responsible for compensation.

16.11.13.1 Nothing in 16.11.13 shall be construed to affect a Yukon Indian Person's right to compensation pursuant to Law before the process in 16.11.13 is established.

[45] It is significant to note that there is no specific provision in the Final Agreement that addresses the right of Yukon to transfer land located in the traditional territory of Little Salmon/Carmacks. Although Yukon acknowledged this before the chambers judge, it does not appear to be in doubt that Yukon has the right to so transfer. The chambers judge wrote, "there is no doubt that the right to do so is implied in the Final Agreement" (para. 54), and no appeal is taken from that finding.

The Final Agreement and the duty to consult: submissions on interpretation

[46] Yukon's submissions focus on the various interpretive principles and considerations which are to guide a reading and exposition of the Final Agreement. The Final Agreement is a modern, comprehensive document, the aim of which was to finally settle, with certainty, the Little Salmon/Carmacks' claims to land and resources in Yukon. To achieve that aim, the parties agreed that the Final Agreement was the "entire agreement" between the parties (see clause 2.2.15 quoted above). Consequently, Yukon says that the duty to consult must be found in the Agreement and does not exist outside it.

[47] Yukon submits that a different approach is required when interpreting modern agreements as opposed to historic treaties. Yukon emphasizes the remarks in ***Eastmain Band v. James Bay and Northern Quebec Agreement (Administrator)*** (1992), 99 D.L.R. (4th) 16, [1993] 1 F.C. 501 (C.A.) [cited to D.L.R.]. ***Eastmain***

concerned the interpretation of a modern land claims agreement. The specific issue was whether an environmental review regime established under the treaty applied to the construction of a particular hydro-electric development, which, in turn, required the court to determine whether the development was specifically exempted under the terms of the treaty. The court concluded that the hydro-electric development at issue was exempt from the environmental review regime provided under the agreement.

[48] Yukon's essential position is captured in the following passage from

Eastmain, at pp. 28-29:

When it is modern treaties that are at stake, the aboriginal party must now, too, be bound by the informed commitment that it is now in a position to make. No serious and lasting political compromise or business agreement can be entered into in an atmosphere of distrust and uncertainty. Thus, La Forest J. stated in [*Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85 at 147]:

I think it safe to say that businessmen place a great premium on certainty in their commercial dealings, and that, accordingly, the greatest possible incentive to do business with Indians would be the knowledge that business may be conducted with them on exactly the same basis as with any other person. Any special considerations, extraordinary protections or exemptions that Indians bring with them to the marketplace introduce complications and would seem guaranteed to frighten off potential business partners.

I also think it safe to say that it is in the interests of the aboriginals themselves to interpret the agreements which they sign today in such a way that the other signing parties will not feel themselves at the mercy of constant attempts to renegotiate in the courts.

[49] While I will return to consider more fully Yukon's emphasis on the modern nature of this Agreement, I simply note that in my view ***Eastmain*** is of limited assistance to the case at bar, which involves the application of common law and constitutional principles to the Agreement, an exercise which extends beyond the interpretation of a specific contractual term. However, I also note that the comments of La Forest J. in ***Mitchell***, quoted in ***Eastmain***, were made in the context of the interpretation of a statute. La Forest J. commented on the difference between interpretation of treaties and statutes and stated at p. 143 of ***Mitchell***, "somewhat different considerations must apply in the case of statutes relating to Indians."

[50] With particular focus on the Agreement, Yukon submits that the parties to the Final Agreement negotiated at length as to its extensive terms. As with all such negotiations, there was give and take. The Final Agreement specifies 67 instances in which "consultation" is required.

[51] The Final Agreement states that "Consult" or "Consultation" means to provide:

- (a) to the party to be consulted, notice of a matter to be decided in sufficient form and detail to allow that party to prepare its views on the matter;
- (b) a reasonable period of time in which the party to be consulted may prepare its views on the matter, and an opportunity to present such views to the party obliged to consult; and
- (c) full and fair consideration by the party obliged to consult of any views presented.

[52] Yukon emphasizes that no such consultation is required under the Agreement in respect of proposed dispositions of Crown land. Yukon says that the absence of a consultative requirement clearly signifies an intention to exclude such a requirement. Yukon says that Little Salmon/Carmacks' position – that consultation is a constitutional imperative – will create uncertainty and will result in endless renegotiation of the agreement.

[53] Canada accepts that a duty to consult is triggered by Crown conduct that has potential adverse impacts on aboriginal or treaty rights protected by s. 35(1) of the ***Constitution Act, 1982***. Canada contends that the duty in this case was satisfied if one assesses the treaty as a whole. Canada argues that the provisions of the Final Agreement that preserve availability of land and wildlife supply for harvesting, and allow for participation by First Nations in land use and fish and wildlife management are sufficient to satisfy the duty to consult.

[54] Little Salmon/Carmacks submits that the duty to consult and accommodate is a constitutional obligation that "infuses" and applies to every treaty, whether historic or modern and comprehensive. Little Salmon/Carmacks says that the treaty cannot displace the common law, and says this is so for two reasons. First, governments retain a great deal of discretionary authority that could adversely affect the rights and interests secured by the treaty; and second, myriad government actions could adversely affect the rights and interests secured by the treaty without breaching an express term, thereby frustrating or undermining the achievement of the stated

objectives of the treaty and the goal of reconciliation, which, as Little Salmon/Carmacks says, is an on-going process.

[55] Little Salmon/Carmacks' position is supported by the intervenors, Council of Yukon First Nations and the Kwanlin Dün First Nation ("Kwanlin Dün").

[56] The Council is comprised of 11 Yukon First Nations. One of the Council's objects is the implementation of First Nations land claim settlement agreements. The Council submits that if Yukon's position – that there is no legal obligation to consult – is accepted, then Yukon will be free to grant permits for various uses of Crown lands within traditional territories that are inconsistent or incompatible with the continued exercise of subsistence harvesting treaty rights without consultation, thereby allowing, by unilateral action, the extinguishment of constitutionally protected treaty rights.

[57] Kwanlin Dün is the largest First Nation in the Yukon. It is a signatory to a treaty with the same provisions as the Final Agreement. Kwanlin Dün's traditional territory encompasses the City of Whitehorse and, as such, is exposed to the inevitable pressures associated with an urban environment, including the need to develop Crown lands to accommodate an increasing population.

[58] Kwanlin Dün submits that the full implication of the positions taken by Yukon and Canada is that the honour of the Crown is spent once a final agreement is executed, provided the Crown honours the agreement. Kwanlin Dün acknowledges that the Paulsen application is, in the scheme of things, minor. However, another

application, with potentially greater and more serious impacts, would be subjected to the same result if Yukon's position prevails. That is, Yukon could simply say that the treaty does not require consultation and the affected First Nation would be without recourse.

The Duty to Consult

[59] The Supreme Court of Canada recently reviewed the source of a duty to consult and accommodate in ***Haida Nation***. In ***Haida Nation***, the Supreme Court identified its task as “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” (para. 11). The claims to title over and aboriginal rights in Haida Gwaii were still in the claims process at the time the Haida Nation challenged the procedures by which the British Columbia government replaced and transferred tree farm licenses for logging on Haida Gwaii. The Haida Nation submitted that absent consultation and accommodation, it risked acquiring title only to find the land stripped of forests, which were vital to its economy and culture.

[60] Yukon contends that the pre-treaty context of ***Haida Nation*** limits the applicability of the concepts and principles developed in that case to the one at bar. With respect, that position gives insufficient weight to what Chief Justice McLachlin referred to in ***Haida Nation*** as “the age-old tradition of the common law” (para. 11), by which this Court is now being asked to consider the application of a duty to consult in a new circumstance – a modern negotiated land claims agreement. ***Haida Nation*** provided foundational comments on the duty of the Crown to act honourably:

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

17 The historical roots of the principle of the honour of the Crown suggest that it must be understood generously in order to reflect the underlying realities from which it stems. In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably. Nothing less is required if we are to achieve "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown": [*Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010] at para. 186, quoting [*R. v. Van der Peet*, [1996] 2 S.C.R. 507] at para. 31.

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*, at para. 4, the majority of this Court supported its interpretation of a treaty by stating that "nothing less would uphold the honour and integrity of the Crown in its dealings with the Mi'kmaq people to secure their peace and friendship . . .".

[61] The principled discussion in *Haida Nation* in my view informs the development of the law in this area and should not be rejected as inapplicable. The foregoing passages support the holding in that case that the government had a legal duty to consult with the Haida people about the harvest of timber in the disputed area, including decisions to transfer or replace tree farm licenses. Such "a wider circle of analysis [...] is obviously intended for guidance and [...] should be accepted as authoritative" (*R. v. Henry*, [2005] 3 S.C.R. 609, 2005 SCC 76 at para. 57).

[62] In the companion case of ***Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)***, [2004] 3 S.C.R. 550, 2004 SCC 74, which also involved the duty to consult a First Nation with as yet unproven aboriginal rights and title claims, Chief Justice McLachlin wrote for the Court at para. 24:

[...] As discussed in the companion case of *Haida, supra*, the principle of the honour of the Crown grounds the Crown's duty to consult and if indicated accommodate Aboriginal peoples, even prior to proof of asserted Aboriginal rights and title. The duty of honour derives from the Crown's assertion of sovereignty in the face of prior Aboriginal occupation. It has been enshrined in s. 35(1) of the *Constitution Act, 1982*, which recognizes and affirms existing Aboriginal rights and titles. Section 35(1) has, as one of its purposes, negotiation of just settlement of Aboriginal claims. In all its dealings with Aboriginal peoples, the Crown must act honourably, in accordance with its historical and future relationship with the Aboriginal peoples in question. The Crown's honour cannot be interpreted narrowly or technically, but must be given full effect in order to promote the process of reconciliation mandated by s. 35(1).

[Emphasis added.]

[63] As much as they establish the framework for assessing when the duty to consult arises, and for determining the scope and content of the duty, ***Haida Nation*** and ***Taku River Tlingit*** reaffirm the honour of the Crown as a "core precept" that is to guide the relationship between aboriginal peoples and the Crown. As explained at para. 18 of ***Haida Nation***, "[t]he honour of the Crown gives rise to different duties in different circumstances." Chief Justice McLachlin commented specifically on the treaty context and stated clearly that "[t]he honour of the Crown infuses the processes of treaty making and treaty interpretation" (para. 19). These cases do not presume the duty to consult arises in all aspects of a Crown-First Nations relationship. Rather, ***Haida Nation*** and ***Taku River Tlingit*** assist in articulating the

question at hand: what is required in the circumstances of the case at bar to fulfill the honour of the Crown in its dealings with the First Nation and in the implementation of the Final Agreement?

[64] In *Mikisew*, the Supreme Court of Canada considered the duty to consult in the context of Treaty 8, an 1899 treaty in which First Nations surrendered 840,000 square kilometres in what is now northern Alberta, northeastern British Columbia, northwestern Saskatchewan, and the southern portion of the Northwest Territories. The dispute centred on the construction of a 118-kilometre winter road that traversed traplines and hunting grounds, and affected about 14 Mikisew trappers and 100 hunters. The Mikisew were not consulted before the decision was made to approve the road.

[65] Treaty 8 covers eight pages. As Binnie J. noted, at para. 30, it contemplated that portions of surrendered lands would "from time to time" be "taken up", be transferred from the inventory of lands over which the First Nations had treaty rights to hunt, fish and trap, and be placed in an inventory in which they did not.

[66] Ultimately, Binnie J. concluded:

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.

[Emphasis in original.]

[67] The inescapable conclusion to be drawn from the reasons of Binnie J. is that the honour of the Crown and a duty to consult and accommodate applies in the interpretation of treaties and exists independent of treaties.

[68] Yukon contends the historical context of Treaty 8 limits the applicability of ***Mikisew***. The considerations which Yukon submits should guide the interpretation of the Final Agreement – the extensive negotiation and ratification process, the Agreement's comprehensive scope, and its expressed objective of certainty – exemplify the modern nature of this Agreement and distinguish it from an historical treaty. Accordingly, Yukon says, the Supreme Court of Canada's extension of the duty to consult and accommodate in ***Mikisew*** to the treaty context does not apply to the Final Agreement.

[69] In my view, an attempt to so categorize the Crown's various relationships and agreements with aboriginal peoples, as based in historic or modern negotiations, does not demonstrate a sufficiently broad and purposive understanding of the constitutional grounding of the Crown's duty to act honourably. Moreover, the language of s. 35 does not support a distinction between historic and modern

agreements. The honour of the Crown, from which the duty to consult derives, has been enshrined in s. 35(1) of the ***Constitution Act, 1982***. This section provides, “[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.” Subsection (3) explains, “[f]or greater certainty, in subsection (1) “treaty rights” includes rights that now exist by way of land claims agreements or may be so acquired.” [Emphasis added.]

[70] Further, I note the lack of qualification in the comments of Binnie J. in ***Mikisew***, which is in keeping with s. 35(3). At para. 57, he states, “the honour of the Crown infuses every treaty and the performance of every treaty obligation”. At para. 63, he specifically refers to a modern agreement:

The determination of the content of the duty to consult will, as *Haida* suggests, be governed by the context. One variable will be the specificity of the promises made. Where, for example, a treaty calls for certain supplies, or Crown payment of treaty monies, or a modern land claims settlement imposes specific obligations on aboriginal peoples with respect to identified resources, the role of consultation may be quite limited. [...]

[71] Extrapolating from this passage, the modern nature of a land claims agreement is a contextual factor to be taken into account in determining the duty to consult. To find otherwise would lend credence to Yukon's position that, as a result of entering into the Final Agreement, the relationship between the Crown and Little Salmon/Carmacks is now governed solely by the terms of the Agreement and is not subject to common law or constitutional principles. To the contrary, while the Final Agreement gives structure to the relationship between the Crown and the First Nation, the relationship is a continuing one. The principle of consultation, as was

said in *Mikisew*, "is a matter of broad general importance to the relations between aboriginal and non-aboriginal peoples" (para. 3).

Is the duty to consult an implied term of the treaty?

[72] Yukon submits that the chambers judge erred in law in concluding, at para. 66, that the duty to consult "is an implied term of every treaty" and in therefore finding the duty to consult to be an implied term of the Final Agreement.

[73] Much time was spent by the parties on the issue of whether the duty to consult is an implied term of the Final Agreement. In the end, however, none of the parties seriously contended that the chambers judge's finding on this point could be upheld. I therefore do not propose to discuss the issue further other than to say that none of the traditional bases on which terms may be implied in a contract are readily applied in the context of the Final Agreement: see *Canadian Pacific Hotels Ltd. v. Bank of Montreal*, [1987] 1 S.C.R. 711.

Does the duty to consult apply to the terms of the Final Agreement?

[74] The more difficult issue is whether the parties intended the terms of the Final Agreement to incorporate all consultative duties and thus to eliminate any that were not expressly stated.

[75] I have already reproduced several of the relevant Final Agreement provisions. Yukon emphasizes two such provisions – those relating to certainty, section 2.5.0 (at page 21 of these reasons), and the entire agreement clause, section 2.2.15 (at page 20). It is uncontroversial that a primary objective of the Agreement is the

reconciliation of government interests and aboriginal rights by providing certainty as to the parties' respective ownership and use of lands and their respective rights and obligations thereto.

[76] The issue at bar focuses on the undisputed fact that section 6.2.3 of the Final Agreement does not require Yukon to consult with the First Nation before exercising its right to dispose of Crown land. The obvious impact on the First Nation is that, once the land is disposed of, the First Nation's right of access to Crown lands for specific purposes, including subsistence harvesting of fish and wildlife on the transferred land, is lost.

[77] Yukon submits that the Final Agreement specifies when consultation is required and highlights the absence of any specific provision providing for consultation with the First Nation with respect to the government's decision to dispose of or transfer Crown land in the traditional territory of the First Nation. Yukon conceives of the duty to consult as a condition or limitation on its right to dispose of Yukon Crown land, and submits any limitation on this right must be found in the express provisions of the Final Agreement. However, as earlier noted, there is no specific provision in the Final Agreement that addresses Yukon's right to transfer land and to which a requirement for consultation might logically attach.

[78] At para. 67 the chambers judge articulated the question before him as "whether the wording of the Final Agreement prevents the common law duty to consult and accommodate from applying to the implied right of the Yukon Government to transfer land in the First Nation's Traditional Territory." At para. 86 of

his reasons, he wrote, "[t]he fact that the right of the Yukon Government to transfer lands in the Traditional Territory of a First Nation is implied rather than expressly stated in the Final Agreement does not mean that the honour of the Crown disappears." I agree, but for reasons different from those of the chambers judge.

[79] The chambers judge accepted Little Salmon/Carmacks' argument that section 2.2.4 permitted an interpretation of the Agreement such as to give rise to the duty to consult.

[80] For ease of reference, section 2.2.4 reads:

2.2.4 Subject to 2.5.0, 5.9.0, 5.10.1 and 25.2.0, Settlement Agreements shall not affect the ability of aboriginal people of the Yukon to exercise, or benefit from, any existing or future constitutional rights for aboriginal people that may be applicable to them.

[81] The gist of the First Nation's argument on this point is that the Final Agreement was executed in 1997 prior to the Supreme Court of Canada's explication of the duty to consult in ***Haida Nation***, ***Taku River Tlingit***, and ***Mikisew***. Little Salmon/Carmacks thus argued that because the duty to consult was unknown at the time the Agreement was signed, it is entitled under section 2.2.4 to take advantage of constitutional rights – i.e. the duty to consult – that had not hitherto been recognized.

[82] Yukon's counter-argument is that section 2.2.4 is specifically subject to the certainty clause. Yukon contends that the intent of section 2.5.0 was that the Agreement would govern, to the extent identified, relations between the parties from

that point forward. The scheme of the Agreement is that Little Salmon/Carmacks surrendered all of its aboriginal claims, rights, title and interests in exchange for, *inter alia*, defined rights and title. Yukon says that, in this respect, "existing or future constitutional rights" in section 2.2.4 means rights not dealt with in the treaty.

[83] Kwanlin Dün supports Little Salmon/Carmacks and argues that section 2.5.0 provided for the surrender of the First Nation's common law aboriginal rights and title in exchange for defined treaty rights. Kwanlin Dün asserts that the duty to consult is a duty imposed on the Crown in the exercise of its powers. It is not a right of aboriginal people within the meaning of section 2.5.0 and could not have been ceded in 1993 since it was only declared by the Supreme Court of Canada in 2004. Kwanlin Dün contends that the phrase "future constitutional rights for aboriginal people" in section 2.2.4 must be constitutional rights relating to the exercise of their treaty rights, namely the right to be consulted.

[84] Canada urges us to refrain from concluding that the duty to consult is a constitutional right. In Canada's view, the duty is a procedural, not substantive one. As I have noted, Canada's position is that the terms of the treaty satisfy any duty to consult and there is thus no need to decide the issue in this case.

[85] A similar argument was made by Canada in ***Chief Joe Hall v. Canada (Attorney General)***, 2007 BCCA 133, 66 B.C.L.R. (4th) 272, 281 D.L.R. (4th) 752, [2007] 7 W.W.R. 1. Chief Justice Finch, writing for a five-member division of the Court, rejected the argument at paras. 47-48:

The learned chambers judge held that the duty to consult was a "constitutional issue". Counsel for the Attorney General vigorously contested the constitutional nature of the duty to consult. He conceded that the duty is a "legal duty" which has as its source "the honour of the Crown" but argued that "...it is not a constitutional right or obligation."

I do not accept that as a sound proposition. The honour of the Crown speaks to the Crown's obligation to act honourably in all its dealings with aboriginal peoples. It may not lawfully act in a dishonourable way. That is a limitation on the powers of government, not to be found in any statute, that has a constitutional character because it helps to define the relationship between government and the governed.

[86] Most recently, in ***R. v. Kapp***, 2008 SCC 41, the majority of the Supreme Court of Canada stated at para. 6:

[...] The decision to enhance aboriginal participation in the commercial fishery may also be seen as a response to the directive of this Court in *Sparrow*, at p. 1119, that the government consult with aboriginal groups in the implementation of fishery regulation in order to honour its fiduciary duty to aboriginal communities. Subsequent decisions have affirmed the duty to consult and accommodate aboriginal communities with respect to resource development and conservation; it is a constitutional duty, the fulfilment of which is consistent with the honour of the Crown: see e.g. *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010.

[Emphasis added.]

[87] The difficulty posed by the arguments advanced by Little Salmon/Carmacks, the Council, and Kwanlin Dün is that they all implicitly accept that the duty to consult is a "constitutional right" as that term is used in section 2.2.4.

[88] In my opinion, there can be no doubt that the duty to consult is recognized as a constitutional duty. However, I am unable to conclude that it is a constitutional right. So far as I am aware, the Supreme Court of Canada has never defined the

duty as a constitutional right, perhaps for reasons relating to the interpretation of s. 35 of the ***Constitution Act, 1982***. Further, it is not necessary, for the purposes of deciding this appeal, to make that finding.

[89] I am therefore unable to conclude that the duty to consult is a constitutional right contemplated by section 2.2.4, even if one could overcome the limiting language of section 2.5.0.

[90] However, as I have noted, the honour of the Crown and the correlative duty to consult are constitutional duties for the reasons expressed in ***Haida Nation, Taku River Tlingit, and Mikisew***. They exist outside and infuse the treaty and govern Yukon's dealings with Yukon First Nations. In my opinion, the duty to consult does apply to the interpretation and implementation of the Final Agreement and is not precluded from application by the terms of the treaty. In my view, such a finding does not render the Final Agreement uncertain or open to unending renegotiation. It simply means that Yukon must be cognizant of potential adverse impacts on First Nations' treaty rights when Yukon proposes to dispose of Crown lands, and, when treaty rights may be affected, Yukon must seek consultation with First Nations. The degree of consultation will be a function of potential impact.

[91] It cannot be said that the honour of the Crown is fully satisfied by the conclusion of treaties, for it is clear that the duty continues to apply in the implementation of treaties. Yukon and Canada's positions would suggest that the conclusion of the Final Agreement achieves reconciliation. In my opinion, that position does not accord with the remarks in ***Haida Nation, Taku River Tlingit***, or

Mikisew. It is clear that treaty making is just one step on the path to reconciliation. As Binnie J. stated in **Mikisew**, at para. 54, "[t]reaty making is an important stage in the long process of reconciliation, but it is only a stage." As arduous as it has been to conclude treaties, the implementation of them also poses significant challenges. Reconciliation will inevitably be a long and sometimes difficult process, which will require the good faith efforts of all levels of government – federal, territorial, and First Nations.

Was the duty to consult and accommodate met in this case?

[92] The essential position of Little Salmon/Carmacks is that the duty was triggered because the proposed disposition of land had a potential adverse impact on the treaty rights of the First Nation, namely the right to harvest for subsistence as provided in section 16.4.2 of the Final Agreement. The chambers judge also found that the Paulsen application might undermine the Fish and Wildlife Management plan contemplated in section 16 of the Agreement and might also affect settlement lands.

[93] The First Nation emphasizes the right to harvest furbearing animals for subsistence purposes as provided in section 16.4.2 and the right to trade non-edible by-products from the harvest of furbearers under section 16.4.5. The transfer of lands under the Paulsen application is within Mr. Sam's trapline, which has been in his family for generations. Mr. Sam deposed to the importance of the trapline for the purposes of training future generations as to their connection to the land and the aboriginal way of life.

[94] The process for reviewing applications for land grants requires notice to be given to potentially affected First Nations and, indeed, non-aboriginals. The evident purpose of such notice is to manage the complex and potentially conflicting interests of landowners and those entitled to reap the resources on Yukon lands, including lands within the traditional territories of Yukon First Nations. As Yukon stated in its 30 January 2004 letter to Chief Skookum:

The Yukon Government consults with First Nations regarding dispositions because it is good practice when conducting public business to liaise with other governments. First Nations are consulted about land applications because they are owners of significant amounts of Settlement Land and would be interested in what occurs on nearby Crown land. We believe it is good practice to consult on land applications with First Nations and other publics in the nearby territory because the information and interests that are brought to our attention result in better-informed decisions.

[95] The duty to consult arises whenever Yukon proposes to take action that may have potential adverse effects on treaty rights. The threshold is obviously low because, until a First Nation is informed of the proposed action, it is unable to provide input as to the extent of any impact the proposed action may have on its treaty rights. Yukon will know whether the proposed disposition may potentially affect a First Nation's treaty right, at which point the duty to consult will be triggered. As Mr. Justice Lambert observed in *Haida Nation v. B.C. and Weyerhaeuser*, 2002 BCCA 147, at para. 46, 99 B.C.L.R. (3d) 209, [2002] 6 W.W.R. 243, a duty to consult logically arises "as a prelude to a potential infringement and should be assessed in relation to the severity of the proposed Crown action." [Emphasis in original.]

[96] In *Mikisew*, Binnie J. explained the trigger and the content of the duty at para. 34:

In the case of a treaty the Crown, as a party, will always have notice of its contents. The question in each case will therefore be to determine the degree to which conduct contemplated by the Crown would adversely affect those rights so as to trigger the duty to consult. *Haida Nation* and *Taku River* set a low threshold. The flexibility lies not in the trigger (“might adversely affect it”) but in the variable content of the duty once triggered. At the low end, “the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice” (*Haida Nation*, at para. 43). The *Mikisew* say that even the low end content was not satisfied in this case.

[97] In my opinion, Yukon’s recognition that consultation was “good practice” was coincident with the point at which a duty to consult was triggered in this case. As the Supreme Court of Canada has observed on several occasions, the existence and scope of the duty must be determined on a case by case basis. Here, it is clear that there existed potential infringement of treaty rights, thereby triggering the duty to consult. The more difficult issue is the scope of the duty and whether it was satisfied in this case.

[98] The scope of the duty will depend on the terms of the treaty and the rights granted thereunder that may be adversely affected. The greater the potential adverse impact on the treaty right, the greater the need for in-depth consultation.

[99] Yukon submits that the chambers judge erred in considering several matters that were not the subject of the Final Agreement and could not be considered treaty rights. The first was the potential effect of the Paulsen application on Mr. Sam’s

trapline. Mr. Sam's trapline concession authorizes commercial harvesting and is issued under the **Wildlife Act**. There is no right under the Final Agreement for a member of the First Nation to access Crown land for commercial harvesting.

Further, the "Fish and Wildlife Management plan" considered by the chambers judge is in fact a five-year work plan that has not been authorized by the Minister and does not form part of the Final Agreement. Lastly, Yukon submits, the First Nation's settlement land is not affected by the Paulsen application. In other words, Yukon contends that since no treaty rights were in fact at risk, any duty to consult was minimal.

[100] In **Mikisew**, the court held, at para. 64, that the duty to consult lay at "the lower end of the spectrum":

The duty here has both informational and response components. In this case, given that the Crown is proposing to build a fairly minor winter road on *surrendered* lands where the Mikisew hunting, fishing and trapping rights are expressly subject to the "taking up" limitation, I believe the Crown's duty lies at the lower end of the spectrum. The Crown was required to provide notice to the Mikisew and to engage directly with them (and not, as seems to have been the case here, as an afterthought to a general public consultation with Park users). This engagement ought to have included the provision of information about the project addressing what the Crown knew to be Mikisew interests and what the Crown anticipated might be the potential adverse impact on those interests. The Crown was required to solicit and to listen carefully to the Mikisew concerns, and to attempt to minimize adverse impacts on the Mikisew hunting, fishing and trapping rights. The Crown did not discharge this obligation when it unilaterally declared the road realignment would be shifted from the reserve itself to a track along its boundary. I agree on this point with what Finch J.A. (now C.J.B.C.) said in [*Halfway River First Nation v. British Columbia (Ministry of Forests)*, 1999 BCCA 470, 178 D.L.R. (4th) 666] at paras. 159-60.

The fact that adequate notice of an intended decision may have been given does not mean that the requirement for adequate consultation has also been met.

The Crown's duty to consult imposes on it a positive obligation to reasonably ensure that aboriginal peoples are provided with all necessary information in a timely way so that they have an opportunity to express their interests and concerns, and to ensure that their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action.

[All emphasis in original.]

[101] If the duty to consult in ***Mikisew*** was at the lower end of the spectrum, it is clear that the duty in this case also lies at a low level of the spectrum.

[102] It is conceded on all sides that the Paulsen application was relatively modest and straightforward. That is not to say that the application did not have perceived adverse impacts for Mr. Sam and other members of Little Salmon/Carmacks.

[103] The complaint of the First Nation is not with the information provided but rather that it considered that its views were not taken seriously by Yukon.

[104] Yukon says that the process provided under LARC and undertaken in this case amply satisfied any applicable standard of consultation. The LARC process is not, of course, mandated under the Final Agreement. However, as was the case in ***Taku River Tlingit***, it may be enough if a separate consultation process meets the requirements of consultation (see: para. 40).

[105] The LARC process is not perfect. For instance, the introduction to the LARC terms of reference states that "LARC is not constituted by statute and there is no legislative requirement for LARC to consider any lands matter." That statement would obviously provide little comfort to a First Nation that depended on the LARC process to be notified of Crown land dispositions that might affect treaty rights.

[106] Some comfort might be taken from the subsequent introductory statement:

The Yukon Government recognizes rights and obligations arising from Yukon First Nation Final and Self Government Agreements including the obligation to consult. LARC terms of reference will be revised whenever necessary to comply with legislated mechanisms referenced in statutory agreements (ie. Yukon Environmental and Socioeconomic Assessment Act).

[107] Whatever might constitute the consultation process in a future case, we are concerned here with the process adopted in this case and whether it satisfied the requisite level of consultation.

[108] I have already reviewed in some detail at paras. 10 to 22 of these reasons the process followed in this case.

[109] The chambers judge was critical of the process, in part because Yukon denied that there was a legal duty to consult and he considered that denial infected Yukon's approach to consultation. In my opinion, the criticism levelled at Yukon was unwarranted. Yukon relied on the comprehensive terms of the Final Agreement and, at the time, could legitimately hold the view that, insofar as Yukon transfers of Crown land were concerned, there was no duty to consult the First Nation beyond the terms

of the treaty. That position was taken prior to the decision in ***Mikisew***, which was the first case to consider a duty to consult in the context of a concluded treaty.

[110] Little Salmon/Carmacks' petition sought, among other things, a declaration that the honour of the Crown requires Yukon to consult with the First Nation and make all reasonable efforts to accommodate its rights and interests that stand to be adversely affected by the Paulsen application. In seeking that relief, Little Salmon/Carmacks sought the protection and supervision of its rights under the Final Agreement. The treaty right in question was the right to harvest for subsistence as provided by section 16.4.2. The definition of "subsistence" in chapter 16 of the Final Agreement specifically excludes harvesting for commercial purposes (with some limited exceptions). The management and use of commercial traplines is dealt with under section 16.11 and traplines are confined by an allocation formula set out in section 16.11.13. There is specific provision for compensation to First Nations members whose traplines are diminished. There is no limitation as to what the First Nation may do on settlement lands.

[111] These provisions exemplify why it is important in each case involving a concluded treaty to first examine the terms of the agreement to determine the scope of the duty to consult.

[112] In this case, at the time LARC held a meeting to consider the Paulsen application and the response of the First Nation, all LARC had before it was the letter from Little Salmon/Carmacks of 27 July 2004. That letter referred to Mr. Sam's trapline concession issued under the ***Wildlife Act*** to trap for commercial purposes

and the impact on his trapline, as well as concerns related to heritage and cultural sites. The First Nation was directly notified on two occasions as to the date of the meeting at which the Paulsen application was to be considered and was given an opportunity to be heard. Even in the First Nation's absence, its letter was considered by LARC.

[113] Mr. Sam's affidavits filed in the Supreme Court elaborated on his concerns related to commercial uses of the trapline, but those of course do not relate to the right to subsistence harvesting protected under the treaty. It is true that Mr. Sam expressed concerns related to "cultural transmission" and his desire to pass on the traditional ways to the next generation, which is consistent with one of the objectives of chapter 16, namely "to preserve and enhance the culture, identity and values of Yukon Indian People". That signifies that a potential treaty right might be affected by the Paulsen application.

[114] In any case, it is clear that LARC identified and considered Little Salmon/Carmacks' concerns and it cannot reasonably be said that the meeting was simply an exercise in allowing the First Nation to "blow off steam" while permitting Yukon to "run roughshod" over the First Nation's treaty rights. (See ***Haida Nation*** at para. 27.)

[115] In my opinion, in light of the low level of consultation required by the circumstances of this case, the duty to consult was met.

[116] Lastly, I conclude that the chambers judge erred in requiring consultation with the individual trapper. Mr. Sam was aware of the Paulsen application. He specifically asked that Little Salmon/Carmacks act on his behalf in the LARC process. It would be unreasonable in those circumstances to demand consultation with him. Further, the duty to consult, as an adjunct to the implementation of the Final Agreement, can only apply between the parties to the agreement – Yukon and the First Nation – and not to individual members of the First Nation.

[117] In summary, I would find that a constitutional duty to consult applies in the context of the Final Agreement. The duty to consult in this case was triggered but was at the lower end of the spectrum and was met. In the result, I would allow the

appeal and set aside the Supreme Court order. Because, in a very real sense, success has been divided, I would order that each party bear its own costs of the appeal.

“The Honourable Madam Justice Kirkpatrick”

I agree:

“The Honourable Madam Justice Newbury”

I agree:

“The Honourable Mr. Justice Tysoe”



SUPREME COURT OF CANADA

CITATION: Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), [2005] 3 S.C.R. 388, 2005 SCC 69

DATE: 20051124
DOCKET: 30246

BETWEEN:

Mikisew Cree First Nation

Appellant

and

**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

CORAM: McLachlin C.J. and Major, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ.

REASONS FOR JUDGMENT:
(paras. 1 to 70)

Binnie J. (McLachlin C.J. and Major, Bastarache, LeBel, Deschamps, Fish, Abella and Charron JJ. concurring)

Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), [2005] 3 S.C.R.
388, 2005 SCC 69

Mikisew Cree First Nation

Appellant

v.

**Sheila Copps, Minister of Canadian Heritage,
and Thebacha Road Society**

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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
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Interveners

**Indexed as: Mikisew Cree First Nation v. Canada (Minister of Canadian
Heritage)**

Neutral citation: 2005 SCC 69.

File No.: 30246.

2005: March 14; 2005: November 24.

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

on appeal from the federal court of appeal

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.

Crown — Honour of Crown — Duty to consult and accommodate Aboriginal peoples

Appeal — Role of intervener — New argument.

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 injunction 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.

The government's approach, rather than advancing the process of reconciliation between the Crown and the Treaty 8 First Nations, undermined it. [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. [33-34] [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. [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. [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 “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. [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. [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. [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 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.

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Treaties and Proclamations

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Treaty No. 8 (1899).

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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.

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.

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

1 BINNIE J. — 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), exceeds the size of Manitoba (650,087 square kilometres), Saskatchewan (651,900 square kilometres) and Alberta (661,185 square kilometres) and approaches the size of British Columbia (948,596 square kilometres). In exchange for this surrender, the First Nations were promised reserves and some other benefits including, most importantly to them, the following rights of hunting, trapping, and fishing:

And Her Majesty the Queen HEREBY AGREES with the said Indians that they shall have right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as before described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes. [Emphasis added.]

(Report of Commissioners for Treaty No. 8 (1899), at p. 12)

3 In fact, for various reasons (including lack of interest on the part of First Nations), sufficient land was not set aside for reserves for the Mikisew Cree First Nation (the “Mikisew”) until the 1986 Treaty Land Entitlement Agreement, 87 years after Treaty 8 was made. Less than 15 years later, the federal government approved a 118-kilometre winter road that, as originally conceived, ran through the new Mikisew First Nation Reserve at Peace Point. The government did not think it necessary to engage in consultation directly with the Mikisew before making this decision. After the Mikisew protested, the winter road alignment was changed to track

the boundary of the Peace Point reserve instead of running through it, again without consultation with the Mikisew. The modified road alignment traversed the traplines of approximately 14 Mikisew families who reside in the area near the proposed road, and others who may trap in that area although they do not live there, and the hunting grounds of as many as 100 Mikisew people whose hunt (mainly of moose), the Mikisew say, would be adversely affected. The fact the proposed winter road directly affects only about 14 Mikisew trappers and perhaps 100 hunters may not seem very dramatic (unless you happen to be one of the trappers or hunters in question) but, in the context of a remote northern community of relatively few families, it is significant. Beyond that, however, the principle of consultation in advance of interference with existing treaty rights is a matter of broad general importance to the relations between aboriginal and non-aboriginal peoples. It goes to the heart of the relationship and concerns not only the Mikisew but other First Nations and non-aboriginal governments as well.

4 In this case, the relationship was not properly managed. Adequate consultation in advance of the Minister's approval did not take place. The government's approach did not advance the process of reconciliation but undermined it. The duty of consultation which flows from the honour of the Crown, and its obligation to respect the existing treaty rights of aboriginal peoples (now entrenched in s. 35 of the *Constitution Act, 1982*), was breached. The Mikisew appeal should be allowed, the Minister's approval quashed, and the matter returned to the Minister for further consultation and consideration.

I. Facts

5 About 5 percent of the territory surrendered under Treaty 8 was set aside in 1922 as Wood Buffalo National Park. The Park was created principally to protect the last remaining herds of wood bison (or buffalo) in northern Canada and covers 44,807 square kilometres of land straddling the boundary between northern Alberta and southerly parts of the Northwest Territories. It is designated a UNESCO World Heritage Site. The Park itself is larger than Switzerland.

6 At present, it contains the largest free-roaming, self-regulating bison herd in the world, the last remaining natural nesting area for the endangered whooping crane, and vast undisturbed natural boreal forests. More to the point, it has been inhabited by First Nation peoples for more than over 8,000 years, some of whom still earn a subsistence living by hunting, fishing and commercial trapping within the Park boundaries. The Park includes the traditional lands of the Mikisew. As a result of the Treaty Land Entitlement Agreement, the Peace Point Reserve was formally excluded from the Park in 1988 but of course is surrounded by it.

7 The members of the Mikisew Cree First Nation are descendants of the Crees of Fort Chipewyan who signed Treaty 8 on June 21, 1899. It is common ground that its members are entitled to the benefits of Treaty 8.

A. The Winter Road Project

8 The proponent of the winter road is the respondent Thebacha Road Society, whose members include the Town of Fort Smith (located in the Northwest Territories on the northeastern boundary of Wood Buffalo National Park, where the Park headquarters is located), the Fort Smith Métis Council, the Salt River First Nation, and

Little Red River Cree First Nation. The advantage of the winter road for these people is that it would provide direct winter access among a number of isolated northern communities and to the Alberta highway system to the south. The trial judge accepted that the government's objective was to meet "regional transportation needs": (2001), 214 F.T.R. 48, 2001 FCT 1426, at para. 115.

B. The Consultation Process

9 According to the trial judge, most of the communications relied on by the Minister to demonstrate appropriate consultation were instances of the Mikisew's being provided with standard information about the proposed road in the same form and substance as the communications being distributed to the general public of interested stakeholders. Thus Parks Canada acting for the Minister, provided the Mikisew with the Terms of Reference for the environmental assessment on January 19, 2000. The Mikisew were advised that open house sessions would take place over the summer of 2000. The Minister says that the first formal response from the Mikisew did not come until October 10, 2000, some two months after the deadline she had imposed for "public" comment. Chief Poitras stated that the Mikisew did not formally participate in the open houses, because ". . . an open house is not a forum for us to be consulted adequately".

10 Apparently, Parks Canada left the proponent Thebacha Road Society out of the information loop as well. At the end of January 2001, it advised Chief Poitras that it had just been informed that the Mikisew did not support the road. Up to that point, Thebacha had been led to believe that the Mikisew had no objection to the road's going through the reserve. Chief Poitras wrote a further letter to the Minister

on January 29, 2001 and received a standard-form response letter from the Minister's office stating that the correspondence "will be given every consideration".

11 Eventually, after several more miscommunications, Parks Canada wrote Chief Poitras on April 30, 2001, stating in part: "I apologize to you and your people for the way in which the consultation process unfolded concerning the proposed winter road and any resulting negative public perception of the [Mikisew Cree First Nation]". At that point, in fact, the decision to approve the road with a modified alignment had already been taken.

12 On May 25, 2001, the Minister announced on the Parks Canada website that the Thebacha Road Society was authorized to build a winter road 10 metres wide with posted speed limits ranging from 10 to 40 kilometres per hour. The approval was said to be in accordance with "Parks Canada plans and policy" and "other federal laws and regulations". No reference was made to any obligations to the Mikisew.

13 The Minister now says the Mikisew ought not to be heard to complain about the process of consultation because they declined to participate in the public process that took place. Consultation is a two-way street, she says. It was up to the Mikisew to take advantage of what was on offer. They failed to do so. In the Minister's view, she did her duty.

14 The proposed winter road is wide enough to allow two vehicles to pass. Pursuant to s. 36(5) of the *Wood Buffalo National Park Game Regulations*, SOR/78-830, creation of the road would trigger a 200-metre wide corridor within which the use

of firearms would be prohibited. The total area of this corridor would be approximately 23 square kilometres.

15 The Mikisew objection goes beyond the direct impact of closure of the area covered by the winter road to hunting and trapping. The surrounding area would be, the trial judge found, injuriously affected. Maintaining a traditional lifestyle, which the Mikisew say is central to their culture, depends on keeping the land around the Peace Point reserve in its natural condition and this, they contend, is essential to allow them to pass their culture and skills on to the next generation of Mikisew. The detrimental impact of the road on hunting and trapping, they argue, may simply prove to be one more incentive for their young people to abandon a traditional lifestyle and turn to other modes of living in the south.

16 The Mikisew applied to the Federal Court to set aside the Minister's approval based on their view of the Crown's fiduciary duty, claiming that the Minister owes "a fiduciary and constitutional duty to adequately consult with Mikisew Cree First Nation with regard to the construction of the road" (trial judge, at para. 26).

17 An interlocutory injunction against construction of the winter road was issued by the Federal Court, Trial Division on August 27, 2001.

II. Relevant Enactments

18 *Constitution Act, 1982*

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

III. Judicial History

A. *Federal Court, Trial Division* ((2001), 214 F.T.R. 48, 2001 FCT 1426)

19 Hansen J. held that the lands included in Wood Buffalo National Park were not “taken up” by the Crown within the meaning of Treaty 8 because the use of the lands as a national park did not constitute a “visible use” incompatible with the existing rights to hunt and trap (*R. v. Badger*, [1996] 1 S.C.R. 771; *R. v. Sioui*, [1990] 1 S.C.R. 1025). The proposed winter road and its 200-metre “[no] firearm” corridor would adversely impact the Mikisew’s treaty rights. These rights received constitutional protection in 1982, and any infringements must be justified in accordance with the test in *R. v. Sparrow*, [1990] 1 S.C.R. 1075. In Hansen J.’s view, the Minister’s decision to approve the road infringed the Mikisew’s Treaty 8 rights and could not be justified under the *Sparrow* test.

20 In particular, the trial judge held that the standard public notices and open houses which were given were not sufficient. The Mikisew were entitled to a distinct consultation process. She stated at paras. 170-71:

The applicant complains that the mitigation measures attached to the Minister’s decision were not developed in consultation with Mikisew and were not designed to minimize impacts on Mikisew’s rights. I agree. Even the realignment, apparently adopted in response to Mikisew’s objections, was not developed in consultation with Mikisew. The evidence does not establish that any consideration was given to whether the new route would minimize impacts on Mikisew’s treaty rights. The evidence of Chief George Poitras highlighted an air of secrecy surrounding the realignment, a process that should have included a transparent consideration of Mikisew’s concerns.

Parks Canada admitted it did not consult with Mikisew about the route for the realignment, nor did it consider the impacts of the realignment on Mikisew trappers' rights.

21 Accordingly, the trial judge allowed the application for judicial review and quashed the Minister's approval.

B. *Federal Court of Appeal* ([2004] 3 F.C.R. 436, 2004 FCA 66)

22 Rothstein J.A., with whom Sexton J.A. agreed, allowed the appeal and restored the Minister's approval. He did so on the basis of an argument brought forward by the Attorney General of Alberta as an intervener on the appeal. The argument was that Treaty 8 expressly contemplated the "taking up" of surrendered lands for various purposes, including roads. The winter road was more properly seen as a "taking up" pursuant to the Treaty rather than an infringement of it. As Rothstein J.A. held:

Where a limitation expressly provided for by a treaty applies, there is no infringement of the treaty and thus no infringement of section 35. This is to be contrasted with the case where the limitations provided by the treaty do not apply but the government nevertheless seeks to limit the treaty right. In such a case, the *Sparrow* test must be satisfied in order for the infringement to be constitutionally permissible. [para. 21]

Rothstein J.A. also held that there was no obligation on the Minister to consult with the Mikisew about the road, although to do so would be "good practice" (para. 24). (This opinion was delivered before the release of this Court's decisions in *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73, and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550, 2004 SCC 74.)

23 Sharlow J.A., in dissenting reasons, agreed with the trial judge that the winter road approval was itself a *prima facie* infringement of the Treaty 8 rights and that the infringement had not been justified under the *Sparrow* test. The Crown's obligation as a fiduciary must be considered. The failure of the Minister's staff at Parks Canada to engage in meaningful consultation was fatal to the Crown's attempt at justification. She wrote:

In this case, there is no evidence of any good faith effort on the part of the Minister to understand or address the concerns of Mikisew Cree First Nation about the possible effect of the road on the exercise of their Treaty 8 hunting and trapping rights. It is significant, in my view, that Mikisew Cree First Nation was not even told about the realignment of the road corridor to avoid the Peace Point Reserve until after it had been determined that the realignment was possible and reasonable, in terms of environmental impact, and after the road was approved. That invites the inference that the responsible Crown officials believed that as long as the winter road did not cross the Peace Point Reserve, any further objections of the Mikisew Cree First Nation could be disregarded. Far from meaningful consultation, that indicates a complete disregard for the concerns of Mikisew Cree First Nation about the breach of their Treaty 8 rights. [para. 152]

Sharlow J.A. would have dismissed the appeal.

IV. Analysis

24 The post-Confederation numbered treaties were designed to open up the Canadian west and northwest to settlement and development. Treaty 8 itself recites that "the said Indians have been notified and informed by Her Majesty's said Commission that it is Her desire to open for settlement, immigration, trade, travel, mining, lumbering and such other purposes as to Her Majesty may seem meet". This stated purpose is reflected in a corresponding limitation on the Treaty 8 hunting, fishing and trapping rights to exclude such "tracts as may be required or taken up from

time to time for settlement, mining, lumbering, trading or other purposes”. The “other purposes” would be at least as broad as the purposes listed in the recital, mentioned above, including “travel”.

25 There was thus from the outset an uneasy tension between the First Nations’ essential demand that they continue to be as free to live off the land after the treaty as before and the Crown’s expectation of increasing numbers of non-aboriginal people moving into the surrendered territory. It was seen from the beginning as an ongoing relationship that would be difficult to manage, as the Commissioners acknowledged at an early Treaty 8 negotiation at Lesser Slave Lake in June 1899:

The white man is bound to come in and open up the country, and we come before him to explain the relations that must exist between you, and thus prevent any trouble.

(C. Mair, *Through the Mackenzie Basin: A Narrative of the Athabasca and Peace River Treaty Expedition of 1899*, at p. 61)

As Cory J. explained in *Badger*, at para. 57, “[t]he Indians understood that land would be taken up for homesteads, farming, prospecting and mining and that they would not be able to hunt in these areas or to shoot at the settlers’ farm animals or buildings”.

26 The hunting, fishing and trapping rights were not solely for the benefit of First Nations people. It was in the Crown’s interest to keep the aboriginal people living off the land, as the Commissioners themselves acknowledged in their Report on Treaty 8 dated September 22, 1899:

We pointed out that the Government could not undertake to maintain Indians in idleness; that the same means of earning a livelihood would

continue after the treaty as existed before it, and that the Indians would be expected to make use of them. [p. 5]

27 Thus none of the parties in 1899 expected that Treaty 8 constituted a finished land use blueprint. Treaty 8 signalled the advancing dawn of a period of transition. The key, as the Commissioners pointed out, was to “explain the relations” that would govern future interaction “and thus prevent any trouble” (Mair, at p. 61).

A. *Interpretation of the Treaty*

28 The interpretation of the treaty “must be realistic and reflect the intention[s] of both parties, not just that of the [First Nation]” (*Sioui*, at p. 1069). As a majority of the Court stated in *R. v. Marshall*, [1999] 3 S.C.R. 456, at para. 14:

The Indian parties did not, for all practical purposes, have the opportunity to create their own written record of the negotiations. Certain assumptions are therefore made about the Crown’s approach to treaty making (honourable) which the Court acts upon in its approach to treaty interpretation (flexible) as to the existence of a treaty . . . the completeness of any written record . . . and the interpretation of treaty terms once found to exist. The bottom line is the Court’s obligation is to “choose from among the various possible interpretations of the *common* intention [at the time the treaty was made] the one which best reconciles” the [First Nation] interests and those of the Crown. [Emphasis in original; citations omitted.]

See also *R. v. Marshall*, [2005] 2 S.C.R. 220, 2005 SCC 43, *per* McLachlin C.J. at paras. 22-24, and *per* LeBel J. at para. 115.

29 The Minister is therefore correct to insist that the clause governing hunting, fishing and trapping cannot be isolated from the treaty as a whole, but must

be read in the context of its underlying purpose, as intended by both the Crown and the First Nations peoples. Within that framework, as Cory J. pointed out in *Badger*,

the words in the treaty must not be interpreted in their strict technical sense nor subjected to rigid modern rules of construction. Rather, they must be interpreted in the sense that they would naturally have been understood by the Indians at the time of the signing. [para. 52]

30 In the case of Treaty 8, it was contemplated by all parties that “from time to time” portions of the surrendered land would be “taken up” and transferred from the inventory of lands over which the First Nations had treaty rights to hunt, fish and trap, and placed in the inventory of lands where they did not. Treaty 8 lands lie to the north of Canada and are largely unsuitable for agriculture. The Commissioners who negotiated Treaty 8 could therefore express confidence to the First Nations that, as previously mentioned, “the same means of earning a livelihood would continue after the treaty as existed before it” (p. 5).

31 I agree with Rothstein J.A. that not every subsequent “taking up” by the Crown constituted an infringement of Treaty 8 that must be justified according to the test set out in *Sparrow*. In *Sparrow*, it will be remembered, the federal government’s fisheries regulations infringed the aboriginal fishing right, and had to be strictly justified. This is not the same situation as we have here, where the aboriginal rights have been surrendered and extinguished, and the Treaty 8 rights are expressly limited to lands not “required or taken up from time to time for settlement, mining, lumbering, trading or other purposes” (emphasis added). The language of the treaty could not be clearer in foreshadowing change. Nevertheless the Crown was and is expected to manage the change honourably.

32 It follows that I do not accept the *Sparrow*-oriented approach adopted in this case by the trial judge, who relied in this respect on *Halfway River First Nation v. British Columbia (Ministry of Forests)* (1999), 178 D.L.R. (4th) 666, 1999 BCCA 470. In that case, a majority of the British Columbia Court of Appeal held that the government’s right to take up land was “by its very nature limited” (para. 138) and “that *any* interference with the right to hunt is a *prima facie* infringement of the Indians’ treaty right as protected by s. 35 of the *Constitution Act, 1982*” (para. 144 (emphasis in original)) which must be justified under the *Sparrow* test. The Mikisew strongly support the *Halfway River First Nation* test but, with respect, to the extent the Mikisew interpret *Halfway River* as fixing in 1899 the geographic boundaries of the Treaty 8 hunting right, and holding that any post-1899 encroachment on these geographic limits requires a *Sparrow*-type justification, I cannot agree. The Mikisew argument presupposes that Treaty 8 promised continuity of nineteenth century patterns of land use. It did not, as is made clear both by the historical context in which Treaty 8 was concluded and the period of transition it foreshadowed.

B. The Process of Treaty Implementation

33 Both the historical context and the inevitable tensions underlying implementation of Treaty 8 demand a *process* by which lands may be transferred from the one category (where the First Nations retain rights to hunt, fish and trap) to the other category (where they do not). The content of the process is dictated by the duty of the Crown to act honourably. Although *Haida Nation* was not a treaty case, McLachlin C.J. pointed out, at paras. 19 and 35:

The honour of the Crown also infuses the processes of treaty making and treaty interpretation. In making and applying treaties, the Crown must

act with honour and integrity, avoiding even the appearance of “sharp dealing” (*Badger*, at para. 41). Thus in *Marshall*, *supra*, at para. 4, the majority of this Court supported its interpretation of a treaty by stating that “nothing less would uphold the honour and integrity of the Crown in its dealings with the Mi’kmaq people to secure their peace and friendship”.

...

But, when precisely does a duty to consult arise? The foundation of the duty in the Crown’s honour and the goal of reconciliation suggest that the duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it.

34 In the case of a treaty the Crown, as a party, will always have notice of its contents. The question in each case will therefore be to determine the degree to which conduct contemplated by the Crown would adversely affect those rights so as to trigger the duty to consult. *Haida Nation* and *Taku River* set a low threshold. The flexibility lies not in the trigger (“might adversely affect it”) but in the variable content of the duty once triggered. At the low end, “the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice” (*Haida Nation*, at para. 43). The Mikisew say that even the low end content was not satisfied in this case.

C. *The Mikisew Legal Submission*

35 The appellant, the Mikisew, essentially reminded the Court of what was said in *Haida Nation* and *Taku River*. This case, the Mikisew say, is stronger. In those cases, unlike here, the aboriginal interest to the lands was asserted but not yet proven. In this case, the aboriginal interests are protected by Treaty 8. They are established legal facts. As in *Haida Nation*, the trial judge found the aboriginal interest was threatened by the proposed development. If a duty to consult was found to exist in

Haida Nation and *Taku River*, then, *a fortiori*, the Mikisew argue, it must arise here and the majority judgment of the Federal Court of Appeal was quite wrong to characterise consultation between governments and aboriginal peoples as nothing more than a “good practice” (para. 24).

D. *The Minister’s Response*

36 The respondent Minister seeks to distinguish *Haida Nation* and *Taku River*. Her counsel advances three broad propositions in support of the Minister’s approval of the proposed winter road.

1. In “taking up” the 23 square kilometres for the winter road, the Crown was doing no more than Treaty 8 entitled it to do. The Crown as well as First Nations have rights under Treaty 8. The exercise by the Crown of *its* Treaty right to “take up” land is not an infringement of the Treaty but the performance of it.
2. The Crown went through extensive consultations with First Nations in 1899 at the time Treaty 8 was negotiated. Whatever duty of accommodation was owed to First Nations was discharged at that time. The terms of the Treaty do not contemplate further consultations whenever a “taking up” occurs.
3. In the event further consultation was required, the process followed by the Minister through Parks Canada in this case was sufficient.

37 For the reasons that follow, I believe that each of these propositions must
be rejected.

(1) In “taking up” Land for the Winter Road the Crown Was Doing No
More Than It Was Entitled To Do Under the Treaty

38 The majority judgment in the Federal Court of Appeal held that “[w]ith the
exceptions of cases where the Crown has taken up land in bad faith or has taken up so
much land that no meaningful right to hunt remains, taking up land for a purpose
express or necessarily implied in the treaty itself cannot be considered an infringement
of the treaty right to hunt” (para. 19).

39 The “Crown rights” argument was initially put forward in the Federal
Court of Appeal by the Attorney General of Alberta as an intervener. The respondent
Minister advised the Federal Court of Appeal that, while she did not dispute the
argument, “[she] was simply not relying on it” (para. 3). As a preliminary objection,
the Mikisew say that an intervener is not permitted “to widen or add to the points in
issue”: *R. v. Morgentaler*, [1993] 1 S.C.R. 462, at p. 463. Therefore it was not open
to the Federal Court of Appeal (or this Court) to decide the case on this basis.

(a) *Preliminary Objection: Did the Attorney General of Alberta Overstep
the Proper Role of an Intervener?*

40 This branch of the Mikisew argument is, with respect, misconceived. In
their application for judicial review, the Mikisew argued that the Minister’s approval
of the winter road infringed Treaty 8. The infringement issue has been central to the
proceedings. It is always open to an intervener to put forward any legal argument in
support of what it submits is the correct legal conclusion on an issue properly before

the Court, provided that in doing so its legal argument does not require additional facts, not proven in evidence at trial or raise an argument that is otherwise unfair to one of the parties. An intervener is in no worse a position than a party who belatedly discovers some legal argument that it ought to have raised earlier in the proceedings but did not, as in *Lamb v. Kincaid* (1907), 38 S.C.R. 516, where Duff J. stated, at p. 539:

A court of appeal, I think, should not give effect to such a point taken for the first time in appeal, unless it be clear that, had the question been raised at the proper time, no further light could have been thrown upon it.

See also *Athey v. Leonati*, [1996] 3 S.C.R. 458, at paras. 51-52.

41 Even granting that the Mikisew can fairly say the Attorney General of Alberta frames the non-infringement argument differently than was done by the federal Minister at trial, the Mikisew have still not identified any prejudice. Had the argument been similarly formulated at trial, how could “further light” have been thrown on it by additional evidence? The historical record was fully explored at trial. At this point the issue is one of the rules of treaty interpretation, not evidence. It thus comes within the rule stated in *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, [2002] 1 S.C.R. 678, 2002 SCC 19, that “[t]he Court is free to consider a new issue of law on the appeal where it is able to do so without procedural prejudice to the opposing party and where the refusal to do so would risk an injustice” (para. 33). Here the Attorney General of Alberta took the factual record as he found it. The issue of treaty infringement has always been central to the case. Alberta’s legal argument is not one that should have taken the Mikisew by surprise. In these circumstances it would be intolerable if the courts were precluded from giving effect to a correct legal

analysis just because it came later rather than sooner and from an intervener rather than a party. To close our eyes to the argument would be to “risk an injustice”.

(b) *The Content of Treaty 8*

42 The “hunting, trapping and fishing clause” of Treaty 8 was extensively reviewed by this Court in *Badger*. In that case Cory J. pointed out that “even by the terms of Treaty No. 8, the Indians’ right to hunt for food was circumscribed by both geographical limitations and by specific forms of government regulation” (para. 37). The members of the First Nations, he continued, “would have understood that land had been ‘required or taken up’ when it was being put to a [visible] use which was incompatible with the exercise of the right to hunt” (para. 53).

[T]he oral promises made by the Crown’s representatives and the Indians’ own oral history indicate that it was understood that land would be taken up and occupied in a way which precluded hunting when it was put to a visible use that was incompatible with hunting. Turning to the case law, it is clear that the courts have also accepted this interpretation and have concluded that whether or not land has been taken up or occupied is a question of fact that must be resolved on a case-by-case basis. [para. 58]

43 While *Badger* noted the “geographic limitation” to hunting, fishing and trapping rights, it did not (as it did not need to) discuss the process by which “from time to time” land would be “taken up” and thereby excluded from the exercise of those rights. The actual holding in *Badger* was that the Alberta licensing regime sought to be imposed on all aboriginal hunters within the Alberta portion of Treaty 8 lands infringed Treaty 8, even though the treaty right was expressly made subject to “regulations as may from time to time be made by the government”. The Alberta licensing scheme denied to “holders of treaty rights as modified by the [*Natural*

Resources Transfer Agreement, 1930] the very means of exercising those rights” (para. 94). It was thus an attempted exercise of regulatory power that went beyond what was reasonably within the contemplation of the parties to the treaty in 1899. (I note parenthetically that the *Natural Resources Transfer Agreement* is not at issue in this case as the Mikisew reserve is vested in Her Majesty in Right of Canada. Paragraph 10 of the Agreement provides that after-created reserves “shall thereafter be administered by Canada in the same way in all respects as if they had never passed to the Province under the provisions hereof”.)

44

The Federal Court of Appeal purported to follow *Badger* in holding that the hunting, fishing and trapping rights would be infringed only “where the Crown has taken up land in bad faith or has taken up so much land that no meaningful right to hunt remains” (para. 18). With respect, I cannot agree with this implied rejection of the Mikisew procedural rights. At this stage the winter road is no more than a contemplated change of use. The proposed use would, if carried into execution, reduce the territory over which the Mikisew would be entitled to exercise their Treaty 8 rights. Apart from everything else, there would be no hunting at all within the 200-metre road corridor. More broadly, as found by the trial judge, the road would injuriously affect the exercise of these rights in the surrounding bush. As the Parks Canada witness, Josie Weninger, acknowledged in cross-examination:

Q: But roads, in effect, change the pattern of moose and other wildlife within the Park and that’s been what Parks Canada observed in the past with regards to other roads, correct?

A: It is documented that roads do impact. I would be foolish if I said they didn’t.

The Draft Environmental Assessment Report acknowledged the road could potentially result in a diminution in quantity of the Mikisew harvest of wildlife, as fewer furbearers (including fisher, muskrat, marten, wolverine and lynx) will be caught in their traps. Second, in qualitative terms, the more lucrative or rare species of furbearers may decline in population. Other potential impacts include fragmentation of wildlife habitat, disruption of migration patterns, loss of vegetation, increased poaching because of easier motor vehicle access to the area and increased wildlife mortality due to motor vehicle collisions. While *Haida Nation* was decided after the release of the Federal Court of Appeal reasons in this case, it is apparent that the proposed road will adversely affect the existing Mikisew hunting and trapping rights, and therefore that the “trigger” to the duty to consult identified in *Haida Nation* is satisfied.

45 The Minister seeks to extend the *dictum* of Rothstein J.A. by asserting, at para. 96 of her factum, that the test ought to be “whether, after the taking up, it still remains reasonably practicable, within the Province as a whole, for the Indians to hunt, fish and trap for food [to] the extent that they choose to do so” (emphasis added). This cannot be correct. It suggests that a prohibition on hunting at Peace Point would be acceptable so long as decent hunting was still available in the Treaty 8 area north of Jasper, about 800 kilometres distant across the province, equivalent to a commute between Toronto and Quebec City (809 kilometres) or Edmonton and Regina (785 kilometres). One might as plausibly invite the truffle diggers of southern France to try their luck in the Austrian Alps, about the same distance as the journey across Alberta deemed by the Minister to be an acceptable fulfilment of the promises of Treaty 8.

46 The Attorney General of Alberta tries a slightly different argument, at para. 49 of his factum, adding a *de minimus* element to the treaty-wide approach:

In this case the amount of land to be taken up to construct the winter road is 23 square kilometres out of 44,807 square kilometres of Wood Buffalo National Park and out of 840,000 square kilometres encompassed by Treaty No. 8. As Rothstein J.A. found, this is not a case where a meaningful right to hunt no longer remains.

47 The arguments of the federal and Alberta Crowns simply ignore the significance and practicalities of a First Nation's traditional territory. Alberta's 23 square kilometre argument flies in the face of the injurious affection of surrounding lands as found by the trial judge. More significantly for aboriginal people, as for non-aboriginal people, location is important. Twenty-three square kilometres alone is serious if it includes the claimants' hunting ground or trapline. While the Mikisew may have rights under Treaty 8 to hunt, fish and trap throughout the Treaty 8 area, it makes no sense from a practical point of view to tell the Mikisew hunters and trappers that, while their own hunting territory and traplines would now be compromised, they are entitled to invade the traditional territories of other First Nations distant from their home turf (a suggestion that would have been all the more impractical in 1899). The Chipewyan negotiators in 1899 were intensely practical people, as the Treaty 8 Commissioners noted in their report (at p. 5):

The Chipewyans confined themselves to asking questions and making brief arguments. They appeared to be more adept at cross-examination than at speech-making, and the Chief at Fort Chipewyan displayed considerable keenness of intellect and much practical sense in pressing the claims of his band.

Badger recorded that a large element of the Treaty 8 negotiations were the assurances of *continuity* in traditional patterns of economic activity. Continuity respects traditional patterns of activity and occupation. The Crown promised that the Indians' rights to hunt, fish and trap would continue "after the treaty as existed before it" (p. 5). This promise is not honoured by dispatching the Mikisew to territories far from their traditional hunting grounds and traplines.

48

What Rothstein J.A. actually said at para. 18 is as follows:

With the exceptions of cases where the Crown has taken up land in bad faith or has taken up so much land that no meaningful right to hunt remains, taking up land for a purpose express or necessarily implied in the treaty itself cannot be considered an infringement of the treaty right to hunt. [Emphasis added.]

The "meaningful right to hunt" is not ascertained on a treaty-wide basis (all 840,000 square kilometres of it) but in relation to the territories over which a First Nation traditionally hunted, fished and trapped, and continues to do so today. If the time comes that in the case of a particular Treaty 8 First Nation "no meaningful right to hunt" remains over *its* traditional territories, the significance of the oral promise that "the same means of earning a livelihood would continue after the treaty as existed before it" would clearly be in question, and a potential action for treaty infringement, including the demand for a *Sparrow* justification, would be a legitimate First Nation response.

(c) *Unilateral Crown Action*

49 There is in the Minister’s argument a strong advocacy of unilateral Crown action (a sort of “this is surrendered land and we can do with it what we like” approach) which not only ignores the mutual promises of the treaty, both written and oral, but also is the antithesis of reconciliation and mutual respect. It is all the more extraordinary given the Minister’s acknowledgment at para. 41 of her factum that “[i]n many if not all cases the government will not be able to appreciate the effect a proposed taking up will have on the Indians’ exercise of hunting, fishing and trapping rights without consultation”.

50 The Attorney General of Alberta denies that a duty of consultation can be an implied term of Treaty 8. He argues:

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.

52 It is not as though the Treaty 8 First Nations did not pay dearly for their entitlement to honourable conduct on the part of the Crown; surrender of the aboriginal interest in an area larger than France is a hefty purchase price.

(2) Did the Extensive Consultations with First Nations Undertaken in 1899 at the Time Treaty 8 Was Negotiated Discharge the Crown’s Duty of Consultation and Accommodation?

53 The Crown’s second broad answer to the Mikisew claim is that whatever had to be done was done in 1899. The Minister contends:

While the government should consider the impact on the treaty right, there is no duty to accommodate in this context. The treaty itself constitutes the accommodation of the aboriginal interest; taking up lands, as defined above, leaves intact the essential ability of the Indians to continue to hunt, fish and trap. As long as that promise is honoured, the treaty is not breached and no separate duty to accommodate arises. [Emphasis added.]

54 This is not correct. Consultation that excludes from the outset any form of accommodation would be meaningless. The contemplated process is not simply one of giving the Mikisew an opportunity to blow off steam before the Minister proceeds to do what she intended to do all along. Treaty making is an important stage in the long process of reconciliation, but it is only a stage. What occurred at Fort Chipewyan in 1899 was not the complete discharge of the duty arising from the honour of the Crown, but a rededication of it.

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

56 In summary, the 1899 negotiations were the first step in a long journey that is unlikely to end any time soon. Viewed in light of the facts of this case, we should qualify *Badger*'s identification of two inherent limitations on Indian hunting, fishing and trapping rights under Treaty 8 (geographical limits and specific forms of government regulation) by a third, namely the Crown's right to take up lands under the treaty, which itself is subject to its duty to consult and, if appropriate, accommodate First Nations' interests before reducing the area over which their members may continue to pursue their hunting, trapping and fishing rights. Such a third qualification (not at issue in *Badger*) is fully justified by the history of the negotiations leading to Treaty 8, as well as by the honour of the Crown as previously discussed.

57 As stated at the outset, the honour of the Crown infuses every treaty and the performance of every treaty obligation. Treaty 8 therefore gives rise to Mikisew procedural rights (e.g. consultation) as well as substantive rights (e.g. hunting, fishing and trapping rights). Were the Crown to have barrelled ahead with implementation of the winter road without adequate consultation, it would have been in violation of its *procedural* obligations, quite apart from whether or not the Mikisew could have established that the winter road breached the Crown's *substantive* treaty obligations as well.

58 *Sparrow* holds not only that rights protected by s. 35 of the *Constitution Act, 1982* are not absolute, but also that their breach may be justified by the Crown in certain defined circumstances. The Mikisew rights under Treaty 8 are protected by s. 35. The Crown does not seek to justify in *Sparrow*-terms shortcomings in its consultation in this case. The question that remains, therefore, is whether what the

Crown did here complied with its obligation to consult honourably with the Mikisew First Nation.

(3) Was the Process Followed by the Minister Through Parks Canada in this Case Sufficient?

59 Where, as here, the Court is dealing with a *proposed* “taking up” it is not correct (even if it is concluded that the proposed measure *if implemented* would infringe the treaty hunting and trapping rights) to move directly to a *Sparrow* analysis. The Court must first consider the *process* by which the “taking up” is planned to go ahead, and whether that process is compatible with the honour of the Crown. If not, the First Nation may be entitled to succeed in setting aside the Minister’s order on the process ground whether or not the facts of the case would otherwise support a finding of infringement of the hunting, fishing and trapping rights.

60 I should state at the outset that the winter road proposed by the Minister was a permissible purpose for “taking up” lands under Treaty 8. It is obvious that the listed purposes of “settlement, mining, lumbering” and “trading” all require suitable transportation. The treaty does not spell out permissible “other purposes” but the term should not be read restrictively: *R. v. Smith*, [1935] 2 W.W.R. 433, (Sask. C.A.), at pp. 440-41. In any event, as noted earlier, the opening recital of Treaty 8 refers to “travel”.

61 The question is whether the Minister and her staff pursued the permitted purpose of regional transportation needs in accordance with the Crown’s duty to consult. The answer turns on the particulars of that duty shaped by the circumstances

here. In *Delgamuukw*, the Court considered the duty to consult and accommodate in the context of an infringement of aboriginal title (at para. 168):

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

62

In *Haida Nation*, the Court pursued the kinds of duties that may arise in pre-proof claim situations, and McLachlin C.J. used the concept of a spectrum to frame her analysis (at paras. 43-45):

At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice. . . .

At the other end of the spectrum lie cases where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required. While precise requirements will vary with the circumstances, the consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision. This list is neither exhaustive, nor mandatory for every case. . . .

Between these two extremes of the spectrum just described, will lie other situations. Every case must be approached individually. Each must also be approached flexibly, since the level of consultation required may change as the process goes on and new information comes to light. The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake. . . . [Emphasis added.]

63 The determination of the content of the duty to consult will, as *Haida* suggests, be governed by the context. One variable will be the specificity of the promises made. Where, for example, a treaty calls for certain supplies, or Crown payment of treaty monies, or a modern land claims settlement imposes specific obligations on aboriginal peoples with respect to identified resources, the role of consultation may be quite limited. If the respective obligations are clear the parties should get on with performance. Another contextual factor will be the seriousness of the impact on the aboriginal people of the Crown's proposed course of action. The more serious the impact the more important will be the role of consultation. Another factor in a non-treaty case, as *Haida* points out, will be the strength of the aboriginal claim. The history of dealings between the Crown and a particular First Nation may also be significant. Here, the most important contextual factor is that Treaty 8 provides a framework within which to manage the continuing changes in land use already foreseen in 1899 and expected, even now, to continue well into the future. In that context, consultation is key to achievement of the overall objective of the modern law of treaty and aboriginal rights, namely reconciliation.

64 The duty here has both informational and response components. In this case, given that the Crown is proposing to build a fairly minor winter road on *surrendered* lands where the Mikisew hunting, fishing and trapping rights are expressly subject to the "taking up" limitation, I believe the Crown's duty lies at the lower end of the spectrum. The Crown was required to provide notice to the Mikisew and to engage directly with them (and not, as seems to have been the case here, as an afterthought to a general public consultation with Park users). This engagement ought to have included the provision of information about the project addressing what the

Crown knew to be Mikisew interests and what the Crown anticipated might be the potential adverse impact on those interests. The Crown was required to solicit and to listen carefully to the Mikisew concerns, and to attempt to minimize adverse impacts on the Mikisew hunting, fishing and trapping rights. The Crown did not discharge this obligation when it unilaterally declared the road realignment would be shifted from the reserve itself to a track along its boundary. I agree on this point with what Finch J.A. (now C.J.B.C.) said in *Halfway River First Nation* at paras. 159-60.

The fact that adequate notice of an intended decision may have been given does not mean that the requirement for adequate consultation has also been met.

The Crown's duty to consult imposes on it a positive obligation to reasonably ensure that aboriginal peoples are provided with all necessary information in a timely way so that they have an opportunity to express their interests and concerns, and to ensure that their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action. [Emphasis added.]

65 It is true, as the Minister argues, that there is some reciprocal onus on the Mikisew to carry their end of the consultation, to make their concerns known, to respond to the government's attempt to meet their concerns and suggestions, and to try to reach some mutually satisfactory solution. In this case, however, consultation never reached that stage. It never got off the ground.

66 Had the consultation process gone ahead, it would not have given the Mikisew a veto over the alignment of the road. As emphasized in *Haida Nation*, consultation will not always lead to accommodation, and accommodation may or may not result in an agreement. There could, however, be changes in the road alignment or construction that would go a long way towards satisfying the Mikisew objections.

We do not know, and the Minister cannot know in the absence of consultation, what such changes might be.

67 The trial judge’s findings of fact make it clear that the Crown failed to demonstrate an “intention of substantially addressing [Aboriginal] concerns’ . . . through a meaningful process of consultation” (*Haida Nation*, at para. 42). On the contrary, the trial judge held that

[i]n the present case, at the very least, this [duty to consult] would have entailed a response to Mikisew’s October 10, 2000 letter, and a meeting with them to ensure that their concerns were addressed early in the planning stages of the project. At the meetings that were finally held between Parks Canada and Mikisew, a decision had essentially been made, therefore, the meeting could not have been conducted with the genuine intention of allowing Mikisew’s concerns to be integrated with the proposal. [para. 154]

The trial judge also wrote:

. . . it is not consistent with the honour of the Crown, in its capacity as fiduciary, for it to fail to consult with a First Nation prior to making a decision that infringes on constitutionally protected treaty rights. [para. 157]

68 I agree, as did Sharlow J.A., dissenting in the Federal Court of Appeal. She declared that the mitigation measures were adopted through a process that was “fundamentally flawed” (para. 153).

69 In the result I would allow the appeal, quash the Minister’s approval order, and remit the winter road project to the Minister to be dealt with in accordance with these reasons.

V. Conclusion

70 Costs are sought by the Mikisew on a solicitor and client basis but there are no exceptional circumstances to justify such an award. The appeal is therefore allowed and the decision of the Court of Appeal is set aside, all with costs against the respondent Minister in this Court and in the Federal Court of Appeal on a party and party basis. The costs in the Trial Division remain as ordered by the trial judge.

Appeal allowed with costs.

Solicitors for the appellant: Rath & Co., Priddis, Alberta.

Solicitor for the respondent Sheila Copps, Minister of Canadian Heritage: Attorney General of Canada, Edmonton.

Solicitors for the respondent the Thebacha Road Society: Ackroyd Piasta Roth & Day, Edmonton.

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

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

Solicitors for the intervener the Big Island Lake Cree Nation: Woloshyn & Co., Saskatoon.

Solicitors for the intervener the Lesser Slave Lake Indian Regional Council: Donovan & Co., Vancouver.

Solicitors for the intervener the Treaty 8 First Nations of Alberta: Cook Roberts, Victoria.

Solicitors for the intervener the Treaty 8 Tribal Association: Woodward & Co., Victoria.

Solicitors for the intervener the Blueberry River First Nations: Thomas R. Berger, Vancouver.

Solicitors for the intervener the Assembly of First Nations: Pitblado, Winnipeg.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Musqueam Indian Band v. British Columbia
(Minister of Sustainable Resource Management),
2005 BCCA 128***

Date: 20050307
Docket: CA031826

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)

Before: The Honourable Madam Justice Southin
The Honourable Mr. Justice Hall
The Honourable Mr. Justice Lowry

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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

Place and Date of Hearing:

Vancouver, British Columbia
21st, 22nd and 23rd September, 2004

Place and Date of Judgment:

Vancouver, British Columbia
7th March, 2005

Written Reasons concurring in allowing the appeal by:

The Honourable Madam Justice Southin

Written Reasons by:

The Honourable Mr. Justice Hall (P. 43, para. 75)

Concurring Reasons by:

The Honourable Mr. Justice Lowry (P. 60, para. 103)

Reasons for Judgment of the Honourable Madam Justice Southin:

[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.

[3] Judgment in those cases having been delivered (2004 SCC 73 and 2004 SCC 74), counsel have made further submissions which we have considered.

[4] Before addressing the substance of this appeal, I propose to digress into history because this year is the centenary of the birth of the Honourable Louis-Philippe Pigeon who, from 21st September, 1967, to 8th February, 1980, was a judge of the Supreme Court of Canada.

[5] Had his judgment in the celebrated case of ***Calder v. British Columbia (Attorney-General)***, [1973] S.C.R. 313 at 422, not turned on a point which

apparently neither side in the Supreme Court of Canada sought to be decided, it is probable that this action and others like it would have no possibility of success.

[6] It will be remembered that seven judges sat on ***Calder***, in which the issue was a claim of aboriginal title by the Nisga'a Tribal Council and four Indian bands to a substantial part of north-western British Columbia. Three judges, Martland, Judson and Ritchie JJ., held that aboriginal title was extinguished in British Columbia, and three judges, Hall, Spence and Laskin JJ., that it was not. Had Pigeon J. adhered to the judgment of the former, then, if after the proclamation of the ***Constitution Act, 1982***, the Supreme Court of Canada had reversed that decision and held that aboriginal title was not extinguished, the country would have been shaken to its very foundations. If, however, Pigeon J. had adhered to the judgment of the latter, British Columbia - which from the earliest post-confederation days had asserted that aboriginal title was extinguished (see my judgment in ***Skeetchestn Indian Band v. British Columbia (Registrar of Land Titles)*** (2000), 80 B.C.L.R. (3d) 233 at 257-259, 2000 BCCA 525) - would have pressed the federal government to join with it in extinguishing such title and, if British Columbia had failed, the Legislature, in light of the adamant position of the then Ministry, which had a majority, that there were no unextinguished aboriginal rights, would not have consented to the repatriation of the Constitution if the Act contained what is now section 35.

[7] Thus did the decision of one judge – and a judge bred not in the common law but in the civil law – to follow his own star become pivotal in the history of this Province.

[8] I come now to the case at bar. As I propose to address hereafter not only the alleged breach but also the procedure for raising such a breach, I must set out at some length the proceedings below.

[9] The appeal is from the judgment of the Honourable Mr. Justice Warren pronounced the 16th April, 2004, dismissing the petition of the appellant for Judicial Review of a decision of the Minister of Sustainable Resource Management authorizing sale of the lands and for an injunction restraining sale pending the determination of the appellant's claim of aboriginal title to the lands in issue. [I have begun the words "Judicial Review" with upper case letters for the reason I alluded to in my judgment in ***Cimolai v. Children's and Women's Health Centre of British Columbia*** (2003), 228 D.L.R. (4th) 420, 14 B.C.L.R. (4th) 199, 2003 BCCA 338 ¶ 72.]

[10] In its further amended petition, the appellant sought, in part:

1. an order quashing the decision of the Respondents, Land and Water British Columbia Inc. ("LWBC"), and the Minister of Sustainable Resource Management (the "Minister"), to proceed with the sale of land described as Blocks A and B, District Lot 3900, Group 1, NWD, Plan 20266, Parcel Identifiers 006-707-289 and 006-707-483, otherwise known as the site of the University of British Columbia Golf Course (the "Golf Course Land");

2. an order quashing the Order of the Lieutenant Governor in Council, Order-in-Council No. 0131/03 dated February 14, 2003, ordering that:
 - (a) the Minister may survey, resurvey and subdivide any or all of the Golf Course Land into lots, blocks, streets, lanes, boulevards, recreational courts, parks and other areas;
 - (b) the Minister may advertise and otherwise provide for the disposition by sale or lease, and sell or lease, any or all of the Golf Course Land in the manner, at the prices and on the terms and conditions that the Minister considers proper; and
 - (c) the Minister may dispose of the Golf Course Land by Crown grant to The University of British Columbia.(the "Order-in-Council").
 3. an order prohibiting LWBC and the Minister, and representatives of each, from authorizing the disposition of the Golf Course Land until such time as the Musqueam Indian Band ("Musqueam") has been consulted in good faith concerning Musqueam's aboriginal rights and title in respect of the Golf Course Land and workable accommodations of Musqueam's aboriginal and treaty interests in the Golf Course Land have been made;
 4. a declaration that LWBC and the Minister have fiduciary and constitutional duties to consult with Musqueam in good faith concerning any disposition of the Golf Course Land, prior to any disposition of the Golf Course Land, and to make workable accommodations of the aboriginal and treaty interests of Musqueam in respect of the Golf Course Land prior to any such disposition;
 5. a declaration that LWBC and the Minister have not satisfied their fiduciary and constitutional duties to consult with Musqueam in good faith concerning the disposition of the Golf Course Land or made workable accommodations of Musqueam's aboriginal and treaty interests in the Golf Course Land;
- * * *
7. an injunction restraining LWBC and the Minister, by their servants, agents or otherwise, from selling, conveying, transferring or otherwise disposing of the Golf Course Land until such

time as an interim measures agreement or a land protection agreement has been finalized among Musqueam, British Columbia and Canada for purposes of protecting against the further alienation of Crown-held land in the Musqueam claim area;

8. a declaration that the Musqueam are entitled to the negotiation of an interim measures agreement or a land protection agreement with British Columbia and Canada for purposes of protecting against the further alienation of Crown-held land in the Musqueam claim area;

* * *

12. an interlocutory order enjoining and restraining the LWBC and the Minister, by their servants, agents or otherwise, from selling, conveying, transferring or otherwise disposing of the Golf Course Land pending the hearing and determination of this Petition;

[11] The Order-in-Council impugned in these proceedings is in these terms:

Order in Council No. 0131, Approved and Ordered FEB 14 2003
"Administrator"

Executive Council Chambers, Victoria

On the recommendation of the undersigned, the Administrator, by and with the advice and consent of the Executive Council, orders that:

- (a) the Minister of Sustainable Resource Management may survey, resurvey and subdivide into lots, blocks, streets, lanes, boulevards, recreational courts, parks and other areas any or all of the lands that are held by the government within:

Block A District Lot 3900 Plan 20266, and

Block B District Lot 3900 Plan 20266

(collectively the "Land");

- (b) the Minister of Sustainable Resource Management may advertise and otherwise provide for the disposition by sale or lease, and sell or lease, any or all the Land in the manner, at the prices and on the terms and conditions the minister considers proper; and

- (c) the Minister of Sustainable Resource Management may dispose of the Land by Crown grant to The University of British Columbia.

"Minister of Sustainable
Resource Management"

"Presiding Member of the
Executive Council"

*(This part is for administrative purposes only and is not part of the
Order.)*

Authority under which Order is made:

Act and section: University Endowment Land Act, section 2(1)(a) and
(d); Land Act, section 51 and 106(3)

Other (specify):

[12] These are the statutory provisions noted as "Authority under which Order is made":

University Endowment Land Act, R.S.B.C. 1996, c. 469 -

- 2 (1) Subject to the regulations [and with the approval of the Lieutenant Governor in Council], the minister may do one or more of the following:
- (a) survey, resurvey and subdivide into lots, blocks, streets, lanes, boulevards, recreational courts, parks and other areas all lands that are held by the government within the University Endowment Land;
- * * *
- (d) advertise and otherwise provide for the disposition by sale or lease, and sell or lease, any of the land so subdivided into lots or blocks and any of the land subdivided under the *British Columbia University Loan Act, 1920*, S.B.C. 1920, c. 49, in the manner, at the prices and on the terms and conditions the minister considers proper;

[The phrase in brackets was removed by SBC 2003-66-57.]

Land Act, R.S.B.C. 1996, c. 245 –

51 (1) Despite any other provision of this Act, Crown land may, with the approval of the Lieutenant Governor in Council and subject to the terms, reservations and restrictions that the Lieutenant Governor in Council considers advisable, be disposed of by Crown grant under this Act, free or otherwise, to a government corporation, municipality, regional district, hospital board, university, college, school board, francophone education authority as defined in the *School Act* or other government related body or to the Greater Vancouver Transportation Authority established under the *Greater Vancouver Transportation Authority Act* or any of its subsidiaries.

(2) A disposition under subsection (1) may be limited to a specific public purpose.

* * *

[106] (3) A power under any Act, other than the *Ministry of Lands, Parks and Housing Act*, to dispose of the fee simple in Crown land as defined in this Act, must be exercised in compliance with this Act.

[13] As required by the Rules, the petitioner asserted that it relied on:

1. *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241;
2. Sections 24(1) and 35 of the *Constitution Act, 1982*;
3. Rules 10, 44, 45 and 46 of the Rules of Court;
4. Rule 57 of the Rules of Court.

[14] I shall not quote the whole of the enactments there referred to but only sufficient to elucidate the points in issue:

1. ***Judicial Review Procedure Act***, R.S.B.C. 1996, c. 241 -

1 In this Act:

* * *

"**statutory power**" means a power or right conferred by an enactment

(a) to make a regulation, rule, bylaw or order,

- (b) to exercise a statutory power of decision,
- (c) to require a person to do or to refrain from doing an act or thing that, but for that requirement, the person would not be required by law to do or to refrain from doing,
- (d) to do an act or thing that would, but for that power or right, be a breach of a legal right of any person, or
- (e) to make an investigation or inquiry into a person's legal right, power, privilege, immunity, duty or liability;

* * *

- 2** (1) An application for judicial review is an originating application and must be brought by petition.
- (2) On an application for judicial review, the court may grant any relief that the applicant would be entitled to in any one or more of the proceedings for:
- (a) relief in the nature of mandamus, prohibition or certiorari;
 - (b) a declaration or injunction, or both, in relation to the exercise, refusal to exercise, or proposed or purported exercise, of a statutory power.

* * *

- 10** On an application for judicial review, the court may make an interim order it considers appropriate until the final determination of the application.

2. Constitution Act, 1982 -

PART I, CANADIAN CHARTER OF RIGHTS AND FREEDOMS:

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

PART II, RIGHTS OF THE ABORIGINAL PEOPLES OF CANADA:

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

3. Rules of Court, Rules 10, 44, 45 and 46 (in part) -

RULE 10 – ORIGINATING APPLICATION

- (1) An application, other than an interlocutory application or an application in the nature of an appeal, may be made by originating application where
- (a) an application is authorized to be made to the court,
 - (b) the sole or principal question at issue is alleged to be one of construction of an enactment, will, deed, oral or written contract, or other document,

* * *

RULE 44 – INTERLOCUTORY APPLICATION

- (1) If an application in a proceeding is authorized to be made to the court, it must be made by interlocutory application.

* * *

RULE 45 – INJUNCTIONS

- (1) An application for an interlocutory injunction may be made by a party whether or not a claim for an injunction is included in the relief claimed.

* * *

RULE 46 – DETENTION, PRESERVATION AND RECOVERY OF PROPERTY

- (1) The court may make an order for the detention, custody or preservation of any property that is the subject matter of a proceeding or as to which a question may arise and, for the purpose of enabling an order under this rule to be carried out, the court may authorize a person to enter upon any land or building.

4. Rules of Court, Rule 57 -

As this rule relates only to costs, there is no need to quote it.

[15] As required by the Rules, the petitioner set forth the facts upon which its petition was based, thus:

1. The Petitioner Musqueam Indian Band ("Musqueam") is an Indian Band within the meaning of the *Indian Act*, R.S.C. 1985, c. I-5 and its members are Indians within the meaning of the *Indian Act* and Section 91(2) of the *Constitution Act, 1867*, and are aboriginal peoples within the meaning of the *Constitution Act, 1982*.

* * *

3. The Respondent Land and Water British Columbia Inc. ("LWBC"), formerly called British Columbia Assets and Land Corporation, is a corporation incorporated under the laws of the province of British Columbia and having its registered office at 900 Waterfront Centre, 200 Burrard Street, Vancouver, British Columbia. LWCB exercises delegated authority pursuant to the *Land Act*, RSBC 1996, c. 245 and the *Ministry of Lands, Parks and Housing Act*, RSBC 1996, c. 307. LWBC provides lands and assets marketing and land management services for the provincial government.
4. The Respondent Minister of Sustainable Resource Management is the Minister responsible for LWBC.

* * *

7. LWBC proposes to sell the Golf Course Land to the University of British Columbia....
8. The Golf Course Land is located within the traditional territory of the Musqueam.
9. The Golf Course Land is currently unalienated Crown land registered to Her Majesty the Queen in Right of the Province of British Columbia c/o Ministry of Lands, Parks and Housing.
10. The present members of Musqueam are descendants of people who lived along English Bay, Burrard Inlet, Point Grey, and the

lower reaches of the Fraser River, including the area known as the University Endowment Lands, where the Golf Course Land is located. Much of what is now known as Vancouver and Richmond is in Musqueam traditional territory.

11. Musqueam's reserve land base is small. Musqueam's reserve allotment on a per capita basis is the smallest of all British Columbia bands.
12. Musqueam's reserves are not adequate for Musqueam's present or future needs in providing housing to its members, nor do these reserve lands provide a sustainable land base for the Musqueam people. The Musqueam are suffering from a serious land shortage.
13. A larger land base, beyond Musqueam's present reserves, is essential for the survival of the Musqueam people as a people. Without more land, Musqueam cannot provide proper housing to its members, prosper or be self-supporting or self-determining as a people. Today the community is poor and many Musqueam people are unemployed. Obtaining a greater land base is the Musqueam's greatest priority at the treaty table for these reasons.
14. The Golf Course Land is one of the very few remaining parcels of Crown held land in the Musqueam traditional territory that could be available for treaty settlement purposes. Since Musqueam first filed its comprehensive land claim in 1977, other significant parcels of Crown held land within Musqueam territory have been disposed of without any consultation with Musqueam or any accommodation of Musqueam's aboriginal title interests. The precious few available Crown held lands remaining within Musqueam territory continue to be sold.
15. The federal and provincial governments have taken the position that they will not offer First Nations any monetary compensation for land previously alienated to third parties. The Crown has specifically advised Musqueam during treaty negotiations that it will not provide compensation to Musqueam for its lost reserve lands or for other infringements of their land based rights.
16. The policy of the federal and provincial governments in negotiating treaties with First Nations is that third party interests in land will not be involuntarily affected. Accordingly, only unalienated Crown lands can be potentially restored through treaty settlements.

* * *

21. For many years, Musqueam has asserted and articulated the nature and scope of their claim to their traditional territory, including the Golf Course Land, to the provincial government through correspondence, court proceedings against the provincial government and treaty discussions.
22. As part of its treaty discussions, Musqueam has repeatedly asked both the federal and provincial governments to preserve Crown-held lands for treaty settlement purposes. However, both governments have a policy of not holding land for treaty settlement until the affected First Nation has signed a Framework Agreement. The federal government will only sign a Framework Agreement on the basis of its policy that it will not include compensation as a negotiable item. In other words, the federal Crown will not negotiate compensation for loss of land or infringement of any other aboriginal right. This has also been the policy of the provincial Crown.
23. In combination, the result of these two policies is that neither the federal nor the provincial governments have implemented any interim measures to preserve Crown-held lands in Musqueam traditional territory. In the meantime, the amount of land which the federal and provincial governments can bring to a treaty settlement has been seriously diminished as various parcels of Crown-held land are alienated to third parties.

* * *

25. LWBC and the Minister have fiduciary and constitutional obligations to consult with Musqueam prior to taking any action that may infringe Musqueam's aboriginal rights or title interests, and to accommodate Musqueam's aboriginal rights and title interests.
26. None of the Respondents, or any other representative of the provincial government, has consulted with Musqueam in good faith concerning a possible accommodation of Musqueam's aboriginal interests in the Golf Course Land. No tangible efforts have been made by the Crown to protect these lands for treaty settlement purposes or to reach any other workable solution with Musqueam. The failure to consult is also a breach of natural justice.

27. On or about January 23, 2003, Musqueam was advised by LWBC that it had decided there was no information that would indicate aboriginal rights or title on the Golf Course Land, and further that LWBC had decided to proceed with the sale of the Golf Course Land to UBC. Musqueam was advised on March 20, 2003 by LWBC that this sale would take place on April 1, 2003.
28. Musqueam says that the decision of LWBC that there is no information that would indicate aboriginal rights or title on the Golf Course Land is unreasonable or patently unreasonable and an error on the face of the record.
29. Musqueam can see no prejudice from any attempts by the Crown to accommodate Musqueam's interests, yet, such accommodation has not yet occurred.
30. Once the government divests itself of lands, those lands are no longer available for treaty settlement. In addition, the government refuses to compensate Musqueam for the loss of any land. If the Crown disposes of the Golf Course Land, Musqueam will be unable to obtain either the land or any monetary compensation therefore [*sic*] at the treaty table. Musqueam is facing the very real prospect of a land-less treaty.
31. On or about October 9, 2003, Musqueam learned for the first time that the Order-in-Council had been issued purporting to approve the disposition of the Golf Course Land to the University of British Columbia. The Order-in-Council was issued on or about February 14, 2003.
32. At the time that the Order-in-Council was issued, no representative of the provincial government had consulted with Musqueam in good faith concerning a possible accommodation of Musqueam's aboriginal interests in the Golf Course Land.
33. While the disposition of the Golf Course Land is imminent, Musqueam know of no reason why the sale must necessarily proceed on April 1, 2003.

How Should Such a Claim be Raised?

[16] The ***Judicial Review Procedure Act***, invoked below, is inapt to the claims asserted here because the appellant does not assert that the transaction in issue is not authorized by statute. To put it another way, no administrative grounds are asserted. I addressed this point of the scope of the ***Judicial Review Procedure Act*** in my judgment in ***Taku River Tlingit First Nation v. Tulsequah Chief Mine Project*** (2002), 98 B.C.L.R. (3d) 16, 2002 BCCA 59, rev'd. 2004 SCC 74, at pages 28-30 (B.C.L.R.), and I shall not repeat what I there said.

[17] These cases arising from aboriginal land claims address themselves, in substance, not to whether powers conferred by an enactment are lawfully exercised, but to an overarching constitutional imperative.

[18] During argument in ***Skeetchestn Indian Band v. British Columbia (Registrar of Land Titles)***, *supra*, Mackenzie J.A. felicitously described a claim of an aboriginal right as "upstream" of the certificate of infeasible title.

[19] I consider these claims of failure to consult and accommodate also to be upstream not only of the certificate of infeasible title but also of the statutes under which the ministerial power has been exercised.

[20] The correct way, in my opinion, for an aboriginal band to invoke the rights conferred upon it by the judgment of the Supreme Court of Canada in ***Delgamuukw v. British Columbia***, [1997] 3 S.C.R. 1010, as elucidated by the judgment of the Supreme Court of Canada in ***Haida Nation v. British Columbia (Minister of***

Forests) (2004), 245 D.L.R. (4th) 33, 2004 SCC 73, is by action against the Attorney General in which the plaintiffs plead along these lines:

1. The plaintiffs assert an aboriginal title to [*here give the legal descriptions*] and have done so heretofore.

Particulars of Prior Assertion

[*Here insert particulars.*]

2. Pursuant to an Act of the Legislature of British Columbia [*giving particulars*], the Minister of *this or that* has done or proposes to do *this or that*, e.g. to grant to X lands within the purview of the claim.

3. The plaintiffs are engaging with the Province of British Columbia and the Government of Canada in treaty negotiations pursuant to:

_____.

4. The Minister of X has failed in his duty on behalf of the Crown to consult with the plaintiffs concerning such proposed grant and has failed to accommodate the particulars of the concerns expressed by the plaintiffs. [*Here insert those concerns.*]

WHEREFORE THE PLAINTIFFS CLAIM:

1. An injunction restraining the defendants and any other Ministry of the Crown from granting to X [*here insert whatever it is which is in issue*] unless and until the concerns of the plaintiffs are duly accommodated or a treaty has been

made between Her Majesty the Queen in right of British Columbia and the plaintiffs.

[21] I do not overlook what was said in ***Haida*** about the inutility in land claims cases of injunctions. But, as I understand the reasons of the Chief Justice of Canada, she is addressing interlocutory injunctions in a proceeding to establish aboriginal title, whereas I am addressing injunctions both interlocutory and permanent in aid of a right to be consulted and accommodated, a related but different right unknown either to law or to equity before the judgment in ***Delgamuukw***.

[22] It is convenient at this point to note that section 24(1) of the ***Constitution Act, 1982***, has nothing to do with claims under section 35 of the ***Constitution Act, 1982***. Section 24 is part of Part I and, on its face, applies only to infringements of rights under the ***Charter***. Section 35 is not part of the ***Charter***.

[23] Although I consider a petition is not apt to this claim, I think it right to proceed as if this were an action commenced by writ for two reasons:

1. The judgment of the Supreme Court of Canada in ***Haida*** has overtaken or elucidated much of what has gone before.
2. While I consider it generally erroneous for the court to treat proceedings which appear to be ill conceived as if the proper proceedings had been brought, to send this case back to the court below, by requiring an action to be brought, will only lead to a further appeal to this Court and further

unacceptable delay in the resolution of issues which have been pending for decades, as well as adding to the already substantial, if not mountainous, expense to which the parties have been put.

Has There Been a Breach of the Duty to Consult and Accommodate?

[24] The learned judge's reasons are now reported at (2004), 27 B.C.L.R. (4th) 254, [2004] 3 C.N.L.R. 224, 2004 BCSC 506. In those reasons the learned judge recounted the dealings between the respondents, other than the University, and the appellant in connection with these lands and I shall not repeat what he said. As will appear, I do not find it necessary to answer the question of whether there was adequate consultation. Whether there was or was not, there has been, in my opinion, a failure to accommodate.

[25] The relief sought in this Court is somewhat different from the relief sought below.

[26] The relief sought here is this:

1. an order that the appeal be allowed and the order of the Honourable Mr. Justice Warren be set aside [*Amended Notice of Appeal ("ANA")*, para. (a)];
2. an order quashing the decision of Land and Water British Columbia Inc., and the Minister of Sustainable Resource Management, (the "Crown Respondents") to proceed with the sale of the Golf Course Land (legally described as Blocks A and B, District Lot 3900, Group 1, NWD, Plan 20266, Parcel Identifiers 006-707-289 and 006-707-483) [*Further Amended Petition ("FAP")*, para. 1; *ANA*, para. (b)(i)];

3. an order quashing the Order of the Lieutenant Governor in Council, No. 0131/03 dated February 14, 2003 [*FAP*, para. 2; *ANA*, para. (b)(ii)];
4. an order that the agreement between the Crown Respondents and the University of British Columbia ("UBC") for the purchase and sale of the Golf Course Land be declared void [*FAP*, para. 8.1; *ANA*, para. (b)(iii)];
5. a declaration that the conveyance of the Golf Course Land by the Crown Respondents to UBC is *ultra vires* and void; such further additional orders or declarations as are required to give effect to the re-conveyance of the Golf Course Land to Her Majesty the Queen in Right of the Province of British Columbia [*ANA*, paras. (c) and (e)];
6. an injunction restraining the Crown Respondents from selling, conveying, transferring or otherwise disposing of the Golf Course Land; in the alternative, an injunction restraining the Crown Respondents from selling, conveying, transferring or otherwise disposing of the Golf Course Land pending the development of an interim land protection measure [*FAP*, paras. 7, 12; *ANA*, para. (b)(viii)];
7. in the alternative, an order compelling the Respondents to consult with Musqueam in good faith concerning the use and disposition of the Golf Course Land and to make meaningful accommodations of Musqueam's aboriginal and treaty interests [*FAP*, para. 6; *ANA*, para. (vii)];
8. any other orders, including declaratory relief, that this Honourable Court considers just [*FAP*, para. 14; *ANA*, para. (f)]; and
9. costs in this Court and in the Court below [*FAP*, para. 13; *ANA*, para. (g)].

[27] The facts which the appellant alleges in the petition are essentially true, but it may be useful to expand upon them somewhat to put this dispute into context.

[28] The lands in issue fall within a part of Point Grey which has been known for a very long time as the University Endowment Lands.

[29] The name, I have always understood, owes its origin to Chapter 45 of the Statutes of 1907:

1. This Act may be cited as the "University Endowment Act, 1907."

2. It shall be lawful for the Lieutenant-Governor in Council to set apart by way of endowment to the University of British Columbia lands in the Province of British Columbia, not exceeding two million acres, in aid of higher education in this Province.

3. The said reservation of land shall not include any lands held by grant, lease, agreement for sale, pre-emption or other alienation by the Crown, nor shall it include Indian reserves or settlements nor military or naval reserves, nor lakes or lands in which any person other than the Crown shall have a vested interest.

* * *

6. All revenue derived from the sale or other disposition of said lands, not including, however, any taxes or royalties, shall be devoted to the maintenance by said University of the following Faculties:-

- (a.) A Faculty of Arts and Science, which shall embrace all branches of a liberal education necessary for the degrees of Bachelor of Arts and Master of Arts, and such other degrees as may be determined by the said University:
- (b.) A Faculty of Medicine, which shall embrace all branches of medical and surgical training necessary for the degrees of Bachelor of Medicine, Doctor of Medicine, Master of Surgery, and such other degrees as may be determined by the said University:
- (c.) A Faculty of Law, which shall embrace all branches of the knowledge and practice of law necessary for the degree of Bachelor of Laws, and such other degrees as may be determined by the said University:
- (d.) A Faculty of Applied Science, including manual training and engineering, leading to the degree of Bachelor of Applied Science, and such other degrees or diplomas as may be determined by the said University.

[30] No useful purpose would be served by my recounting the chequered history of the Endowment Lands. Suffice it to say that, despite the name, the lands in issue and the revenue from them were not devoted to the maintenance of the University which did not grant its first degrees until shortly after the First World War. Indeed, it was not until after the Second World War that the University embarked on granting degrees in medicine and law. Since that time, the University has become an extremely large institution with a substantial need for financing. Nonetheless, it was, in its inception, and remains, a public institution governed by the ***University Act***, R.S.B.C. 1996, c. 468. As such, there is no reason at all for the Legislature to hold its hand if the University does not do what it decently ought to do.

[31] In 2002, Land and Water British Columbia Inc. obtained from Deloitte & Touche an appraisal of the Golf Course Land.

[32] Their report describes the lands in question:

Neighbourhood Description

The subject is located in the University Endowment Lands, which lie west of the City of Vancouver and are generally bound by Camosun and Blanca Streets and Drummond Drive to the east and Marine Drive to the south, west and north. More specifically, the subject property is situated on the west side of Blanca Street and is bisected by University Boulevard. Marine Drive is the major traffic corridor, which surrounds the University Endowment Lands to the south, west and north. Other major traffic arterials leading into the University Endowment Lands (UEL) from Vancouver include West 10th Avenue, which becomes University Boulevard west of Blanca Street, and West 4th, West 16th and West 41st Avenues. The University of British Columbia is located approximately one-half kilometre west of the subject property.

The University Endowment Lands are located within an unincorporated area, and, as such, do not have municipal status. The UEL are located

within Electoral Area A of the GVRD and have a form of government, servicing and taxation that is quite different from municipal systems. For example, UEL residents presently lack control over services and taxes that are administered on a Provincial level. Also, the GVRD locally administers development services through the UEL administration office, for such things as the administration of community sewers, water lines, building permits, street lights, garbage collection, etc.

As at October 2002, the UEL comprises a population of approximately 6,833 residents located within approximately 440 detached dwellings and approximately 600 rental apartment units. A significant recent development is the University Marketplace, a joint venture between Cressey Developments and Trilogy Properties. It comprises a mixed use commercial/residential apartment rental building with a total of 108 residential rental units.

The University of British Columbia is not part of the University Endowment Lands however the developments within the University campus are relevant for this report because of the proximity of the campus to the subject property. One of the most significant residential developments is Hampton Place which is a multiple family neighbourhood incorporating townhouses and low-rise and high-rise apartment buildings. Hampton Place comprises eleven sites which were developed in phases between 1990 and 1998. Three of the sites are student rental housing. The remaining eight parcels have a 99-year prepaid leasehold interest in place and were developed with market oriented housing. There are 947 units in total in Hampton Place which house a total of over 2,000 people. In addition, as of September 20, 2002 the tender for the development of three lots on the University of British Columbia campus closed. The development plans for the lots include a 100-unit residential high-rise, a 32-unit townhouse development and a 55-unit apartment/ townhouse development. All of these developments will be a mix[ed] use of rental housing for faculty and staff and market oriented housing.

Directly south and north of the subject property are portions of the Pacific Spirit Park which is predominantly in its natural state consisting of a second growth forest. Also, north of the subject is a small enclave of detached dwellings known as 'Little Australia' that was developed in the 1950's. In proximity to the west of the subject property are a number of institutional developments, the largest being the University Hill Secondary School. East of the subject property, and within the City of Vancouver, is a mix of single-family dwellings with some mid-rise and low-rise apartment buildings plus ancillary retail commercial development along West 10th Avenue.

In summary, the subject is located in the University Endowment Lands and just west of the City of Vancouver. The area is generally characterized by the presence of the University of British Columbia campus to the west of the subject with residential dwellings in the immediate area as well as the Pacific Spirit Park. The property is located on a major arterial and good access into the subject neighbourhood is provided. Therefore, it is our opinion that the subject property is well located for its golf course use, and specifically for the operation of a public golf course as stipulated under the lease.

[33] On the 17th May, 1985, Her Majesty granted the lands, which had not previously been brought into the land title system, to UGCC Holdings Inc. for a term of 20 years commencing the 23rd May, 1985:

- 4.01 YIELDING AND PAYING THEREFORE [*sic*] during the Term, rental calculated as follows:
- (a) a minimum monthly rental
 - (i) of \$3,600.00 during the first fourteen months of the Term, AND
 - (ii) for each succeeding year of the Term thereafter, an amount calculated annually, on each anniversary of the Rental Adjustment Date to be 1/12th of the Percentage Rental and Minimum Rental payable in respect of the immediately preceding Financial Year, and
 - (b) a percentage rental of 8% of the Gross Revenue calculated in respect of each Financial Year, less the Minimum Rental paid in respect of such financial year.

[34] By Article X, the lessee was entitled to apply for a further 20 year lease, but the granting of the lease was to be in the sole discretion of the lessor. The lease was modified by instruments dated the 21st June, 1988, 10th September, 1990, and 11th March, 2003. For present purposes, the important modification is that of 10th

September, 1990, under which the term of the lease was extended to 30 years.

Thus, the lease will expire in 2015.

[35] The offer to purchase by the University, which was made in 2002, was in part this:

ARTICLE 2 - OFFER

2.01 The Purchaser offers to purchase the Land from the Province in fee simple, subject to the Permitted Encumbrances, for the Purchase Price and on the terms and conditions set out in this Agreement.

**ARTICLE 3 – PURCHASE PRICE, CROWN GRANT FEE,
ADJUSTMENTS AND TAXES**

3.01 The Purchaser will deliver the Purchase Price and the Crown Grant Fee to the Province as follows:

- (a) the sum of \$1,000.00 on account of the Deposit will be delivered to the Province with this offer;
- (b) the further sum of \$999,000.00 on account of the Deposit will be paid to the Province on the second business day following the removal of the last of the conditions set out in sections 5.01 and 5.03 of this Agreement;
- (c) the sum of \$7,900,000.00 and the Crown Grant Fee, together with the GST payable on the Crown Grant Fee, plus or minus the adjustments provided for in section 4.01, will be delivered to the Province in accordance with Article 7, and
- (d) the balance of the Purchase Price, being \$2,100,000.00, and interest on the balance of the Purchase Price accruing from and after the Closing Date at the rate of approximately 4% per annum compounded annually, will be paid to the Province in 3 equal annual instalments of \$750,000.00 each, commencing on the 1st anniversary of the Closing Date and ending on the 3rd anniversary of the Closing Date.

* * *

ARTICLE 5 – CONDITIONS PRECEDENT

5.01 The obligation of the Province to complete the sale of the Land is subject to the satisfaction or waiver of the following conditions by the Province on or before February 28, 2003:

- (a) in accordance with the guidelines established by the Province concerning consultation on aboriginal rights and title (and all revisions or replacements of such guidelines), the Province has determined that it may complete the transactions contemplated by this Agreement;
- (b) the Lieutenant Governor in Council has, by order, approved the survey and sale of the Land in accordance with section 2(1) of the *University Endowment Land Act* and section 51 of the *Land Act*;
- (c) the Purchaser, acting reasonably, has agreed as to the form of an agreement under which the Province will assign its interest in the Lease to the Purchaser and under which the Purchaser will assume the Province's obligations under the Lease;
- (d) the Purchaser, acting reasonably, has agreed to the form of the covenant registrable under section 219 of the *Land Title Act* which will restrict the use of the Land to a public golf course and which will prohibit any subdivision of the Land;
- (e) approval by the Board of Directors of LWBC of this Agreement and the transactions contemplated by it.

5.02 The conditions set out in section 5.01 are for the sole benefit of the Province and may be waived by written notice to the Purchaser prior to the date set out above. If the conditions are not satisfied or waived on or before the date set out above, this Agreement will terminate, the Deposit will be returned to the Purchaser and neither party will have any further obligations to the other under this Agreement.

[36] The restrictive covenant is in part this:

- 2. The Transferor covenants with the Transferee that it will not subdivide the Land by any means for any purpose other than a purpose directly related to the operation of a public golf course, including without limitation, to accommodate a driving range concession. The Transferor acknowledges that, without limiting

the generality of the foregoing, the Transferor must not subdivide the Land for residential purposes.

3. The Transferor covenants with the Transferee that it will use the Land only for the purpose of operating an 18 hole public golf course and facilities ancillary to the golf course on the Land. The ancillary facilities, including without limitation, any driving range and other practice facilities, restaurant, coffee shop, bar, pro shop, washrooms and other clubhouse facilities, when open, must be generally available to the public and the golf course, when open, must be generally available to the public such that at least 70% of the annual rounds of golf are available for booking and play by the public, with access to the public for booking and playing rounds being evenly distributed throughout the calendar year, with at least proportionate public access during daily and weekly periods of peak demand.
4. The Transferor may use the Land for
 - (a) educational purposes connected with the operation of a golf academy,
 - (b) physical and health education, and research and athletic activities, all of which must be directly related to golf,which golf academy and activities, when open, must be generally available to the public and provided that such golf academy and other activities do not limit the operation of the public golf course on the Land in accordance with section 3.

[37] The appellant wants, in settlement of its claim of aboriginal title, not money but land. It says it does not have a sufficient land base for its members. I have no difficulty in accepting the assertion that there is little land contiguous to or even reasonably near the main reserve still within public control. To the west is the Fraser River; to the east, the affluent and generally expensive residential neighbourhoods of Dunbar, Kerrisdale and Shaughnessy; to the south, the bucolic residential neighbourhood of Southlands familiarly known as the Flats.

[38] As to why it has insufficient land, it asserts that its "reserve allotment on a per capita basis is the smallest of all British Columbia bands."

[39] The implication of that paragraph, perhaps unintended, is that somehow, when the reserve question was settled, the Musqueam people were ill treated. But the reason is that, in 1916 and in the years leading up to the *Report of the Royal Commission on Indian Affairs for the Province of British Columbia*, published in 1916 by Acme Press, Limited, the population of the Musqueam Band was very small. Thus, under the heading "New Westminster Agency" at page 626 of the Report, we find:

Comparatively little change has been made by the Commission in the matter of Reserves of the New Westminster Agency, in which tours of visitation were made for inspections of Indian lands and meetings with the occupants thereof during the field seasons of 1913, 1915 and 1916; Mr. Agent Byrne also being examined at length as to Indian affairs of his district, from the 25th January to the 16th February and again on the 7th March, 1916.

The Commission at its organization found allotted for the Indians of the New Westminster Agency 157 Reserves, of an aggregate area of 42,310.99 acres, giving a per capita allowance of 16.45 acres for the Agency. There have been sold and surrendered by the Indians for railway and other public purposes, six Reserves in their entirety. The Commission has cut off one Reserve, in the City of New Westminster, originally established to meet camping requirements, no longer existent, of all Coast tribes, in common; and has reduced one other in more legitimate proportion to the Indian utilization and need, the total area of reduction for the Agency being 152.48 acres. At the same time there have been created to meet determined reasonable requirements of the Indians 18 new Reserves, of 1,168.45 acres in all – giving a net added area for the Agency of 1,015.93 acres, and a new total (including 40,923.37 acres in confirmed Reserves) of 41,939.30 acres, or 16.30 acres per capita.

* * *

and then, at 685-686:

New Westminster Agency – Musqueam Tribe

ORDERED: That the Indian Reserves of the Musqueam Tribe or Band, New Westminster Agency, described in the Official Schedule of Indian Reserves, 1913, at Page 98 thereof, and numbered from One (1) to Three (3), both inclusive, BE CONFIRMED as now fixed and determined and shewn on the Official Plans of Survey, viz.:

"No. 1 - 5.16 acres;
No. 2 – Musqueam 416.82 acres, and
No. 3 – Sea Island, 60.75 acres."

Victoria, B.C., April 11th, 1916.

CERTIFIED CORRECT,

C. H. GIBBONS, *Secretary*.

* * *

New Westminster Agency – Pemberton Tribe

ORDERED: That the Indian Reserves of the Pemberton Tribe or Band, New Westminster Agency, described in the Official Schedule of Indian Reserves, 1913, at Pages 98 and 99 thereof, and numbered from One (1) to Eight (8), both inclusive, BE CONFIRMED as now fixed and determined and shewn on the Official Plans of Survey, viz.:

"No. 1 – Pemberton, 188.50 acres;
No. 2 – 105.00 acres;
No. 3 – Ne-such, 909.50 acres;
No. 4 – Lokla, *16.30 acres;
No. 5 – Graveyard, 1.40 acres;
No. 6 – 4,000.00 acres;
No. 7 – 320.00 acres, and
No. 8 – 813.00 acres."

*Less allowed right-of-way of Pacific Great Eastern Railway Co., 3.20 acres-13.10.

Victoria, B.C., April 11th, 1916.

CERTIFIED CORRECT,

C. H. GIBBONS, *Secretary*.

[40] I have included the passage on the Pemberton Tribe which was the subject of the decision of this Court in ***British Columbia (Attorney General) v. Mount Currie***

Indian Band (1991), 54 B.C.L.R. (2d) 156, [1991] 4 C.N.L.R. 3 (B.C.C.A.) because it is clear that the population of the Pemberton Tribe was substantially greater in 1916 than that of the Musqueam.

[41] Although Mr. Ernest Campbell, who was the Chief of the appellant at the time these proceedings were commenced, does not speak to the size of the Band in 1916, he does remark, at paragraph 6 of his affidavit sworn 25th March, 2003:

6. ... In 1958 there were 235 Musqueam Band members. Our population has increased at an average rate of 3.5% per year since then to its present level of 1100. If our population continues to increase at that rate (and given the youthful character of our population, and the fact that our current rate of population increase is about 4%, the 3.5% growth rate estimate is conservative), in 50 years our population will increase six fold to 6,600 members.

[42] As to the assertion in paragraph 13 of the petition, "Today the community is poor and many Musqueam people are unemployed", I doubt whether, in comparison with many other Indian bands, the appellant is poor. I say that because the appellant owns lands in the City of Vancouver (not within a reserve) – see ***Musqueam Holdings Ltd. v. British Columbia (Assessor Area No. 9 – Vancouver)*** (2000), 76 B.C.L.R. (3d) 323, 2000 BCCA 299 – and is also the beneficial owner of certain lands which have been leased on long term leases to non-aboriginals. See ***Musqueam Indian Band v. Glass***, [2000] 2 S.C.R. 633, 2000 SCC 52, and see, also, ***Guerin v. Canada***, [1984] 2 S.C.R. 335.

[43] As to paragraph 21 of the petition, there is no doubt of its truth.

[44] The question of the rights of the appellant first came before me on the 2nd July, 1987, in an action, Vancouver Registry C873062, [1987] B.C.J. No. 2788 (QL) (B.C.S.C.), between the plaintiffs, The Chiefs and Other Members of the Musqueam Indian Band, and the defendants, Her Majesty the Queen in the right of the Province of British Columbia, the Minister of Forests and Lands, the Honourable Dave Parker, the Greater Vancouver Regional District, and John Doe and Jane Doe, in which the writ of summons asserted:

1. A declaration that the Plaintiffs have a valid and existing aboriginal title to certain lands in the Lower Mainland of British Columbia including the University Endowment Lands, and comprising some 770 hectares, which are the subject matter of a proposal to be considered by the defendant, the Greater Vancouver Regional District, at a meeting on June 24, 1987.
2. Damages against the Defendants for trespass and for interference with and threatened interference with the Plaintiffs' rights to use the said lands.
3. An injunction preventing the Defendants, Dave Parker and the Greater Vancouver Regional District, and other persons unknown having notice of the order from trespassing on the said lands or interfering with the plaintiffs' rights in the said land, or altering the present physical condition of the said lands.
4. Costs.

[45] The plaintiffs sought an interlocutory injunction restraining the defendants until the trial or disposition of the action from:

- (a) Conveying, transferring, disposing of or receiving or accepting those certain lands referred to in the writ of summons in this action; and
- (b) Conducting or engaging in activities intending to have the effect of divesting the plaintiffs of their entitlement to the said lands.

[46] In refusing that injunction, I weighed in the scale the delay by the Musqueam in proving their rights, saying in part:

But although for these reasons the delay in asserting the claim of title from the establishing of the University Endowment Lands in 1925 until 1977 cannot be fairly considered to deprive them of any rights, I consider the delay of this decade at least, that is from say 1978 or '9 to now in commencing this action must weigh heavily in the balance of convenience between themselves and the Regional District.

I am mindful that other Indian Bands brought actions concerning their titles sometime ago. The Ghitskan case, I understand, was commenced in 1984 and I know of no reason why the Musqueam could not have sued the Crown for a declaration of title at least at that time.

[47] What I did not then appreciate, and I doubt anyone else would have appreciated it, is that for an Indian band to establish its "aboriginal rights", whatever they may be, has become an enormously expensive undertaking.

[48] This point is illustrated by the action which began in 1998, between Roger William, on his own behalf and 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, as plaintiff, and Her Majesty the Queen in right of the Province of British Columbia, the Regional Manager of the Cariboo Forest Region, and the Attorney General of Canada, as defendants, in which the issue is aboriginal title or right to a part of the interior of British Columbia thus described in the Amended Statement of Claim filed 16th June, 2003 (Victoria Registry, No. 90 0913):

11. The Brittany is an area located in the Cariboo Forest Region of British Columbia. The boundaries of the Brittany may be described as follows. The point of commencement is marked by the confluence of the Chilko and Taseko Rivers. The eastern boundary follows the

Taseko River to the Davidson Bridge. The southern boundary follows the Nemiah Valley Road in a westerly direction until it reaches Konni Lake, and then follows the southern shores of Konni Lake to its confluence with Nemiah Creek, and then follows Nemiah Creek to the western shore of Chilko Lake. The western boundary follows the western shore of Chilko Lake in a northerly direction to the Chilko River, then continues along the Chilko River until the confluence of the Chilko and Taseko River (point of commencement). The Brittany includes the inside banks of the rivers, creeks, lakes and other water bodies, which mark its boundaries. The Brittany is outlined in green on the map attached as Schedule A. For the purposes of this litigation, the Brittany does not include the lands within the following Indian Reserves: Chilco Lake 1; Chilco Lake 1A; Garden 2; Garden 2A; LEZBYE NO. 6; Lohbiee 3; Tanakut 4; and Tsunnia Lake 5.

[49] There is also asserted a claim to lands known as the "Trapline Territory".

[50] The prayer for relief is, in part, for:

- a) A declaration that the Tsilhqot'in has existing aboriginal title to the Brittany;
- b) A declaration that the Tsilhqot'in has existing aboriginal title to the Trapline Territory;
- c) A declaration that aboriginal title lands in the Brittany and Trapline Territory are not Crown lands as defined in the *Forest Act* and *Forest Practices Code of British Columbia* (as amended) and that this legislation does not authorize the inclusion of the Brittany and Trapline Territory in the Williams Lake Timber Supply Area or the issuance of Forest Licences or Authorizations and the granting of interests in forest resources on aboriginal title land in the Brittany and Trapline Territory;

[51] The trial of that action began in November 2002. As of 6th December, 2004, it had proceeded at trial before the Honourable Mr. Justice Vickers for 163 days and it may well last another 163 days.

[52] The plaintiffs in that action obtained an order for advanced costs.

[53] As of the 31st January, 2004, counsel for the plaintiff had been paid over \$5,000,000.00, much of which I infer was for expert witnesses and other out-of-pocket expenses.

[54] Thus, if the appellant has been reluctant to embark on an action of unpredictable length and of unknown cost, I do not fault it.

[55] Had I appreciated in 1987 that a trial of an action to establish aboriginal right is potentially of such dimensions and devastating expense, I might not have given the weight I then did to the delay of the Musqueam in pursuing the claim to the then unoccupied and unconveyed Endowment Lands.

The Position of the Parties

[56] At the hearing before us, the appellant asserted that the learned judge below erred by:

- (a) declining to grant a declaration that the Contract of Sale was unenforceable and to quash the Order in Council in circumstances where he found that the Contract of Sale and the Order in Council were entered into in breach of the Province's legal and equitable duty to consult with Musqueam to seek accommodation of Musqueam's interests;
- (b) concluding that the Province had, after the filing of these proceedings, satisfied its duty of consultation and accommodation in respect of the sale of the Golf Course Land, even though:
 - (i) LWBC was contractually bound to complete its agreement with UBC and as such was in no position to enter into *bona fide* consultation and negotiations with Musqueam toward the accommodation of Musqueam's aboriginal title concerns and interests; and

- (ii) the proposal made by LWBC did not meaningfully or substantially address the accommodation of Musqueam's aboriginal title concerns and interests.
- (c) finding that UBC fulfilled its duties to Musqueam by requiring the inclusion of a contractual term in the Contract of Sale that the Province would satisfy its obligations to Musqueam, in circumstances, *inter alia*, where UBC had acknowledged Musqueam's aboriginal entitlement and its duty to consult with Musqueam; and
- (d) failing to restrain the disposition of the Golf Course Land until either a treaty settlement is reached with Musqueam or, alternatively, the Province agrees to consult with and endeavour in good faith to accommodate Musqueam with respect to the development of a land protection measure (which may or may not contemplate the disposition of the UBC Golf Course Land).

[57] For its part, the Crown said that the appeal raises the following issues:

- a) Whether the Crown's legal and equitable obligation to accommodate aboriginal rights and title requires it to engage in interim protection measures with respect to matters of interest to aboriginal peoples generally, or in treaty negotiations; and
- b) If not, whether the Chambers Judge erred in finding the Crown met its enforceable legal and equitable duty to consult with and seek to accommodate Musqueam's claimed aboriginal rights and title interests in this case.

[58] For its part, the University adopted those issues and, in addition, submitted that the following issues are raised in relation to the University:

- a. Can Musqueam seek a declaration or any other order that the University owes Musqueam an independent fiduciary duty to consult without pleading the allegation in the Petition?
- b. If the answer to question #1 is yes, then did the University owe an independent fiduciary duty to consult with the Petitioner;
- c. If the answer to question #2 is yes, then did the University comply with that obligation?

[59] Now, the Crown says that the issue is:

Whether the recent decision of the SCC in *Haida* and to a lesser extent *Taku* is relevant to the matters raised in this appeal and therefore ought to be considered by this Court.

[60] The Crown puts its position thus in its supplemental factum:

9. The reasons given by the SCC in *Haida* confirm the correctness of the decision of the Chambers Judge below. As the reasons in *Haida* attest, the Crown's duty to accommodate requires it to balance *prima facie* Aboriginal rights and title claims against the short and long term objectives of the Crown in disposing of Crown-held lands in accordance with the public interest and compelling legislative objective. As the Chambers Judge notes at paragraph 71 of his reasons, the duty of consultation and accommodation amounts to a duty to formulate a practical interim compromise. In this particular case, the Chambers Judge was satisfied on the evidence that the Crown had met its duty in this interim stage.

10. A significant aspect of the Appellant's appeal from the decision of Warren J., supported by the Intervener, was with respect to the notion that the duty to consult was based on the Crown's fiduciary duty to Aboriginal peoples. The Appellant and particularly the Intervener submitted that, as a fiduciary, the Crown was obligated to put the interests of Aboriginal peoples first, before competing public interests. In this regard, the Chambers Judge is said to have erred in accepting the argument below that the Crown's duty to consult amounted to a duty to balance Aboriginal and other interests in the interim, until rights and title were either proven in court or settled in treaty.

11. The SCC has confirmed that unproven Aboriginal interests are insufficiently specific for the duty to consult to amount to a fiduciary duty. To the contrary, the SCC has confirmed that the duty is a duty to strike a reasonable interim compromise among competing interests. The Chambers Judge has therefore clearly been proven to have correctly interpreted the law regarding the Crown's duty of consultation.

12. As the Appellant argues at paragraph 75 of its factum, the alleged error of the Chambers Judge was not in relation to the strength or weakness of Musqueam's *prima facie* case, but rather on the basis that in his view, the duty to consult is interim in nature. Again, the SCC decision in *Haida* has shown the Chambers Judge to have been

correct in this regard. The duty to consult is clearly an interim remedy pending proof of title or rights or settlement of those claims in a negotiated process.

[61] For its part, the University says, in part:

9. To grant Musqueam a remedy which, in effect, enjoins, aborts, sets aside or otherwise interferes with the transfer to the University and to require the Crown to hold the Golf Course Land in inventory pending *possible* resolution of Musqueam's disputed claims, at some future date, by virtue of treaty negotiations, which resolution may or may not involve the Golf Course Land is, in effect, to give Musqueam a veto; a veto which the Supreme Court of Canada reiterates in *Haida Nation* that Musqueam does not enjoy (*Haida, supra*, para. 48).

[62] For purposes of this case, I consider that the central passages in the judgment of the Supreme Court of Canada in ***Haida Nation v. British Columbia (Minister of Forests)***, *supra*, are these:

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

* * *

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.

* * *

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.

* * *

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

* * *

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

* * *

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

* * *

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.

* * *

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.

* * *

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

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

49 This flows from the meaning of "accommodate". The terms "accommodate" and "accommodation" have been defined as to "adapt, harmonize, reconcile" ... "an adjustment or adaptation to suit a special or different purpose ... a convenient arrangement; a settlement or compromise": *The 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.

[63] In 1991, in ***British Columbia (Attorney General) v. Mount Currie Indian Band***, *supra*, I wrote, at 185 (B.C.L.R.):

THE ISSUE OF ABORIGINAL TITLE

[62] In my opinion, it is quite impossible to decide, at this stage of these proceedings, whether the Band or its predecessors had aboriginal title, whatever that may be, to these lands.

[63] As to what it may be, the chain of authority begins with *St. Catherine's Milling & Lumber Co. v. R.* (1888), 14 App. Cas. 46 (P.C.), and comes, up to now, to *R. v. Sparrow*, [1990] 1 S.C.R. 1075, 46 B.C.L.R. (2d) 1, [1990] 4 W.W.R. 410, 56 C.C.C. (3d) 263, 70 D.L.R. (4th) 385, [1990] 3 C.N.L.R. 160, 111 N.R. 241.

[64] But none of the authorities to which we were referred holds that the aboriginal "right of the aboriginal people" is ipso facto the equivalent of a fee simple. Only something akin thereto or akin to an estate derived therefrom could give a right of exclusive possession at common law.

[65] From the mists of the past, there came to be recognized in English law many rights of use, such as piscary, turbary, common and way, all over land or inland waters and of navigation over tidal waters, which gave the Sovereign's subjects the ability to maintain themselves. Some were public rights, others were given by grant or acquired by prescription. I need not attempt to do what I am not qualified to do, namely trace how these rights came about. But they illustrate that English law has long recognized rights either as a private personal or heritable right or as a right in common with others to go upon land the fee simple of which is in another. Those rights are not equivalent to a fee simple, a right which must have its origin at common law in a Crown grant. It seems to me reasonable that there may well be as a matter of aboriginal right, some sort of interest - perhaps equivalent to a copyhold - in a village and a much lesser interest - perhaps equivalent to a profit à prendre - in lands over which the denizens of the village, for their maintenance, hunted and fished and from which they obtained fuel, building materials and foods such as berries. Although Indian interests are sui generis, it ought to be possible to describe them by analogy to common law interests and, therefore, make them understandable to common law lawyers. Whether it is possible to describe them by analogy to interests known to the civil law, I am, through ignorance of the civil law, unable to say.

[64] The reason why no definition of those rights exists is that no case has yet reached the Supreme Court of Canada with a record sufficient to determine the particular "right" claimed.

[65] ***Delgamuukw v. British Columbia***, *supra*, did not determine the rights of the First Nation represented by the plaintiff because, in the end, a new trial was ordered and no new trial has ever taken place.

[66] With some hesitation I pose the issue here thus: Does the honour of the Crown require that the powers of sale exercised in the impugned Order-in-Council not be exercised to dispose of lands claimed by an aboriginal band when, if the power is exercised, there may be little, if any, public land left available to be granted to the aboriginal band as part of a treaty settlement? To put it another way, is it a breach of the duty to "accommodate" to do what the Crown proposes to do in this case?

[67] My answer to that question is "yes" in the absence of any pressing countervailing public necessity for the disposition in issue.

[68] That the University of British Columbia, of whose convocation I am a member, is generally accepted to be an institution of great public importance, I accept. But I do not accept that the evidence establishes any pressing present need for the University to obtain title to these lands. The lands are leased to a third party until 2015. Thus, the University cannot develop those lands now, for instance, by constructing a new library. If the purpose of the disposition is to enable the

University to make use of the revenue due by the present lessee to the lessor, the Government of British Columbia can easily enough pay that revenue to the University. Thus, this case bears no resemblance on its facts to the **Taku** case in which a private business had invested years of time and millions of dollars in seeking to develop a mine. It is well known that such developments not only bring employment to many, but also put revenue into the provincial coffers.

[69] I do not overlook that there is a body of opinion that new mines should not be permitted in British Columbia because they damage the land. But it is not for judges to decide between those holding that opinion and those in favour of turning natural resources to account. Such a dispute falls within the purview of the Legislature.

[70] For these reasons, I would allow the appeal.

[71] The appellant being entitled to a remedy, the question is, how should it be framed? My tentative view (and had I not been differing from my colleagues I should have wished further argument on the proper remedy) is that the University should be ordered, if the lands have been conveyed to it, to re-convey the lands to the Crown and if the purchase price has been paid, the purchase price should be repaid, and the Minister should be restrained during the pendency of treaty negotiations or until further order from exercising the powers conferred upon him by Order-in-Council No. 0131/03.

[72] By saying "or further order", I have in mind that if some pressing public necessity does arise, the Minister may apply to vary or discharge the injunction,

which I decline to describe either as interlocutory or permanent. By making this order, I am not giving the appellant a veto, something which by its nature would prevent, absent the consent of the appellant, any development, no matter what the public necessity might be.

[73] I also have in mind that if either the appellant or the Crown were to announce that under no circumstances will it negotiate for a treaty, the appellant will be forced to commence an action to establish its aboriginal title, whatever that may be. It will then have the right in common with everyone who claims title to lands to apply for an interlocutory injunction in aid of the pending action. If that should happen, then there would be the irony that the appellant is right back to 1987 when the issue of Musqueam title first arose in the Supreme Court of British Columbia.

[74] As I have said, I would allow the appeal. Costs to the appellant against the Minister of Sustainable Resource Management only.

“The Honourable Madam Justice Southin”

Reasons for Judgment of the Honourable Mr. Justice Hall:

[75] In March 2003, the appellant Musqueam Indian Band brought a petition in the Supreme Court of British Columbia under the ***Judicial Review Procedure Act***, R.S.B.C. 1996, c. 241. The Band sought an order quashing a decision by the respondents Land and Water British Columbia Inc. ("LWBC") and the Minister of Sustainable Resource Management to sell the University of British Columbia Golf Course (the "Golf Course Land") to the respondent the University of British Columbia ("UBC"). The petitioner also sought an order quashing an Order in Council dated 14 February 2003 of the Lieutenant Governor in Council authorizing the sale.

Essentially, the relief sought was an order prohibiting LWBC and the Minister from proceeding with the disposition of the Golf Course Land until the appellant had been consulted in good faith concerning Musqueam's aboriginal rights and title in respect of the Golf Course Land and some workable accommodation of the title or rights claimed by the Musqueam in the Golf Course Land had been made. The appellant also sought to restrain any disposition of the land pending the finalization of interim measures of land protection to ensure lands are available for purposes of treaty settlement. The Musqueam argued the respondents had not consulted in good faith concerning a possible accommodation of any infringement of the appellant's asserted aboriginal interests in the Golf Course Land. The case was heard over six days in November and December 2003, and on 16 April 2004 Warren J. dismissed the petition.

[76] The appellant submits that the chambers judge erred in:

- (a) declining to grant a declaration that the Contract of Sale was unenforceable and to quash the Order in Council in circumstances where he found that the Contract of Sale and the Order in Council were entered into in breach of the Province's legal and equitable duty to consult with Musqueam to seek accommodation of Musqueam's interests;
- (b) concluding that the Province had, after the filing of these proceedings, satisfied its duty of consultation and accommodation in respect of the sale of the Golf Course Land, even though:
 - (i) LWBC was contractually bound to complete its agreement with UBC and as such was in no position to enter into *bona fide* consultation and negotiations with Musqueam toward the accommodation of Musqueam's aboriginal title concerns and interests; and
 - (ii) the proposal made by LWBC did not meaningfully or substantially address the accommodation of Musqueam's aboriginal title concerns and interests.
- (c) finding that UBC fulfilled its duties to Musqueam by requiring the inclusion of a contractual term in the Contract of Sale that the Province would satisfy its obligations to Musqueam, in circumstances, *inter alia*, where UBC had acknowledged Musqueam's aboriginal entitlement and its duty to consult with Musqueam; and
- (d) failing to restrain the disposition of the Golf Course Land until either a treaty settlement is reached with Musqueam or, alternatively, the Province agrees to consult with and endeavour in good faith to accommodate Musqueam with respect to the development of a land protection measure (which may or may not contemplate the disposition of the UBC Golf Course Land).

[77] The learned chambers judge at para. 2 of his reasons said this:

In essence, Musqueam says that the interim sale agreement between UBC and LWBC and the Order in Council were made in violation of the Province's fiduciary and Constitutional duties to consult and seek accommodation of Musqueam's interests. It also says that the Province is precluded from disposing of lands that are subject to

treaty negotiations. It extends these obligations to UBC as a party who is cooperating or dealing with the Province.

[78] At the time this appeal was argued in September 2004, the Supreme Court of Canada had not yet released its decisions in ***Haida Nation v. British Columbia (Minister of Forests)***, 2004 SCC 73 [*Haida*] and ***Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)***, 2004 SCC 74 [*Taku*], both of which were subsequently delivered on 18 November 2004. Following the release of these decisions, counsel for the appellant, respondents and intervener made further submissions to this Court. It seems clear that as a result of the decision of the Supreme Court of Canada in *Haida*, it cannot be successfully asserted by the appellant that the respondent UBC owed it any duties of consultation and accommodation, although the extent of the Province's duty to consult with and accommodate the interests of the appellant remains a contested issue.

[79] When the Musqueam filed their petition in Supreme Court, UBC and LWBC had already entered into an agreement of purchase and sale, and subsequently the Golf Course Land was conveyed to UBC. UBC has undertaken to abide by any court order made concerning the disposition of the Golf Course Land. The lands in question are the site of an 18-hole golf course, and are adjacent to UBC. These lands have been used as a golf course for upwards of 75 years. A private operator has held a lease over the Golf Course Land since 1985. I understand this lease arrangement runs until 2015 and may thereafter be renewed by the operator for a further term of years. In its factum, UBC states that it wishes to ensure that the land

is maintained as a golf course in perpetuity as a recreational facility for the public including members of the university community. The agreement of purchase and sale between LWBC and UBC includes a restrictive covenant on the lands restricting the use of the property to a public golf course.

[80] When it began to consider selling the lands, LWBC obtained a First Nations heritage overview report from an archaeology research firm that detailed evidence of aboriginal use of the Golf Course Land. This report indicated there had been general historical use by First Nations of the University Endowment Lands, of which the Golf Course Land is a part. There are overlapping claims to this area in the treaty process by other bands, although the appellant was found to have the most significant interest in the area because of the proximity of its villages and evidence of its traditional use of lands in the area for travel, hunting and fishing.

[81] Aside from considerations relating to the treaty process, it seems to me that what is at issue here is a question of aboriginal title to these lands. Although in its petition, the appellant claimed both aboriginal right and title, in effect the Musqueam are here claiming a right relating to the land itself and not merely a right to practice customary uses of the land.

[82] As Lamer C.J. observed in ***Delgamuukw v. British Columbia (Attorney General)***, [1997] 3 S.C.R. 1010, 153 D.L.R. (4th) 193, Canadian jurisprudence on aboriginal title is not greatly developed. The roots of the concept in North America can be found in decisions of the Supreme Court of the United States given by

Marshall C.J. in the early years of the nineteenth century. Two of the leading cases are ***Johnson v. M'Intosh***, 21 U.S. (8 Wheat.) 543 (1823) and ***Worcester v. State of Georgia***, 31 U.S. (6 Pet.) 515 (1832). Marshall C.J. said this in ***Johnson*** at 570-71:

The exclusion of all other Europeans, necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it. It was a right with which no Europeans could interfere. It was a right which all asserted for themselves, and to the assertion of which, by others, all assented.

Those relations which were to exist between the discoverer and the natives, were to be regulated by themselves. The rights thus acquired being exclusive, no other power could interpose between them.

In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle that discovery gave exclusive title to those who made it.

While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives. These grants have been understood by all to convey a title to the grantees, subject only to the Indian right of occupancy.

[83] In ***Delgamuukw***, Lamer C.J. noted that Canadian jurisprudence on the subject originated in the case of ***St. Catherine's Milling and Lumber Co. v. The Queen*** (1888), 14 App. Cas. 46 (P.C.). That case had its origins in Ontario, where it first came before the Ontario Chancery Division. The case, which was heard by

Chancellor Boyd, involved an issue of which level of government, federal or provincial, had the right to regulate and receive revenue from logging on the lands in north-western Ontario. By a treaty signed in 1873, the federal government had quieted the Indian title to the lands in question. The Province argued that under the ***Constitution Act, 1867*** (U.K.), 30 & 31 Vict., c. 3, reprinted R.S.C. 1985, App. II, No. 5, title to this land resided in the Province. The defendant lumber company argued that it had a valid licence to cut timber from the Dominion Government. It submitted that because the district in question had been at the time of Confederation in Indian occupation and because the aboriginal title had not been dealt with until the 1873 treaty when the Dominion had acquired the Indian title, which title was asserted to be paramount to the provincial title, the federal title should prevail. Accordingly, it was argued the Province had no ownership of the land nor could it regulate activities on the land. Chancellor Boyd found in favour of the Province, holding that when the aboriginal title to the lands was extinguished by the terms of the Dominion treaty of 1873, thereafter full title to the land was held by the Province. He held that the lands, being relieved of the burden of the aboriginal title, were then in full ownership of the Province and the Province therefore had the right to regulate the lands in question. This conclusion was upheld by the Ontario Court of Appeal, the majority of the Supreme Court of Canada and the Privy Council. See (1885), 10 O.R. 196 (Ch.D.); (1886), 13 Ont. App. R. 148; (1887), 13 S.C.R. 577; and (1888), 14 App. Cas. 46.

[84] In *R. v. Van der Peet*, [1996] 2 S.C.R. 507, 137 D.L.R. (4th) 289, Lamer C.J.

giving the majority judgment said this at para. 33:

...Aboriginal title is the aspect of aboriginal rights related specifically to aboriginal claims to land; it is the way in which the common law recognizes aboriginal land rights. As such, the explanation of the basis of aboriginal title in *Calder* [***Calder v. British Columbia (Attorney General)***], [1973] S.C.R. 313] can be applied equally to the aboriginal rights recognized and affirmed by s. 35(1). Both aboriginal title and aboriginal rights arise from the existence of distinctive aboriginal communities occupying "the land as their forefathers had done for centuries" (p. 328).

[85] As recognized in *Delgamuukw*, aboriginal title is a *sui generis* interest in land that is inalienable except to the federal government. Only the federal government has the capacity to affect this title. In British Columbia, for historical reasons, there was not much done by the Crown after 1846 to quiet aboriginal title and the issue remains open today in many parts of the province. The situation is otherwise in most of the other provinces of Canada and in the United States where the aboriginal interest was usually dealt with by treaty in earlier times. For instance, after the transfer of the lands comprising the prairie provinces from the Hudson's Bay Company, a series of treaties quieted the aboriginal title concerning these lands.

[86] In *Delgamuukw*, Lamer C.J. recognized that actions taken by a provincial government could justifiably infringe upon aboriginal title. He said this at para. 165:

The general principles governing justification laid down in *Sparrow* [***R. v. Sparrow***, [1990] 1 S.C.R. 1075], and embellished by *Gladstone* [***R. v. Gladstone***, [1996] 2 S.C.R. 723], operate with respect to infringements of aboriginal title. In the wake of *Gladstone*, the range of legislative objectives that can justify the infringement of

aboriginal title is fairly broad. Most of these objectives can be traced to the reconciliation of the prior occupation of North America by aboriginal peoples with the assertion of Crown sovereignty, which entails the recognition that "distinctive aboriginal societies exist within, and are a part of, a broader social, political and economic community" (at para. 73). In my opinion, the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of aboriginal title. Whether a particular measure or government act can be explained by reference to one of those objectives, however, is ultimately a question of fact that will have to be examined on a case-by-case basis.

[Emphasis in original.]

[87] Thus, provincial governments can justifiably infringe aboriginal title, but as the Supreme Court of Canada recently stated in ***Haida***, if there is infringement or potential infringement of an aboriginal right – which of course includes aboriginal title – consultation is required with those affected with a view to reaching some accommodation pending final resolution of the validity of the rights claimed.

[88] I understand that the appellant has outstanding a claim filed many years ago asserting aboriginal title to the lands in question. This action has not proceeded with any dispatch and there may be difficulties associated with establishing such rights; the issue of whether the appellant enjoyed exclusive occupation of the area may be especially challenging. This difficulty was discussed by Lamer C.J. at paras. 155-58 in his judgment in ***Delgamuukw***. He noted, referring to ***United States v. Santa Fe Pacific Railroad Co.***, 314 U.S. 339 (1941), that the issue of exclusive possession

might be susceptible of a recognition of joint title that could arise from shared exclusivity by different aboriginal groups.

[89] In the court below, LWBC conceded that the appellant had established a *prima facie* case for aboriginal title to the lands in question. Because of the existence of that *prima facie* case, there was no issue in the court below regarding whether the Province had a duty to consult with the appellant and seek to reach some accommodation of the appellant's interest. The learned chambers judge found that the Province had failed in its duty to consult and seek accommodation prior to entering into the agreement of purchase and sale with UBC, and indeed, in its factum, the Crown does not take issue with the finding that it failed to consult prior to entering the sale negotiation, although the Crown notes that the decision of this Court that recognized such a duty, ***Haida Nation v. British Columbia (Minister of Forests)*** (2002), 99 B.C.L.R. (3d) 209, 2002 BCCA 147, was decided late in the sale process.

[90] Ultimately, the chambers judge went on to find that after the appellant commenced the petition proceedings, consultations did occur in a *bona fide* manner. In his reasons, the chambers judge wrote that between April 2003 and the time of the hearing in chambers, LWBC and the Musqueam had discussions further to those they had had prior to the filing of the petition. On 25 August 2003, LWBC tabled a proposal that provided, *inter alia*, for the sale to the land to UBC; for Musqueam to receive \$550,000; for Musqueam to receive five per cent of any revenue received by LWBC for any modification of the covenant that required the land be used as a golf

course; and for one truckload of timber per year for two years for use as longhouse firewood. Musqueam's counter-proposal of 22 September 2003 provided that the Musqueam would buy the golf course for \$10 million, which it would pay on the earlier of ten years or the conclusion of the treaty; Musqueam would agree to maintain the covenant restricting the use of the land to a golf course for a long-term period; Musqueam would receive a logging truckload of timber for longhouse firewood; and LWBC would assist Musqueam access a forest tenure licence. LWBC's counter-proposal of 30 October 2003 again had as its core the sale of the Golf Course Land to UBC but, *inter alia*, slightly increased the amount of wood available to Musqueam.

[91] The judge held that at the stage at which matters stood relating to the claim of aboriginal title, the duty of consultation and accommodation would amount to a duty to formulate a "practical interim compromise". He found that an offer of economic compensation, which was the core of the LWBC offer, met the duty imposed upon the agents of the Province and, accordingly, he dismissed the petition. In my view, if the chambers judge had had the benefit of the judgments in the cases of ***Haida*** and ***Taku***, he would not have reached the conclusion he did.

[92] We now have the benefit of these judgments of the Supreme Court of Canada. I have found helpful the analysis set forth in these cases. What I take from these judgments is the principle that the duty of government to consult and in appropriate cases to accommodate "is part of a process of fair dealing and reconciliation" with an affected First Nation where aboriginal rights or title are in play.

The honour of the Crown mandates such an approach. There is a legal duty cast on government to consult prior to an aboriginal group proving its claim, which duty is conditioned and informed by the nature and strength of any claims of the First Nation advancing such claims. McLachlin C.J. said this at paras. 37-38 of *Haida, supra*:

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.

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.

“The Honourable Mr. Justice Hall”

Reasons for Judgment of the Honourable Mr. Justice Lowry:

[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.

“The Honourable Mr. Justice Lowry”

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Musqueam Indian Band et al v. City of Richmond et al,***
2005 BCSC 1069

Date: 20050718
Docket: L040742
Registry: Vancouver

In the Matter of the ***Judicial Review Procedure Act***, R.S.B.C. 1996, c. 241
And in the Matter of the ***Local Government Act***, R.S.B.C. 1996, c. 323

Between:

**Musqueam Indian Band and
Gordon Grant**

Petitioners

And

**City of Richmond and
British Columbia Lottery Corporation
and Great Canadian Casinos Inc.**

Respondents

- and -

Docket: L041328
Registry: Vancouver

In the Matter of the ***Judicial Review Procedure Act***, R.S.B.C. 1996, c. 241

Between:

**Musqueam Indian Band and
Gordon Grant**

Petitioners

And

**British Columbia Lottery Corporation,
Minister of Public Safety and Solicitor General of British Columbia,
City of Richmond and
Her Majesty the Queen in Right of the Province of British Columbia
and Great Canadian Casinos Inc.**

Respondents

Before: The Honourable Madam Justice Brown

Reasons for Judgment

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Date and Place of Hearing:

February 21 – 25; 28,
March 1 – 4, 2005

Vancouver, B.C.

[1] These petitions were heard together. Both relate to the development of the River Rock Casino in Richmond, British Columbia. In the first petition (L040742) the petitioners ask the court to set aside a resolution of the Richmond city council approving the proposed relocation of the Richmond gaming facility and the addition of slot machines.

[2] In the second petition (L041328) the petitioners ask the court to set aside the decision of the British Columbia Lottery Corporation to relocate its gaming facility and to change the nature and extent of the lottery schemes by adding slot machines.

I. BACKGROUND FACTS

[3] Before March 2004 the Lottery Corporation had a gaming facility in the City of Richmond at 8440 Bridgeport Road. This casino was operated for the Lottery Corporation by Great Canadian Casinos. In March 2004 the Lottery Corporation decided to move its casino to 8811 River Road and to expand the casino by adding slot machines.

[4] The background facts are set forth in each of the petitions. The Musqueam Indian Band is a band under the *Indian Act*, R.S.C. 1985, C. I-5 and Gordon Grant is a member of the Musqueam who owns property and resides in the City of Richmond.

[5] The property at 8811 River Road, Richmond is known as the Bridgepoint lands. It is approximately 7 hectares of land at the south foot of the Oak Street Bridge. The Bridgepoint lands are close to the current Musqueam reserves and the Musqueam have asserted aboriginal title over the Bridgepoint lands. The Bridgepoint lands are subject of the Musqueam Comprehensive Land Claim filed in 1984 and accepted for negotiation by the Crown in 1991. The Musqueam have been participating in negotiations with British Columbia and Canada through the British Columbia Treaty Commission since early 1994. The Musqueam's reserve land is small, relative to their population, and not adequate for Musqueam's present or future needs. The Musqueam say that the provincial and federal governments have a policy that third party interests in lands will not be involuntarily affected and that they will not offer monetary compensation for land already alienated to third

parties. The Musqueam have repeatedly asked the federal and provincial governments to preserve Crown held lands for treaty purposes, but each government has a policy of not holding land for treaty purposes until the affected First Nation has signed a framework agreement. The Musqueam have not signed a framework agreement. There is a limited and shrinking base of Crown held land within the Musqueam traditional territory which could be included in a Musqueam treaty.

[6] The Bridgepoint lands are owned by the Province. They are leased to the North Fraser Port Authority (a federal crown entity). In 1987 they were sub-leased to Bridgepoint Developments Ltd. which developed a public market on the site. The public market was not a success and by the mid 1990's, the site was unused.

[7] For many years, the Musqueam have expressed a desire to develop a gaming facility in their traditional territory. In 1996 and 1997 they proposed developing a gaming facility on the reserve on Sea Island. Richmond was opposed to this development and in 1998 the provincial government rejected the Musqueam proposal. In its treaty discussions the Musqueam have advised the federal and provincial governments that they propose to pursue economic development through participation in gaming. Through the late 1990's the Musqueam pursued commercial acquisition of an interest in the Bridgepoint lands for the purpose of establishing a gaming facility on those lands, without success.

[8] For many years there was one provincially controlled gaming facility in Richmond at 8440 Bridgeport Road. This facility had 30 gaming tables and no slot

machines. In 1997 Richmond city council passed a resolution opposing Las Vegas style casino gambling and video lottery terminals within the city. In 1998 the city council passed a resolution expressing opposition to any expansion of gaming within the city. In the summer of 2001 the provincial gaming minister froze all relocations of casinos in British Columbia. In January 2002 the Executive Council of the provincial government concluded that those casinos which had taken significant steps and made investments based on direction from the government or the Lottery Corporation to relocate or expand would remain eligible to do so. Four casinos fell into this category: the Royal Diamond Casino in Vancouver, the Royal Towers Casino in New Westminster, the Grand Casino in Vancouver and Casino Hollywood in Prince George. The Richmond casino, operated by Great Canadian, was not among the four. As a result, Great Canadian brought action against the provincial government and the Lottery Corporation. This litigation was settled in approximately December 2002 when the parties entered a tentative settlement agreement which was contingent on re-zoning of the Bridgepoint lands for an expanded casino, which would include slot machines.

[9] In the meantime, Richmond was changing its policy with respect to gaming. In May 2002, Richmond city council held a special meeting for the purpose of considering a general gaming policy which would allow a full service gaming facility and support Great Canadian as the operator of that casino.

[10] In October 2002, before reaching a settlement with the Province and Lottery Corporation, Great Canadian entered an agreement to purchase the sub-lease of the Bridgepoint lands, subject to regulatory approval. The lease payments were in

arrears and the land was subject to tax sale. To ensure that the sub-lease would not be lost, Great Canadian paid \$250,000 to bring the arrears into good standing.

[11] In February 2003, Great Canadian Casinos applied to have the Bridgepoint lands re-zoned to allow development of a casino on the lands. A public hearing was held on the re-zoning in March of 2003. The lands were re-zoned. In April 2003 Great Canadian acquired title to the sub-lease and Richmond issued a development permit for the Bridgepoint site. In May 2003 Richmond adopted the Bridgepoint re-zoning by-law and issued the development permit to Great Canadian.

[12] In May 2003, Great Canadian announced that the tentative settlement agreement with the Province and Lottery Corporation was final as a result of the adoption of the Bridgepoint re-zoning by-law and that it would immediately begin its planned construction program for the Bridgepoint lands.

[13] In May 2003 the Lottery Corporation advised Richmond that it would relocate the Richmond casino, subject to approval from Richmond, and that it would not make a final decision regarding the Richmond relocation until it received approval from Richmond, as required by the **Gaming Control Act**, S.B.C. 2002, c. 14.

[14] In June 2003 the Lottery Corporation advised Richmond that it must consult with adjacent municipalities and First Nations as set out in the **Act**. In July 2003 Richmond council directed its staff to implement a consultation program. On February 23, 2004 Richmond city council approved the relocation of the casino to the Bridgepoint site with the addition of slot machines and advised the Lottery Corporation accordingly.

[15] On February 24, 2004 the Lottery Corporation advised the Musqueam that the Lottery Corporation had received the approval of Richmond for relocation of the casino to the Bridgepoint lands; if the Musqueam wished to file an objection as provided for by the **Act**, they must do so by March 8, 2004. On March 5, 2004 Musqueam filed an objection with the Lottery Corporation.

[16] On March 26, 2004 the Lottery Corporation advised the Musqueam that the objection filed by the Musqueam was not an objection within the meaning of s. 21 of the **Act**, that the Lottery Corporation was satisfied that all of the statutory preconditions had been met for the proposed relocation; that the Lottery Corporation was satisfied that adequate community input had been sought and considered by Richmond and the Lottery Corporation had finalized its decision to relocate the casino to the Bridgepoint lands.

II. OVERVIEW

[17] In these two petitions, the Petitioners raise four main objections:

1. that Richmond failed to obtain adequate community input to the relocation and substantial change of the casino, as it was required to by s. 19(2) of the **Act**;
2. that the Lottery Corporation did not comply with s. 19(1) of the **Act** when it decided to relocate the casino and add slot machines because Richmond had not consulted with the Musqueam as an adjacent and

materially affected First Nation, a prerequisite to the Lottery Corporation's decision;

3. that the Lottery Corporation failed to require Richmond to participate in non-binding dispute resolution with the Musqueam, after the Musqueam objected to the relocation and addition of slot machines (s. 21);
4. that the Province, through its agent the Lottery Corporation, did not fulfill its constitutional and common law duty to consult with the Musqueam regarding use of the Bridgepoint lands.

III. THE STATUTORY SCHEME FOR GAMBLING IN BRITISH COULMBIA

[18] The ***Criminal Code***, R.S.C. 1985, c. C-46 makes public gambling an offence unless it is conducted and managed by the provincial government (ss. 197(2), 201-207.1). Only the provincial government can run a casino with slot machines. In British Columbia, the Province does so through the Lottery Commission as set forth in the ***Gaming Control Act***. The Lottery Corporation is a corporation which acts as the agent of the government. The Lottery Corporation is responsible for conducting, managing and operating provincial gaming on behalf of the government. Section 18 of the ***Act*** allows the Lottery Corporation to develop, use, or operate a facility as a gaming facility, relocate an existing facility or substantially change the type or extent of lottery schemes at a gaming facility after receiving authorization by written directive of the Minister. Section 20 of the ***Act*** provides that in deciding whether to develop, use or operate a facility as a gaming facility, to relocate an existing facility

or substantially change the type or extent of lottery schemes at a gaming facility, the Lottery Corporation may take into account factors that the Lottery Corporation considers relevant.

[19] Before the Lottery Corporation decides to relocate or substantially change a gaming facility, the Lottery Corporation must first receive the approval of the municipality where the facility is to be located and must be satisfied that the municipality has consulted with the adjacent or materially affected first nation:

19 (1) The lottery corporation must not ... relocate an existing gaming facility or substantially change the type or extent of lottery schemes...unless the lottery corporation

- (a) first receives the approval ...of the municipality...,
- (b) is satisfied that the municipality... has consulted each ... first nation that is immediately adjacent or that the lottery corporation considers will be materially affected by the gaming facility....

[20] A municipality must not give approval to the relocation or substantial change unless it satisfies the Lottery Corporation that adequate community input has been sought and considered:

19 (2) A municipality... must not give an approval ... unless, before or concurrently with giving the approval, the municipality... satisfies the lottery corporation that adequate community input has been sought and considered.

[21] Community input is defined in s. 10 of the ***Gaming Control Regulation***, B.C.

Reg. 208/2002 as:

... includes comments, information and representations received, from persons who reside in the community or are representative of organizations in the community ... after the municipality ... has both (a) given public notice within the community of the proposal and the particulars of the proposal; and

(b) provided an opportunity for the residents and representatives to provide comments, information and representations concerning the proposal, in the form of ... (i) one or more public hearings or meetings ...

[22] A First Nation that objects to the proposal may file an objection with the Lottery Corporation pursuant to s. 21 of the **Act**.

21 (1) A ... first nation ... may file an objection with the lottery corporation in the form and manner required by the lottery corporation, setting out how the objector will be materially affected by a gaming facility at the proposed location.

(2) If the lottery corporation receives an objection under subsection (1), then, within 30 days after the filing of the objection, the lottery corporation must require the municipality...to participate in a form of non-binding dispute resolution with [the]...first nation.

(3) The results of the alternate dispute resolution proceedings under this section must

... (b) be considered by the lottery corporation before the lottery corporation decides whether to locate or relocate the gaming facility.

IV. PETITION L040742: THE PETITION AGAINST THE CITY OF RICHMOND

[23] In petition L040742, the petitioners, the Musqueam Indian Band and Gordon Grant seek the following relief:

1. an order declaring that the resolution adopted by the Richmond city council on or about February 23, 2004, approving the proposed relocation of the Richmond Gaming Facility to the Bridgepoint lands and the proposed addition of slot machines is illegal and void in that it was made contrary to s. 19(2) of the **Gaming Control Act**, and s. 10 of the **Gaming Control Regulation**.

2. an order setting aside the approval for illegality in that it was made contrary to s. 19(2) of the **Gaming Control Act** and s. 10 of the **Gaming Control Regulation**; and
3. an order declaring that the City of Richmond did not satisfy, or in any event could not have reasonably satisfied, the Lottery Corporation that adequate community input had been sought and considered in respect of the Bridgepoint casino proposals pursuant to s. 19(2) of the **Gaming Control Act**, and s. 10 of the **Gaming Control Regulation** before or concurrently with giving the approval.

[24] The petitioners bring their petition pursuant to the **Judicial Review Procedure Act**, R.S.B.C. 1996, c. 241 and the **Local Government Act**, R.S.B.C. 1996, c. 323.

[25] Section 262 of the **Local Government Act** allows the court to set aside all or part of a by-law for illegality. By-law is defined to include a resolution.

[26] The **Judicial Review Procedure Act** gives the court the power to set aside a decision that is unauthorized or otherwise invalid.

[27] The petitioners argue that the Richmond resolution approving relocation of the gaming facility and the addition of slot machines must be set aside because Richmond has not complied with the requirements of the **Gaming Control Act** and **Regulations**. The petitioners say that Richmond was required to give public notice of the proposal and its particulars and provide the public with an opportunity for

comments in the form of one or more public hearings or meetings; that Richmond did not do so and therefore could not satisfy the Lottery Commission, as it was required to do, that it had sought and considered adequate community input.

A. THE POSITION OF THE PARTIES

[28] The petitioners say that s. 10 of the **Gaming Control Regulations** is mandatory, that because community input is defined as including comments, information and representations received **after** the municipality has given public notice **and** provided an opportunity for the residents to provide comments, the municipality must do both before giving its approval to the relocation or substantial change of the gaming facility. The petitioners say that here, Richmond did not give public notice to the community of particulars of the proposal and did not, after giving such notice, allow the residents and representatives an opportunity to provide comments. The petitioners say that, as a result, the Richmond resolution approving the relocation and substantial change of the casino is invalid and must be set aside. The petitioners say further that the Lottery Corporation could not have been satisfied that Richmond had sought adequate community input before it relocated the casino, because Richmond had not complied with s. 10 of the **Gaming Control Regulation**.

[29] The petitioners say that the question of whether Richmond had sought and considered adequate community input is a question of law and the standard of review is correctness. The petitioners say that, even if the standard were not correctness, the Lottery Corporation's decision is patently unreasonable because

there was no publication of the particulars of the proposal and no public hearing or meeting following such a public notice.

[30] Richmond says that “community input” is to be interpreted broadly; that even if it were narrowly interpreted, it has complied, has given public notice of the proposal and its particulars, and has provided an opportunity for the residents to provide comments. Richmond argues that the legislation contemplates the Lottery Corporation determining whether it is satisfied that there has been adequate community input. Richmond says that the standard of review of that decision is patent unreasonableness. Finally, Richmond says that the court should not, in any event, declare its resolution void; that the court should apply the doctrine of substantial performance; that there has been no prejudice to the petitioners, that there would be substantial prejudice to others were the resolution set aside.

[31] The Lottery Corporation argues that the decision made by the Lottery Corporation (whether it is satisfied that Richmond sought and considered adequate community input) is discretionary; that the standard of review is patent unreasonableness. The Lottery Corporation says that the definition of community input is inclusive, not exhaustive. Finally, the Lottery Corporation says that there is no evidence of prejudice to any one in its conclusion that it was satisfied that adequate community input had been sought and considered, but there is considerable prejudice to the Lottery Corporation, to Richmond, to Great Canadian Casinos and to its employees if the relief sought in this petition is granted. Therefore, the Lottery Corporation says the relief should be refused in any event.

B. ISSUES

[32] This petition raises the following issues:

1. What is the decision under review?
2. What is the appropriate standard of review of that decision?
3. Is the definition of community input in the **Regulations** inclusive or exhaustive?

C. DECISION UNDER REVIEW

[33] The petitioner says:

This petition is solely concerned with the legality and validity of a resolution passed by the respondent, City of Richmond, on February 23, 2004 approving the relocation of and substantial change to the gaming facility ...

[34] After reviewing s. 19, I have concluded that the impugned decision is the Lottery Corporation's decision in May, 2003 in which it concluded that it was satisfied that Richmond had sought and considered adequate community input. The **Act** does not dictate that the municipality must seek and consider community input; rather, it provides that the municipality must not give approval to a relocation or substantial change to a gaming facility **unless** it **satisfies** the **Lottery Corporation** that adequate community input has been sought and considered. Here, the Lottery Corporation was satisfied before Richmond gave its approval in February, 2004. Thus, Richmond had complied with the requirements of the **Act** in giving its approval because it had satisfied the Lottery Corporation. The real thrust of the petitioner's

argument is that the Lottery Corporation could not or should not reasonably have been satisfied that the municipality had sought and considered adequate community input, because the municipality did not provide public notice of the proposal and the particulars of the proposal and then provide an opportunity for the residents and representatives to provide comments, information and representations concerning the proposal at one or more public hearings or meetings before the Lottery Corporation decided that it was satisfied with the community input (s. 10 of the ***Gaming Control Regulation***).

[35] Put another way, the **Act** does not dictate that the municipality must seek community approval in any particular form before granting its approval, rather the **Act** says that the municipality must not give an approval unless it satisfies the Lottery Corporation that adequate community input has been sought and considered: it is the Lottery Corporation's decision that it was satisfied which is truly in issue.

D. THE APPROPRIATE STANDARD OF REVIEW

[36] In ***Dr. Q. and the College of Physicians and Surgeons of British Columbia***, [2003] 1 S.C.R. 226, Chief Justice McLachlin, speaking for the court, considered the approach to be taken by the reviewing judge and said at paras. 21-22:

.... In every case where a statute delegates power to an administrative decision-maker, the reviewing judge must begin by determining the standard of review on the pragmatic and functional approach...

... the pragmatic and functional approach calls upon the court to weigh a series of factors in an effort to discern whether a particular issue before the administrative body should receive exacting review by a court, undergo "significant searching or testing" (*Southam, supra*, at para. 57), or be left to the near exclusive determination of the decision-maker. These various postures of deference correspond, respectively, to the standards of correctness, reasonableness *simpliciter*, and patent unreasonableness.

(paras. 21-22)

[37] The court identified four factors to be considered:

27 The first factor focuses generally on the statutory mechanism of review. A statute may afford a broad right of appeal to a superior court or provide for a certified question to be posed to the reviewing court, suggesting a more searching standard of review: see *Southam, supra*, at para. 46; *Baker, supra*, at para. 58. A statute may be silent on the question of review; silence is neutral, and "does not imply a high standard of scrutiny": *Pushpanathan, supra*, at para. 30. Finally, a statute may contain a privative clause, militating in favour of a more deferential posture. The stronger a privative clause, the more deference is generally due.

28 The second factor, relative expertise, recognizes that legislatures will sometimes remit an issue to a decision-making body that has particular topical expertise or is adept in the determination of particular issues. Where this is so, courts will seek to respect this legislative choice when conducting judicial review. Yet expertise is a relative concept, not an absolute one. Greater deference will be called for only where the decision-making body is, in some way, more expert than the courts and the question under consideration is one that falls within the scope of this greater expertise.... Simply put, "whether because of the specialized knowledge of its decision-makers, special procedure, or non-judicial means of implementing the Act", an administrative body called upon to answer a question that falls within its area of relative expertise will generally be entitled to greater curial deference: *Pushpanathan, supra*, at para. 32.

...

30 The third factor is the purpose of the statute.... As a general principle, increased deference is called for where legislation is intended to resolve and balance competing policy objectives or the interests of various constituencies: see *Pushpanathan, supra*, at para.

36, where Bastarache J. used the term "polycentric" to describe these legislative characteristics.

31 A statutory purpose that requires a tribunal to select from a range of remedial choices or administrative responses, is concerned with the protection of the public, engages policy issues, or involves the balancing of multiple sets of interests or considerations will demand greater deference from a reviewing court : ...A legislative purpose that deviates substantially from the normal role of the courts suggests that the legislature intended to leave the issue to the discretion of the administrative decision-maker and, therefore, militates in favour of greater deference. ...

...

33 The final factor is the nature of the problem....When the finding being reviewed is one of pure fact, this factor will militate in favour of showing more deference towards the tribunal's decision. Conversely, an issue of pure law counsels in favour of a more searching review. This is particularly so where the decision will be one of general importance or great precedential value: *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84, 2002 SCC 3, at para. 23. Finally, with respect to questions of mixed fact and law, this factor will call for more deference if the question is fact-intensive and less deference if it is law-intensive.

...

35 Having considered each of these factors, a reviewing court must settle upon one of three currently recognized standards of review..... Where the balancing of the four factors above suggests considerable deference, the patent unreasonableness standard will be appropriate. Where little or no deference is called for, a correctness standard will suffice. If the balancing of factors suggests a standard of deference somewhere in the middle, the reasonableness *simpliciter* standard will apply.

[38] What is the appropriate standard of review in this case? Dealing with each of the factors in turn:

1. Statutory Mechanism for Review

[39] Here, the legislation does not include a privative clause and does not provide for a statutory right of appeal. As the statute is silent on the question of review, it is neutral and does not imply a high standard of scrutiny.

2. Relative Expertise of the Tribunal

[40] The petitioner argues that s. 10 of the **Gaming Control Regulation** is mandatory: that the Lottery Corporation cannot give approval unless the municipality has first given public notice of the proposal and its particulars and provided an opportunity for the residents to provide comments at one or more public hearings or meetings. If this were correct, the decision to be made by the Lottery Corporation would place only a limited call on the Lottery Corporation's expertise. However, as detailed below, in my view, the petitioners' interpretation of the legislation is not correct and the decision calls upon the Lottery Corporation to employ its expertise in managing the gaming industry in British Columbia.

[41] The legislation requires the Lottery Corporation to be satisfied that **adequate** community input has been sought and considered. In addition, s. 20 of the **Act** provides that in deciding to relocate or substantially change a facility, the Lottery Corporation may take into account factors that the Lottery Corporation considers relevant. Thus, the legislation requires the Lottery Corporation to employ its expertise and discretion in determining whether to relocate or substantially change a gaming facility and in determining whether adequate community input has been sought and considered. If the legislature intended that a municipality could not give approval until (as the petitioners argue) it had provided public notice of the proposal

and its particulars and provided an opportunity for the residents to provide comments at public meetings or hearings, it could easily have said so. Rather, the legislation provides that the municipality must not give its approval unless it has satisfied the Lottery Corporation. The legislature clearly intended to provide the Lottery Corporation with a wide discretion in reaching its decision. Hence, the legislation calls on the Lottery Corporation to exercise its expertise in managing the gaming industry in British Columbia and the decision is entitled to greater curial deference.

3. Purpose of the Statute

[42] The Lottery Corporation is given a broad mandate in the **Gaming Control Act** to conduct and manage gaming on behalf of the government (s. 7). Sections 19(2) and 20 confer a broad discretion on the Lottery Corporation. It is the Lottery Corporation that is to be satisfied that the community input has been adequate. When deciding to relocate or substantially change a facility, the Lottery Corporation may take into account factors that the Lottery Corporation considers relevant. This suggests that the legislative purpose deviates substantially from the normal role of the courts, suggests that the legislature intended to leave the issue to the discretion of the administrative decision maker and militates in favour of greater deference.

4. Nature of the Problem: Question of Fact or Law?

[43] The petitioners argue that the question is one of pure law, the statutory interpretation of s. 19 of the **Act** and s. 10 of the **Regulation**. The petitioners say that s. 10 of the **Regulation** is mandatory, that the definition of community input as

“includes” comments, information and representation received after the municipality has both given public notice of the proposal and the particulars of the proposal and provided an opportunity for residents to provide comments means that this, at least, must be done. If it is not done, then community input has not been sought. The question is simply one of interpreting the legislation, a pure question of law.

[44] The respondents argue that the word “includes” is to be given its ordinary meaning, citing Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983) at p. 18:

The standard guide for draftsman is that *means* restricts and *includes* enlarges. This is what Lord Watson had to say in *Dilworth v. Commissioner of Stamps*:

The word “include” is very generally used in interpretation clauses in order to enlarge the meaning of words or phrases occurring in the body of the statute; and when it is so used these words or phrases must be construed as comprehending, not only such things as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include.

[45] Reading the legislation as a whole, the *Regulation* together with the *Act*, I am satisfied that the legislature did not intend by the definition of community input to strip the Lottery Corporation of the broad discretion granted to it in the *Act*.

“Includes” should be given its ordinary interpretation as enlarging rather than restricting the definition. The question is one of mixed fact and law. In that the legislation requires the Lottery Corporation to determine the adequacy of community input, the question is highly factual. (I note parenthetically that even if the question were, as the petitioner argues, only whether the municipality had first given public notice of the proposal and its particulars and then provided an opportunity for the

residents to provide comments that, too, would be a question of mixed fact and law, although it would be less factually weighted.) That a decision maker is to be satisfied of something is a strong indication that the matter is fact intensive and calls for more deference.

[46] I conclude that the legislature intended to confer substantial discretion on the Lottery Corporation to determine whether adequate community input had been sought and considered and the court should give considerable respect to the decision of the Lottery Corporation. The standard of review is patent unreasonableness.

E. WAS THE LOTTERY CORPORATION DECISION PATENTLY UNREASONABLE?

[47] Mr. Asselstine, casino project coordinator for the Lottery Corporation considered the status of Richmond's community input efforts in May 2003. He was aware, through communications with Great Canadian, of Richmond's efforts to obtain community input. In addition, he reviewed:

- (a) the meeting minutes of the City of Richmond regular council meeting of May 12, 2003;
- (b) Richmond Zoning & Development By-law 7484 and 7485;
- (c) the meeting minutes of the City of Richmond regular council meeting for public hearings of March 17, 2003; and

- (d) Report to Committee of the City of Richmond with respect to By-law 7484 and 7485 dated January 30, 2003 which he obtained from the City of Richmond website.

On May 12, 2003 Richmond passed the by-law approving the re-zoning of the lands to permit development of casino, following a public hearing on March 17, 2003.

Richmond gave notice of the proposed rezoning by publishing five separate notices of public hearing in two newspapers. The notices provided:

Applicant/s: Great Canadian Casinos Inc.

Purpose: To re-zone a portion as shown on the attached sketch from automobile-oriented commercial district (c-6 to comprehensive development district cd/87) in order to permit the development of a casino, hotel, offices and accessory uses.

Information on procedure:

Persons who believe that their interest in property is affected by the proposed by-law may make an oral presentation or submit written comments at this public hearing. If you are unable to attend, you may send your written submission to the City clerk's office by 4:00 p.m. on the date of the public hearing. All submissions will form part of the record of the hearing. Further information may be obtained from the City contact identified above. A copy of the proposed by-law, supporting staff and committee reports and other background material may be inspected at the urban development division, between the hours of 8:15 a.m. and 5:00 p.m. Monday through Friday except statutory holidays commencing March 7, 2003 and ending March 17, 2003 or upon the conclusion of the hearing. Staff reports on the matter (as) identified above are available on the City website at <http://www.city.richmond.bc.ca/council/hearings/2003/ph2003listdoc.htm>.

- [48] Mr. Asselstine reviewed the website materials which included the re-zoning and development by-law and the staff report, which provided detailed information on the relocation of the casino:

This report addresses two applications to facilitate the relocation of the Great Canadian Casino from its current location at Bridgeport/Sea Island Way to the Bridgepoint Market site on River Road. The applications are proceeding concurrently in order to ensure consistency with council's current gaming policy which supports only one full service community casino in Richmond. Council adopted this policy on May 29, 2002

and on the gaming policy:

On May 29, 2002, council adopted a gaming policy that supports one full service community gaming casino in Richmond which contains a maximum of 30 gaming tables, up to 6 poker tables and a maximum of 300 slot machines (see attachment 5). This policy was adopted after a planning process which included public consultation with Richmond residents.

In order to ensure consistency with this policy, relocation of the Great Casino operation requires the land use contract at its current location at Sea Island Way/Bridgeport Road and No. 3 Road be amended to remove casinos as a permitted use on that site. Carousel Ventures Ltd. which owns the existing casino site has applied to the City to amend the current land use contract (LUC 126) on the site to prohibit casinos as a permitted use.

The Lottery Corporation has recognized council's policy to allow one full service community gaming casino in Richmond. The Lottery Corporation has advised the City that the Great Canadian Gaming Corporation is eligible to be relocated within the City of Richmond as a full service casino (including table games and slot machines) pursuant to council's adopted casino policy and supports the new site at the Bridgepoint Market property subject to all necessary approvals by the City.

[49] Mr. Asselstine advised Mr. Lynch, the Vice-President of casino gaming for the Lottery Corporation that Richmond had satisfied the community input requirement.

Mr. Lynch had attended the May 2002 gaming policy hearings and was aware of the March 2003 rezoning public meeting. He agreed with Mr. Asselstine and concluded, on behalf of the Lottery Corporation, that Richmond had satisfied the requirement for community input.

[50] Was this conclusion patently unreasonable? Patent unreasonableness has been defined as clearly irrational, evidently not in accordance with reason. It is a very strict test (***Canada (Attorney General) v. Public Service Alliance of Canada***, [1993] 1 S.C.R. 941).

[51] In my view, the decision was not patently unreasonable. There was a rational basis for the Lottery Corporation to conclude that Richmond had sought and considered adequate community input. The public hearings in May 2002 addressed the gaming policy generally, the expansion to slot machines and Las Vegas style gambling. The rezoning hearing provided members of the public to express their views with respect to the relocation of the casino to this site.

[52] Even if the standard of review were correctness, I would not set aside the decision. Richmond did give the public notice of the proposed casino project at the Bridgepoint site. The public notice, both in the newspaper and on signs posted on the site directed the reader to further information available from the city. The staff report for the rezoning application provided full particulars of the Bridgepoint casino project and was available at the city offices or on the website. A public hearing was conducted on the rezoning application and members of the community provided comments on the casino project.

[53] Finally, the Lottery Corporation was aware of the two day public hearing held in May 2002 with respect to changing the city's policy with respect to gaming, and particularly with respect to slot machines in Richmond and the extensive public input at that time. Hence, even if the standard to be applied were correctness I would not

set aside the decision of the Lottery Corporation that adequate community input had been sought and considered.

V. PETITION L041328:

[54] In petition L041328 the petitioners, the Musqueam Indian Band and Gordon Grant seek:

1. An order setting aside the decision of the Lottery Corporation of March 26, 2004 to relocate the gaming facility to the Bridgepoint site as contrary to sections 18(1)(b), 19(1)(a)(2), 19(b) and 21 of the **Gaming Control Act** and sections 10 and 11 of the **Gaming Control Regulations**;
2. An order setting aside the decision of the Lottery Corporation made on March 26, 2004 to substantially change the nature and extent of the lottery schemes at the Richmond Gaming Facility including adding slot machines as contrary to sections 18(1)(c), 19(1)(a)(3) and 19(1)(b) of the **Gaming Control Act** and sections 10, 11, 12 and 13.1 of the **Gaming Control Regulations**;
3. An order setting aside the Bridgepoint Casino relocation and substantial change decisions as invalid on ground of reasonable apprehension of bias or on the ground that the Lottery Corporation improperly fettered its discretion in respect of those decisions;
4. an order declaring that the Bridgepoint Casino decisions are invalid and setting aside those decisions on the grounds that the Lottery Corporation and Her Majesty the Queen in Right of the Province of British Columbia failed to fulfill their fiduciary and constitutional duties to consult and accommodate the Musqueam Indian Band in respect of aboriginal and treaty interests asserted by the Musqueam and affected by those decisions.
5. An order prohibiting the Lottery Corporation from taking any further steps to relocate or substantially change the gaming facility until:
 - (a) the Lottery Corporation has received valid authorizations from the Minister in conformity with s. 18 of the **Gaming**

Control Act, received a valid approval from the City of Richmond in conformity with s. 19 of the **Gaming Control Act**; and been satisfied on a reasonable basis that the City of Richmond has consulted Musqueam in conformity with s. 19 of the **Gaming Control Act**; and

- (b) the fiduciary and constitutional duty of the Lottery Corporation and Her Majesty the Queen in Right of the Province of British Columbia to consult and accommodate the Musqueam in respect of the aboriginal and treaty interests that are asserted by Musqueam and that would be affected by that relocation or substantial change, has been satisfied.

A. POSITION OF THE PARTIES

[55] The petitioners argue that Richmond did not fulfill its obligation to consult with the Musqueam as an immediately adjacent First Nation pursuant to s. 19(1)(b) of the **Act**; that the Lottery Corporation erred in being satisfied that Richmond had fulfilled its duty to consult with Musqueam and that Richmond's purported consultation was not made in good faith.

[56] Second, the petitioners say that the Musqueam filed an objection to the proposed relocation of the gaming facility; the Lottery Corporation was required to refer Richmond and the Musqueam to non-binding dispute resolution and to consider the results of that dispute resolution; that Lottery Corporation erred in rejecting the Musqueam objection and in not referring Richmond and Musqueam to non-binding dispute resolution.

[57] The Musqueam say that the Lottery Corporation improperly fettered its discretion by its settlement agreement with Great Canadian and that the Lottery Corporation's conduct gives rise to a reasonable apprehension of bias, if not actual bias.

[58] Finally, the Musqueam say that the decision of the Crown in this case with respect to use of the Bridgepoint lands triggered a common law and constitutional duty to consult and accommodate which was not fulfilled.

[59] The respondents say that Richmond consulted with the Musqueam pursuant to the **Act**, that the objection made by the Musqueam was not that contemplated by the **Act** and the Lottery Corporation properly concluded that it was not an objection. They say that the argument with respect to bias and fettering of discretion is misconceived in circumstances such as these, where the Lottery Corporation is the proponent of the casino relocation and expansion. Finally, they say that the land in question had already been alienated some years before by virtue of the lease to the North Fraser Harbour Commission and sub-lease to the Bridgepoint Market, that there was no duty to consult or accommodate in these circumstances.

B. CONSULTATION BY RICHMOND

[60] Section 19(1) of the **Act** provides that the Lottery Corporation must not relocate or substantially change a gaming facility unless the Lottery Corporation is satisfied that the municipality has consulted with any First Nation that is immediately adjacent or will be materially affected. The **Gaming Control Regulation** provides in s. 11(2) that “materially affected” includes that, as a result of the proposal proceeding, the First Nation can demonstrate a likelihood that it will incur significant new infrastructure or policing costs, experience increased traffic with a significant impact on its highways, or experience a significant adverse impact on the amenities and character of one or more of its neighbourhoods.

[61] The issues between these parties are the scope of Richmond's duty to consult and whether that duty was fulfilled.

[62] The Musqueam say that Richmond had a duty to consult with them on issues which were likely to be important to the Musqueam and say that these would include aboriginal title claims, treaty negotiations and economic and social development issues. The respondents say that Richmond's duty to consult was limited to land use issues, as those would be the only issues within Richmond's jurisdiction. Richmond says that it has fulfilled that obligation to consult.

C. BACKGROUND

[63] On July 14, 2003 Richmond directed staff to implement its consultation program with adjacent municipalities and the Musqueam. On July 21, 2003, Richmond sent written information to the Musqueam and to the municipalities of Vancouver, Delta, Burnaby and New Westminster, asking if they considered themselves to be materially affected by the casino relocation. On July 21st the Musqueam contacted Terry Crowe, the manager of the policy planning department of Richmond, requesting a meeting on August 18, 2003 to discuss the proposed relocation of the casino and advise of the band's concerns. On August 14, 2003 Richmond delivered an information package to the Musqueam with respect to the relocation and addition of slot machines.

[64] On August 18, 2003 Mr. Crowe met with Musqueam representatives to discuss the process. On October 9, 2003 Mr. Crowe wrote to Darryl Harjit, Chief Administrative Officer/Band Manager for the Musqueam, requesting a meeting "to

hear how you are materially affected by the casino relocation". The Musqueam took the position that the obligation to consult with them arose because they were immediately adjacent and the consultation was not limited to the manner in which they were "materially affected". On December 4, Mr. Crowe and Richmond Solicitor Mr. Paul Kendrick met with Musqueam representatives, including their legal counsel. There is an issue between Richmond representatives and the Musqueam representatives as to whether Mr. Kendrick and Mr. Crowe said that this would or would not be part of the consultation process. The Richmond representatives say that to their minds it was part of the consultation process, although they were not authorized to make decisions on behalf of the Richmond. The Musqueam representatives say that Mr. Kendrick and Mr. Crowe said it would not be part of the consultation process. In any event, at that meeting the Musqueam representatives identified three areas where the band felt they were materially affected:

1. Alienation of the land when it is one of the few remaining parcels of land available for their land claims;
2. That the casino relocation would affect their own gaming initiatives;
3. Economic impact from the Musqueam not having the income stream which the casino would provide.

[65] Mr. Crowe and Mr. Kendrick reported on the meeting to city council on December 8, 2003. Also on December 8, 2003, Mr. Rosenbloom, counsel to the Musqueam, wrote a letter summarizing the Musqueam concerns with respect to the proposed casino development. In that letter, Mr. Rosenbloom took the position that the letter itself should not be considered part of the required consultation process.

He said:

The proposed casino relocation and development at Bridgepoint materially affects the Musqueam in many ways, including by:

1. infringing Musqueam aboriginal rights and title over the land comprising the Bridgepoint site;
2. prejudicing the Musqueam in their ongoing treaty negotiations, by reducing the amount of land in the Musqueam traditional territory available for the settlement of the Musqueam comprehensive land claim;
3. prejudicing the Musqueam in their ongoing treaty negotiations with regard to gaming and authority over gaming;
4. adversely affecting Musqueam financial interests in gaming and gaming-related business ventures;
5. adversely affecting Musqueam interests in community development directly or indirectly related to gaming.

[66] On January 19, 2004, Richmond's solicitor, Mr. Kendrick, wrote to Mr.

Rosenbloom:

The city wishes to move the consultation process required under the **Gaming Act** and the regulations under that **Act** to a conclusion . . . the constraints of the Community Charter and the role of the council and the committee system employed in Richmond has led me to suggest the procedure that follows. Council has set up a number of standing committees which look at various matters before they are considered at a formal council meeting. [T]he committee (as does council) will hear delegations on items on the agenda. One of those committees is the general purposes committee which consists of all members of council.

The rules for the procedure of a committee are less formal than council, and allow for a more complete discussion of the issues. Items are placed on the committee agenda through staff reports which set out the issues and make recommendations. The committee then decides whether or not to endorse the staff position and sends the result to the formal council meeting.

I will be writing a report to the general purposes committee setting out how the Musqueam consider they are materially affected based on the comments made at the meeting held on December 4, 2003 and on the five points contained in your letter of December 8, 2003. The report will not try to separate the concerns on the basis of whether they come under the **Gaming Act**, or the common-law duty that you have

indicated the City has to consult. . . . you and your clients are invited to attend either or both of these meetings to explain the band's position and to add other concerns if that is deemed to be appropriate.

I will attempt to supply you with a copy of the report in advance of the meeting.

[67] With respect to the first three issues raised by Mr. Rosenbloom, Mr. Kendrick took the position that relocating the casino and the addition of slot machines did not infringe on aboriginal rights; that the disposition of lands was a provincial and federal issue; that Richmond had no authority over gaming and Richmond's decision whether or not to allow the casino to move was a land use issue, not a gaming issue. With respect to the fourth issue, Mr. Kendrick said that the current city policy allowed only one casino in Richmond, but that policy could be changed if council wished. The Musqueam could apply to council to change the policy if the band were given the right to have a casino in Richmond; further, the Province had the power to overrule any city policy that would impact on the casino. With respect to the fifth item, Mr. Kendrick said that Richmond was entitled to a percentage of the revenue from the casino as a host city, the percentage set by the provincial government. Richmond had been receiving revenue from its existing casino; the situation was not changed by the relocation of the casino. He said, in conclusion "if there were other points you wish me to deal with in the report, please advise and I will add them. As mentioned, you and the band are invited to attend at the committee meeting to comment on the position I have taken and to suggest any other areas which the band considers that it is "materially affected"."

[68] Mr. Rosenbloom responded and requested itemized documents and information, including copies of minutes of all meetings of Richmond council and

committees regarding casino relocation and development from 2001 to date; a copy of all Richmond policies on gaming from 2001 to date; a copy of any agreement or draft agreement between Richmond and the Lottery Corporation regarding gaming at the Bridgepoint site; an explanation of how and when Richmond was advised that the Great Canadian Gaming Corporation was eligible to relocate and or expand its casino operations within Richmond; Richmond's estimate of the projected revenues from all sources to be derived from gaming and related businesses at the proposed casino development.

[69] Mr. Kendrick responded, reiterating his concerns that the consultation taking place was pursuant to the provisions of the **Gaming Control Act**, limited to matters clearly within the jurisdiction of the municipality such as traffic, policing costs, etc.

[70] On February 10, Mr. Kendrick provided certain of the requested documents and information, including the minutes of meetings of council and committees concerning casino relocation and development from 2001 to date; Richmond's policy on casinos and gambling, along with information provided by the Lottery Corporation to a special council meeting on May 28, 2002; a copy of the host financial assistance agreement between the province and Richmond; information with respect to revenue currently received from the existing casino.

[71] On February 16, 2004, the General Purposes Committee met with the Musqueam. At that meeting the Musqueam expressed their concern with the manner in which the consultation had taken place, and with Richmond's delay in contacting the Musqueam. They expressed their view that Richmond had failed to

consult and accommodate the Musqueam in good faith. They said that the meeting with the committee should be taking place *in camera*. The Musqueam submitted that:

The report [the report from the city solicitor to the committee] wrongly characterizes the nature and extent of the City's obligation to consult the Musqueam in respect of the proposed Bridgepoint Casino and accommodate Musqueam concerns and interests. The report wrongly suggests that the City is not obligated to take account of the infringement of Musqueam aboriginal title and rights, the prejudice to Musqueam treaty negotiations and the damage to Musqueam financial and community development interests that would result from the relocation and expansion of the casino at Bridgepoint.

The report wrongly suggests that the Musqueam would not be materially affected by the Bridgepoint casino within the meaning of the Gaming Control Act and Regulation. There can be no doubt that the Musqueam would be materially affected by the proposed casino. The consequences for the Musqueam would be severe and profoundly damaging on a number of levels, including the economic level.

The City has long been aware of the Musqueam initiative to own and operate their own gaming facility in the area. . . . The City clearly considers that it would be materially affected by the establishment of a Musqueam gaming facility. And yet, city staff, in their report to committee, suggest that the Musqueam will not be materially affected by the proposed Bridgepoint casino. The double standard is obvious . . . the City appears to have done no more than grudgingly go through the motions of a superficial hearing of the Musqueam. An invitation to respond to a deeply deficient city report in a public forum with restrictions on discussion is far wide of the mark of bona fide consultation. There has been no accommodation of Musqueam concerns and interests. The City has not discharged its legal obligations."

[72] On February 23, 2004 Richmond determined that it had fulfilled its duty to consult with the Musqueam and others under the **Gaming Control Act** and **Regulations** and approved the relocation and expansion of the casino.

[73] On February 24, 2004, Richmond advised the Lottery Corporation that it had completed its consultation with municipalities and First Nations and approved the relocation and expansion of the casino.

[74] On February 24, 2004 the Lottery Corporation advised the Musqueam of the approval and noted:

The **Gaming Control Act** provides for a procedure by which an immediately adjacent local government or First Nation may file an objection with BCLC setting out how the objector will be materially affected by a gaming facility at the proposed location ... if BCLC receives an objection which fits within the context of the **Act** and is properly supported within the required time, then BCLC will require the City of Richmond and the objector to participate in non-binding dispute resolution process in the manner specified by BCLC. A copy of BCLC's objection and dispute resolution process for the location or relocation of gaming facilities is attached for your reference.

[75] The enclosed materials provide in part:

The objection must set out how the objector will be materially affected by a gaming facility at the proposed location. The term "materially affected" is given more precise meaning in s. 11(2) of the Regulation. Specifically, the definition of "materially affected" describes certain grounds for objection which include that as a result of the proposed proceeding the objector:

Can demonstrate a likelihood that it will:

- (a) incur significant new infrastructure or policing costs;
- (b) experience increased traffic with a significant impact on its highway; or
- (c) experience a significant adverse impact on the amenities and character of one or more of its neighbourhoods.

If an objector raises any other grounds, the objector must demonstrate to BCLC satisfaction that those grounds are contemplated by the **Act** and the Regulation which includes that the proposed host government and objector have the ability to resolve the objection through a non-binding DR process involving only those parties. In determining

whether such an objection is contemplated by the **Act**, BCLC will be guided by the definition of “materially affected” in the Regulation.

[76] Counsel for the Musqueam responded on March 5, 2004, saying that the Musqueam would be materially affected by the proposed relocation substantial change of the casino:

1. Infringement of Musqueam aboriginal title and rights;
2. Would prejudice Musqueam treaty negotiations in respect of the Bridgepoint lands;
3. Would prejudice Musqueam treaty negotiations in respect of gaming: the establishment of a massive new gaming facility at Bridgepoint would make Musqueam treaty negotiations on the subject of gaming all but academic;
4. Would adversely affect Musqueam economic interests relating to gaming: the capacity of the Musqueam to participate in and obtain economic benefit from the gaming industry would be severely limited by the establishment of a massive new gaming facility;
5. Would adversely affect the Musqueam community development interest relating to gaming: the suppression of Musqueam participation in the gaming industry would have a significant negative impact on the future employment and social development of the Musqueam community and its members, here referring to creation of jobs anticipated by the development and the availability of gaming revenues to fund services.

[77] On March 26, 2004 the Lottery Corporation responded, saying:

BCLC has reviewed and considered the Musqueam objection and has determined that it does not represent an objection within the meaning of s. 21 of the **Act**. BCLC has concluded that the Musqueam objection does not set out how the Musqueam will be “materially affected” by a gaming facility at the proposed location within the meaning of the **Act**. The concerns raised by the Musqueam are not concerns that can be resolved through non-binding dispute resolution with the City of Richmond under the **Act**. As BCLC does not regard the March 5 letter as an “objection” within the meaning of s. 21 of the **Gaming Control Act**, BCLC will not be referring the objection to non-binding dispute resolution under the **Act**.

D. STATUTORY REQUIREMENTS

[78] The Lottery Corporation must not relocate or substantially change gambling facilities unless the Lottery Corporation is satisfied that the municipality has consulted with each First Nation that is immediately adjacent or that the Lottery Corporation considers will be materially affected by the proposed gaming facility (s.19(1)(b)).

[79] A First Nation that is dissatisfied with its consultation with the municipality may file an objection with the Lottery Corporation setting out how the objector will be materially affected by the facility at the proposed location. If the Lottery Corporation receives such an objection, it must require the municipality to participate in a form of non-binding dispute resolution with the First Nation (s. 21).

[80] “Materially affected” is defined in s. 11(2) of ***Gaming Control Regulation*** as meaning:

... as a result of the proposal proceeding, the municipality, regional district, or first nation can demonstrate a likelihood that it will:

- (a) incur significant new infrastructure or policing costs;
- (b) experience increased traffic with a significant impact on its highways; or
- (c) experience a significant adverse impact on the amenities and character of one or more of its neighbourhoods.

[81] Results of the alternate dispute resolution proceedings are reported to the Lottery Corporation and considered by the Lottery Corporation (s. 21(3)) and the Lottery Corporation has 30 days after receiving the report to decide whether or not to locate or relocate the gaming facility.

E. THE DECISIONS IN ISSUE

[82] As with the dispute relating to s. 19(2) in Petition L040742, the decisions in issue here are those of the Lottery Corporation:

1. That it was satisfied that the municipality had consulted with the Musqueam First Nation; and
2. That the objection filed by the Musqueam First Nation is not that contemplated by s. 21(1).

Although the petitioner argues that Richmond failed to consult with the Musqueam as contemplated by the **Act**, there is no positive duty placed on Richmond by the **Act**. Rather, the **Act** requires that the Lottery Corporation is satisfied that Richmond has consulted.

F. STANDARD OF REVIEW

[83] The Lottery Corporation's decision pursuant to s. 19(1), that it was satisfied that the municipality had consulted with the Musqueam, is akin to its decision pursuant to s. 19(2), that it was satisfied that Richmond had sought and considered community input. As with that decision, I have concluded that the standard of review is patent unreasonableness, for the reasons set out above with respect to the decision pursuant to s. 19(2).

[84] The Lottery Corporation's decision that the objection filed by the Musqueam did not come within s. 21(1) is a question of statutory interpretation, for which the

Lottery Corporation is no more expert than is the court. The appropriate standard of review, as acknowledged by the parties, is correctness.

G. WAS THE LOTTERY CORPORATION PATENTLY UNREASONABLE IN DECIDING THAT IT WAS SATISFIED THAT RICHMOND HAD CONSULTED WITH THE MUSQUEAM?

[85] I have concluded the Lottery Corporation's decision was not clearly irrational or not in accordance with reason. The Lottery Corporation had evidence logically capable of supporting its conclusion. Staff from Richmond had, over the course of several months, met with representatives of the Musqueam, received the Musqueam's concerns with respect to the development and provided information to the Musqueam. While the Musqueam did not consider these meetings with staff to be consultation or appropriate consultation, the Lottery Corporation considered such meetings to be part of the consultation process. This was a rational conclusion. The Richmond staff report was provided to the Musqueam representatives before it was provided to Richmond city council. The Musqueam were given ample opportunity to respond to the staff report and to raise additional concerns with Richmond city council.

[86] The petitioners argue that consultation process with Richmond was a sham because Richmond had already made up its mind that it wanted to pursue the casino at the Bridgepoint site. It is apparent from the evidence before me that Richmond was keen to pursue the casino development at the Bridgepoint site. This does not mean that the consultation process was a sham. The consultation process allowed

the Musqueam to advise Richmond of their concerns. The Musqueam might have raised concerns that Richmond would have chosen to address. For example, an adjacent municipality or a First Nation may be concerned with traffic flow or adequacy of parking. These are matters which Richmond could respond to and which Richmond may be inclined to respond to, given that the Lottery Corporation had yet to reach its final conclusion as to whether it would develop the casino in its proposed location.

[87] There is some force to the petitioner's argument that by the time their input was sought, many of the development decisions were already taken by Richmond in that the property had been rezoned and development permits issued. This argument may have had more force, had the issues raised by the Musqueam been issues which would be addressed in the zoning application or development permit process. So, for example, were the Musqueam concerned with traffic flow or adequacy of parking, these would be issues that could have been addressed in the zoning and development permit process.

[88] However, in this case, the issues raised by the Musqueam were not of this type. Rather, the Musqueam's concerns were of a larger nature: if the Richmond casino were substantially expanded as contemplated, then it would be less likely that the Musqueam would be able to have a casino of their own or that any casino that the Musqueam did develop would be as financially successful; that development of a casino on the Bridgepoint site would infringe Musqueam aboriginal title and rights, and would prejudice Musqueam treaty negotiations with respect to the land and in respect of gaming. These concerns are of a higher order and are properly

addressed to either the Lottery Corporation with respect to its decision as to where it chose to place its casino, or with the provincial and federal governments with respect to treaty negotiations. They are not matters over which Richmond had jurisdiction or which could be addressed by Richmond. Essentially, the Musqueam were asserting that Richmond must become the Musqueam's advocate with respect to Musqueam interest. This cannot be the type of consultation contemplated by the **Act**.

[89] The petitioners argue that Richmond failed to consult with them because Richmond refused to hold an *in camera* meeting with the Musqueam. I accept the argument of Richmond that its meetings with the Musqueam were not such as to allow it to hold an *in camera* meeting: section 90 of the **Community Charter**, S.B.C. 2003, c. 26. Further, Musqueam's wish for confidentiality could have been met in other ways. Two of the Richmond staff members, Mr. Crowe and Mr. Kendrick, met and corresponded with various representatives of the Musqueam, including counsel for the Musqueam. If there were information or materials which the Musqueam wished to be kept confidential, surely it could have been raised and addressed at this point. A vehicle could have been considered to keep such materials confidential.

[90] The Musqueam say that they were not consulted by Richmond in a timely way, that they were not consulted until August 14, 2003, after Richmond had taken many steps to facilitate the establishment of the casino including re-zoning, demolition and construction permits for the development of the casino.

[91] The statute does not provide any time frame within which the consultation must take place. However, to be effective, there would be instances in which the consultation must take place before re-zoning, demolition, construction and development permits are issued. For example, an adjacent municipality may be concerned that a casino development will have an impact on its community because the development proposed is adjacent to a school, or will impact a nearby road on which there is already too much traffic. In those circumstances, the adjacent municipality may wish to have the casino developed elsewhere, or may wish accommodation in redevelopment of roads, overpasses, etc. These sorts of accommodation would necessarily take place before the relevant re-zoning, construction and development permits were issued. Presumably, it would be in the interests of the developer and of the municipality promoting the casino that legitimate concerns of adjacent municipalities and First Nations be elicited early enough in the process to accommodate these concerns, as, otherwise, they would risk a decision by the Lottery Corporation not to place the casino as originally proposed.

[92] However, in this instance, the concerns that the Musqueam advanced could not be accommodated by Richmond, so the timing of the meetings with Richmond is not of consequence, and does not make the Lottery Corporation conclusion that Richmond had consulted with the Musqueam patently unreasonable.

H. LOTTERY CORPORATION REJECTION OF MUSQUEAM OBJECTION

[93] The Lottery Corporation rejected the objection filed by the Musqueam as not coming within s. 21, not being matters that could be resolved with Richmond through non-binding dispute resolution. In my view, this is a correct interpretation of this section. The then applicable **Regulation** defined “materially affected”:

11(2) For the purposes of the Act “**materially affected**”, in relation to a municipality, regional district or first nation, includes that, as a result of the proposal proceeding, the municipality, regional district or first nation can demonstrate a likelihood that it will

- (a) incur significant new infrastructure or policing costs,
- (b) experience increased traffic with a significant impact on its highways, or
- (c) experience a significant adverse impact on the amenities and character of one or more of its neighbourhoods.

[94] The definition of “materially affected” is to be given its usual interpretation; ‘includes’ is expansive, not restrictive (as discussed above with respect to Petition L04072). The definition is not limited to the three items listed in s. 11(2) of the **Regulation**, but includes those items. However, to refer municipalities and First Nations to non-binding arbitration after consultation has failed to resolve issues between them, must contemplate matters that can be addressed by the municipality. The subject of the objection and the non-binding resolution is clearly land use planning. The issues which the Musqueam raised were not land use planning issues, and were not matters which could be addressed by Richmond. Therefore, the objection was not an objection contemplated by the **Act**.

I. **BIAS/FETTERING**

[95] The Musqueam argue that the Lottery Corporation has an obligation to be objective and unbiased and not to fetter its discretion. The Musqueam say that the Lottery Corporation improperly fettered its discretion by entering a settlement agreement with Great Canadian with respect to the Bridgepoint lands and was improperly biased in exercising its discretion in reaching its decisions on the various issues before it.

[96] I accept the argument of the Lottery Corporation that the reasonable apprehension of bias standard is not suited to Lottery Corporation decisions.

[97] In ***Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquid Control and Licensing Branch)*** [2001] 2 S.C.R. 781 at paras. 21 – 22 the court said:

Confronted with silent or ambiguous legislation, courts generally infer that Parliament or the legislature intended the tribunal's process to comport with the principles of natural justice ... in such circumstances, administrative tribunals may be bound by the requirement of an independent or impartial decision maker, one of the fundamental principles of a natural justice. ... [I]ndeed, courts will not lightly assume that legislators intended to enact procedures that run contrary to this principle, although the precise standard of independence required will depend 'on all the circumstances, and in particular on the language of the statute under which the agency acts, the nature of the task it performs and the type of decision it is required to make...'

However, like all principles of natural justice, the degree of independence required of tribunal members may be ousted by express statutory language or necessary implication ...

[98] Here, the legislation contemplates the Lottery Corporation being the proponent of the casino relocation and expansion and contemplates the Lottery

Corporation being driven by business considerations in reaching its conclusions.

The minister's letter in this particular case provided:

This directive, issued pursuant to s. 18 of the **Gaming Control Act**, authorizes the British Columbia Lottery Corporation in its discretion to:

- (a) relocate gaming facilities for business reasons, in accordance with provincial policy, the **Gaming Control Act**, and the Gaming Control Regulation, as they may be amended from time to time; and
- (b) substantially change the type or extent of lottery schemes in gaming facilities in order to best meet market place demand, in accordance with provincial policy, the **Gaming Control Act**, and the Gaming Control Regulation, as they may be amended from time to time.

[99] Thus, the Lottery Corporation is the proponent of the development. It cannot be independent or unbiased. It must follow certain statutory procedures and consider certain issues as laid out by the statute, but it is not required to be independent or unbiased. The **Act** contemplates the Lottery Corporation choosing a site for relocation of the casino and reaching a preliminary decision with respect to expansion of the casino before it notifies the relevant land use authority. That being so, the Lottery Corporation would in all instances have reached a preliminary conclusion or decision with respect to the casino development. It would never be unbiased.

[100] The Musqueam argue that because the Lottery Corporation entered a settlement agreement with Great Canadian and concluded that the Bridgepoint site would be an appropriate site for the relocation and redevelopment of the casino, it must be taken to have improperly fettered its discretion. However, it is clear that as early as December 16, 2002, immediately after the settlement was reached with

Great Canadian, the Lottery Corporation indicated to both Richmond and Great Canadian that the relocation and expansion would be subject to “all necessary approvals by the City of Richmond.” Great Canadian was advised in approximately December of 2002 that, before the Lottery Corporation could finalize a decision with respect to the relocation of a full service casino in Richmond, all of the statutory steps under the ***Gaming Control Act*** had to be completed. Until the Lottery Corporation’s final decision was made on March 26, 2004, the development was undertaken at Great Canadian’s risk. Richmond may not have approved of the development and the Lottery Corporation may not have made a final decision in favour of the Bridgepoint casino proposal.

[101] I cannot conclude that the Lottery Corporation improperly fettered its discretion. As noted above, the ***Act***, which contemplates the Lottery Corporation being both the proponent and the ultimate decision maker, determines that the Lottery Corporation must have concluded that the relocation and redevelopment was appropriate before the process is commenced. However, that does not mean that the Lottery Corporation blinds itself to its statutory duty to be satisfied that Richmond has sought and considered adequate community input or has consulted with the adjacent First Nation. The evidence before me to allow me to reach such a conclusion.

J. MINISTERIAL AUTHORIZATION

[102] The petitioners argue that the Lottery Corporation did not have the authority of the gaming minister to relocate and substantially change this casino, and therefore, the decision must be set aside.

[103] Section 18 provides that the Lottery Corporation may relocate or substantially change a gaming facility, subject to first receiving authorization from the Minister. The Lottery Corporation decided to relocate and substantially change this casino in February 2004. By that time, it had received an s.18 authorization from the Minister, dated June 17, 2003 which directed the Lottery Corporation to use its discretion to relocate gaming facilities for business reasons, and to substantially change gaming facilities to best meet marketplace demand.

[104] Section 18 does not require an individual authorization for each site. The authorization of June 17, 2003 is sufficient for s.18.

K. CONSTITUTIONAL/COMMON-LAW DUTY TO CONSULT

[105] The Supreme Court of Canada has dealt with the issue of the duty to consult and accommodate in two recent decisions: ***Haida Nation v. British Columbia (Minister of Forests)***, [2004] 3 S.C.R. 511 and ***Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)***, [2004] 3 S.C.R. 550. The SCC confirmed the obligation of the Federal and Provincial Crown to consult and determined that a third party in the position of Great Canadian or Richmond did not have a duty to consult. In ***Haida*** the court said at paras. 16-17:

The government's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the honour of the Crown ... It is not a mere incantation, but rather a core precept that finds its application in concrete practices.

The historical roots of the principle of the honour of the Crown suggest that it must be understood generously in order to reflect the underlying realities from which it stems. In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably. ...

The court continued at paras. 24 – 25:

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 decision" 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.

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.

1. When does the duty to consult arise?

[106] In *Haida*, the Supreme Court noted that proving rights may take time, in some cases a very long time. In the meantime, how are the interests under discussion to be treated?

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. ... 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. ...

(para. 27)

...

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.

(para. 35)

...

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.

...

2. The Scope and Content of the Duty to Consult and Accommodate

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.

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 ...

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. ...

...However, there is no duty to agree; rather, the commitment is to a meaningful process of consultation. ...

...At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice. “[C]onsultation’ in its least technical definition is talking together for mutual understanding”...

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 requirement 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.

Between these two extremes of the spectrum just described, will lie other situations. Every case must be approached individually.

(para. 37-45)

3. Administrative Review

[107] The Supreme Court of Canada suggests that the appropriate standard of review, should the government misconceive the seriousness of the claim or the impact of the infringement, a question of law, is correctness. The process itself would likely fall to be examined on a standard of reasonableness.

L. DISCUSSION

1. Existence of the Duty

[108] Did the Province have knowledge, real or constructive, of the potential existence of an aboriginal right or title claim and contemplate conduct that might adversely affect the claim?

[109] The Musqueam advance a title claim to the Bridgepoint lands. They argue that they have established a *prima facie* case to such a claim, as their claim to these lands has been accepted for negotiation in the treaty process. This point was not extensively argued before me. The Musqueam have produced historical materials which suggest that the Musqueam have historically used these lands. The Province consulted with the Musqueam with respect to other portions of the Bridgepoint lands and with respect to use of these lands after 2041. While I understand that four other bands also claim title to these lands, in my view, the Musqueam have established a credible claim to these lands, which the Province recognizes.

[110] Parenthetically, in their dealings with Richmond, Great Canadian Casino and Lottery Corporation, the Musqueam also asserted an aboriginal right to gaming.

This argument was not advanced before me and I need not address it.

2. Scope and Content of the Duty

[111] The scope of the consultation will be proportionate to a preliminary assessment of the strength of the case supporting the existence of the title claim and to the seriousness of the potentially adverse effect on the title claimed.

[112] As noted above, the Musqueam have advanced a claim to title and the Province has recognized a duty to consult with respect to the Bridgepoint lands. Therefore, I accept that there is a *prima facie* case in support of the claim to Aboriginal title.

[113] The Musqueam argue that, having advanced a *prima facie* claim to title, they are entitled to say how the lands are used. The respondents say that even if the Musqueam have a *prima facie* claim, there was no duty to consult: the lands in question were already leased for commercial purposes until the year 2041; placing a casino and hotel development on those lands had no impact and did not alter the use to which the lands had already been committed, Great Canadian Casino merely assumed the lease; the Province need not consult with the Musqueam when deciding to place its casino on the lands.

3. Discussion

[114] Because the Lottery Corporation is an agent of the Crown, the provincial crown had a duty to consult which was triggered when it contemplated moving and expanding its casino to lands which it knew were subject to the Musqueam claims. Placing the casino on the Bridgepoint lands might affect Musqueam interests.

[115] Although the lease and sub-lease were in place, by 2002 the market was defunct, the land unused for several years. The sub-lease was in arrears. The Lottery Corporation gave life to the moribund lease when it contemplated moving the casino to the property. Without the casino, Great Canadian would not have taken over the property. In the words of *Taku*, the Crown actor had knowledge of the potential existence of Aboriginal title and contemplated conduct that might adversely affect the claim. The potential adverse effects include the redevelopment of the property which makes it unlikely that the property will be available to the Musqueam before 2041. As the Musqueam argue, because the casino has been developed on the lands, it is less likely that the lands will be included in a Musqueam treaty settlement, the development itself may make the lands more valuable and more difficult for Musqueam to acquire, or may prevent the Musqueam from developing the lands for a different purpose.

[116] Therefore, the Crown's contemplated move of the casino to the Bridgepoint lands triggered a duty to consult. To be effective, consultation should take place at the earliest stages, before irrevocable steps have been taken. That did not occur. What relief is appropriate in these circumstances?

[117] In the petition, the Petitioners seek orders setting aside the Lottery Corporation's decision to relocate the casino to the Bridgepoint lands and prohibiting the Lottery Corporation from taking further steps to relocate or substantially change the gaming facility until it has satisfied its duty to consult and accommodate. This would shut down the casino and impair the entire development.

[118] This relief is not appropriate in the circumstances of this case. As the petitioners acknowledge, practically speaking, at this late date, accommodation could only be economic accommodation. Because the harm suffered by the Musqueam from a failure to consult and potentially accommodate is compensable it is not appropriate to set aside the decisions, close the casino, and cause consequential damage.

[119] I have concluded that the Crown had a duty to consult in this case, and will grant that declaration. It is possible that following consultation, accommodation may be appropriate. Because the Crown did not recognize a duty to consult, the parties have not attempted to determine appropriate consultation and accommodation. In *Haida*, the court suggested that the parties can assess the strength of the claim and the appropriate scope and content of the duty to consult and accommodate. If they cannot agree, the courts can assist. That seems to me appropriate in this case: the parties can assess the strength of the claim and determine the scope and content of the duty to consult and accommodate. If they are not able to agree, they may return to court for additional relief.

[120] The parties may make submissions on costs if necessary.

“B.J. Brown J.
The Honourable Madam Justice B.J. Brown

Paul v. British Columbia (Forest Appeals Commission), [2003] 2 S.C.R. 585, 2003
SCC 55

**Attorney General of British Columbia
and Ministry of Forests**

Appellants

v.

Thomas Paul

Respondent

and

**Forest Appeals Commission,
Attorney General of Canada,
Attorney General of Ontario,
Attorney General of Quebec,
Attorney General of New Brunswick,
Attorney General of Manitoba,
Attorney General for Saskatchewan,
Attorney General of Alberta and
First Nations Summit**

Interveners

Indexed as: Paul v. British Columbia (Forest Appeals Commission)

Neutral citation: 2003 SCC 55.

File No.: 28974.

Hearing and judgment: June 11, 2003.
Reasons delivered: October 3, 2003.

Present: McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour,
LeBel and Deschamps JJ.

on appeal from the court of appeal for british columbia

Constitutional law — Division of powers — Indians — Forestry — Whether province can constitutionally confer on administrative tribunal power to determine questions of aboriginal rights and title as they arise in course of tribunal's duties — Constitution Act, 1867, s. 91(24) — Forest Practices Code of British Columbia Act, R.S.B.C. 1996, c. 159, s. 96 — Constitution Act, 1982, s. 35.

Administrative law — Forest Appeals Commission — Jurisdiction — Aboriginal rights — Whether Forest Practices Code confers on Commission power to decide existence of aboriginal rights or title — Forest Practices Code of British Columbia Act, R.S.B.C. 1996, c. 159, s. 96.

Administrative law — Boards and tribunals — Jurisdiction — Constitutional issues — Powers of administrative tribunals to determine questions of constitutional law — Appropriate test.

The B.C. Ministry of Forestry seized four logs in the possession of P, a registered Indian, who planned to use the wood to build a deck on his home. P asserted that he had an aboriginal right to cut timber for house modification and, accordingly, s. 96 of the *Forest Practices Code*, a general prohibition against cutting Crown timber, did not apply to him. Both the District Manager and the Administrative Review Panel agreed that P had contravened s. 96. P appealed to the Forest Appeals Commission, which decided, as a preliminary matter of jurisdiction, that it was able to hear and determine the aboriginal rights issues in the appeal. The B.C. Supreme Court concluded that the Legislature of B.C. had validly conferred on the Commission

the power to decide questions relating to aboriginal title and rights in the course of its adjudicative function in relation to contraventions of the Code. A majority of the Court of Appeal set aside the decision, holding that s. 91(24) of the *Constitution Act, 1867*, which gives Parliament exclusive power to legislate in relation to Indians, precluded the Legislature from conferring jurisdiction on the Commission to determine questions of aboriginal title and rights in the forestry context.

Held: The appeal should be allowed.

The province has legislative competence to endow an administrative tribunal with capacity to consider a question of aboriginal rights in the course of carrying out its valid provincial mandate. The parties conceded that the Code is, in its entirety, valid provincial legislation in relation to development, conservation and management of forestry resources in the province, and there was no suggestion that, in operation, the law's effects on Indians are so significant as to reveal a pith and substance that is a matter under exclusive federal competence. As a law of general application, the Code applies *ex proprio vigore* to Indians, to the extent that it does not touch on the "core of Indianness" and is not unjustifiably inconsistent with s. 35 of the *Constitution Act, 1982*. Under the doctrine of incidental effects, it is constitutionally permissible for a validly enacted provincial statute of general application to affect matters coming within the exclusive jurisdiction of Parliament. While, through operation of the doctrine of interjurisdictional immunity, the "core" of Indianness is protected from provincial laws of general application, the Commission's enabling provisions do not attempt to supplement or amend the constitutional and federal rules respecting aboriginal rights. The effect of the Code is to prescribe that Indians charged under the Code will first raise an aboriginal rights defence before the

Commission, as opposed to before a superior court judge. This effect has not been shown to have a substantial impact upon Indians *qua* Indians. The doctrine of interjurisdictional immunity relates to the exercise of legislative powers — that is, the power of a province to apply its valid legislation that affects matters under federal competence. The majority of the Court of Appeal erred in applying the doctrine in the context of an adjudicative, not legislative, function. The conclusion that a provincial board may adjudicate matters within federal legislative competence fits comfortably within the general constitutional and judicial architecture of Canada. In determining, incidentally, a question of aboriginal rights, a provincially constituted board would be applying constitutional or federal law in the same way as a provincial court, which is also a creature of provincial legislation. Boards must take into account all applicable legal rules, both federal and provincial, in applying their enabling legislation.

A determination by an administrative tribunal, such as the Commission, is very different from both extinguishment of a right and legislation in relation to Indians or aboriginal rights. First, and most important, any adjudicator, whether a judge or a tribunal, does not create, amend, or extinguish aboriginal rights. Second, the Commission's decisions do not constitute legally binding precedents, nor will their collective weight over time amount to an authoritative body of common law. They could not be declaratory of the validity of any law. Moreover, as for constitutional determinations respecting s. 91(24) or s. 35, the Commission's rulings would be reviewable, on a correctness basis, in a superior court on judicial review.

To determine if a tribunal has the power to apply the Constitution, including s. 35 of the *Constitution Act, 1982*, the essential question is whether the empowering legislation implicitly or explicitly grants to the tribunal the jurisdiction

to interpret or decide any question of law. If it does, the tribunal will be presumed to have the concomitant jurisdiction to interpret or decide the question at issue in light of s. 35 or any other relevant constitutional provision. There is no persuasive basis for distinguishing the power to determine s. 35 questions from the power to determine other constitutional questions, and practical considerations will not suffice generally to rebut the presumption that arises from authority to decide questions of law. Here, the Commission has the power to decide questions relating to aboriginal rights arising incidentally to forestry matters and to hear P's defence of his aboriginal right to harvest logs for renovation of his home. Section 131(8) of the Code permits a party to "make submissions as to facts, law and jurisdiction". The Commission thus has the power to determine questions of law and nothing in the Code provides a clear implication to rebut the presumption that the Commission may decide questions of aboriginal law. The nature of the appeal does not prohibit the Commission from hearing a s. 35 argument. Even if the Administrative Review Panel has no jurisdiction to determine a s. 35 question, the Commission is not restricted to the issues considered by that board. Lastly, any restriction on the Commission's remedial powers is not determinative of its jurisdiction to decide s. 35 issues, nor is the complexity of the questions.

Cases Cited

Applied: *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504, 2003 SCC 54; **referred to:** *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854; *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, [2002] 2 S.C.R. 146, 2002 SCC 31; *Reference*

re Firearms Act (Can.), [2000] 1 S.C.R. 783, 2000 SCC 31; *Global Securities Corp. v. British Columbia (Securities Commission)*, [2000] 1 S.C.R. 494, 2000 SCC 21; *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641; *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437; *Bell Canada v. Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 749; *Ontario (Attorney General) v. Pembina Exploration Canada Ltd.*, [1989] 1 S.C.R. 206; *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19; *Krieger v. Law Society of Alberta*, [2002] 3 S.C.R. 372, 2002 SCC 65; *Buhs v. Board of Education of Humboldt Rural School Division No. 47* (2002), 217 Sask. R. 222, 2002 SKCA 41; *Adler v. Ontario*, [1996] 3 S.C.R. 609; *Canada (Deputy Minister of National Revenue) v. Mattel Canada Inc.*, [2001] 2 S.C.R. 100, 2001 SCC 36; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982; *Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 S.C.R. 322; *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3; *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570; *Four B Manufacturing Ltd. v. United Garment Workers of America*, [1980] 1 S.C.R. 1031; *R. v. Francis*, [1988] 1 S.C.R. 1025; *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, 2003 SCC 29; *Ermineskin Cree Nation v. Canada* (2001), 297 A.R. 226, 2001 ABQB 760; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748; *R. v. 974649 Ontario Inc.*, [2001] 3 S.C.R. 575, 2001 SCC 81; *R. v. Hynes*, [2001] 3 S.C.R. 623, 2001 SCC 82; *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22; *Mills v. The Queen*, [1986] 1 S.C.R. 863; *Dupras v. Mason* (1994), 99 B.C.L.R. (2d) 266; *McKenzie v. Mason* (1992), 72 B.C.L.R. (2d) 53, leave to appeal refused, [1993] 1 S.C.R. vii; *British Columbia Chicken Marketing*

Board v. British Columbia Marketing Board (2002), 216 D.L.R. (4th) 587, 2002 BCCA 473.

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Bill 69, *Forest and Range Practices Amendment Act, 2003*, 4th Sess., 37th Parl., British Columbia, 2003 (date of first reading, May 29, 2003).

Canadian Charter of Rights and Freedoms, ss. 11, 24(1).

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Constitution Act, 1982, ss. 35, 52.

Forest and Range Practices Act, S.B.C. 2002, c. 69 [not yet in force], ss. 77, 80, 82.

Forest Practices Code of British Columbia Act, R.S.B.C. 1996, c. 159, ss. 96, 130 to 141, 131(8).

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C.E.L.R. (N.S.) 149, [2001] 7 W.W.R. 105, [2001] 4 C.N.L.R. 210, [2001] B.C.J. No. 1227 (QL), 2001 BCCA 411, supplementary reasons (2001), 206 D.L.R. (4th) 320, 40 C.E.L.R. (N.S.) 169, [2001] B.C.J. No. 2237 (QL), 2001 BCCA 644, allowing an appeal from a judgment of the British Columbia Supreme Court (1999), 179 D.L.R. (4th) 351, 31 C.E.L.R. (N.S.) 141, [2000] 1 C.N.L.R. 176, [1999] B.C.J. No. 2129 (QL). Appeal allowed.

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T. Murray Rankin, Q.C., and Mark G. Underhill, for the intervener the Forest Appeals Commission.

Mitchell R. Taylor and Peter Southey, for the intervener the Attorney General of Canada.

Michel Y. Hélie, for the intervener the Attorney General of Ontario.

Written submissions only by *Pierre-Christian Labeau*, for the intervener the Attorney General of Quebec.

Written submissions only by *Gabriel Bourgeois, Q.C.*, for the intervener the Attorney General of New Brunswick.

Holly D. Penner, for the intervener the Attorney General of Manitoba.

Written submissions only by *P. Mitch McAdam*, for the intervener the Attorney General for Saskatchewan.

Written submissions only by *Kurt J. W. Sandstrom*, for the intervener the Attorney General of Alberta.

Arthur C. Pape and *Jean Teillet*, for the intervener the First Nations Summit.

The judgment of the Court was delivered by

BASTARACHE J. —

I. Overview

1 These are the reasons following the decision of the Court on June 11, 2003 to allow the appeal. In August 1995, an official in the British Columbia Ministry of Forestry seized four logs in the possession of Thomas Paul, a registered Indian. Mr. Paul had cut three trees and found the fourth, and planned to use the wood to build a deck on his home. Mr. Paul asserted that he had an aboriginal right to cut timber for house modification, and accordingly that s. 96 of the *Forest Practices Code of British Columbia Act*, R.S.B.C. 1996, c. 159 (“Code”), a general prohibition against cutting Crown timber, did not apply to him. Both the District Manager and the Administrative Review Panel agreed that Mr. Paul had contravened s. 96. Mr. Paul then appealed to the Forest Appeals Commission (“Commission”). No one disputes these facts.

2 The issue in dispute is whether the Commission has jurisdiction to hear Mr. Paul's defence that he cut the trees and possessed the logs in the exercise of his aboriginal rights. To this point, Mr. Paul has asserted his right but never attempted to prove it. The issue is not whether provincial legislation can override an aboriginal right recognized and affirmed by s. 35 of the *Constitution Act, 1982*. As the submissions by the parties and the interveners show, the question is of great significance both to aboriginal persons and to provincial governments, which enable administrative tribunals to address a vast diversity of issues that may encompass s. 35 rights.

3 The Commission had decided, as a preliminary matter of jurisdiction, that it was able to hear and determine the aboriginal rights issues in the appeal. In the Supreme Court of British Columbia, Mr. Paul moved, under the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, for an order for *certiorari* quashing the preliminary decision of the Commission and an order of prohibition preventing the Commission from considering and determining questions relative to his aboriginal rights. Pitfield J., the chambers judge, concluded that the Legislature of British Columbia had validly conferred on the Commission the power to decide questions relating to aboriginal title and rights in the course of its adjudicative function in relation to contraventions of the Code: (1999), 179 D.L.R. (4th) 351. A majority of the Court of Appeal allowed the appeal: (2001), 89 B.C.L.R. (3d) 210, 2001 BCCA 411. Lambert J.A. concluded that s. 91(24) of the *Constitution Act, 1867*, which gives Parliament exclusive power to legislate in relation to Indians, precluded the Legislature from conferring jurisdiction on the Commission to determine questions of aboriginal title and rights in the forestry context. Huddart J.A., dissenting, held that an administrative decision maker must be able to decide questions of aboriginal rights

necessary to the exercise of its statutory authority. Specifically, she held that the Commission had capacity to hear and decide the issues in relation to Mr. Paul's aboriginal rights.

4 In the hearing before this Court, all parties conceded the general validity of the Code and of the Legislature's power to create the Commission. The Code, a law of general application, is clearly legislation in relation to the development, conservation and management of forestry resources in the province under s. 92A(1)(b) of the *Constitution Act, 1867*. Within the Code, ss. 130 to 141 regulate the appeals process for all persons, rather than singling out Indians or any other group.

5 There are two prongs to the respondent's challenge to the jurisdiction of the Commission. The first is that the Legislature of British Columbia cannot give the Commission the power to adjudicate questions relating to aboriginal rights, on the basis that doing so would encroach on the federal power under s. 91(24). This is the constitutional argument. The majority of the Court of Appeal had also determined, as an alternative approach, that the Code ran afoul of the doctrine of interjurisdictional immunity. The Court of Appeal reasoned that, since the existence and extent of aboriginal title and aboriginal rights come within the essential core of "Indianness" (*Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010), a law granting quasi-judicial jurisdiction to determine matters of aboriginal title and aboriginal rights intrudes upon the core of Indianness and is therefore inapplicable to Indians. Furthermore, held the majority, s. 88 of the *Indian Act*, R.S.C. 1985, c. I-5, which makes provincial laws of general application apply to Indians, fails to invigorate the relevant portions of the Code, since s. 88 incorporates laws respecting Indians, not land.

6 With respect, I think that the majority of the Court of Appeal misunderstood the scope of the doctrine of interjurisdictional immunity. The doctrine relates to the exercise of legislative powers, that is, the power of a province to apply its valid legislation that affects matters under federal competence. As the parties conceded, the Code is constitutional. The majority of the Court of Appeal applied the doctrine in the context of an adjudicative, not legislative, function. The effect of the Code is not to alter the substance of any federal rule or aboriginal right, but rather to prescribe that Indians charged under the Code will first raise an aboriginal rights defence before the Commission, as opposed to before a superior court judge. This effect has not been shown to have a substantial impact upon Indians *qua* Indians. There is therefore no need to consider s. 88; the Code applies *ex proprio vigore*.

7 The second prong of Mr. Paul's challenge deals with the Commission's statutory jurisdiction. The respondent argued that the enabling provisions of the Code were insufficient to empower the Commission to decide the existence of aboriginal rights or title. Mr. Paul argues that the Legislature would need to confer the power to determine such questions, even ones arising incidentally to forestry matters, upon the Commission expressly. I note that the appellants agree with the respondent that the particular provisions of the Code fail to confer such power on the Commission. Only the Commission itself, intervening, believes it has been so empowered. Since the majority of the Court of Appeal believed that granting the Commission power to determine questions of aboriginal law would be unconstitutional, it did not examine the statutory interpretation question in detail. Nevertheless, the majority believed that practical considerations militated against a finding that the Code conferred jurisdiction on the Commission. In his brief concurring reasons, Donald J.A. referred to *Cooper*

v. Canada (Human Rights Commission), [1996] 3 S.C.R. 854, as authority for the importance of practical considerations in seeking out implied jurisdiction (paras. 92-109). This prong of the challenge is the administrative law question of interpretation of a tribunal's enabling statute.

8 The facts in this appeal and in *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504, 2003 SCC 54, released concurrently, have given this Court the opportunity to reappraise the law respecting the jurisdiction of administrative tribunals to apply the Constitution. The correct approach in a constitutional case such as the present appeal is the same as that in *Martin*, which concerns the *Canadian Charter of Rights and Freedoms*. That approach is to determine whether the tribunal is empowered to decide questions of law. If so, the judge must verify whether there is a clear implication arising from the statutory scheme that the power to decide questions of law was meant to exclude the legal issues under review. In this case, s. 131(8) of the Code permits a party to "make submissions as to facts, law and jurisdiction". It is therefore clear that the Commission has power to determine questions of law. The Commission is not restricted to the issues considered by the Administrative Review Panel, the decision maker appealed from. Any restriction on the Commission's remedial powers is not determinative, nor is the complexity of the questions. Nothing in the Code provides a clear implication to rebut the presumption that the Commission may decide questions of aboriginal law.

II. Analysis

9 My analysis follows the two prongs of the challenge to the Commission's jurisdiction identified above. In the first part, the division of powers discussion, the

question is whether the Legislature of British Columbia is constitutionally capable of conferring on an administrative tribunal the power to determine questions of aboriginal right and title as they arise in the course of the tribunal's duties. In the second part, I will consider the extent of the power actually conferred on the Commission in this case. I turn first to the doctrines relevant to determining the Legislature's powers in endowing administrative tribunals to adjudicate questions relative to aboriginal rights.

A. *Division of Powers: Can the Province Empower the Commission to Hear and Determine Section 35 Questions?*

(1) The Scope of the Constitutional Challenge

10 It is important to indicate precisely which provisions of the Code are under discussion at this point. The challenge is to the notion that ss. 130 to 141, which provide that a person may appeal the decision of the Administrative Review Panel to the Commission, permit the Commission to hear and rule upon a defence of aboriginal rights. In contrast, there is no challenge to the substantive prohibition, which appears in s. 96(1):

96 (1) A person must not cut, remove, damage or destroy Crown timber unless authorized to do so

...

Nor, I should note, do the appellants take the position that s. 96(1) would prevail in a conflict with a demonstrated aboriginal right affirmed by s. 35 of the *Constitution Act, 1982*. Once an aboriginal right is proven, s. 96(1) would be of no effect to the extent that it was inconsistent with that right, unless that inconsistency could be justified

according to the test in *R. v. Sparrow*, [1990] 1 S.C.R. 1075. On this, there is no dispute.

(2) The Validity and Application of the Code

11 As I noted above, at the hearing the parties conceded that the Code is in its entirety valid provincial legislation. In any case, it is clear to me that the Code is legislation in relation to development, conservation and management of forestry resources in the province, under s. 92A(1)(b) of the *Constitution Act, 1867*. There was no argument made that the entire Code, or that portion treating appeals before the Commission, has as its true meaning, essential character, or core matters relating to Indians and lands reserved for the Indians (s. 91(24)) or to any other federal head of power. More specifically, there was no suggestion that, in operation, the law's effects on Indians are so significant as to reveal a pith and substance that is a matter under exclusive federal competence: *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, [2002] 2 S.C.R. 146, 2002 SCC 31, at para. 54; *Reference re Firearms Act (Can.)*, [2000] 1 S.C.R. 783, 2000 SCC 31, at para. 18.

12 As a law of general application, the Code applies *ex proprio vigore* to Indians, to the extent that it does not touch on the “core of Indianness” and is not unjustifiably inconsistent with s. 35 of the *Constitution Act, 1982*. There is no need to consider whether s. 88 of the *Indian Act* would revive the statute and render it applicable.

13 In the classic federalism cases, the *vires* of legislation is challenged: *Reference re Firearms Act (Can.)*, *supra*; *Global Securities Corp. v. British Columbia (Securities Commission)*, [2000] 1 S.C.R. 494, 2000 SCC 21. Here the question is the relationship

between valid provincial legislation and matters under the federal competence to legislate under s. 91(24).

(3) Incidental Effects

14 The doctrine of incidental effects holds that where there is a valid provincial law of general application, the provincial law applies if its effects upon matters within federal legislative competence are “merely incidental, irrelevant for constitutional purposes”: P. W. Hogg, *Constitutional Law of Canada* (loose-leaf ed.), vol. 1, at p. 15-8, quoted in *Global Securities, supra*, at para. 22. See also *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641, at p. 670. In other words, as Iacobucci and Major JJ. put it in *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437, at para. 81, “it is constitutionally permissible for a validly enacted provincial statute of general application to affect matters coming within the exclusive jurisdiction of Parliament”. Since all relevant provisions of the Code are valid provincial legislation, it follows that by virtue of the doctrine of incidental effects, any impact of the Code upon aboriginals is irrelevant for classification purposes. It remains to be seen, however, whether the law’s application to specific factual contexts can be put in issue.

(4) Interjurisdictional Immunity

15 The doctrine of interjurisdictional immunity is engaged when a provincial statute trenches, either in its entirety or in its application to specific factual contexts, upon a head of exclusive federal power. The doctrine provides that, where the general language of a provincial statute can be read to trench upon exclusive federal power in its application to specific factual contexts, the statute must be read down so as not to

apply to those situations: *Grail, supra*, at para. 81. The doctrine has limited the application of a provincial statute to a matter of exclusive federal power in numerous contexts. For example, in *Grail*, a provincial statute of general application was found to have the effect of regulating indirectly an issue of maritime negligence law. The provincial statute had the effect of supplementing existing rules of federal maritime negligence law in such a manner that the provincial law effectively altered rules within the exclusive competence of Parliament. Accordingly, the provincial statute of general application was read down so as not to apply to a maritime negligence action. In *Bell Canada v. Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 749, this Court held that a provincial occupational health and safety statute was inapplicable to a federal undertaking. More relevant, for present purposes, in *Delgamuukw, supra*, at para. 181, Lamer C.J. held that s. 91(24) protects a “core” of Indianness from provincial laws of general application, through operation of the doctrine of interjurisdictional immunity. See also *Kitkatla Band, supra*, at para. 75: in that case it was not established that the impugned provisions affected “the essential and distinctive core values of Indianness”, and thus they did not “engage the federal power over native affairs and First Nations in Canada”.

16 The question, then, is whether, in a valid law of general application, provisions that empower a provincially constituted administrative tribunal to hear and rule upon arguments relating to aboriginal rights as they arise in execution of its provincial mandate trench upon the core of Indianness. If so, those provisions will be inapplicable to Indians.

(5) Application: Adjudication Versus Legislation

17 Lambert J.A., in the British Columbia Court of Appeal, concluded that such provisions would touch the core of Indianness. The doctrine of interjurisdictional immunity would, accordingly, render those enabling provisions inapplicable to questions of aboriginal law. It is helpful to review the heart of his reasoning on this point, at para. 72:

The existence and extent of aboriginal title and aboriginal rights has been held in *Delgamuukw* to come within the essential core of Indianness. That being so, I cannot imagine that a law granting quasi-judicial jurisdiction to determine matters of aboriginal title and aboriginal rights could be anything other than equally and co-extensively within the core of Indianness. As such it fulfils the conditions for application of the principle of interjurisdictional immunity

18 This short passage reveals the fundamental error in the analysis of the majority of the Court of Appeal. It equates legislation respecting the “existence and extent of aboriginal title and aboriginal rights” (a legislative or regulatory function) with legislation enabling a board “to determine matters of aboriginal title and aboriginal rights” (an adjudicative function) (emphasis added). The respondent made the same error, stating in his factum that “the province’s power to enact the jurisdiction-granting sections of the Code cannot extend to matters that are not within the province’s legislative competence” (respondent’s factum, at para. 105).

19 Legislation that triggers the doctrine of interjurisdictional immunity purports to regulate indirectly matters within exclusive federal competence, that is, to alter rights and obligations. Such inapplicable legislation may purport to “supplement” existing federal rules, as in *Grail, supra*. It may purport to “regulate” the essential parts of federal undertakings, as in *Bell, supra*. To my knowledge, none of the authorities applying the doctrine of interjurisdictional immunity has done so in respect of an adjudicative function. The function at issue in this appeal is one of identifying

where existing aboriginal rights affirmed by s. 35 of the *Constitution Act, 1982* prevail over provisions in the Code. The Commission's enabling provisions do not attempt to supplement or amend the constitutional and federal rules respecting aboriginal rights. Indeed, the question is whether the legislature may empower the Commission to take cognizance of existing constitutional rights and rights under federal rules, not to alter or supplant them. In my view, as I shall explain, there is no reason under the Constitution that the legislature may not so empower the Commission.

20 The respondent cites Professor Hogg's discussion of the rationale for the conferral upon Parliament by the founders of Confederation of legislative power over Indians. Professor Hogg writes that the main reason "seems to have been a concern for the protection of the Indians against local settlers" (Hogg, *supra*, at p. 27-2). Once adjudicative and legislative functions are separated, however, it becomes clear that neither s. 91(24) itself nor Professor Hogg's discussion refers to adjudication. The passage is therefore unhelpful in this context.

21 The conclusion that a provincial board may adjudicate matters within federal legislative competence fits comfortably within the general constitutional and judicial architecture of Canada. In determining, incidentally, a question of aboriginal rights, a provincially constituted board would be applying constitutional or federal law in the same way as a provincial court, which of course is also a creature of provincial legislation. At the hearing all parties agreed that a provincial court may determine s. 35 issues. I believe that *Ontario (Attorney General) v. Pembina Exploration Canada Ltd.*, [1989] 1 S.C.R. 206, is helpful. It stands for the proposition that legislative and adjudicative competence are not coterminous. In that case, this Court concluded that a small claims court, a provincially constituted inferior court, was

competent to hear a case of admiralty law. Admiralty law, of course, falls within exclusive federal competence. The Court noted that, within the unitary court system in Canada, provincially constituted inferior and superior courts apply federal as well as provincial laws. There are procedural and structural differences between provincially created courts and administrative tribunals, including the judicial independence requirements bearing upon them. Nevertheless, I believe that, analogous to the result in *Pembina, supra*, the division of powers does not preclude a validly constituted provincial administrative tribunal, legislatively empowered to do so, from determining questions of constitutional and federal law arising in the course of its work.

22 I do not agree with the respondent that the conclusion in *Pembina* that a provincially constituted court could determine questions of federal law implies, *a contrario*, that a provincially constituted administrative tribunal cannot do so. First, while I need not decide this point, it is arguable that La Forest J.’s reference to “courts of inferior jurisdiction” naturally includes an adjudicative tribunal such as the Commission. Such a conclusion follows perhaps even more readily from the French version, “*tribunaux d’instance inférieure*” (*Pembina, supra*, at p. 225). Second, even if the statement in *Pembina* does not embrace the Commission, La Forest J. was speaking of the jurisdiction of a small claims court, and I do not think he can be taken to have been pronouncing, by implication, on broader questions. Third, the constitutional protection of judicial review of administrative tribunals, derived from s. 96 of the *Constitution Act, 1867*, integrates administrative tribunals into the unitary system of justice: *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220. By performing judicial review of the decisions of administrative tribunals, superior courts play an important role in assuring respect for the rule of law (*Dr. Q v. College of*

Physicians and Surgeons of British Columbia, [2003] 1 S.C.R. 226, 2003 SCC 19, at para. 21). While there are distinctions between administrative tribunals and courts, both are part of the system of justice. Viewed properly, then, the system of justice encompasses the ordinary courts, federal courts, statutory provincial courts and administrative tribunals. It is therefore incoherent to distinguish administrative tribunals from provincial courts for the purpose of deciding which subjects they may consider on the basis that only the latter are part of the unitary system of justice.

23 The conclusion sought by the respondent would pose intractable difficulties for administrative tribunals in the execution of their tasks. A provincially constituted board cannot respect the division of powers under the *Constitution Act, 1867* if it is unable to take into account the boundary between provincial and federal powers. For example, in *Krieger v. Law Society of Alberta*, [2002] 3 S.C.R. 372, 2002 SCC 65, the Law Society could only stay within the limits of its jurisdiction to review a prosecutor's ethical breach if it considered federal law relating to prosecutorial discretion. Indeed, a multitude of administrative tribunals, both provincial and federal, routinely make determinations respecting matters within the competence of the other legislator. Provincial boards may have an express statutory mandate to pronounce upon federal legislation: *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sch. A, s. 92.1; *Workers' Compensation Act*, S.N.S. 1994-95, c. 10, s. 48; *Workers Compensation Act*, R.S.B.C. 1996, c. 492 (enabling legislation of provincial boards directing them to interpret and apply federal income tax, pension and employment insurance legislation). Alternatively, the necessity to consider a question of constitutional or federal law may simply arise in the course of a primary determination: *Buhs v. Board of Education of Humboldt Rural School Division No. 47* (2002), 217 Sask. R. 222, 2002 SKCA 41, at para. 31 (municipal tax Board of Revision could hear assessment appeal on ground that

property subject to aboriginal title). In short, in applying their enabling legislation, boards must take into account all applicable legal rules, both federal and provincial. I therefore decline to accept the respondent's argument and its logical extension that the practices just described are constitutionally impermissible.

24 Further reasons persuade me to reject the respondent's general position that questions relating to aboriginal rights are untouchable by a provincially created tribunal by virtue of their falling within federal legislative competence. It is necessary to examine side by side two provisions in the Constitution. The one on which the respondent relies heavily is s. 91(24), which empowers Parliament to legislate in relation to "Indians, and Land reserved for the Indians". The other is s. 35 of the *Constitution Act, 1982*. Unless otherwise specified, such as official language rights in the *Charter* particular to New Brunswick, every right in the *Constitution Act, 1982* applies to every province as well as to the federal government. Section 35 therefore applies to both provinces and the federal government. It is also established that one part of the Constitution cannot abrogate another: *Adler v. Ontario*, [1996] 3 S.C.R. 609. By virtue of s. 35, then, laws of the province of British Columbia that conflict with protected aboriginal rights do not apply so as to limit those rights, unless the limitation is justifiable according to the test in *Sparrow, supra*. I find it difficult to think that the Province cannot, when administering a provincial regulatory scheme, attempt to respect its constitutional obligation by empowering an administrative tribunal to hear a defence of aboriginal rights.

25 *Sparrow* stands for the proposition that government regulation, including provincial regulation, may, by legislation, infringe an aboriginal right if that infringement is justified. Though this is not the basis of the Commission's

jurisdiction, where legislation justifiably infringing rights is possible, surely adjudication by the Commission, which simply takes existing rights into account, must be permissible. This conclusion follows from the distinction between legislation and adjudication and the nature of their impact upon rights.

26 I rely considerably on this distinction. I wish, therefore, to address an argument made by the respondent that, in practical terms in the aboriginal rights context, the two are insufficiently distinguishable.

27 The respondent submits that, in deciding a question arising from a defence of aboriginal right, the Commission will necessarily turn to matters at the core of s. 91(24). In his view, the Commission would determine not only the scope and content of the claimed right, but also perhaps the respondent's relationship to his First Nation, the times at which the claimed right can be practised, and the limits on the right, if any, and how the right can be exercised and by whom. He notes that the Commission might be required to determine whether the aboriginal right at issue had been extinguished. Then he argues that a determination by a provincial decision maker that a right has been extinguished is as much an extinguishment of an aboriginal right as provincial legislation attempting to extinguish that right directly. The respondent's argument, in essence, is that adjudication respecting aboriginal rights is tantamount to legislation respecting them.

28 I wish to reiterate a point acknowledged by the respondent himself, namely that a province lacks the constitutional capacity to extinguish aboriginal rights and aboriginal title. This is because the clear and plain intent necessary to extinguish an aboriginal right would make a law one in relation to Indians and Indian lands and thus

ultra vires the province: *Delgamuukw, supra*, at para. 180. I will now explain why, in two important respects, a determination by an administrative tribunal, such as the Commission, is very different from both the extinguishment of a right and legislation in relation to Indians or aboriginal rights.

29 First, and most important, any adjudicator, whether a judge or a tribunal, does not create, amend or extinguish aboriginal rights. Rather, on the basis of the evidence, a judicial or administrative decision maker may recognize the continued existence of an aboriginal right, including its content and scope, or observe that the right has been properly extinguished by a competent legislative authority. Of course the decision maker may also conclude on the evidence that the aboriginal right simply has not been proven at all.

30 Admittedly, within the administrative state, the line between adjudication and legislation is sometimes blurred. Administrative tribunals that develop and implement policy while adjudicating disputes, such as the Competition Tribunal and a provincial Securities Commission, come to mind. Indeed, this Court's standard of review jurisprudence is sensitive to the deference that may be appropriate where an expert tribunal is simultaneously adjudicating and developing policy, which may sometimes be viewed as a legislative function: *Canada (Deputy Minister of National Revenue) v. Mattel Canada Inc.*, [2001] 2 S.C.R. 100, 2001 SCC 36, at para. 28; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, at para. 48. There is, however, a crucial distinction between a board that has been empowered by valid legislation to make policy within an area that is *intra vires* the enabling legislator, and a provincial board that is called upon, in executing its mandate, to answer incidentally a legal question relating to the Constitution or to federal law. No

one has suggested that the Legislature has the constitutional power to enable a board to determine questions of aboriginal law on the basis of policy considerations favourable to the Province.

31 Second, while both provincially constituted courts and provincially constituted tribunals may consider the Constitution and federal laws, there is nevertheless one important distinction between them that the respondent overlooked. Unlike the judgments of a court, the Commission's decisions do not constitute legally binding precedents, nor will their collective weight over time amount to an authoritative body of common law. They could not be declaratory of the validity of any law. Moreover, as constitutional determinations respecting s. 91(24) or s. 35, the Commission's rulings would be reviewable, on a correctness basis, in a superior court on judicial review: *Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 S.C.R. 322, at para. 40; *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3, at para. 23; *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570. To avoid judicial review, the Commission would have to identify, interpret, and apply correctly the relevant constitutional and federal rules and judicial precedents. As a result of the contrast between the general application of a provincial law by a court and the specific, non-binding effect of a board's particular decision, there is a substantial difference.

(6) The Present Role of the Commission and the Core of Indianness

32 The preceding point brings me to consider the role of the Commission in this case. Recall that the general prohibition against cutting Crown timber appears in s. 96(1) of the Code, and is not attacked in this appeal. The question, then, is not

whether that prohibition unjustifiably infringes an aboriginal right. The question is whether provisions that would enable the Commission to hear a defence of aboriginal right are unconstitutional. I have already noted that the determinations of the Commission respecting aboriginal rights would be reviewable on a correctness standard. Provincial officials cannot initiate any inquiry into aboriginal rights before the Commission. Instead, a question of aboriginal law will arise only when a respondent raises an aboriginal right before the Commission in seeking relief from a general prohibition or other regulatory provision in the Code. I do not see how, by raising a defence of aboriginal right, a respondent should be able to alter the primary jurisdiction of the Commission or halt its proceedings. The nature of a particular defence should be seen as secondary to the Commission's primary jurisdiction. A person accused of violating the Code should not be able to oust the Commission's jurisdiction relating to forestry simply by raising a particular defence and thereby highlighting a constitutional dimension of the main issue. In any event, constitutional law doctrines aside, I think it would be most convenient for aboriginal persons to seek the relief afforded by their constitutionally protected rights as early as possible within the mechanisms of the administrative and judicial apparatus.

33 The respondent has failed to grasp the distinction between adjudication by a provincially created tribunal, on the one hand, and limits on regulation by a province of a matter under federal competence, on the other. Taking this distinction into account, I cannot see how the ability to hear a defence based on s. 35 would constitute an indirect intrusion on the defining elements of "Indianness". The "core" of Indianness has not been exhaustively defined. It encompasses the whole range of aboriginal rights that are protected by s. 35(1): *Delgamuukw, supra*, at para. 178. For present purposes, it is perhaps more easily defined negatively than positively. The

core has been held not to include labour relations (*Four B Manufacturing Ltd. v. United Garment Workers of America*, [1980] 1 S.C.R. 1031) and highway traffic regulation on reserves (*R. v. Francis*, [1988] 1 S.C.R. 1025). On the evidence adduced in *Kitkatla Band, supra*, at para. 70, the status or capacity of Indians was found not to be impaired by the impugned *Heritage Conservation Act*, R.S.B.C. 1996, c. 187. Given that these substantive matters were held not to go to the core of Indianness, I cannot see how the procedural question in this appeal can. The respondent has failed to demonstrate that the procedural right to raise at first instance a defence of aboriginal rights in a superior court, as opposed to before a provincially constituted tribunal, such as the Commission, goes to the core of Indianness.

34 I conclude, therefore, primarily on the basis that adjudication is distinct from legislation, that the Legislature of British Columbia has the constitutional power to enable the Commission to determine questions relative to aboriginal rights as they arise in the execution of its valid provincial mandate respecting forestry. I turn now to the question of whether the provisions of the Code in force at the time of this appeal's events actually gave such a power to the Commission.

(7) The Disguised Claim of Bias

35 There was much discussion in the written and oral submissions concerning the unsuitability of any organ created by the Province of British Columbia hearing an argument relating to s. 35 rights. The concern, evidently, is that the significant number of aboriginal land claims in the Province assure that the interests of the Province are adverse to those of aboriginal persons. As I understand it, this argument is not one of constitutional law. It finds no place within the doctrine that has accreted around the

division of powers. It strikes me more as an administrative law argument respecting the Commission's impartiality. The constitutional determination made here says nothing either way about the impartiality of the Commission, and does not preclude a fact-specific argument being raised in the future in the context of a particular constituted board and its practice: *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, 2003 SCC 29, at paras. 44 and 197; *Matsqui, supra*, at pp. 67-72. In short, the potential bias argument is irrelevant to the constitutional division of powers issue.

B. *Statutory Interpretation: Does the Code Empower the Commission to Hear and Decide Section 35 Questions?*

(1) Are Section 35 Questions Distinct From Other Constitutional Matters?

As a preliminary issue, I note that there is no basis for requiring an express empowerment that an administrative tribunal be able to apply s. 35 of the *Constitution Act, 1982*. There is no persuasive basis for distinguishing the power to determine s. 35 questions from the power to determine other constitutional questions, such as the division of powers under the *Constitution Act, 1867* or a right under the *Charter*. Section 35 is not, any more than the *Charter*, "some holy grail which only judicial initiates of the superior courts may touch" (*Cooper, supra*, at para. 70, per McLachlin J. (as she then was), dissenting). This Court has rejected the theory that Indian reserves are federal "enclaves" from which provincial laws are excluded: Hogg, *supra*, at p. 27-10, discussing *Francis, supra*; *Four B, supra*. Similarly, aboriginal rights do not constitute an enclave that excludes a provincially created administrative tribunal from ruling, at first instance, on the border between those aboriginal rights and a provincial law of general application. The arguments that s. 35 rights are qualitatively

different — that they are more complex, and require greater expertise in relation to the evidence adduced — have little merit. As Moen J. noted in *Ermineskin Cree Nation v. Canada* (2001), 297 A.R. 226, 2001 ABQB 760, at para. 51, in determining that a Human Rights Tribunal had jurisdiction to consider a s. 35 argument:

[T]here is no principled basis for distinguishing *Charter* questions from s. 35 questions in the context of the Tribunal's jurisdiction to consider constitutional questions. In either case, the decision-maker is simply applying the tests set out in the case law to determine if the particular right claimed is protected by the *Constitution*. In either case, if the applicant is successful, the result is a declaration of invalidity or a refusal to apply only the particular statute or provision before the decision-maker.

To the extent that aboriginal rights are unwritten, communal or subject to extinguishment, and thus a factual inquiry is required, it is worth noting that administrative tribunals, like courts, have fact-finding functions. Boards are not necessarily in an inferior position to undertake such tasks. Indeed, the more relaxed evidentiary rules of administrative tribunals may in fact be more conducive than a superior court to the airing of an aboriginal rights claim.

37 One difficulty with the argument about complexity is that it is difficult to draw the line between simple questions of aboriginal law, that boards like the Commission should be able to hear, and complex questions. In the hearing, counsel for the appellants was unable to provide a principled and convincing way to distinguish aboriginal law questions simple enough and therefore appropriate for the Commission from those that, in her view, were not. A member of the Court asked counsel for the appellants whether the Commission would be able to determine whether a person charged with an infraction was an Indian for the purposes of applying a superior court's declaration delineating an aboriginal right. Counsel replied that that would

simply be a factual determination and well within the Commission's competency. She had no response, however, to the rejoinder that even ostensibly "factual" questions of aboriginal status can routinely engage more complex questions of s. 35 and federal aboriginal rights. The nature of the question (fact, mixed fact and law, or law) assists in determining the standard of review for decisions by administrative tribunals: *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748. Such distinctions are not watertight enough, however, to serve as the basis for determining a board's jurisdiction to hear and decide a question. A further unconvincing argument was that aboriginal rights are, today, complicated and in a state of flux, but that in the future, when they have been settled, it may be appropriate for administrative tribunals to consider them. Again, such lines are not easily enough drawn for that to be the judicial test. The Attorney General of British Columbia presented no workable way of taking from administrative tribunals the complicated aboriginal law issues and leaving with them the simpler aboriginal law issues that they could resolve speedily and satisfactorily, in the best interests of all concerned.

38 I conclude, therefore, that there is no principled basis for distinguishing s. 35 rights from other constitutional questions.

(2) The Appropriate Test: the Power to Determine Questions of Law

39 The facts and arguments in this appeal and those in *Martin, supra*, have presented this Court with an opportunity to review its jurisprudence on the power of administrative tribunals to determine questions of constitutional law. As Gonthier J. notes in *Martin*, at para. 34, the principle of constitutional supremacy in s. 52 of the *Constitution Act, 1982* leads to a presumption that all legal decisions will take into

account the supreme law of the land. “In other words”, as he writes, “the power to decide a question of law is the power to decide by applying only valid laws” (para. 36). One could modify that statement for the present appeal by saying that the power of an administrative board to apply valid laws is the power to apply valid laws only to those factual situations to which they are constitutionally applicable, or to the extent that they do not run afoul of s. 35 rights. This Court’s decision in *Cooper, supra*, has too easily been taken as suggesting that practical considerations relating to a tribunal may readily overcome this presumption. I am of the view that the approach set out in *Martin*, in the context of determining a tribunal’s power to apply the *Charter*, is also the approach to be taken in determining a tribunal’s power to apply s. 35 of the *Constitution Act, 1982*. The essential question is whether the empowering legislation implicitly or explicitly grants to the tribunal the jurisdiction to interpret or decide any question of law. If it does, the tribunal will be presumed to have the concomitant jurisdiction to interpret or decide that question in light of s. 35 or any other relevant constitutional provision. 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.

40 The parties spent some time discussing the relationship between a tribunal’s remedial powers and its jurisdiction to hear particular categories of legal questions. The appellants referred the Court to *R. v. 974649 Ontario Inc.*, [2001] 3 S.C.R. 575, 2001 SCC 81 (“*Dunedin*”), and *R. v. Hynes*, [2001] 3 S.C.R. 623, 2001 SCC 82. In those cases, this Court articulated a functional and structural approach for determining whether an inferior court is a “court of competent jurisdiction” for the purposes of

granting a remedy under s. 24(1) of the *Charter*. It was suggested in the hearing that the test in *Dunedin* gives credit to the view that remedial powers are a central feature to determine jurisdiction, that *Dunedin* and *Hynes* can be read broadly as indicating that there are distinctions between particular subject matters of constitutional law, and that implied jurisdiction to consider general questions of law may include only certain questions concerning the constitutional validity of the tribunal's enabling statute. I cannot accept these points. First, this Court has already recognized that the power to find a statutory provision of no effect, by virtue of s. 52(1) of the *Constitution Act, 1982*, is distinct from the remedial power to invoke s. 24(1) of the *Charter*: *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22, at p. 31. In other words, an inferior court's remedial powers are not determinative of its jurisdiction to hear and determine constitutional issues. In any case, s. 35 is part of the *Constitution Act, 1982*, but not of the *Charter*. Accordingly, there is no issue whatsoever of remedies under s. 24(1), and the Commission's remedial powers are not before us in the present appeal. Second, this Court's decisions in *Dunedin* and *Hynes* dealt, in two different contexts, with the same question: Was there a "court of competent jurisdiction" for the purposes of s. 24(1) of the *Charter*? In *Dunedin*, *supra*, at para. 73, McLachlin C.J. held that, where there is no express legislative intention to grant jurisdiction, jurisdiction may nonetheless be implied from the structure of the tribunal's enabling legislation, the powers conferred on the tribunal, the function it performs, and its overall context. The inquiry in those cases, and prior ones, such as *Mills v. The Queen*, [1986] 1 S.C.R. 863, arises from the term "court of competent jurisdiction" in s. 24(1). The test developed for applying that term should not, in my view, be taken as suggesting that, outside that unique context, there will be lines drawn between the kinds of constitutional questions that a tribunal is able to hear.

(3) Application of the Test

(a) *The Statutory Scheme*

In my view, it is clear that the statutory mandate given to the Commission by the Code requires the Commission to determine questions of law. Consider s. 131(8):

131 . . .

(8) A party may

. . .

(d) make submissions as to facts, law and jurisdiction.

The provision providing for an appeal is also revealing:

141 (1) The minister or a party to the appeal before the commission may, within 3 weeks after being given the decision of the commission and by application to the Supreme Court, appeal the decision of the commission on a question of law or jurisdiction.

These provisions make it impossible, in my reading of the Code, to sustain the argument that the Commission, an adjudicative body, determines purely factual matters. Moreover, the Commission's past decisions reveal that it has, in the conduct of its mandate, been determining legal questions including, for example, the availability of protections guaranteed by s. 11 of the *Charter*; application of the principle of double jeopardy; availability of the defences of due diligence, estoppel and officially induced error; and application of the principle *de minimis non curat lex*.

42 I note, in passing, that the *Forest and Range Practices Act*, S.B.C. 2002, c. 69, s. 77, introduced amendments providing the Minister the power to require the holder of an agreement to remedy or mitigate “a potential, unjustifiable infringement of an aboriginal right, including aboriginal title”. The Minister’s order would be appealable to the Commission (ss. 80 and 82). The Commission noted in its factum (at para. 46), “[a]ccordingly, despite the Province’s position in this Court that the Commission is incapable of dealing with ‘aboriginal rights issues’, the Legislative Assembly has seen fit very recently to bring those very same issues before the Commission.” Those amendments are not in force. Indeed, on May 29, 2003, the Legislative Assembly gave First Reading to Bill 69, the *Forest and Range Practices Amendment Act, 2003* (*Debates of the Legislative Assembly*, vol. 16, No. 7, 4th Sess., 37th Parl., p. 7108), which would amend s. 77 (ss. 36 and 39 of Bill 69). It would be inappropriate to rely on s. 77, and it is unnecessary to do so for my analysis.

(b) *The Nature of an Appeal to the Commission*

43 The respondent Mr. Paul made an argument based on the Commission’s role within the forestry administrative scheme. He submitted that the Commission is an appeal board without power to deal with a dispute *de novo*. Therefore, he submits, the Commission’s jurisdiction is limited in the same way as that of the District Manager and Administrative Review Panel. These bodies were found, by the chambers judge, to have no jurisdiction to determine whether a s. 35 right could be invoked. It is unnecessary for the purposes of this appeal to pronounce upon the jurisdiction of the District Manager and the Administrative Review Panel. Assuming for argument’s sake, however, that Pitfield J. was correct, I reject the respondent’s argument that it would necessarily follow that the Commission could not have a broader jurisdiction

than the two decision makers below. In support of his position, the respondent referred to two cases, *Dupras v. Mason* (1994), 99 B.C.L.R. (2d) 266 (C.A.), and *McKenzie v. Mason* (1992), 72 B.C.L.R. (2d) 53 (C.A.), leave to appeal refused, [1993] 1 S.C.R. vii. Both relate to the right of appeal to the Supreme Court of British Columbia from a decision of the Chief Gold Commissioner under provincial mining legislation. Both involved Rule 49 of the British Columbia *Supreme Court Rules*. The Court of Appeal in both cases held that the right of appeal did not permit a trial *de novo*.

44 I wish in no respect to comment on the validity of those decisions in their proper context or on the interpretation of Rule 49. Those cases, however, dealt with an appeal from an administrative scheme to a superior court. It was on precisely that basis that the Court of Appeal in *British Columbia Chicken Marketing Board v. British Columbia Marketing Board* (2002), 216 D.L.R. (4th) 587, 2002 BCCA 473, recently distinguished *Dupras*. The issue there was a statutory appeal from the Chicken Marketing Board to the Marketing Board. The former was not an adjudicative body. In contrast, the Marketing Board almost always conducted hearings with witnesses, sworn testimony and oral submissions; provided the opportunity for parties to be represented by counsel; and gave reasons for its decisions. The Court of Appeal held that the statutory appeal to the Marketing Board was a full hearing on the merits, there being no suggestion that significant deference was owed to the lower board. The chambers judge had erred in applying *Dupras*, an appeal from a specialized statutory office to a superior court, not an appeal within an administrative scheme to a specialized appeal board. The Marketing Board was not a generalist court, but a specialized tribunal expected to use its expertise. That expertise would be squandered if the Marketing Board were bound to defer to the lower board and restrict its inquiry

to the grounds before the lower board (paras. 11-14). I note that in the case of an appeal from a tribunal to a superior court, as opposed to an appeal within an administrative scheme, the reviewing judge will follow the pragmatic and functional approach to determine the appropriate standard of review: *Dr. Q, supra*, at para. 25. This Court's decision in *Tétreault-Gadoury, supra*, is another relevant example. In that case, again within an administrative scheme, only the umpire was expressly given powers to determine questions of law. This Court held that it was the umpire, who sat on appeal from the Board of Referees, who had the power to consider constitutional questions. La Forest J. noted that where the litigant has the possibility of an administrative appeal before a body with the power to consider constitutional arguments, the need for determination of the constitutional issue by the tribunal of original jurisdiction is clearly less (p. 36). That conclusion would have been impossible if, as a general proposition, an appeals tribunal could not consider issues not raised below. I see no basis for prohibiting the Commission from hearing a s. 35 argument on the basis of the nature of the appeal.

45 I conclude, therefore, that the Commission has the power to decide questions relating to aboriginal rights arising incidentally to forestry matters. No argument was made that the Legislature has expressly or by clear implication arising from the statutory scheme withdrawn from the Commission the power to determine related questions under s. 35 that will presumptively attend the power to determine questions of law. The Commission therefore has the power to hear and decide the incidental issues relating to Mr. Paul's defence of aboriginal rights.

III. Conclusion

46 For the reasons given above, I would allow the appeal. The province of British Columbia has legislative competence to endow an administrative tribunal with the capacity to consider a question of aboriginal rights in the course of carrying out its valid provincial mandate. More specifically, the Commission, by virtue of its power to determine legal questions, is competent to hear Mr. Paul's defence of his aboriginal right to harvest logs for renovation of his home.

47 My conclusions mean that the Commission has jurisdiction to continue hearing all aspects of the matter of Mr. Paul's four seized logs. Unless he moves in the Supreme Court of British Columbia for a declaration respecting his aboriginal rights, Mr. Paul must present the evidence of his ancestral right to the Commission. As yet he has merely asserted his defence. If he is unsatisfied with the Commission's determination of the relationship between his s. 35 rights and the prohibition against cutting trees in s. 96 of the Code, he can move for judicial review in the Supreme Court of British Columbia. The standard of review for the Commission's determinations concerning aboriginal law will be correctness.

48 The Attorney General of British Columbia and the Ministry of Forests, who are successful respecting the Province's legislative capacity but unsuccessful respecting the scope of the Commission's actual power, did not seek costs. The respondent, Mr. Paul, sought costs, but has been unsuccessful. Only the Commission, a party intervener, succeeded fully in this appeal. The Commission did not seek costs in this Court, but did request an order setting aside the costs award against it in the court below. In my view, this request should be granted, and accordingly the costs award in the Court of Appeal is set aside.

I would answer the constitutional questions as follows:

1. Can ss. 130 to 141 of the *Forest Practices Code of British Columbia*, S.B.C. 1994, c. 41, constitutionally apply *ex proprio vigore* to confer upon the Forest Appeals Commission jurisdiction to decide questions of law in respect of aboriginal rights or aboriginal title?

Answer: Yes. As a law of general application, the *Forest Practices Code of British Columbia* applies *ex proprio vigore* to Indians, to the extent that it does not touch on the “core of Indianness” and is not unjustifiably inconsistent with s. 35 of the *Constitution Act, 1982*.

2. If the answer is “no”, do the impugned provisions nonetheless apply to confer this jurisdiction by virtue of s. 88 of the *Indian Act*, R.S.C. 1985, c. I-5?

Answer: It is not necessary to answer this question.

Appeal allowed.

Solicitor for the appellants: Attorney General of British Columbia, Victoria.

Solicitors for the respondent: Braker & Company, Port Alberni, British Columbia.

Solicitors for the intervener the Forest Appeals Commission: Arvay Finlay, Victoria.

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

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

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

Solicitor for the intervener the Attorney General of New Brunswick: Attorney General of New Brunswick, Fredericton.

Solicitor for the intervener the Attorney General of Manitoba: Attorney General of Manitoba, Winnipeg.

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

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

Solicitors for the intervener the First Nations Summit: Pape & Salter, Vancouver.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***R. v. Douglas et al,***
2007 BCCA 265

Date: 20070503

Docket: CA033869, CA033870, CA033871, CA033872

Between:

Regina

Appellant

And

**Kelly Ann Douglas
Todd Kenneth Wood
Frederick William Quipp
Howard Glynn Victor**

Respondents

And

Sportfishing Defence Alliance

Intervenor

Before: The Honourable Chief Justice Finch
The Honourable Mr. Justice Mackenzie
The Honourable Mr. Justice Thackray

Cheryl J. Tobias and
Michelle S. Ball

Counsel for the Appellant

Hugh M.G. Braker, Q.C. and
Anja Brown

Counsel for the Respondents

J. Keith Lowes

Counsel for the Intervenor

Place and Date of Hearing:

Vancouver, British Columbia
8 and 9 March 2007

Place and Date of Judgment:

Vancouver, British Columbia
3 May 2007

Written Reasons by:

The Honourable Chief Justice Finch

Concurred in by:

The Honourable Mr. Justice Mackenzie

The Honourable Mr. Justice Thackray

Reasons for Judgment of the Honourable Chief Justice Finch:

I. INTRODUCTION

[1] The Crown appeals from the acquittal of the respondents, all of whom are members of the Cheam First Nation, entered in the British Columbia Supreme Court on 17 February 2006, on summary conviction appeal from convictions in Provincial Court on 8 December 2004, on charges of unlawful fishing without the authority of a licence.

[2] At their trial the respondents' defence was that the regulatory requirement for a licence infringed their aboriginal right to fish for food, social and ceremonial purposes guaranteed by s. 35(1) of the **Constitution Act, 1982**. The Crown admitted an infringement of the respondents' aboriginal rights, but contended that the infringement was justified under the test laid down by the Supreme Court of Canada in **R. v. Sparrow**, [1990] 1 S.C.R. 1075.

[3] In setting aside their convictions, the learned summary conviction appeal judge (the "appeal judge") held that the Crown had not met the requirements for justification, in that it had failed to give priority to the Cheam's fishery, and had breached its duty to consult with the Cheam.

[4] The respondents Kelly Ann Douglas ("Douglas"), Todd Kenneth Wood ("Wood"), Howard Glynn Victor ("Victor") and Frederick William Quipp Jr. ("Quipp") were each convicted on one or more counts under s. 78 of the **Fisheries Act**, R.S.C. 1985, c. F-14 for unlawful fishing without the authority of a licence, contrary

to s. 26(1) of the *Pacific Fishery Regulations, 1993*, SOR/93-54. Wood was also convicted on one count of unlawful possession of fish (salmon), contrary to s. 33 of the *Act*. The charges arose from events in July 2000 and were set out in a single Information, sworn 21 December 2001.

[5] Convictions were entered on 8 December 2004 by the Honourable Judge Jardine in the Provincial Court of British Columbia. On 16 March 2005 Douglas, Wood and Victor were sentenced to pay fines. Quipp was sentenced to 30 days imprisonment.

[6] On appeal before Johnston J., all four successfully appealed from conviction and Quipp also appealed his 30-day sentence.

[7] Each of the respondents was found, on the basis of their admissions or, in the case of Douglas, as a result of findings of fact made at trial which are not now disputed, to have engaged in either the act of fishing, being in possession of the fruits of that endeavour, or both, without holding the required licences.

[8] The Crown agrees that the respondents have an aboriginal right to fish for food, social and ceremonial purposes. The Crown also admits that the *Fisheries Act* and the *Regulations* under which each was charged constitute an infringement of that right. The contentious issue is whether the Crown has justified the infringement pursuant to the test set out in *Sparrow*, supra. Specifically, the issues on this appeal are:

(1) Did the learned appeal judge misapply the test for justification by finding that the Crown did not give priority to the Cheam First Nation's fishery?

(2) Did the learned appeal judge misapply the test for justification by finding that the Crown did not adequately consult with the Cheam First Nation?

[9] For the reasons that follow, I am respectfully of the opinion that the learned appeal judge erred on both issues, that convictions were properly entered by the trial judge in Provincial Court, that the Crown's appeal against acquittals should therefore be allowed, and that the appeal of Quipp's sentence should be remitted to the British Columbia Supreme Court.

II. BACKGROUND

[10] In late June and early July each year, sockeye salmon migrate from the Pacific Ocean through the Fraser River watershed to their spawning grounds. This appeal concerns a discrete group of migrating sockeye, called the "Early Stuart run", and the measures taken by the Department of Fisheries and Oceans ("DFO") to manage those and other salmon stocks. In particular, the dispute relates to DFO's decision to open a marine sport fishery permitting retention by non-aboriginal fishers of Early Stuart sockeye from 4-9 July 2000, when there were restrictions on the aboriginal fishery.

[11] Jardine P.C.J. set out the background as follows:

[24] The case at Bar involves the Early Stuart run of Sockeye salmon. This run is significant to the Cheam people, as it is to the other people along the river, as the salmon migrate to spawn in North-Central British Columbia. First, it is the first run of Sockeye. Second, the Early Stuarts are highly desired and sought after by all First Nations' people due to its fat content and high quality.

[25] Each year the Department of Fisheries and Oceans ("DFO") develops a fishing plan for salmon returning to the Fraser River. The fishing plan must take into account the history and escapement anticipated in the cycle of fish. The Fraser River planning commences in October of the previous year and Aboriginal groups are accorded a priority to ensure their needs are met.

[26] The planning is very detailed and quite complex. At the international level there is a treaty between Canada and the United States. The Pacific Salmon Treaty signed in 1985 made provisions for salmon enhancement programs and addressed concerns about Aboriginal priority.

[27] There are 93 Aboriginal groups or bands encompassing approximately 30,000 people who must be taken into account in developing the fishing plan. They are all to be considered and consulted. Infringements on their Aboriginal right to fish must be justified by government.

[28] On March 13, 2000, after a March 3, 2000 meeting with Cheam did not occur, DFO sent a letter to the Cheam Band, under cover of a letter to all Fraser River First Nations, to initiate discussion and consideration of four main elements for the fishing plan for Sockeye in the year 2000. The four elements were:

1. Development of a pre-season forecast.
2. Development of an escapement strategy.
3. Consideration of other factors which must be taken (i.e. buffers).
4. Allocation of the catch amongst sectors.

[29] Further correspondence was faxed on March 22, 2000, March 24, 2000, March 27, 2000, and April 13, 2000. The accompanying materials included escapement goals and the fishing plan being developed by DFO. Consultation and discussion was sought from all the First Nations.

[30] The biological evidence is that the Early Stuart run arrives in the lower river in late June to late July. The stocks are intermingled with Chinook in the early times and with Early Summer Sockeye as the Early Stuarts start to dwindle. The initial forecast for 2000 was 291,000 Early Stuarts.

[31] On May 3, 2000 DFO faxed a letter to the Cheam First Nation addressed to Chief Quipp. The Department sought discussions on Sockeye escapement goals and sought communication with the Cheam of the result of discussions with other First Nations on escapement goals and strategies and the development of a plan. It was made clear the Department wanted to work toward a resolution. There was disagreement as to what the floor figure of return should be. First Nations in the terminal areas wanted more fish on the spawning grounds. A figure of 90,000 had been suggested. The Department proposed a floor figure of 66,000. Some in the lower river wanted the number to be as low as 35,000. Following all the consultations DFO settled on a floor of 75,000.

[12] The appeal judge noted that the goal of 75,000 (the “escapement goal” or conservation target) was set with the objective of increasing the Early Stuart run stock in future years. One of the goals behind increasing the run was so that others, meaning non-aboriginals, might in the future have some opportunity to share in the resource (at para. 46).

[13] Jardine P.C.J. continued:

[32] In the year 2000 the planners were concerned about the uncertainty of forecasts of returning Sockeye and about the high discharge levels of water in the river. Debris generated by high water levels leads to high numbers of en route and pre-spawning mortality. On July 3, 2000 the Fraser River panel approved an estimated run size up-grade to 300,000. By July 11, 2000 the panel up-graded the estimate to 350,000. Notwithstanding the increase in the estimate of numbers, only 90,000 Early Stuarts Sockeye reached their natal areas.

[33] In 2000, the DFO continued to apply a policy where the fish would be shared in the following order:

1. Reaching the escapement goal.
2. Fish for ceremonial purposes.
3. Sharing amongst the Fraser River Basin Aboriginal groups.
4. Other groups including commercial and sports fishers.

[34] Pursuant to this policy the DFO provided the Cheam First Nation with a communal licence to fish from 1800 hours June 30, 2000 to 1800 hours July 2, 2000. Another licence ran from 1800 hours July 7 to 1800 hours July 8, 2000. They also authorized a fishery from 0800 hours to 1800 hours on July 8, 2000 from the Port Mann Bridge to Mission. A fishery was also authorized from 1200 hours July 15, 2000 to 1800 hours July 15, 2000. The DFO also permitted dry-rack fisheries from Sawmill Creek to Hope, seven days per week from June 29, 2000 to July 16, 2000.

[35] The Cheam First Nation communicated their disagreement with the policies of DFO. They took the position the DFO had to give them priority and if there was an opening to any other group, the Cheam were entitled to fish. It was also their stated position they did not agree with the DFO policy on escapement goals and targets. Kelly Ann Douglas expressed her view clearly to the fisheries officer on July 5 when she said, "We are Cheam, we don't need a licence". Frederick William Quipp takes direction from the Cheam Council Fishery Committee through conversation with his mother Chief June Quipp. His view was clearly expressed. He said he fishes when there are fish in the water. Todd Kenneth Wood reports to the Band council and is a fishing partner of Mr. Quipp. They do not consider themselves accountable to DFO or to the licencing provisions set down by DFO as to fishing gear or equipment. Howard Victor relied on word of mouth and conversation with band members. He ignored DFO.

[14] The trial judge heard testimony from DFO that: as the Early Stuart run of sockeye salmon progressed, estimates of its size or strength increased, and it was determined by DFO that there would be some opportunity for sport or recreational fishers, fishing on the ocean, to retain Early Stuart sockeye that were caught while these fishers were fishing for chinook during an opening for that latter fishery; DFO

decided to open the marine sport fishery to permit retention of sockeye salmon between 4-9 July 2000; DFO expected that less than 400 to 500 Early Stuart sockeye would be retained by the recreational or sport fishers; DFO estimated the ultimate catch to be 200; no commercial fishery was permitted; and the in-river sport fishery was left open but there was a non-retention policy with respect to Early Stuart.

[15] The fishing activities described in the Information occurred on 5 July 2000 (Douglas), 7 July (Quipp and Victor), and 13 July (Wood and Victor).

[16] It is not disputed that the respondents have an aboriginal right to fish for food, social and ceremonial purposes and that the conservation measures imposed by DFO constitute a *prima facie* infringement of that right, as protected by s. 35(1) of the **Constitution Act, 1982**. The respondents contended at trial and on appeal before Johnston J. that the Crown has failed to justify the infringement of their aboriginal fishing rights under the second step of the **Sparrow** test, namely that DFO's decision to open the marine sport fishery at a time when there were restrictions on the aboriginal fisheries was not in accordance with the honour of the Crown because (1) it failed to give priority to the aboriginal right and (2) DFO made that decision without consulting the Cheam First Nation.

III. THE TRIAL JUDGMENT

[17] Having found, on the basis of the Crown concessions, that there had been a *prima facie* infringement of the respondents' aboriginal rights, Jardine P.C.J. moved to the question of whether the infringement was justified under the **Sparrow** test.

[18] He concluded that the first part of the test was satisfied in that there was a valid legislative objective, namely conservation.

[19] The judge also held that the second part was satisfied; that is, he found that the honour of the Crown was upheld in the government's interpretation and application of its objective.

[20] On the question of priorities, Jardine P.C.J. accepted DFO's position that it did not believe it necessary to close the marine sport fishery to Early Stuarts because historically it has had very little impact on the stock and very few are caught (para. 45). He concluded that:

[46] I am also satisfied that the allocation of the Early Stuart fishery by DFO was appropriate in the circumstances and was in keeping with the special trust relationship which must exist between the Government and Aboriginal Peoples. The Cheam hold the view that if anybody is allowed to fish, the Cheam Band is allowed to fish. It is the Court's view that those beliefs are untenable. The Cheam are a part of the people of the whole of the river and they do not have rights exclusive of the needs of others. Their rights must be balanced with the rights of others. They cannot claim a right to an abundance of the fish which happen to swim by the traditional Aboriginal territory of any particular Band.

[47] With respect to those fish, the Cheam have no more than a constitutionally protected Aboriginal right to fish, and that same right extends to all other Aboriginal bands on the Fraser River, and in fact to Aboriginal bands on Vancouver Island, who may have some access to the same fish. The Crown, and their managing body, the DFO, have a fiduciary duty to all Aboriginal peoples.

[48] It was therefore fair and appropriate for the DFO to allocate the resource of Early Stuarts as they did. They were entitled to take into account the importance of the Early Stuart for ceremonial purposes, such as funerals and weddings, as well as the importance of the Early Stuarts for the dry-rack fishery in the lower part of the Fraser River. They were also entitled to take in account the fact that the bands in the Stuart River area have access to very few runs of salmon, whereas the

Early Stuarts comprise only a small percentage of the salmon available each year to the Cheam Band.

[49] ... In my view the approach taken by DFO was reasonable given the number of persons they have to consider and the variables which they had to take into account. The measures taken were reasonable in my view.

[21] Nor did the trial judge accept the respondents' submission that the Cheam's consent was required as part of the duty to consult in this case. He held that DFO's failure to consult or even inform the First Nations of the marine fishery opening was a breach of the Crown's fiduciary duty. However, "in the context of the whole fishery, [it was not] a serious breach such that the limits on the Aboriginal right to fish are not justified" (at para. 72). On the whole, he concluded that DFO had adequately consulted the Cheam in 2000, and that the Cheam had been deliberately non-responsive to DFO's efforts. He summarized the evidence as follows:

[63] The Cheam First Nation has withdrawn from the Sto:lo Nation in relation to fishing matters. The Cheam First Nation is not a part of the Fraser Watershed Aboriginal Fisheries Forum of the BC Aboriginal Fisheries Commission. Following the termination of the pilot sales program for sale of Aboriginal caught fish, the Cheam have taken the view they must be consulted separately. The Cheam have consistently asked to be consulted directly and for any meetings between DFO and the Cheam to be held at the Cheam Band Office.

[64] Mr. Braker argued the DFO did not provide the Cheam First Nation with a fisheries management plan of Early Stuarts. He submitted the Cheam were provided with the Chinook Management Plan within which was a section on Early Stuarts. He said the Cheam were not consulted at all about the decision by DFO to open marine recreational fishing for Early Stuarts in early July.

[65] DFO did not meet directly with the Cheam in 2000. A meeting was set for March 3, 2000 but did not take place, although DFO went to the Cheam Band Office. The Cheam had been sent information on the Fraser River Sockeye Outlook 2000 in advance of the scheduled

meeting. Further attempts were made by DFO but no meetings took place despite efforts by DFO requesting direct consultation. In 2000 DFO provided First Nations, including the Cheam, with information regarding escapement goals, the Chinook Fisheries Management Plan, the Integrated Fisheries Management Plan, and on May 3, 2000 made a request for Chief June Quipp to engage in direct consultation on the fishing options being considered and the positions taken by other First Nations during discussions. He heard nothing further from Chief Quipp.

[66] In a letter dated May 16, 2000 to Chiefs and fishing representatives of First Nations, including the Cheam, DFO reported on consultations regarding the draft escapement goals and to provide notice of the escapement goals adopted by DFO.

[67] The process of consultation between the DFO and First Nations on the Fraser River is part of a continuum which has been in place since at least 1992. In 1992 DFO, in consultation with Aboriginal bands, entered into a Watershed Agreement. The Cheam were part of that agreement until 1997. Ernie Crey was the last Cheam fishing representative with whom DFO could say they met and consulted. Since 1997 Cheam have made it clear to DFO they are not part of the allocation agreements and that they do not consider notice to the Sto:lo, the Fraser River Watershed Forum, or the B.C. Aboriginal Fishery Commission, notice to them.

[68] In the year 2000 the DFO gave notice to the Cheam of their meetings with other First Nations groups. DFO also receives input from the Fraser River Sockeye Panel, the Pacific Salmon Commission, and groups of First Nations, The DFO gave notice to the Cheam of the information received from those groups. The Cheam were invited to take part in conference calls with other First Nations, or with groups of First Nations. Cheam did not attend or take part in the general discussions.

[69] The Cheam Band, despite those efforts, chose not to consult or discuss their issues with the DFO. They informed the DFO they did not agree with the limits placed on the Cheam and they would fish according to the decision of their band. They refused to accept the licensing and regulatory limits placed on them by the DFO.

[70] I agree with Mr. Braker the Cheam Band was not consulted or informed directly of the opening of the Marine fishery to retention of Sockeye in early July. Nor was any other of the affected Aboriginal bands. This was a breach of the fiduciary duty of DFO.

[71] Following the termination of the pilot sales agreements the Cheam and DFO have been at odds. The relations between them have been strained and reflect apparent conflicts. There is no common ground as to conservation, consultation, communication means, escapement goals, or Cheam needs. The Cheam have not communicated their needs to DFO in concrete terms. They did not respond to requests to do so in 2000.

The trial judge concluded as follows:

[72] I find on the whole of the evidence, and having regard to the tests articulated in the case law, that adequate and comprehensive consultation did take place in 2000 with the Cheam. The failure to inform about the marine opening for Sockeye retention was not, in the context of the whole fishery, a serious breach such that the limits on the Aboriginal right to fish are not justified.

[73] It is my view that the refusal by the Cheam to meet, to communicate, and to refuse to attend group discussions has direct implications on the assertion the consultation efforts of government are flawed. Their failure to respond to repeated entreaties to meet, or consult, or respond, leads to the inescapable conclusion they simply want to frustrate the consultation process. In my view, while not perfect, the DFO has made reasonable and good-faith efforts to consult.

[22] Jardine P.C.J. was satisfied that the Crown had justified the infringement of s. 35(1) of the **Constitution Act, 1982** and convicted the respondents.

IV. SUMMARY CONVICTION APPEAL

[23] The respondents appealed on numerous grounds, only two of which were given effect by Johnston J. A review of the unsuccessful grounds is unnecessary to the disposition of this appeal.

[24] Johnston J. concluded that the honour of the Crown was offended with respect to the priority of the aboriginal right in either the allocation by the DFO of the

fish resource or the consultation by the DFO, both in relation to the marine sport fishery.

[25] Johnston J. disagreed with the trial judge as to whether DFO had afforded priority to the aboriginal right to fish for food, social and ceremonial purposes. He held:

[87] The appellants are quite correct when they argue that, where the Aboriginal right in issue is the right to fish for food, social or ceremonial purposes, there is a clear priority given to that right over non-Aboriginal recreational fisheries. This priority was first stated by Dickson J. in *Jack v. The Queen*, [1980] 1 S.C.R. 294, and repeated by the court in *Sparrow*. Any possible doubt about the nature of the priority was removed by the court in *R. v. Adams*, [1996] 3 S.C.R. 101 at para. 59:

59 Furthermore, the scheme does not meet the second leg of the test for justification, because it fails to provide the requisite priority to the aboriginal right to fish for food, a requirement laid down by this Court in *Sparrow*. As we explained in *Gladstone*, the precise meaning of priority for aboriginal fishing rights is in part a function of the nature of the right claimed. The right to fish for food, as opposed to the right to fish commercially, is a right which should be given first priority after conservation concerns are met.

[88] There was other evidence given by Mr. Ionson that First Nations generally and the Cheam in particular had never agreed with the DFO as to what number of fish were necessary to satisfy the food, social and ceremonial needs of Aboriginal peoples in the Fraser River watershed.

[89] There was evidence that the DFO had no definition of food, social or ceremonial needs, although Mr. MacDonald thought there was some definition of that phrase in the *Fisheries Act*.

[90] The impression left from the evidence as a whole was that the DFO determined in early July 2000 that recreational sport fishers, fishing on the ocean, could catch and keep early Stuart sockeye because, in the opinion of the relevant DFO employee or employees, the food, social and ceremonial needs of the First Nations in the Fraser

River watershed would be met, although there was no agreement nor any clearly articulated assessment of what those needs were.

[91] Given that the learned trial judge found that the failure to consult the Aboriginal peoples on the question of opening the marine sport fishery was a breach of the fiduciary duty of the Crown through the DFO, it is difficult to see how the opening of that fishery to non-Aboriginals at a time when the Aboriginal fishery was subject to closures could satisfy the honour of the Crown and could be found to have recognized the priority given to the Aboriginal food, social and ceremonial fishery in the authorities cited above.

[92] It is my view that the learned trial judge erred in finding that the priority accorded to the Aboriginal food, social and ceremonial fishery was met in this case.

[Emphasis added.]

[26] Johnston J. agreed that, generally speaking, the Crown made reasonable efforts to consult with the Cheam on the fishery conservation measures to be taken in 2000. He also pointed to the Cheam's non-responsiveness to these efforts.

[27] However, on the specific issue of the marine sport fishery, he held that the Crown's failure to at least inform the Cheam was fatal to its justification argument:

[127] With respect to the DFO's failure to inform Aboriginal people, including the Cheam, of the marine sport fishing opening, I agree with the trial judge that was a breach by the DFO of its duty to consult. This is not a matter the seriousness of which should be measured by the number of fish caught by non-Aboriginal sport fishers. Because the honour of the Crown is at stake, this may be one of the rare occasions where indeed "the principle of the thing" may properly apply.

[128] Where the Crown through the DFO has restricted the legal ability of Aboriginal people to fish for sockeye salmon, knowing that they are prized by Aboriginal people, the Crown through the DFO cannot permit non-Aboriginals to catch and keep some of those same fish without full and proper consultation. That was not done here, and it offends the honour of the Crown.

V. THE PARTIES' POSITIONS

[28] The Crown emphasizes that the elements of the test for justification are to be assessed in each case according to what is reasonable in the circumstances. The Crown argues that the marine sport fishery opening was compatible with the overall fishing strategy, and therefore did not require specific additional consultation. Nor, the Crown says, did it dilute the priority of the aboriginal food, social and ceremonial fishery. In support of its position that DFO acted reasonably in the circumstances the Crown points to the Cheam's refusal to participate in consultation despite repeated efforts by DFO, to the small number of Early Stuarts it anticipated would be caught by recreational fishers, and to the "insignificant" number actually retained by the sport fishery as compared to the ultimate harvest by the First Nations.

[29] The respondents say that this case is not about numbers but principles. They agree that the standard of reasonableness applies, but say that it was unreasonable for DFO not to consult with the Cheam on the opening of the sport fishery to retention of Early Stuarts where DFO knew that the Early Stuarts are highly prized by the Cheam. Similarly, the respondents take the position that DFO's decision to allow retention of Early Stuarts by the marine sport fishery was contrary to the legal principle of aboriginal priority vis-à-vis all other users.

[30] The intervenor is a coalition of associations "representing and advancing the interests of British Columbia recreational fishers." It supports generally the Crown's position but does so from the perspective of a user of the resource. It argues that the priority to be given to aboriginal fisheries must be interpreted and applied in a

manner which accounts for and accommodates the realities of the British Columbia fishery and the rights and interests of all of its users.

VI. DISCUSSION

A. How the issues developed:

[31] In *R. v. Sparrow*, *supra*, the Supreme Court of Canada provided the analytical framework for determining whether aboriginal fishing rights had been interfered with in a way that infringed the right protected by s. 35(1), and if so whether the Crown can justify the infringement.

[32] Here infringement is conceded by the Crown.

[33] The elements of the justification analysis in *Sparrow* are as follows:

1. Was the government acting pursuant to a valid legislative objective?
2. Given the Crown's trust relationship and responsibility towards Aboriginals, has the honour of the Crown been upheld?

[34] Factors relevant in answering the second question include: whether the Crown's allocation of the right to fish gives priority to aboriginal food fishing rights, after valid conservation measures have been implemented; whether there has been as little infringement to the aboriginal right as possible in effecting the desired result; whether, in a situation of expropriation, fair compensation is available; and, whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented.

[35] The trial judge held that the honour of the Crown was upheld in DFO's management of the 2000 Early Stuart stock. He found that the aboriginal fishery was accorded priority and that DFO had made reasonable and good faith efforts to consult with the First Nations, including the Cheam. Although he was of the view that the Crown breached its fiduciary duty in failing to consult specifically on the marine sport fishery, he concluded that the breach was not so serious as to defeat the Crown's claim to justification.

[36] On appeal, Johnston J. found that DFO had not accorded priority to the Cheam's food, social and ceremonial fishery. He agreed with the trial judge that there had been a breach of the duty to consult and concluded that because the honour of the Crown was at stake, the 'principle of the thing' must apply to defeat the claim to justification (paras. 127 and 128).

[37] For reasons which follow, I agree with the Crown's submission that the learned appeal judge fell into error on both conclusions by applying a standard for justification that was too rigid and did not take into account the relevant context. The Supreme Court of Canada has repeatedly emphasized the need to consider the specific factual context of a given case in applying the justification test, including the requirements for consultation and priority: see *Sparrow, supra*, at 1111. The standard to be applied is reasonableness: *R. v. Nikal*, [1996] 1 S.C.R. 1013 at para. 110.

[38] It may be convenient to consider the two issues in the reverse order:

1. was the Crown in breach of its duty to consult;

2. did the Crown give priority to the aboriginal food, social and ceremonial fishery.

B. Consultation

[39] On the consultation issue the trial judge began by referring to the following passages from *Halfway River First Nation v. British Columbia (Ministry of Forests)*, 1999 BCCA 470, 178 D.L.R. 4th 220 at paras 160-161:

The Crown's duty to consult imposes on it a positive obligation to reasonably insure that Aboriginal Peoples are provided with all necessary information in a timely way so that they have an opportunity to express their interests and concerns, and to ensure that their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action...

...There is a reciprocal duty on Aboriginal Peoples to express their interests and concerns once they have had an opportunity to consider the information provided by the Crown, and to consult in good faith by whatever means are available to them. They cannot frustrate the consultation process by refusing to meet or participate, or by imposing unreasonable conditions...

[40] In this case, DFO conducted extensive and detailed consultations with Fraser River First Nations as to its conservation objectives. Given the nature of the Fraser River salmon fishery, the number of First Nations involved, and the lack of unanimity between them on important issues, DFO's emphasis on joint consultations was reasonable and appropriate. DFO provided the necessary information and technical assistance. DFO provided opportunities for the First Nations to express their concerns and resources to facilitate the meetings. DFO adjusted the escapement target and exploitation rate in response to First Nations' concerns. In this way, DFO

complied with the standard set out in *Halfway River*, *supra*, and in *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388 at para. 64. Because the Cheam refused to participate in the joint consultations, DFO attempted to consult them separately. The trial judge found, and the appeal judge agreed, that DFO's efforts to engage the Cheam in consultation were reasonable and in good faith.

[41] The appeal judge held that the requirement to consult triggered by the conservation measures included a requirement to consult specifically on the opening of the marine recreational fishery, and that failure to do so undermined DFO's justification of the restrictions of the Cheam's aboriginal right.

[42] In my respectful opinion, that conclusion was in error. Having conducted appropriate consultations in developing and implementing its fishing strategy, DFO is not required to consult each First Nation on all openings and closures throughout the salmon fishing season, where those actions were consistent with the overall strategy. Because the number of Early Stuarts that would be taken was insignificant, the brief opening of the marine recreational fishery to retention of Early Stuarts was in keeping with the strategy developed in 2000. If DFO was required to consult on the opening of the marine recreational fishery, it would have had to consult all the Fraser River First Nations on each and every opening, including all of the First Nations fisheries.

[43] Each First Nation had a separate and equal aboriginal right to fish and their interests were not always the same. This was evident from their different positions

on the escapement goal, and from their inability to agree on allocations amongst themselves.

[44] In addition, even if the marine recreational opening was not consistent with the strategy developed through consultation, it did not call for any further specific consultation because it had no appreciable adverse effect on the First Nations' ability to exercise their aboriginal right to fish for food, social and ceremonial purposes. As the Supreme Court of Canada has held, the trigger for a duty to consult is twofold: not only does it require knowledge of the existence of an aboriginal right, but also contemplated conduct that might adversely affect it: see ***Haida Nation v. British Columbia (Minister of Forests)***, 2004 SCC 73, [2004] 3 S.C.R. 511 at para. 64 and ***Mikisew***, *supra*, at para. 33.

[45] Finally, it is illogical to conclude that DFO failed to conduct adequate consultations with the Cheam because DFO did not approach them on a minor matter, when the trial judge found that the Cheam had failed to respond to repeated requests to meet, consult or respond on the major issues. Significantly, the Cheam failed to communicate their needs in concrete terms in response to DFO's request that they do so. The Cheam did not fulfil their reciprocal obligation to carry out their end of the consultation. To hold that members of a First Nation who deliberately frustrated all of the government's attempts to consult, and thereby failed in its own obligations should receive a remedy for an infringement of its aboriginal right because the government did not approach it on a minor issue goes far beyond what is required to justify DFO's conduct. The DFO's duty as described by the Supreme Court of Canada in ***Sparrow*** was to uphold the honour of the Crown and conform to

the unique contemporary relationship between the Crown and aboriginal peoples. As the trial judge held, “the refusal by the Cheam to meet, to communicate, and to refuse to attend group discussions has direct implications on the assertion the consultation efforts of government are flawed” (at para. 73).

[46] The appeal judge concluded that DFO breached its duty to consult, noting “because the honour of the Crown is at stake, this may be one of the rare occasions where indeed ‘principle of the thing’ may properly apply.” In my respectful view, he erroneously interpreted the consultation requirement as one that was invariable regardless of the circumstances. As Chief Justice McLachlin said at para. 39 in *Haida*, however, what the honour of the Crown requires varies with the circumstances:

The content of the duty to consult and accommodate varies with the circumstances... In all cases the honour of the Crown requires that the Crown act with good faith to provide meaningful consultation appropriate to the circumstances.

[47] I am therefore of the view that the trial judge erred in holding that DFO was required to consult the Cheam about the opening of the marine recreational fishery. However, despite that error he correctly concluded that their efforts to consult, while not perfect, were reasonable and in good faith. DFO amply discharged its obligation to consult Fraser River First Nations and the Cheam in particular about its intentions to pursue conservation objectives in ways that would restrict the exercise of their aboriginal right to fish for food, social and ceremonial purposes. DFO provided meaningful consultation, in good faith, appropriate to the circumstances.

C. Priority

[48] In *R. v. Gladstone*, [1996] 2 S.C.R. 723 Lamer C.J. held at para. 63:

The content of this priority -- something less than exclusivity but which nonetheless gives priority to the aboriginal right -- must remain somewhat vague pending consideration of the government's actions in specific cases. Just as the doctrine of minimal impairment under s. 1 of the *Canadian Charter of Rights and Freedoms* has not been read as meaning that the courts will impose a standard "least drastic means" requirement on the government in all cases, but has rather been interpreted as requiring the courts to scrutinize government action for reasonableness on a case-by-case basis (citations omitted), priority under *Sparrow's* justification test cannot be assessed against a precise standard but must rather be assessed in each case to determine whether the government has acted in a fashion which reflects that it has truly taken into account the existence of aboriginal rights.

[Emphasis added.]

[49] The trial judge properly applied the standard of priority in the context of this case. He found the DFO applied its allocation policy first to conservation, second to aboriginal fishing for ceremonial purposes, followed by allocations between the Fraser River Basin First Nations, and finally to the commercial and sports sectors. In all, the First Nations took about 206,000 Early Stuarts which constituted all of the harvest, except for the 200 fish retained by the recreational fishery, and the portion taken by the test fisheries. The commercial fisheries took nothing at all.

[50] DFO had to impose significant restrictions, not only to ensure adequate escapement, but also so that the resource was shared equitably among First Nations. One six-hour set net and drift fishery between the Port Mann Bridge and Sawmill Creek on July 15, along with that week's dry rack fishery, produced 23,706 sockeye. On an initial run forecast of 291,000 fish, fishing by the Cheam and other

lower Fraser First Nations had to be restricted if the First Nations in the upper reaches of the river to the terminal areas were to receive a fair share. The trial judge correctly held that DFO properly took account of all of the First Nations' interests.

[51] The learned trial judge, citing *Nikal, supra*, correctly applied the standard of reasonableness in the context of the specific circumstances.

[52] The appeal judge found it relevant that there was no agreement between DFO and the First Nations as to how many fish were needed to satisfy their food, social and ceremonial purposes (at paras. 88-90). However, as the Crown points out, regardless of how much they needed, the First Nations took what was essentially the entire available harvest of Early Stuarts, some 206,000 fish according to DFO. Moreover, any complaint by the Cheam now that their needs were not met must be considered in light of their refusal to articulate those needs to DFO when asked to do so.

[53] The respondents say that upon upgrading the estimate for the Early Stuart run, DFO should have opened the fishery first to aboriginals, and then to other users if appropriate. They say that in opening the marine sport fishery to retention of Early Stuarts on 4 July, when the aboriginal communal fishery did not open until 7 July, DFO violated the priority requirement set out in *Sparrow*. With respect, this argument mischaracterizes the events as found by the trial judge. The aboriginal fisheries of the Cheam and the other Lower Fraser First Nations both preceded and occurred simultaneously with the marine sport fishery. By 2 July, set net, drift net and dry rack fisheries had all taken place in the lower Fraser River, and the dry rack

fishery was open continuously from 29 June to 16 July. This is not a situation where the non-aboriginal fishery was opened in the absence of, or to the exclusion of, the aboriginal fishery. In fact, the evidence shows that by the time the sport fishery was opened, the lower Fraser First Nations, including the Cheam, were approaching their allocated 40% share of the anticipated harvest of 110,000 Early Stuarts.

[54] This is not to say that the priority required by **Sparrow** means that the food, social and ceremonial fisheries must always precede or occur contemporaneously with the non-aboriginal fisheries. As part of the contextual analysis into priority, it will sometimes be necessary to consider the practical difficulties occasioned by the movement of the fish themselves: **Sparrow**, *supra*, at 1116, citing **R. v. Jack**, [1980] 1 S.C.R. 294 at 313. The Fraser River sockeye encounter numerous fisheries, including aboriginal, recreational and commercial, as they migrate from the Pacific to their spawning grounds. If a non-aboriginal fishery could never precede any of the aboriginal fisheries, the result would be an exclusive food, social and ceremonial fishery, regardless of need and abundance of stock. That cannot be the intended result of **Sparrow**, where the Court stated that the objective of the priority requirement is to guarantee that fisheries conservation and management plans “treat aboriginal peoples in a way ensuring that their rights are taken seriously” (at 1119). DFO’s actions in this case were consistent with that purpose.

[55] The respondents say that it was the Cheam, and not the other users of the resource, who bore the brunt of conservation measures because they were not permitted to fish while the marine sport fishery was open between 4-9 July 2000. With respect, there is simply no merit to this position. The aboriginal fisheries –

including that of the Cheam – both preceded and occurred simultaneously with the sport fishery. Looking at the whole of the 2000 season, including the time both before and after the marine fishery opening, the trial judge had no difficulty concluding that “[t]he brunt of the conservation measures was obviously borne by the sports and commercial fisheries which, combined, caught a total of 16 Early Stuarts in the in-river recreational fishery. The DFO estimated a catch of 200 for the marine fishery from July 4 to July 9, 2000” (at para. 50).

VII. CONCLUSION

[56] In my respectful opinion, the learned appeal judge erred in holding that the Crown breached its duty to consult and failed to accord priority to the aboriginal food, social and ceremonial fisheries on the Fraser River in July 2000. DFO acted reasonably in the circumstances and upheld the honour of the Crown. It met the onus of showing that the infringement of the respondents’ aboriginal fishing rights was justified.

[57] I would allow the appeal, set aside the acquittals of the respondents, restore the fines imposed by the trial judge and remit Quipp’s sentence appeal to the Supreme Court of British Columbia.

“The Honourable Chief Justice Finch”

I AGREE:

“The Honourable Mr. Justice Mackenzie”

I AGREE:

“The Honourable Mr. Justice Thackray”

Date: 20091023

**Docket: A-537-08, A-541-08,
A-542-08, A-475-08**

Citation: 2009 FCA 308

**CORAM: NOËL J.A.
LAYDEN-STEVENSON J.A.
RYER J.A.**

Docket A-537-08

BETWEEN:

**STANDING BUFFALO DAKOTA FIRST NATION,
and CHIEF RODGER REDMAN, COUNCILLOR WAYNE GOODWILL,
COUNCILLOR DION YUZICAPPI, COUNCILLOR VERGIL BEAR,
COUNCILLOR HERMAN GOODPIPE, COUNCILLOR STELLA ISNANA,
and COUNCILLOR CONRAD TAWIYAKA
as representatives of
THE MEMBERS OF STANDING BUFFALO DAKOTA FIRST NATION**

Appellants

and

**ENBRIDGE PIPELINES INC., CANADIAN
ASSOCIATION OF PETROLEUM PRODUCERS and
NATIONAL ENERGY BOARD**

Respondents

and

**ATTORNEY GENERAL OF SASKATCHEWAN,
THE ATTORNEY GENERAL OF ALBERTA and
THE ATTORNEY GENERAL OF CANADA**

Interveners

Docket A-541-08

BETWEEN:

**STANDING BUFFALO DAKOTA FIRST NATION,
and CHIEF RODGER REDMAN, COUNCILLOR WAYNE GOODWILL,
COUNCILLOR DION YUZICAPPI, COUNCILLOR VERGIL BEAR,
COUNCILLOR HERMAN GOODPIPE, COUNCILLOR STELLA ISNANA,
and COUNCILLOR CONRAD TAWIYAKA
as representatives of
THE MEMBERS OF STANDING BUFFALO DAKOTA FIRST NATION**

Appellants

and

**ENBRIDGE SOUTHERN LIGHTS GP INC. on behalf of
ENBRIDGE SOUTHERN LIGHTS LP and
ENBRIDGE PIPELINES INC.,
NATIONAL ENERGY BOARD, and CANADIAN
ASSOCIATION OF PETROLEUM PRODUCERS**

Respondents

and

ATTORNEY GENERAL OF CANADA

Intervener

Docket A-542-08

BETWEEN:

**STANDING BUFFALO DAKOTA FIRST NATION,
and CHIEF RODGER REDMAN, COUNCILLOR WAYNE GOODWILL,
COUNCILLOR DION YUZICAPPI, COUNCILLOR VERGIL BEAR,
COUNCILLOR HERMAN GOODPIPE, COUNCILLOR STELLA ISNANA,
and COUNCILLOR CONRAD TAWIYAKA
as representatives of
THE MEMBERS OF STANDING BUFFALO DAKOTA FIRST NATION**

Appellants

and

**TRANSCANADA KEYSTONE PIPELINE GP LTD.,
NATIONAL ENERGY BOARD, and CANADIAN
ASSOCIATION OF PETROLEUM PRODUCERS**

Respondents

and

THE ATTORNEY GENERAL OF CANADA

Intervener

Docket A-475-08

BETWEEN

**THE SWEETGRASS FIRST NATION, and
THE MOOSOMIN FIRST NATION**

Appellants

and

**THE NATIONAL ENERGY BOARD, ENBRIDGE PIPELINES INC.,
ATTORNEY GENERAL OF CANADA, and
THE CANADIAN ASSOCIATION OF PETROLEUM PRODUCERS**

Respondents

and

**THE ATTORNEY GENERAL OF ALBERTA and
THE ATTORNEY GENERAL FOR SASKATCHEWAN**

Interveners

Heard at Ottawa, Ontario, on October 13, 2009.

Judgment delivered at Ottawa, Ontario, on October 23, 2009.

REASONS FOR JUDGMENT BY:

RYER J.A.

CONCURRED IN BY:

NOËL J.A.
LAYDEN-STEVENSON J.A.

Date: 20091023

**Dockets: A-537-08, A-541-08,
A-542-08, A-475-08**

Citation: 2009 FCA 308

**CORAM: NOËL J.A.
LAYDEN-STEVENSON J.A.
RYER J.A.**

Docket A-537-08

BETWEEN:

**STANDING BUFFALO DAKOTA FIRST NATION,
and CHIEF RODGER REDMAN, COUNCILLOR WAYNE GOODWILL,
COUNCILLOR DION YUZICAPPI, COUNCILLOR VERGIL BEAR,
COUNCILLOR HERMAN GOODPIPE, COUNCILLOR STELLA ISNANA,
and COUNCILLOR CONRAD TAWIYAKA**

**as representatives of
THE MEMBERS OF STANDING BUFFALO DAKOTA FIRST NATION**

Appellants

and

**ENBRIDGE PIPELINES INC., CANADIAN
ASSOCIATION OF PETROLEUM PRODUCERS and
NATIONAL ENERGY BOARD**

Respondents

and

**ATTORNEY GENERAL OF SASKATCHEWAN,
THE ATTORNEY GENERAL OF ALBERTA and
THE ATTORNEY GENERAL OF CANADA**

Intervenors

Docket A-541-08

BETWEEN:

**STANDING BUFFALO DAKOTA FIRST NATION,
and CHIEF RODGER REDMAN, COUNCILLOR WAYNE GOODWILL,
COUNCILLOR DION YUZICAPPI, COUNCILLOR VERGIL BEAR,
COUNCILLOR HERMAN GOODPIPE, COUNCILLOR STELLA ISNANA,
and COUNCILLOR CONRAD TAWIYAKA
as representatives of
THE MEMBERS OF STANDING BUFFALO DAKOTA FIRST NATION**

Appellants

and

**ENBRIDGE SOUTHERN LIGHTS GP INC. on behalf of
ENBRIDGE SOUTHERN LIGHTS LP and
ENBRIDGE PIPELINES INC.,
NATIONAL ENERGY BOARD, and CANADIAN
ASSOCIATION OF PETROLEUM PRODUCERS**

Respondents

and

ATTORNEY GENERAL OF SASKATCHEWAN

Intervener

Docket A-542-08

BETWEEN:

**STANDING BUFFALO DAKOTA FIRST NATION,
and CHIEF RODGER REDMAN, COUNCILLOR WAYNE GOODWILL,
COUNCILLOR DION YUZICAPPI, COUNCILLOR VERGIL BEAR,
COUNCILLOR HERMAN GOODPIPE, COUNCILLOR STELLA ISNANA,
and COUNCILLOR CONRAD TAWIYAKA
as representatives of
THE MEMBERS OF STANDING BUFFALO DAKOTA FIRST NATION**

Appellants

and

**TRANSCANADA KEYSTONE PIPELINE GP LTD.,
NATIONAL ENERGY BOARD, and CANADIAN
ASSOCIATION OF PETROLEUM PRODUCERS**

Respondents

and

THE ATTORNEY GENERAL OF CANADA

Intervener

Docket A-475-08

BETWEEN

**THE SWEETGRASS FIRST NATION , and
THE MOOSOMIN FIRST NATION**

Appellants

and

**THE NATIONAL ENERGY BOARD, ENBRIDGE PIPELINES INC.,
ATTORNEY GENERAL OF CANADA, and
THE CANADIAN ASSOCIATION OF PETROLEUM PRODUCERS**

Respondents

and

**THE ATTORNEY GENERAL OF ALBERTA and
THE ATTORNEY GENERAL FOR SASKATCHEWAN**

Interveners

REASONS FOR JUDGMENT

RYER J.A.

[1] In the four appeals that were before the Court, the appellants seek to set aside three decisions of the National Energy Board (the "NEB") that granted applications for approvals in respect of three western Canadian pipeline projects following hearings in which those applications were considered.

[2] The appellants raise the novel question of whether, before making its decisions in relation to those applications, the NEB was required to determine whether by virtue of the decision in *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73, the Crown, which was not a party to those applications or a participant in the hearings, was under a duty to consult the appellants with respect to potential adverse impacts of the proposed projects on the appellants and if it was, whether that duty had been adequately discharged.

[3] The four appeals were heard together by order of this Court. These reasons dispose of each of the appeals and will be filed as reasons for judgment in Court files A-537-08, A-541-08, A-542-08 and A-475-08.

RELEVANT STATUTORY PROVISIONS

[4] The statutory provisions that are relevant to the appeals are subsections 21(1), 22(1) and section 52 of the *National Energy Board Act*, R.S.C. 1985, c. N-7 (the "NEB Act") and subsection 35(1) of the *Constitution Act, 1982* (the "Constitution"). These provisions are reproduced in the appendix to these reasons.

BACKGROUND

[5] The NEB held hearings with respect to applications for approvals in respect of three proposed pipeline projects (the "Keystone Project", the "Southern Lights Project" and the "Alberta Clipper Project", collectively, the "Projects"). The Standing Buffalo First Nation ("SBFN"), a

Dakota band, participated as an intervener in the hearings with respect to all of the Projects. The Sweetgrass First Nation and the Moosomin First Nation ("SFN/MFN") participated in the hearing with respect to the Alberta Clipper Project through Battleford Agency Tribal Chiefs Inc. ("BATC"), which intervened in that hearing on their behalf.

[6] In the Keystone hearing, SBFN gave evidence that it had been in negotiations with Canada, through the auspices of the Office of the Treaty Commissioner, from 1997 to 2006, with respect to asserted claims in respect of unextinguished Aboriginal title to lands, self-government rights and *ochechea* (its status as an ally of the Crown). According to SBFN, the Crown broke off these negotiations in 2006 and for that reason, SBFN decided to intervene in the Keystone hearing to advance its interests. To that end, SBFN informed the Crown of its decision to intervene in the proceedings and reiterated its desire to resume the negotiations that had broken off.

[7] In the Alberta Clipper hearing, the applicant introduced a without prejudice letter, dated July 25, 2007, in which the Crown took the position that the Dakota First Nations, including SBFN, "do not have Aboriginal rights in Canada".

[8] In the Alberta Clipper hearing, BATC expressed concerns on behalf of SFN/MFN about potentially adverse effects that the Alberta Clipper Project would have on sacred sites and plant gathering for traditional and medicinal purposes. In this Court, counsel for SFN/MFN raised the concern that the SFN/MFN have interests in land that will be affected by the Alberta Clipper Project. More particularly, SFN/MFN asserted that the possibility that their claims to land under the

Treaty Land Entitlement Process might be satisfied by lands affected by this Project formed part of the basis of their right to *Haida* consultation.

[9] The NEB made three separate decisions (the "Decisions") with respect to the Projects. In particular:

- a. in Hearing Order OH-1-2007 (the "Keystone Decision"), dated September 20, 2007, the NEB granted approvals that were requested by TransCanada Keystone Pipeline GP ("Keystone") in relation to the Keystone Project, including a Certificate of Public Convenience and Necessity (a "Section 52 Certificate") under section 52 of the NEB Act;
- b. in Hearing Order OH-3-2007 (the "Southern Lights Decision"), dated February 19, 2008, the NEB granted approvals that were requested by Enbridge Southern Lights GP on behalf of Enbridge Southern Lights LP and Enbridge Pipelines Inc. (collectively "Enbridge Southern Lights") in relation to the Southern Lights Project, including a Section 52 Certificate; and
- c. in Hearing Order OH-4-2007 (the "Alberta Clipper Decision"), dated February 22, 2008, the NEB granted approvals that were requested by Enbridge Pipelines Inc. ("Enbridge") in relation to the Alberta Clipper Project, including a Section 52 Certificate.

[10] The issue referred to at the beginning of these reasons was squarely raised in motions that were made by SBFN in the hearings with respect to the Southern Lights and Alberta Clipper

Projects. The motion made in the Southern Lights hearing is summarized at page 6 of the Southern Lights Decision as follows:

The Notice of Motion ... requested the following decision of the Board

- (a) a decision that the Board has no jurisdiction to consider the Southern Lights Application on its merits without first determining whether Standing Buffalo has a credible claim within the meaning of the Supreme Court's decision in *Haida Nation*...;
- (b) a decision that the duty of fairness requires that the Crown be required to attend and respond to Standing Buffalo's claim, and that, in absence of any such response from the Crown, Standing Buffalo's claim should be accepted as uncontradicted and the Board should then determine that it is without jurisdiction to determine the substantive merits of the Southern Lights applications.

[11] This motion also raises the collateral issues of the requirement for Crown participation in the hearing process and the consequences in the event that the Crown does not participate in that process.

[12] The NEB determined that the motion should not be decided as a preliminary matter because evidence in the hearing would provide a further factual basis that would be relevant to the motion and that completing the hearing without first deciding the motion would not prejudice the SBFN.

[13] In its reasons for the Southern Lights Decision, the NEB denied this motion and held that its mandate was to consider the application before it in accordance with the public interest. In doing so, the NEB stated that Aboriginal concerns were taken into account because the applicant was required to consult with affected Aboriginal groups and mitigative accommodations of Aboriginal concerns could be ordered. The NEB stated that requirements that may be imposed upon other governmental

authorities with respect to a proposed federal pipeline project are not relevant to the NEB decision making process in respect of that project. In addition, the NEB stated that recourse should be to the courts, and not the NEB, in relation to issues of whether other governmental authorities have met their legal obligations with respect to a project that also falls under NEB oversight. The NEB further stated that it had no jurisdiction to settle Aboriginal land claims. Finally, the NEB concluded that because it had the jurisdiction to deal with the applications before it, without having to adjudicate the existence of a credible claim within the meaning of *Haida*, it was not obligated to require the Crown to attend the hearing to participate in such an adjudication.

[14] The motion brought by SBFN in the Alberta Clipper hearing is essentially the same as the motion that it brought in the Southern Lights hearing and was dealt with by the NEB in a similar fashion.

[15] The issue raised in the motions brought by SBFN in the Southern Lights and Alberta Clipper hearings was not raised by way of a formal motion in the Keystone hearing. As a consequence, the Keystone Decision does not deal with that issue in the same way as it was dealt with in the Southern Lights and Alberta Clipper Decisions. However, the issue was raised in an application for a review of the Keystone Decision, in accordance with subsection 21(1) the NEB Act, that was made by SBFN on October 12, 2007. Paragraph 9.c. of that application reads as follows:

... the NEB erred when, without having first satisfied itself that adequate Crown consultation had taken place, it implicitly concluded that it had jurisdiction to consider the application for the certificate of public convenience and necessity on its merits;

[16] By correspondence (the "Keystone Review Decision"), dated February 13, 2008, the NEB denied SBFN's request for a review of the Keystone Decision.

[17] The appellants obtained leave to appeal the Decisions as required by subsection 22(1) of the NEB Act.

ISSUES

[18] The issues in this appeal are as follows:

- (a) before considering the applications for Project approvals, was the NEB required to determine
 - (i) whether the Crown had a duty to consult, and if appropriate, accommodate the appellants in relation to the Projects; and
 - (ii) if the Crown had such a duty, whether that duty had been discharged; and
- (b) does section 52 of the NEB Act violate subsection 35(1) of the Constitution?

ANALYSIS

The *Haida* Duty

[19] The duty to consult that is at issue in these appeals is the Crown's duty to consult as described in *Haida*. Paragraph 35 of the Supreme Court of Canada's decision in that case stipulates 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 ...

[20] Guidance with respect to how to determine whether the Crown is subject to a *Haida* duty, and, if such a duty exists, how to determine the scope of that duty, is provided at paragraph 37 of that decision, which reads as follows:

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.

[21] The final phase in the *Haida* analysis is whether the duty to consult, and if appropriate accommodate, has been discharged by the Crown.

[22] It is evident that the existence, scope and fulfillment of a *Haida* duty are matters that can be agreed upon by the Crown and the affected Aboriginal groups. However, where agreement on any or all of these matters cannot be reached, adjudication may be required. In addition to references to adjudication in paragraph 37 of *Haida*, at paragraph 60 of that decision, the Court states:

... Where the government's conduct is challenged on the basis of allegations that it failed to discharge its duty to consult and accommodate pending claims resolution, the matter may go to the courts for review.

The Jurisdictional Issue

[23] In the context of these appeals, the appellants assert that before the NEB could decide whether or not to grant the requested Project approvals, it was required to determine whether the Crown was subject to a *Haida* duty to consult the appellants in respect of the Projects. If such a duty was found to exist, the appellants assert that the NEB was then required to determine the scope of that duty and whether the Crown discharged it. Thus, the appellants assert that the NEB was required to undertake the full *Haida* analysis before it could make the Decisions.

Standard of Review

[24] In my view, this issue squarely raises a true question of the jurisdiction of the NEB, a question that is to be reviewed on the standard of correctness (see *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9, at para. 59).

NEB did not undertake the Haida analysis

[25] Nowhere in the Decisions did the NEB make any finding that the Crown was or was not subject to a *Haida* duty. In other words, the NEB did not determine the existence of a *Haida* duty. It follows, in my view, that submissions with respect to the scope of such a duty, and whether or not the Crown has fulfilled it, need not be considered in these appeals. If I were to conclude that the NEB erred in not undertaking the initial step in the *Haida* analysis, I would remit the entire *Haida* analysis to the NEB for its consideration.

[26] I would also add that because the NEB did not undertake the *Haida* analysis prior to making the Decisions, in my view, it follows that the Decisions cannot be taken as encompassing any conclusions with respect to whether the consultations that were undertaken by the proponents of the Projects were, or were not, capable of discharging, or sufficient to discharge, any *Haida* consultation duty that the Crown may have in respect of the Projects.

The Paul and Kwikwetlem Decisions

[27] Counsel for SFM/MFN argued that the decisions in *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585, 2003 SCC 55, and *Kwikwetlem First Nation v. British Columbia (Utilities Commission)*, 2009 BCCA 68, [2009] 9 W.W.R. 92, authoritatively determine this jurisdictional question. I disagree.

[28] In *Paul*, the B.C. Forest Appeals Commission found that Mr. Paul, an Aboriginal, had contravened section 96 of the *Forest Practices Code of British Columbia Act*, R.S.B.C. 1996, c. 159, by cutting down four trees that he intended to use to build a deck on his home. The question in the case was whether the British Columbia legislature had validly conferred on that Commission the power to decide questions relating to Aboriginal rights and title in the course of adjudicating whether Mr. Paul had contravened section 96 of the Code, including the question of whether in cutting down the trees Mr. Paul was engaged in the exercise of the Aboriginal rights.

[29] The Supreme Court of Canada answered these questions in the affirmative and at paragraph 47 of its decision, Bastarache J. added an illuminating observation:

My conclusions mean that the Commission has jurisdiction to continue hearing all aspects of the matter of Mr. Paul's four seized logs. Unless he moves in the Supreme Court of British Columbia for a declaration respecting his aboriginal rights, Mr. Paul must present evidence of his ancestral right to the Commission. As yet he has merely asserted his defence. If he is unsatisfied with the Commission's determination of the relationship between his s. 35 rights and the prohibition against cutting trees in s. 96 of the Code, he can move for judicial review in the Supreme Court of British Columbia. The standard of review for the Commission's determinations concerning aboriginal law will be correctness.

[30] In my respectful view, *Paul* provides no authoritative support for the proposition that the NEB was required to undertake the *Haida* analysis before considering the merits of the Project approval applications. If anything, paragraph 47 of *Paul* appears to me to indicate that the courts are the appropriate venue for the adjudication of Aboriginal issues.

[31] In *Kwikwetlem First Nation*, the British Columbia Utilities Commission considered an application for an approval of an electrical transmission project by the British Columbia Transmission Corporation. In that case, the Commission accepted that it was under a *Haida* duty and negotiations were undertaken by the parties on that basis. The question before the Court was whether the Commission could issue an approval without first having decided whether the duty to consult had been discharged to that point in the proceedings. It is noteworthy that all parties accepted that British Columbia Transmission Corporation was the Crown or a Crown agent for the purposes of the *Haida* analysis and that the consultations undertaken by it took place in furtherance of its *Haida* duty. Thus, the question of whether or not the British Columbia Utilities Commission was required to undertake the entire *Haida* analysis to determine whether the applicant before it was

under a duty to consult was not before the Commission. The existence of the *Haida* duty was not contested.

[32] In the appeals under consideration, the applications before the NEB were made by Keystone, Enbridge Southern Lights and Enbridge, private sector entities that are not the Crown or its agent. Accordingly, I am of the view that *Kwkwetlem First Nation* does not support the proposition that the NEB is required to undertake the *Haida* analysis before considering the merits of the applications of Keystone, Enbridge Southern Lights and Enbridge that were before it.

[33] I note as well that the applicant before the British Columbia Utilities Commission in *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)*, 2009 BCCA 67, [2009] 4 W.W.R. 381, 89 B.C.L.R. (4th) 298, was accepted by the parties as being the Crown or its agent. Accordingly, I am of the view that this case provides no support for SFN/MFN's argument on this issue.

[34] Finally, I would add that the NEB itself is not under a *Haida* duty and, indeed, the appellants made no argument that it was. The NEB is a quasi-judicial body (see *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159, at page 184, and, in my view, when it functions as such, the NEB is not the Crown or its agent.

Failure to undertake Haida analysis infringes subsection 35(1) of the Constitution

[35] Subsection 35 of the Constitution reads as follows:

35(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

35(1) Les droits existants — ancestraux ou issus de traités — des peuples autochtones du Canada sont reconnus et confirmés.

[36] In asserting that the NEB erred in failing to undertake the *Haida* analysis before reaching its Decisions, the appellants state that the NEB must exercise its decision-making function in accordance with the dictates of the Constitution, including subsection 35(1) thereof. I agree with that statement, which is supported by the decision of the Supreme Court of Canada in *Quebec (Attorney General) v. Canada (National Energy Board)*, at page 185.

[37] The appellants then contend that while the NEB's mandated consultation by the Project proponents may have addressed potential infringements of Aboriginal rights by those proponents, the failure of the NEB to undertake the *Haida* analysis means that potential infringements of those rights by the Crown would not be addressed. Thus, the argument goes, by failing to undertake the *Haida* analysis, the NEB could be sanctioning potential infringements of Aboriginal rights by the Crown, thereby breaching subsection 35(1) of the Constitution.

[38] The appellants further argue that in the context of an application for a Section 52 Certificate, the NEB must "have regard to all considerations that appear to it to be relevant", as specifically stated in section 52 of the NEB Act. And, according to the appellants, whether the Crown has, and has satisfied, a *Haida* duty, are matters that are relevant to, and therefore must be addressed by, the NEB. A failure to do so, their argument continues, would result in breach by the NEB of its obligation to make its decisions in accordance with the dictates of the Constitution.

[39] For several reasons, I cannot accede to these arguments.

[40] First, as noted above, the decision in *Quebec (Attorney General) v. Canada (National Energy Board)* establishes that in exercising its decision-making function, the NEB must act within the dictates of the Constitution, including subsection 35(1) thereof. In the circumstances of these appeals, the NEB dealt with three applications for Section 52 Certificates. Each of those applications is a discrete process in which a specific applicant seeks approval in respect of an identifiable Project. The process focuses on the applicant, on whom the NEB imposes broad consultation obligations. The applicant must consult with Aboriginal groups, determine their concerns and attempt to address them, failing which the NEB can impose accommodative requirements. In my view, this process ensures that the applicant for the Project approval has due regard for existing Aboriginal rights that are recognized and affirmed in subsection 35(1) of the Constitution. And, in ensuring that the applicant respects such Aboriginal rights, in my view, the NEB demonstrates that it is exercising its decision-making function in accordance with the dictates of subsection 35(1) of the Constitution.

[41] Secondly, the appellants were unable to point to any provision of the NEB Act or any other legislation that prevents it from issuing a Section 52 Certificate without first undertaking a *Haida* analysis or that empowers it to order the Crown to undertake *Haida* consultations.

[42] Thirdly, the Province of Saskatchewan argued that the NEB lacks jurisdiction to undertake a *Haida* analysis where the Crown that is alleged to have a *Haida* duty is the Crown in right of a province. The appellants did not contest this limitation on the ability of the NEB to conduct a *Haida* analysis in relation to the Crown in right of a province.

[43] Fourthly, a determination that the NEB was not required to determine whether the Crown was under, and had discharged, a *Haida* duty before making the Decisions does not preclude the adjudication of those matters by a court of competent jurisdiction. Indeed, the quotations from paragraphs 37 and 60 of *Haida* and paragraph 47 of *Paul* point towards recourse to the courts in such circumstances.

[44] I would add that the ability of an Aboriginal group to have recourse to the courts to adjudicate matters relating to the existence, scope and fulfillment of a *Haida* duty in respect of the subject matter of an application for a Section 52 Certificate should not be taken as suggesting that the Aboriginal group should decline to participate in the NEB process with respect to such an application. As previously stated, the NEB process focuses on the duty of the applicant for a Section 52 Certificate. That process provides a practical and efficient framework within which the Aboriginal group can request assurances with respect to the impact of the particular project on the matters of concern to it. While the Aboriginal group is free to determine the course of action it wishes to pursue, it would be unfortunate if the opportunity afforded by the NEB process to have Aboriginal concerns dealt with in a direct and non-abstract matter was not exploited.

THE CONSTITUTIONAL QUESTION

[45] The SFN/MFN argue that the NEB Act or portions thereof are invalid on the basis that they violate subsection 35(1) of the Constitution. In *R. v. Sparrow*, [1990] 1 S.C.R. 1075, the validity of a regulation that prescribed limits on the length of fishing nets was impugned by an Aboriginal person on the basis that the particular regulation was inconsistent with subsection 35(1) of the Constitution. In that case, the Supreme Court of Canada held that the party impugning a piece of legislation has the onus of establishing that the legislation has the effect of interfering with an existing Aboriginal right. If that onus has been satisfied, the onus then shifts to the Crown to establish that the interference is justified.

[46] In the present circumstances, the assertions of SFN/MFN fall well short of what is required of them to meet their burden of establishing that the NEB Act or any portion of it has the effect of interfering with any Aboriginal or treaty rights they may possess. The assertion that the entire NEB Act infringes an existing Aboriginal or treaty right of the SFN/MFN is entirely unsubstantiated.

[47] SFN/MFN make reference to a single provision of the NEB Act, section 52, and argue that it is invalid because it does not include a specific provision stating that, in making decisions required of it under that legislation, the NEB must adhere to the protection afforded to existing Aboriginal and treaty rights of Aboriginal peoples of Canada. I am unable to accept this argument.

[48] It is clear from the decision of the Supreme Court of Canada in *Quebec (Attorney General) v. Canada (National Energy Board)* that the NEB is required to conduct its decision-making process

in a manner that respects the provisions of subsection 35(1) of the Constitution. In my view, the failure of the NEB Act to specifically refer to this requirement in section 52, or elsewhere in the NEB Act, is insufficient to invalidate that provision.

The A-542-08 Appeal

[49] Keystone argued that SBFN's appeal should be limited to an appeal from the Keystone Review Decision alone and not from the Keystone Decision itself. And, since SBFN's memorandum of fact and law says nothing about the Keystone Review Decision, Keystone contends that SBFN's appeal must be dismissed. In view of my proposed disposition of the jurisdictional and constitutional issues, I do not propose to deal with this issue.

DISPOSITION

[50] For the foregoing reasons, I would dismiss each of the appeals, with costs to the respondent Enbridge Pipelines Inc. in Court files A-537-08 and A-475-08, the respondent Enbridge Southern Lights GP Inc. in Court file A-541-08 and the respondent TransCanada Keystone Pipeline GP Ltd. in A-542-08.

“C. Michael Ryer”

J.A.

“I agree.
Marc Noël J.A.”

“I agree
Carolyn Layden-Stevenson J.A.”

APPENDIX

National Energy Board Act, R.S.C. 1985, c. N-7, subsections 21(1) and 22(1) and section 52

21(1) Subject to subsection (2), the Board may review, vary or rescind any decision or order made by it or rehear any application before deciding it.

21(1) Sous réserve du paragraphe (2), l'Office peut réviser, annuler ou modifier ses ordonnances ou décisions, ou procéder à une nouvelle audition avant de statuer sur une demande.

22. (1) An appeal lies from a decision or order of the Board to the Federal Court of Appeal on a question of law or of jurisdiction, after leave to appeal is obtained from that Court.

22. (1) Il peut être interjeté appel devant la Cour d'appel fédérale, avec l'autorisation de celle-ci, d'une décision ou ordonnance de l'Office, sur une question de droit ou de compétence.

52. The Board may, subject to the approval of the Governor in Council, issue a certificate in respect of a pipeline if the Board is satisfied that the pipeline is and will be required by the present and future public convenience and necessity and, in considering an application for a certificate, the Board shall have regard to all considerations that appear to it to be relevant, and may have regard to the following:

52. Sous réserve de l'agrément du gouverneur en conseil, l'Office peut, s'il est convaincu de son caractère d'utilité publique, tant pour le présent que pour le futur, délivrer un certificat à l'égard d'un pipeline; ce faisant, il tient compte de tous les facteurs qu'il estime pertinents, et notamment de ce qui suit :

- (a) the availability of oil, gas or any other commodity to the pipeline;
- (b) the existence of markets, actual or potential;
- (c) the economic feasibility of the pipeline;
- (d) the financial responsibility and financial structure of the applicant, the methods of financing the pipeline and the extent to which Canadians will have an opportunity of participating in the financing, engineering and construction of the

- a) l'approvisionnement du pipeline en pétrole, gaz ou autre produit;
- b) l'existence de marchés, réels ou potentiels;
- c) la faisabilité économique du pipeline;
- d) la responsabilité et la structure financières du demandeur et les méthodes de financement du pipeline ainsi que la mesure dans laquelle les Canadiens auront la possibilité de participer au financement, à l'ingénierie ainsi qu'à la construction du pipeline;
- e) les conséquences sur l'intérêt

pipeline; and
(e) any public interest that in the Board's opinion may be affected by the granting or the refusing of the application.

public que peut, à son avis, avoir sa décision.

Constitution Act, 1982, subsection 35(1)

35(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

35(1) Les droits existants — ancestraux ou issus de traités — des peuples autochtones du Canada sont reconnus et confirmés.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-537-08

STYLE OF CAUSE: *Standing Buffalo Dakota First Nation et al v. Enbridge Pipelines Inc. et al.*

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: October 13, 2009

REASONS FOR JUDGMENT BY: RYER J.A.

CONCURRED IN BY: NOËL J.A.
LAYDEN-STEVENSON J.A.

DATED: OCTOBER 23, 2009

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FEDERAL COURT OF APPEAL

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DOCKET: A-541-08

STYLE OF CAUSE: *Standing Buffalo Dakota First Nation et al v. Enbridge Southern Lights GP Inc. et al.*

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: October 13, 2009

REASONS FOR JUDGMENT BY: RYER J.A.

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FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-542-08

STYLE OF CAUSE: *Standing Buffalo Dakota First Nation et al v. TransCanada Keystone Pipeline GP Ltd. et al.*

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: October 13, 2009

REASONS FOR JUDGMENT BY: RYER J.A.

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FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-475-08

STYLE OF CAUSE: *The Sweetgrass First Nation et al.
v. The National Energy Board et
al.*

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: October 13, 2009

REASONS FOR JUDGMENT BY: RYER J.A.

CONCURRED IN BY: NOËL J.A.
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Taku River Tlingit First Nation v. British Columbia (Project Assessment Director),
[2004] 3 S.C.R. 550, 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

Indexed as: Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)

Neutral citation: 2004 SCC 74.

File No.: 29146.

2004: March 24; 2004: November 18.

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

on appeal from the court of appeal for british columbia

Crown — Honour of Crown — Duty to consult and accommodate Aboriginal peoples — Whether Crown has duty to consult and accommodate Aboriginal peoples prior to making decisions that might adversely affect their as yet unproven Aboriginal rights and title claims — If so, whether consultation and accommodation engaged in by Province prior to issuing project approval certificate was adequate to satisfy honour of Crown.

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 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 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.

APPEAL from a judgment of the British Columbia Court of Appeal (2002), 211 D.L.R. (4th) 89, [2002] 4 W.W.R. 19, 163 B.C.A.C. 164, 267 W.A.C. 164, 98 B.C.L.R. (3d) 16, 42 C.E.L.R. (N.S.) 169, [2002] 2 C.N.L.R. 312, 91 C.R.R. (2d) 260, [2002] B.C.J. No. 155 (QL), 2002 BCCA 59, affirming a decision of the British Columbia Supreme Court (2000), 77 B.C.L.R. (3d) 310, 34 C.E.L.R. (N.S.) 209, [2000] B.C.J. No. 1301 (QL), 2000 BCSC 1001. Appeal allowed.

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Robert J. M. Janes and Dominique Nouvet, for the intervener Union of British Columbia Indian Chiefs.

The judgment of the Court was delivered by

THE CHIEF JUSTICE —

I. Introduction

1 This case raises the issue of the limits of the Crown’s duty to consult with and accommodate Aboriginal peoples when making decisions that may adversely affect as yet unproven Aboriginal rights and title claims. The Taku River Tlingit First Nation (“TRTFN”) participated in a three-and-a-half-year environmental assessment process related to the efforts of Redfern Resources Ltd. (“Redfern”) to reopen an old mine. Ultimately, the TRTFN found itself disappointed in the process and in the result.

2 I conclude that the Province was required to consult meaningfully with the TRTFN in the decision-making process surrounding Redfern's project approval application. The TRTFN's role in the environmental assessment was, however, sufficient to uphold the Province's honour and meet the requirements of its duty. Where consultation is meaningful, there is no ultimate duty to reach agreement. Rather, accommodation requires that Aboriginal concerns be balanced reasonably with the potential impact of the particular decision on those concerns and with competing societal concerns. Compromise is inherent to the reconciliation process. In this case, the Province accommodated TRTFN concerns by adapting the environmental assessment process and the requirements made of Redfern in order to gain project approval. I find, therefore, that the Province met the requirements of its duty toward the TRTFN.

II. Facts and Decisions Below

3 The Tulsequah Chief Mine, operated in the 1950s by Cominco Ltd., lies in a remote and pristine area of northwestern British Columbia, at the confluence of the Taku and Tulsequah Rivers. Since 1994, Redfern has sought permission from the British Columbia government to reopen the mine, first under the *Mine Development Assessment Act*, S.B.C. 1990, c. 55, and then, following its enactment in 1995, under the *Environmental Assessment Act*, R.S.B.C. 1996, c. 119. During the environmental assessment process, access to the mine emerged as a point of contention. The members of the TRTFN, who participated in the assessment as Project Committee members, objected to Redfern's plan to build a 160-km road from the mine to the town of Atlin through a portion of their traditional territory. However, after a lengthy process, project approval was granted on March 19, 1998 by the Minister of Environment, Lands and Parks and the Minister of Energy and Mines ("Ministers").

4 The Redfern proposal was assessed in accordance with British Columbia’s *Environmental Assessment Act*. The environmental assessment process is distinct from both the land use planning process and the treaty negotiation process, although these latter processes may necessarily have an impact on the assessment of individual proposals. The following provisions are relevant to this matter.

5 Section 2 sets out the purposes of the Act, which are:

- (a) to promote sustainability by protecting the environment and fostering a sound economy and social well-being,
 - (b) to provide for the thorough, timely and integrated assessment of the environmental, economic, social, cultural, heritage and health effects of reviewable projects,
 - (c) to prevent or mitigate adverse effects of reviewable projects,
 - (d) to provide an open, accountable and neutrally administered process for the assessment
 - (i) of reviewable projects, and
- . . .
- (e) to provide for participation, in an assessment under this Act, by the public, proponents, first nations, municipalities and regional districts, the government and its agencies, the government of Canada and its agencies and British Columbia’s neighbouring jurisdictions.

6 “The proponent of a reviewable project may apply for a project approval certificate” under s. 7 of the Act, providing a “preliminary overview of the reviewable project, including” potential effects and proposed mitigation measures. If the project is accepted for review, “the executive director must establish a project committee” for the project (s. 9(1)). The executive director must invite a number of groups to nominate members to the committee, including “any first nation whose traditional

territory includes the site of the project or is in the vicinity of the project” (s. 9(2)(d)). Under s. 9(6), the committee “may determine its own procedure, and provide for the conduct of its meetings”.

7 Redfern’s proposal was accepted for review under the former *Mine Development Assessment Act*, and a project committee was established in November 1994. Invited to participate were the TRTFN, the British Columbia, federal, Yukon, United States, and Alaskan governments, as well as the Atlin Advisory Planning Commission. When the *Environmental Assessment Act* was instituted, the Project Committee was formally constituted under s. 9. Working groups and technical sub-committees were formed, including a group to deal with Aboriginal concerns and a group to deal with issues around transportation options. The TRTFN participated in both of these groups. A number of studies were commissioned and provided to the Project Committee during the assessment process.

8 The project committee becomes the primary engine driving the assessment process. It must act in accordance with the purposes of a project committee, set out in s. 10 as:

- (a) to provide to the executive director, the minister and the responsible minister expertise, advice, analysis and recommendations, and
- (b) to analyze and advise the executive director, the minister and the responsible minister as to,
 - (i) the comments received in response to an invitation for comments under this Act,
 - (ii) the advice and recommendations of the public advisory committee, if any, established for that reviewable project,
 - (iii) the potential effects, and
 - (iv) the prevention or mitigation of adverse effects.

9 The proponent of the project is required to engage in public consultation and distribution of information about the proposal (ss. 14-18). After the period for receipt of comments has expired, the executive director must either “refer the application to the [Ministers] . . . for a decision . . . or order that a project report be prepared . . . and that the project undergo further review” (s. 19(1)). If a project report is to be prepared, the executive director must prepare draft project report specifications indicating what information, analysis, plans or other records are relevant to an effective assessment, on the recommendation of the project committee (s. 21(a)). Sections 22 and 23 set out a non-exhaustive list of what matters may be included in a project report. These specifications are provided to the proponent (s. 21(b)).

10 In this case, Redfern was required to produce a project report, and draft project report specifications were provided to it. Additional time was granted to allow the executive director and Project Committee to prepare specifications.

11 When the proponent submits a project report, the project committee makes a recommendation to the executive director, whether to accept the report for review or to withhold acceptance if the report does not meet the specifications. Redfern submitted a multiple volume project report in November 1996. A time limit extension was granted to allow extra time to complete the review of the report. In January 1997, the Project Committee concluded that the report was deficient in certain areas, and Redfern was required to address the deficiencies.

12 Through the environmental assessment process, the TRTFN’s concerns with the road proposal became apparent. Its concerns crystallized around the potential effect on wildlife and traditional land use, as well as the lack of adequate baseline

information by which to measure subsequent effects. It was the TRTFN's position that the road ought not to be approved in the absence of a land use planning strategy and away from the treaty negotiation table. The environmental assessment process was unable to address these broader concerns directly, but the project assessment director facilitated the TRTFN's access to other provincial agencies and decision makers. For example, the Province approved funding for wildlife monitoring programs as desired by the TRTFN (the Grizzly Bear Long-term Cumulative Effects Assessment and Ungulate Monitoring Program). The TRTFN also expressed interest in TRTFN jurisdiction to approve permits for the project, revenue sharing, and TRTFN control of the use of the access road by third parties. It was informed that these issues were outside the ambit of the certification process and could only be the subject of later negotiation with the government.

13 While Redfern undertook to address other deficiencies, the Environmental Assessment Office's project assessment director engaged a consultant acceptable to the TRTFN, Mr. Lindsay Staples, to perform traditional land use studies and address issues raised by the TRTFN. Redfern submitted its upgraded report in July 1997, but was requested to await receipt of the Staples Report. The Staples Report, prepared by August 1997, was provided for inclusion in the Project Report. The Project Report was distributed for review in September 1997, with public comments received for a 60-day period thereafter. However, the TRTFN, upon reviewing the Staples Report, voiced additional concerns. In response, the Environmental Assessment Office engaged Staples to prepare an addendum to his report, which was completed in December 1997 and also included in the Project Report from that time forward.

14 Under the Act, the executive director, upon accepting a project report, may refer the application for a project approval certificate to the Ministers for a decision

(s. 29). “In making a referral . . . the executive director must take into account the application, the project report and any comments received about them” (s. 29(1)). “A referral . . . may be accompanied by recommendations of the project committee” (s. 29(4)). There is no requirement under the Act that a project committee prepare a written recommendations report.

15 In this case, the staff of the Environmental Assessment Office prepared a written Project Committee Recommendations Report, the major part of which was provided to committee members for review in early January 1998. The final 18 pages were provided as part of a complete draft on March 3, 1998. The majority of the committee members agreed to refer the application to the Ministers and to recommend approval for the project subject to certain recommendations and conditions. The TRTFN did not agree with the Recommendations Report, and instead prepared a minority report stating their concerns with the process and the proposal.

16 After a referral under s. 29 is made, “the ministers must consider the application and any recommendations of the project committee” (s. 30(1)(a)), in order to either “issue a project approval certificate”, “refuse to issue the . . . certificate”, or “refer the application to the Environmental Assessment Board for [a] public hearing” (s. 30(1)(b)). Written reasons are required (s. 30(1)(c)).

17 The executive director referred Redfern’s application to the Ministers on March 12, 1998. The referral included the Project Committee Recommendations Report, the Project Approval Certificate in the form that it was ultimately signed, and the TRTFN Report (A.R., vol. V, p. 858). In addition, the Recommendations Report explicitly identified TRTFN concerns and points of disagreement throughout, as well as suggested mitigation measures. The Ministers issued the Project Approval

Certificate on March 19, 1998, approving the proposal subject to detailed terms and conditions.

18 Issuance of project approval certification does not constitute a comprehensive “go-ahead” for all aspects of a project. An extensive “permitting” process precedes each aspect of construction, which may involve more detailed substantive and information requirements being placed on the developer. Part 6 of the Project Committee’s Recommendations Report summarized the requirements for licences, permits and approvals that would follow project approval in this case. In addition, the Recommendations Report made prospective recommendations about what ought to happen at the permit stage, as a condition of certification. The Report stated that Redfern would develop more detailed baseline information and analysis at the permit stage, with continued TRTFN participation, and that adjustments might be required to the road route in response. The majority also recommended creation of a resource management zone along the access corridor, to be in place until completion of a future land use plan; the use of regulations to control access to the road; and creation of a Joint Management Committee for the road with the TRTFN. It recommended that Redfern’s future Special Use Permit application for the road be referred to the proposed Joint Management Committee.

19 The TRTFN brought a petition in February 1999 under the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, to quash the Ministers’ decision to issue the Project Approval Certificate on administrative law grounds and on grounds based on its Aboriginal rights and title. Determination of its rights and title was severed from the judicial review proceedings and referred to the trial list, on the Province’s application. The chambers judge on the judicial review proceedings, Kirkpatrick J., concluded that the Ministers should have been mindful of the possibility that their

decision might infringe Aboriginal rights, and that they 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 ((2000), 77 B.C.L.R. (3d) 310, 2000 BCSC 1001). She also found in the TRTFN's favour on administrative law grounds. She set aside the decision to issue the Project Approval Certificate and directed a reconsideration, for which she later issued directions.

20 The majority of the British Columbia Court of Appeal dismissed the Province's appeal, finding (*per* Rowles J.A.) that the Province had failed to meet its duty to consult with and accommodate the TRTFN ((2002), 98 B.C.L.R. (3d) 16, 2002 BCCA 59). Southin J.A., dissenting, would have found that the consultation undertaken was adequate on the facts. Both the majority and the dissent appear to conclude that the decision complied with administrative law principles. The Province has appealed to this Court, arguing that no duty to consult exists outside common law administrative principles, prior to proof of an Aboriginal claim. If such a duty does exist, the Province argues, it was met on the facts of this case.

III. Analysis

21 In *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73, heard concurrently with this case, this Court has confirmed the existence of the Crown's duty to consult and, where indicated, to accommodate Aboriginal peoples prior to proof of rights or title claims. The Crown's obligation to consult the TRTFN was engaged in this case. The Province was aware of the TRTFN's claims through its involvement in the treaty negotiation process, and knew that the decision to reopen the Tulsequah Chief Mine had the potential to adversely affect the substance of the TRTFN's claims.

22 On the principles discussed in *Haida*, these facts mean that the honour of the Crown placed the Province under a duty to consult with the TRTFN in making the decision to reopen the Tulsequah Chief Mine. In this case, the process engaged in by the Province under the *Environmental Assessment Act* fulfilled the requirements of its duty. The TRTFN was part of the Project Committee, participating fully in the environmental review process. It was disappointed when, after three and a half years, the review was concluded at the direction of the Environmental Assessment Office. However, its views were put before the Ministers, and the final project approval contained measures designed to address both its immediate and long-term concerns. The Province was under a duty to consult. It did so, and proceeded to make accommodations. 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.

A. *Did the Province Have a Duty to Consult and if Indicated Accommodate the TRTFN?*

23 The Province argues that, before the determination of rights through litigation or conclusion of a treaty, it owes only a common law “duty of fair dealing” to Aboriginal peoples whose claims may be affected by government decisions. It argues that a duty to consult could arise after rights have been determined, through what it terms a “justificatory fiduciary duty”. Alternatively, it submits, a fiduciary duty may arise where the Crown has undertaken to act only in the best interests of an Aboriginal people. The Province submits that it owes the TRTFN no duty outside of these specific situations.

24 The Province's submissions present an impoverished vision of the honour of the Crown and all that it implies. As discussed in the companion case of *Haida, supra*, the principle of the honour of the Crown grounds the Crown's duty to consult and if indicated accommodate Aboriginal peoples, even prior to proof of asserted Aboriginal rights and title. The duty of honour derives from the Crown's assertion of sovereignty in the face of prior Aboriginal occupation. It has been enshrined in s. 35(1) of the *Constitution Act, 1982*, which recognizes and affirms existing Aboriginal rights and titles. Section 35(1) has, as one of its purposes, negotiation of just settlement of Aboriginal claims. In all its dealings with Aboriginal peoples, the Crown must act honourably, in accordance with its historical and future relationship with the Aboriginal peoples in question. The Crown's honour cannot be interpreted narrowly or technically, but must be given full effect in order to promote the process of reconciliation mandated by s. 35(1).

25 As discussed in *Haida*, what the honour of the Crown requires varies with the circumstances. It may require the Crown to consult with and accommodate Aboriginal peoples prior to taking decisions: *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at p. 1119; *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, 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 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.

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 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 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

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, numerous studies and meetings, and extensions of statutory time periods, the assessment process was brought to a close in early 1998. The Environmental Assessment Office stated on February 26 that consultation must end by March 4, citing its work load. The Project Committee was directed to review and sign off on the Recommendations Report on March 3, the same day that it received the last 18 pages of the report. Appendix C to the Recommendations Report notes that the TRTFN disagreed with the Recommendations Report because of certain “information deficiencies”: Southin J.A., at para. 46. Thus, the TRTFN prepared a minority report that was submitted with the majority report to the Ministers on March 12. Shortly thereafter, the project approval certification was issued.

39 It is clear that the process of project approval ended more hastily than it began. But was the consultation provided by the Province nonetheless adequate? On the findings of the courts below, I conclude that it was.

40 The chambers judge was satisfied that any duty to consult was satisfied until December 1997, because the members of the TRTFN were full participants in the assessment process (para. 132). I would agree. The Province was not required to develop special consultation measures to address TRTFN’s concerns, outside of the process provided for by the *Environmental Assessment Act*, which specifically set out a scheme that required consultation with affected Aboriginal peoples.

41 The Act permitted the Committee to set its own procedure, which in this case involved the formation of working groups and subcommittees, the commissioning of studies, and the preparation of a written recommendations report. The TRTFN was at the heart of decisions to set up a steering group to deal with

Aboriginal issues and a subcommittee on the road access proposal. The information and analysis required of Redfern were clearly shaped by TRTFN's concerns. By the time that the assessment was concluded, more than one extension of statutory time limits had been granted, and in the opinion of the project assessment director, "the positions of all of the Project Committee members, including the TRTFN had crystallized" (Affidavit of Norman Ringstad, at para. 82 (quoted at para. 57 of the Court of Appeal's judgment)). The concerns of the TRTFN were well understood as reflected in the Recommendations Report and Project Report, and had been meaningfully discussed. The Province had thoroughly fulfilled its duty to consult.

42 As discussed in *Haida*, the process of consultation may lead to a duty to accommodate Aboriginal concerns by adapting decisions or policies in response. The purpose of s. 35(1) of the *Constitution Act, 1982* is to facilitate the ultimate reconciliation of prior Aboriginal occupation with *de facto* Crown sovereignty. Pending settlement, the Crown is bound by its honour to balance societal and Aboriginal interests in making decisions that may affect Aboriginal claims. The Crown may be required to make decisions in the face of disagreement as to the adequacy of its response to Aboriginal concerns. Balance and compromise will then be necessary.

43 The TRTFN in this case disputes the adequacy of the accommodation ultimately provided by the terms of the Project Approval Certificate. It argues that the Certificate should not have been issued until its concerns were addressed to its satisfaction, particularly with regard to the establishment of baseline information.

44 With respect, I disagree. Within the terms of the process provided for project approval certification under the Act, TRTFN concerns were adequately

accommodated. In addition to the discussion in the minority report, the majority report thoroughly identified the TRTFN's concerns and recommended mitigation strategies, which were adopted into the terms and conditions of certification. These mitigation strategies included further directions to Redfern to develop baseline information, and recommendations regarding future management and closure of the road.

45 Project approval certification is simply one stage in the process by which a development moves forward. In *Haida*, the Province argued that although no consultation occurred at all at the disputed, "strategic" stage, opportunities existed for Haida input at a future "operational" level. That can be distinguished from the situation in this case, in which the TRTFN was consulted throughout the certification process and its concerns accommodated.

46 The Project Committee concluded that some outstanding TRTFN concerns could be more effectively considered at the permit stage or at the broader stage of treaty negotiations or land use strategy planning. The majority report and terms and conditions of the Certificate make it clear that the subsequent permitting process will require further information and analysis of Redfern, and that consultation and negotiation with the TRTFN may continue to yield accommodation in response. For example, more detailed baseline information will be required of Redfern at the permit stage, which may lead to adjustments in the road's course. Further socio-economic studies will be undertaken. It was recommended that a joint management authority be established. It was also recommended that the TRTFN's concerns be further addressed through negotiation with the Province and through the use of the Province's regulatory powers. The Project Committee, and by extension the Ministers, therefore clearly addressed the issue of what accommodation of the TRTFN's concerns was

warranted at this stage of the project, and what other venues would also be appropriate for the TRTFN's continued input. It is expected that, throughout the permitting, approval and licensing process, as well as in the development of a land use strategy, the Crown will continue to fulfill its honourable duty to consult and, if indicated, accommodate the TRTFN.

IV. Conclusion

47 In summary, I conclude that the consultation and accommodation engaged in by the Province prior to issuing the Project Approval Certificate for the Tulsequah Chief Mine were adequate to satisfy the honour of the Crown. The appeal is allowed. Leave to appeal was granted on terms that the appellants pay the party and party costs of the respondents TRTFN and Melvin Jack for the application for leave to appeal and for the appeal in any event of the cause. There will be no order as to costs with respect to the respondents Redfern Resources Ltd. and Redcorp Ventures Ltd.

Appeal allowed.

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IN THE MATTER OF

BRITISH COLUMBIA TRANSMISSION CORPORATION

AND

**AN APPLICATION FOR APPROVAL OF A
TRANSMISSION SYSTEM CAPITAL PLAN F2010 AND F2011**

DECISION

July 13, 2009

Before:

**Liisa A. O'Hara, Commissioner and Panel Chair
Dennis A. Cote, Commissioner**

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COMMISSION ORDER G-87-09

APPENDICES

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challenge will be most felt in the development of load forecasts which will be required to take into account the current situation while addressing the anticipated recovery (BCTC Argument, pp. 11-12).

(ii) First Nation Consultation

The recent British Columbia Court of Appeal decisions with respect to *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)*, 2009 BCCA 67 (“*Carrier Sekani*”) and *Kwikwetlem First Nation v. British Columbia (Utilities Commission)*, 2009 BCCA 68 (“*Kwikwetlem*”) confirmed the Commission has the obligation to assess the adequacy of Crown consultation within the scheme of its regulation. The Commission, as a quasi-judicial tribunal, does not itself have a duty to consult (*Carrier Sekani*, para. 56). Rather, it is the Crown who has a legal duty to consult with aboriginal people when making decisions that may affect aboriginal rights. In fulfilling its role, the Commission will need to develop tools to assess the adequacy of Crown consultation with First Nations. This will undoubtedly have an impact not only on this Application but also the type of information that must be included in future applications.

(iii) Amendments to the Utilities Commission Act

A number of amendments affecting regulatory requirements have been made to the *Act* by the Utilities Commission Amendment Act, 2008 which received Royal Assent on May 1, 2008. With respect to these amendments, subsections 45(6.1) and 45(6.2) were repealed, sections 44.1 and 44.2 were added and additional provisions were added to section 5. Of significance to this Application is the subsection 44.2(1)(b) which states a utility may file an expenditure schedule containing “a statement of public expenditures that the public utility has made or anticipates making during the period addressed by the schedule.” This is similar to what was formally covered under subsection 45(6.1) of the *Act* with the exception that this is no longer a mandatory requirement. A utility is still bound by subsection 45(6) of the *Act* which requires a utility to file a statement (as prescribed by the Commission) of the extensions to its facilities it plans to construct at least once a year. Similarly, section 44.2 of the *Act* is not a major departure from the former



**BRITISH COLUMBIA
UTILITIES COMMISSION**

**ORDER
NUMBER** G-108-09

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IN THE MATTER OF
the Utilities Commission Act, R.S.B.C. 1996, Chapter 473

and

An Inquiry into British Columbia's Electricity Transmission Infrastructure
and Capacity Needs for the Next 30 Years

BEFORE: L.A. O'Hara, Commissioner and Panel Chair September 16, 2009
A.W.K. Anderson, Commissioner
D.A. Cote, Commissioner
M.R. Harle, Commissioner
R.K. Ravelli, Commissioner

O R D E R

WHEREAS:

- A. Section 5(4) of the Utilities Commission Act ("UCA" or "Act") provides that the British Columbia Utilities Commission ("Commission") must conduct an inquiry ("Inquiry") to make determinations with respect to British Columbia's infrastructure and capacity needs for electricity transmission for the period ending 20 years after the day the Inquiry begins, or a different period if so specified by terms of reference issued by the Minister responsible for administration of the Hydro and Power Authority Act ("Minister"); and
- B. On December 11, 2008, the Minister issued Terms of Reference for the Inquiry which identify that the general purpose of the Inquiry is for the Commission to make determinations with respect to British Columbia's electricity transmission infrastructure and capacity needs for a 30-year period commencing from the date the Inquiry begins; and
- C. The Terms of Reference for the Inquiry require the Inquiry Panel to publish its draft report and circulate the report for comments no later than June 30, 2010; and
- D. By Order G-30-09, the Commission established a Preliminary Workshop on April 17, 2009 for Participants to discuss issues related to the Terms of Reference and the process to be used for the Inquiry, and a Procedural Conference on April 27, 2009 to discuss and hear submissions on Inquiry procedures and timing; and

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- E. After the April 27, 2009 Procedural Conference, the Commission issued Order G-47-09 and a Preliminary Inquiry Schedule, which indicated that Commission staff would draft and distribute a discussion draft paper on scoping of the issues, on which other Inquiry Participants were invited to provide written comments. A Workshop for discussion of the issues was scheduled for June 18, 2009 and a second Procedural Conference, on Inquiry issues and scoping, was scheduled for June 24, 2009; and
- F. On June 17, 2009 British Columbia Hydro and Power Authority (“BC Hydro”) submitted to the Inquiry Panel, a March 25, 2009 letter to BC Hydro and the British Columbia Transmission Corporation (“BCTC”) from the Deputy Minister of Energy, Mines and Petroleum Resources, in which he asks that BC Hydro undertake consultation with First Nations on the evidence and submissions presented to the Commission by BCTC and BC Hydro. The letter also states that the Minister will consider whether First Nations’ interests and concerns related to the transmission inquiry and the potential impacts of the Commission’s determination will require further consultation before making a decision to order a regulation under s.5(7) of the UCA; and
- G. At the Procedural Conference to address the scoping issues held on June 24, 2009, several Participants addressed the issue of whether there exists, and if so to what extent, an obligation on the part of the Inquiry Panel to consult with First Nations. Those Participants who addressed it generally supported the proposal for a subsequent Procedural Conference on these matters; and
- H. The Commission, after reviewing the written comments and the oral comments at the June 24, 2009 Procedural Conference, concluded that a process including both written submissions and another procedural conference would be helpful to address the following questions:
- What, if any, is the duty to consult with First Nations and accommodate with respect to determinations of the Long-Term Electricity Transmission Inquiry?
 - If there is a duty to consult, how would that duty be fulfilled and how can it best be fulfilled such that the Panel can also fulfill its legal requirements to hold an Inquiry and complete its draft report by June 30, 2010?
- I. By letter dated June 30, 2009 (Exhibit A-16) the Commission established a process to discuss the above questions, including written submissions which were due by July 24, 2009; reply submissions by July 31, 2009; and another Procedural Conference to be held on August 18 and 19, 2009; and
- J. On August 14, 2009 the Commission issued a letter (Exhibit A-19) enclosing a list of Panel questions for parties to address during the August 18 and 19 Procedural Conference; and
- K. The Inquiry Panel has considered the written submissions and reply submissions as well as the oral submissions made during the Procedural Conference that took place on August 18 and 19, 2009, and have reached the following determinations, for the reasons set out in the attached Reasons for Decision.

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NOW THEREFORE the Commission determines as follows:

1. The Commission is functioning in a quasi-judicial capacity within the context of the long-term electricity transmission inquiry and does not have an independent duty to consult with and, if necessary, accommodate First Nations.
2. Even if the Commission is not fulfilling a quasi-judicial role within the context of the Inquiry, it does not owe an independent duty to consult.
3. The Inquiry Panel will provide First Nations with a meaningful opportunity to engage in the Inquiry to bring their concerns and their perspectives to bear on the analysis and conclusions, and intends to encourage such participation through a variety of means as discussed in Section 3.0 of the attached Reasons for Decision.

DATED at the City of Vancouver, in the Province of British Columbia, this 16th day of September 2009.

BY ORDER

Original signed by:

L.A. O'Hara
Commissioner and Panel Chair

Attachment

LONG-TERM ELECTRICITY TRANSMISSION INQUIRY
DUTY TO CONSULT WITH FIRST NATIONS
REASONS FOR DECISION

1.0 INTRODUCTION AND SUMMARY

The principal issue to be addressed in these reasons is whether there exists an independent duty on the part of the Inquiry Panel to consult with and, if necessary, accommodate First Nations with respect to the British Columbia Utilities Commission's ("BCUC", "Commission") Inquiry into British Columbia's long-term electricity transmission infrastructure needs. A secondary issue to be addressed is, if such an independent duty does not exist, how can First Nations be offered a meaningful opportunity to engage in the Inquiry in any event? The remainder of this section provides the contextual background relative to the issues. Section 2.0 discusses whether or not an independent duty to consult exists, and Section 3.0 discusses specific suggestions for facilitating the engagement of First Nations.

Section 5(4) of the Utilities Commission Act ("UCA" or "Act") provides that the Commission must conduct an inquiry to make determinations with respect to British Columbia's long-term infrastructure for electricity transmission ("Inquiry"). The Minister of Energy, Mines and Petroleum Resources ("Minister") issued Terms of Reference ("TOR") for the Inquiry on December 11, 2008.

The general purpose of the Inquiry is for the Commission to make determinations with respect to B.C.'s electricity transmission infrastructure and capacity needs for a 30-year period. In doing so, the Commission must assess the electricity generation resources in B.C. that will potentially be developed during that 30-year term, grouped by geographical location, and the most cost-effective and most probable sequence(s) of development by geographic area. However, the Commission is not to make determinations on the merits of specific generation projects or with respect to the specific routing or technology of transmission projects. Further, once determinations have been made in this Inquiry, applications for certificates of public convenience and necessity ("CPCN") or other regulatory applications will need to be filed separately for approval by the Commission.

The TOR direct the Commission to invite and consider submissions, evidence and presentations from any interested person, including First Nations. In a letter to British Columbia Hydro and Power Authority ("BC Hydro") and British Columbia Transmission Corporation ("BCTC") dated March 25, 2009 (Exhibit B2-4), the Deputy Minister of Energy, Mines and Petroleum Resources also directed BC Hydro to consult with First Nations on the evidence and submissions presented to the BCUC by BCTC and BC Hydro, as set out in the TOR, "[i]n order to inform the Minister's decision whether to order a regulation under section 5(7) of the UC Act..." ("Deputy Minister's Letter"). Section 5(7) of the UCA states that the Minister may declare by regulation that the Commission may not, during the period specified in the regulation, reconsider, vary or rescind a determination made by the Inquiry Panel. The Deputy Minister's Letter also indicates that prior to making a decision to order a regulation under s.5(7) of the UCA, the Minister will consider whether First Nations' interests and concerns related to the Inquiry, and the potential impacts of the Inquiry Panel's determinations, require further consultation.

Although the TOR identify matters that the Commission must assess and make determinations upon, Participants at the first Procedural Conference, held on April 27, 2009, identified that establishing an appropriate scope for the Inquiry would be a key step in the process (e.g. T1: 20, 31, 60, 69, 78, 82). Consequently, the Commission issued Order G-47-09 (Exhibit A-7) and a Preliminary Inquiry Schedule.

On May 21, 2009 Commission staff drafted and circulated a discussion draft paper on scoping of the issues (Exhibit A-12), on which Participants were invited to provide written comments. A scoping Workshop was held on June 18, 2009 and a second Procedural Conference, on Inquiry issues and scoping, occurred on June 24, 2009.

At the second Procedural Conference, several Participants addressed the issue of whether there exists, and if so to what extent, an obligation on the part of the Inquiry Panel to independently consult with First Nations. Those Participants who addressed the issue at the second Procedural Conference generally supported holding a subsequent procedural conference on these matters.

The Commission, after reviewing the written and oral comments at the June 24, 2009 Procedural Conference, concluded that a further process would be helpful to address the following questions:

- What, if any, is the duty to consult with First Nations and accommodate with respect to determinations of the Long-Term Electricity Transmission Inquiry?
- If there is a duty to consult, how would that duty be fulfilled and how can it best be fulfilled such that the Inquiry Panel can also fulfill its legal requirements to hold an Inquiry and complete its draft report by June 30, 2010?

By letter dated June 30, 2009 (Exhibit A-16) the Inquiry Panel established a timetable for a round of written submissions on the above questions to be followed by reply submissions and a third Procedural Conference to take place on August 18 and 19, 2009. On August 14, 2009, following receipt of the reply submissions, the Inquiry Panel issued a letter (Exhibit A-19) posing eight questions to assist in structuring the discussion at the third Procedural Conference.

After reviewing the submissions provided in writing, and orally at the third Procedural Conference, the Inquiry Panel has concluded that, for the reasons set out in Section 2.0 below, it is functioning as a quasi-judicial body in fulfilling its duties to hold the long-term electricity transmission Inquiry, as required by s.5(4) of the UCA and the Minister's TOR. The Inquiry Panel has further concluded that, as it is functioning in a quasi-judicial capacity, then it follows that it cannot owe an independent duty to consult given the requirements for procedural fairness and natural justice: *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159 ("NEB"). If the Commission were, however, found not to be functioning in a quasi-judicial role within the context of the Section 5 Inquiry, it would not automatically follow that it owes an independent duty to consult. As discussed later in these reasons, the Inquiry Panel has concluded that the legislative intent, which is implied by the recent amendments to the UCA, the TOR and the Deputy Minister's Letter, does not place upon the Commission an independent duty to consult with First Nations. The Minister has delegated the responsibility for current consultation to BC Hydro, and may request BC Hydro to undertake further consultation if it is required for the purposes of a decision by the Minister regarding the BCUC's determinations.

During the third Procedural Conference, several Participants suggested mechanisms that might be used in contributing to the fulfillment of the duty to consult, if the Inquiry Panel has such a duty, or to engage First Nations in the Inquiry if it does not. Although the Inquiry Panel has determined that it does not owe an independent duty to consult with First Nations, the Inquiry Panel intends to establish meaningful engagement to ensure First Nations have the ability to participate effectively in the Inquiry process, through a variety of means as discussed in Section 3.0.

2.0 DUTY TO CONSULT WITH FIRST NATIONS

Background

This section will address the primary issues raised in the oral and written submissions of the Participants as to whether the Inquiry Panel is acting in a quasi-judicial capacity and whether the Commission owes an independent duty to consult. In reviewing these submissions, two clear primary positions emerge amongst the Participants.

On one hand, representatives of various First Nations entities advanced the position that the Commission is not acting in a quasi-judicial capacity within the context of the Inquiry and as a Crown decision-maker it owes an independent duty to consult with First Nations. The main supporting factors advanced for this conclusion include the absence of an applicant in the Inquiry, the nature of the Commission's determinations, and what was described as the overall strategic planning character of the Inquiry. In contrast, it is argued by a number of other Participants including the B.C. Sustainable Energy Association et al. ("BCSEA"), BCTC, the Joint Industry Electricity Steering Committee ("JIESC"), and BC Hydro that the Inquiry Panel is performing a quasi-judicial function in conducting the Inquiry, which they submit precludes the Inquiry Panel from having an independent duty to consult and, if necessary, accommodate First Nations.

With the exception of the BC Old Age Pensioner's Organization ("BCOAPO") and the Commercial Energy Consumers Association of BC ("CEC"), all Participants requested that the Inquiry Panel decide the issue of whether it is acting in a quasi-judicial capacity in the context of the Inquiry.

Further, many of the Participants submitted their views concerning the level of consultation that will be owed by the Crown to First Nations in the context of this Inquiry.

Submissions

The Inquiry Panel has reviewed and considered all the submissions from the Participants. The absence of any reference to a specific submission from a Participant should not be taken as an indication that the Inquiry Panel did not consider that specific submission.

The submissions of the Treaty 8 Tribal Association ("T8TA") focus upon the legislative framework of the Inquiry for the assertion that an independent duty to consult properly lies with the Commission (Exhibit C105-2). With respect to the UCA, T8TA submits that section 5 casts the Commission in the role of an advisor to Cabinet which differs from the role it plays in other regulatory applications. Within the TOR, T8TA points to the Commission's mandate in developing what it describes as a strategic planning framework, as support for T8TA's argument that the Commission's role is one typically played by a government planning agency. T8TA submits the Commission is ultimately an agent or subordinate of the Minister impressed with all the duties that the Minister must fulfill in decisions which may adversely affect Aboriginal rights and title. T8TA submits that such duties apply both to decisions made during strategic planning phases, such as the Inquiry, and to decisions made within the regulatory process when specific projects are proposed.

In the case of the Inquiry, T8TA contends that the determinations to be made will outline the course for the regulation and development of electricity and generation transmission projects. T8TA submits these determinations are strategic planning decisions which may adversely affect its Treaty rights. It submits that such conduct has been confirmed by Canadian courts to sufficiently trigger the duty to consult with First Nations: *Wii'litswx v. British Columbia (Minister of Forests)*, 2008 BCSC 1139. T8TA further submits that pursuant to the decision in *Kwkwetlem First Nation v. British Columbia (Utilities Commission)*, 2009 BCCA 68 ("*Kwkwetlem*"), the

Crown is not permitted to defer consultation until later stages in a regulatory process. Given its assertion that the Commission owes an independent duty to consult, T8TA contends that the Commission must assess the scope and content of its duty prior to the commencement of the Inquiry and throughout. T8TA submits that the parallel consultation process undertaken by BC Hydro and BCTC should be understood as complementary to the independent consultation which the Commission should fulfill.

In its reply, T8TA submits that the quasi-judicial criteria set out in *Minister of National Revenue v. Coopers and Lybrand*, [1979] 1 S.C.R. 495 ("*Coopers & Lybrand*") leads to the conclusion that the role of the Commission within the Inquiry is not quasi-judicial (Exhibit C105-6). T8TA submits that first, while hearings are contemplated within the Inquiry, these hearings will be more investigative in nature rather than adjudicative. Second, while the determinations of the Inquiry Panel may affect the rights and obligations of various persons, rights may equally be affected by policy decisions. Consequently, this factor is not conclusive. Third, the Inquiry does not involve an adversarial dispute which must be adjudicated in a judicial or quasi-judicial manner. Finally, the T8TA asserts that within the context of the Inquiry, the Inquiry Panel is concerned not with individual cases, but with long-term energy policy development, a policy-making process characteristic of an executive or advisory role.

In their reply, the Haisla Nation and We Wai Kai Nation generally agree with T8TA and submit that within the context of the Inquiry, the Inquiry Panel is within the realm of public debate and policy-making on transmission planning (Exhibit C84-3). The Haisla and We Wai Kai Nations distinguish the role of the Inquiry Panel from the roles the Commission usually performs within the applications reviewed under the BC Court of Appeal decisions in *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)*, 2009 BCCA 67 ("*Carrier Sekani*") and *Kwikwetlem*.

Further, they submit that the role of the Inquiry Panel differs from the role of the National Energy Board, which was examined by the Supreme Court of Canada in the *NEB* decision. Haisla and We Wai Kai Nations submit that the *NEB* decision is not instructive as the Inquiry Panel is not acting in a quasi-judicial capacity in the Inquiry and further, the duty to consult flows from the honour of the Crown, not a specific fiduciary duty as was the case in the *NEB* decision. The Haisla and We Wai Kai Nations submit that the absence of a specific directive within the legislative framework does not preclude the Commission from owing the common law duty to consult (T3:430-31). They further point out that in the *NEB* decision the issue was whether to approve the issuance of export licenses, a decision-making process similar to that involved in an application for a CPCN. In support of the conclusion that the Inquiry Panel is not acting in a quasi-judicial capacity, Haisla and We Wai Kai Nations refer to case law confirming that a tribunal, such as the Oil and Gas Commission, may assume multiple roles.

In their reply, the Haisla and We Wai Kai Nations also respond to BC Hydro's application of the criteria set out in *Coopers & Lybrand* (Exhibit C84-5). With respect to the first criterion, they submit that while the Inquiry may result in a public hearing, it has not yet been conclusively determined that a hearing will occur. Second, the Inquiry lacks adversarial parties, the filing of arguments and an adversarial hearing, elements which, together, suggest a non-adversarial nature. They contend that the Inquiry Panel itself is not contemplating an adversarial process in which it will solely be weighing evidence and hearing argument. Third, the Inquiry Panel is not adjudicating a dispute within the Inquiry. Finally, while the Haisla and We Wai Kai Nations recognized that the Inquiry Panel could exercise the powers normally available to it under the UCA, they emphasize that the Inquiry Panel is not required to use such powers.

The Nlaka'pamux Nation Tribal Council, the Okanagan Nation Alliance, the shíshálh Nation, and the Tahltan Central Council (collectively "the Nations") concur with the submissions of T8TA and the Haisla and We Wai Kai Nations (Exhibit C97-3). They submit that the nature of the Inquiry is not quasi-judicial but is best understood as establishing a framework and road map for the scope and nature of energy development, pursuant to the TOR and the Inquiry Panel's Scoping Decision (Appendix A to Order G-86-09). The Nations assert that the Inquiry Panel's determinations within the Inquiry have the potential to seriously and adversely affect Aboriginal title and rights. Consequently, the Inquiry Panel must ensure that the duty to consult and accommodate is fulfilled before reaching any determinations. The Nations relied upon the Deputy Minister's Letter in support of the position that BC Hydro has no mandate or intention to fully discharge the Crown's duty to consult. Further, they submit that the *NEB* decision does not address the question of whether a tribunal may discharge the duty to consult in a non-adjudicative context such as this Inquiry.

With respect to the *Coopers & Lybrand* criteria, the Nations submit that when considered together, the criteria point to the Inquiry Panel not fulfilling a quasi-judicial role within the Inquiry. Similar to the other First Nation Participants, the Nations emphasize the absence of a dispute within the Inquiry, focusing specifically on the lack of reference to a dispute within the legislative framework (T3:438). The Nations submit that the Inquiry constitutes an information gathering exercise rather than a determination as to what rights parties possess. The Nations assert that because the Inquiry Panel is a Crown actor mandated to make determinations with the potential to adversely impact constitutional rights granted to First Nations under section 35 of the Constitution Act, 1982, it will possess the duty to consult regardless of whether it is found to be fulfilling a quasi-judicial role (T3: 439-40). Finally, the Nations submit that if there is indeed a dispute at play in the Inquiry as submitted by other Participants, it is a fundamental contradiction that the Inquiry Panel would rely upon a provincial body such as BC Hydro to put the First Nation's concerns before it (T3:446).

The Squamish Nation, Carrier Sekani Tribal Council and Lax Kw'alaams Indian Band ("Squamish et al.") generally agree with the other First Nation Participants and focus upon the absence of a dispute and the lack of sanctions or penalty to be imposed as support for their position that the Inquiry Panel is not fulfilling a quasi-judicial role within the Inquiry (Exhibit C98-2). Squamish et al. assert that in the case of the Inquiry, it is clear that the Inquiry Panel itself is the decision-maker on behalf of the Crown, by making determinations which may be irrevocable pursuant to s.5(7) of the UCA. Squamish et al. contend that consultation is to begin in the planning stages and not once determinations have already been made and matters have crystallized, and that the Deputy Minister's Letter "...misses the mark on the timing of consultation..." (Exhibit C98-2, p. 4). They submit that if the Inquiry Panel is, however, found to be acting in a quasi-judicial role, an independent duty to consult would still arise on the part of the Commission as it is a matter of constitutional law and not mandate (T3:449-50). Finally they submit that if consultation is not properly fulfilled within the Inquiry, then future consultation of other Crown agencies will need to begin from the position that future consultation is not bound by the Inquiry Panel's determinations.

The Toquaht Nation supports the positions put forth by the other First Nation Participants (Exhibit C103-2). It submits that the Inquiry is a strategic planning initiative that triggers a duty to consult on the part of the Inquiry Panel as Crown agent. Accordingly, submissions from First Nations should inform the assessments, determinations and recommendations that the Inquiry Panel eventually arrives at. Toquaht Nation suggests that if the Inquiry Panel does not find it owes an independent duty to consult, it must promptly identify which Crown actors or agencies are responsible for fulfilling the duty.

The Hwlitsum First Nation raises the argument that given the Inquiry Panel has an independent duty to consult; it cannot rely on a general public consultation forum to fulfill its consultation obligations with First Nations (Exhibit C89-4). As such, the Inquiry Panel must look to supplement its existing process with other processes and approaches.

The Shuswap-Arrow Lakes Division (the “Lakes Division”) also supports the conclusion that the Inquiry Panel is not acting as a quasi-judicial body (Exhibit C79-3-1). With reference to sections 5(4) and 5(6) of the UCA, the Lakes Division submits that the duty to consult lies with both the Minister and the Commission - a duty which cannot be delegated to BC Hydro and/or BCTC. It submits that the Minister has already failed to properly consult with respect to the creation of the TOR for the Inquiry. In fulfilling the next stages of the duty to consult, the Lakes Division has suggested that the Minister and the Commission uphold the principles put forth in the New Relationship¹ and look to develop an integrated intergovernmental structure or institution which could foster shared decision-making for land and resource planning, tenuring, and benefits sharing.

The Sto:lo Tribal Council (“STC”) supports the positions of the other First Nations Participants (Exhibit C72-4). STC submits that the determinations to be made by the Inquiry Panel are distinguishable from binding decisions typically made by quasi-judicial tribunals. STC submits that the Inquiry Panel’s role is more properly understood as being an agent of the Crown, charged with the duty to consult and accommodate. STC contends that the determinations to be made within the Inquiry will have an adverse impact upon the constitutional rights of First Nations and that the opportunity to accommodate the interests and concerns of First Nations will be lost once a determination is arrived at and accepted by the Crown. STC submits that this is an outcome which is inconsistent with the honour of the Crown.

Finally, the First Nations Energy & Mining Council (“FNEMC”) likewise submits that the Commission is assuming the role of an executive agent of the Crown in fulfilling a strategic planning role within the context of the Inquiry (Exhibit C1-8). Regardless of whether the Inquiry Panel is acting quasi-judicially, the FNEMC contends that the determinations of the Inquiry constitute a Crown activity with the potential to adversely affect Aboriginal rights and title and that role, in and of itself, gives rise to an independent duty to consult. FNEMC further submits that the TOR fail to specify that the Commission must allow First Nations to provide evidence and fail to allocate time or authorization of monies to facilitate First Nations participation. In accordance with *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 (“*Baker*”), FNEMC submits that this treatment is unequal to that established in the TOR for the load serving utilities, and is unlawful and conflicts with the principles of fairness. Further, the FNEMC relies on the *Baker* decision to argue that the content of the duty of fairness must take into account the rights of individuals affected by a decision (T3:525). Therefore, FNEMC submits that an independent duty to consult on the part of the Inquiry Panel arises with respect to the potential adverse impacts upon the section 35 constitutional rights of First Nations.

The Independent Power Producers Association of British Columbia (“IPPBC”) submits that although unlikely, the Inquiry Panel’s determinations could adversely impact the interests of First Nations (Exhibit C59-4). Further, IPPBC submits that the lack of legal clarity as to whether a duty to consult exists in the context of the Inquiry combined with the potential of the Inquiry Panel’s determinations to adversely affect First Nations, gives rise to a duty to consult. However, IPPBC submits that the Crown’s duty to consult would be more properly undertaken at the stage of capital expenditures/construction approval, not at the theoretical planning level. IPPBC asserts that the duty to consult is the obligation of BCTC and BC Hydro given the quasi-judicial function performed by the Inquiry Panel (T3:467). IPPBC submits that within the Inquiry, adversarial disputes will arise which must be adjudicated by the Inquiry Panel in a judicial or quasi-judicial manner. IPPBC further suggests that many of the

¹ http://www.gov.bc.ca/themes/new_relationship.html.

elements of CPCN applications, such as a hearing, submission of evidence and cross-examination, are present within the Inquiry. IPPBC maintains that it would prefer for First Nations Participants to provide their views concerning transmission planning directly to the Inquiry Panel at the earliest opportunity.

BCSEA asserts that the duty to consult with respect to the determinations of the Inquiry does not rest with the Inquiry Panel, but with the Provincial Crown (Exhibit C10-4). Within the context of the Inquiry, the sections of the *Administrative Tribunals Act*, S.B.C. 2004, c.45 (“ATA”) made applicable to the Commission under s.2(4) of the UCA, endow the Commission with the authority and responsibility of a quasi-judicial tribunal. For instance, s.11 of the ATA allows the Commission to create its own rules and procedures, while s.48 provides authority to make orders to maintain order at a hearing, including the right to avail the assistance of a peace officer. Section 49 of the ATA grants the Commission the ability to find a witness liable for contempt on an application to the court. Also, s.56 of the ATA provides civil immunity to members of the Commission while acting in the course of their duties. While BCSEA notes that many of the ATA powers it refers to are applicable in the context of an “application”, it submits that an “application” includes the Inquiry as the term has a different and broader meaning within the ATA. BCSEA submits that the term “application” in the ATA is similar to the ways in which the UCA uses the terms “hearing” or “proceeding”. In other words, when referring to an “application”, the ATA refers to the proceeding itself and not the method by which a proceeding is initiated.

BCSEA also points to numerous sections of the UCA which provide the Commission with quasi-judicial powers. In reply to the argument that the Inquiry is not a quasi-judicial process due to the lack of an applicant, BCSEA submits that s.82(2) of the UCA confirms that the Commission’s powers are the same in proceedings whether or not initiated by an application. Those powers are indicative of a quasi-judicial function. BCSEA also refers to the protection of the exclusive jurisdiction clause in s.105(1) of the UCA which, it argues, supports the conclusion that the Inquiry Panel will issue legally binding determinations within the Inquiry rather than mere policy advice or recommendations. BCSEA submits that under s.1 of the ATA, the term “decision” explicitly includes “a determination, an order or other decision”. BCSEA generally agrees with the comments of IPPBC and submits that the Inquiry will involve a number of disputes, that legal interests will be at stake, and that the proceeding is adversarial (T3:496-97). Finally, BCSEA emphasizes that the Inquiry Panel must maintain the independence and impartiality that the legislature intended.

The JIESC submits that while the Inquiry Panel’s determinations are important, they do not trigger a duty to consult with First Nations (Exhibit C6-3). The report to be drafted is not an authorization or approval and the determinations to be made will be of a higher conceptual nature. JIESC states that any duty that may be found to be owed will be at a preliminary level and must lie with a Crown entity other than the Commission. JIESC asserts that the Commission is barred from discharging the duty to consult as it is acting in a quasi-judicial capacity and must arrive at determinations through an impartial process that maintains procedural fairness. In support of the Inquiry Panel acting in a quasi-judicial capacity, JIESC points to the procedural fairness elements which the Inquiry has incorporated including the rules of procedure, written evidence, pre-hearing discovery through information requests, a public hearing, rights of cross-examination, an evidentiary record, and final argument. It runs contrary to impartiality and procedural fairness for a quasi-judicial tribunal to fulfill a special duty to a subset of participants before it, as was held in the *NEB* decision. To the contrary, the JIESC believes the Commission was chosen to conduct the Inquiry precisely because it is independent and would allow the Inquiry to occur within a fair and transparent structure (T3:509). JIESC contends that while there may be an absence of dispute in the case of the Inquiry, many of the traditional Commission decisions under the UCA, such as the granting of a CPCN or the approval of a rate tariff, do not entail an adjudication of rights between parties.

FortisBC Inc. (“Fortis”) submits that the *Carrier Sekani* and *Kwikwetlem* decisions stand for the authority that the Commission itself does not possess an independent duty to consult (Exhibit B3-4). In contrast to the circumstances in *Carrier Sekani* and *Kwikwetlem*, the Inquiry is not the only forum in which the adequacy of

consultation will be examined. Fortis believes that the Inquiry Panel's role within the Inquiry is to monitor the progress of BC Hydro and BCTC's parallel consultation process and assess its adequacy as the Inquiry proceeds. In the event that a duty to consult is identified on the part of the Inquiry Panel, Fortis contends that the fulfillment of the TOR and the assessment of the parallel consultation process will suffice to discharge the duty.

BC Hydro submits that the Crown's duty to consult is likely triggered as a result of the nature of some of the determinations to be made by the Commission (Exhibit B2-7). However, the quasi-judicial status of the Commission and its necessary adherence to natural justice precludes it from owing an independent duty to consult, pursuant to the *NEB* decision. BC Hydro further submits that the *NEB* decision remains determinative of the Commission's role. At the root of the problem is the inherent inconsistency of imposing Crown duties upon a board that owes a duty of good faith as the decision-maker to the parties before it. BC Hydro submits that the quasi-judicial status of the Commission is settled by the *Coopers & Lybrand* criteria. First, an oral hearing process will occur within the context of the Inquiry. Second, the determinations of the Inquiry Panel will affect the rights and obligations of persons including First Nations, BC Hydro, BCTC and Fortis. Third, the repeated references within the TOR to "evidence" support the position that the Commission is tasked to receive and evaluate evidence and, ultimately, adjudicate the need for additional transmission capability. To this end, BC Hydro submits that the powers available to the Commission under s.82(2) of the UCA resemble litigation procedures and clearly suggest that the Inquiry is an adversarial process.

BC Hydro also submits that the powers available extend to the sections of the ATA which include the authority to compel witnesses (s.34(3)), examine witnesses (s.38) and exercise powers in the event that a participant fails to comply with a Commission order or its rules of practice and procedure (s.18). Further, BC Hydro submits that the Commission is not fulfilling a policy-making function within the Inquiry, as that is a role reserved for the Provincial government, and further, that it is clear that the Inquiry Panel will arrive at decisions of a final nature. Like BCSEA, BC Hydro also refers to the term "decision" as it is defined under s.1 of the ATA and notes that the term includes "a determination". The lack of a formal applicant or the fact that the Inquiry may resemble strategic planning is not believed to be determinative.

BC Hydro submits that it is the entirety of the Inquiry regulatory process in combination with the BC Hydro and BCTC parallel consultation process which will discharge the duty to consult and maintain the honour of the Crown. It maintains that these two processes together provide First Nations with Crown consultation and direct access to the decision-maker to bring forward concerns or issues pursuant to 10(a) of the TOR. Accordingly, BC Hydro submits that the Inquiry Panel does not owe a separate or independent duty to consult in the traditional sense of direct, bilateral engagement with First Nations. BC Hydro also relied upon the decisions in *Ka'a'Gee Tu First Nation v. Canada (Attorney General)*, 2007 FC 763 and *Brokenhead Ojibway First Nation v. Canada (Attorney General)*, 2009 FC 484, and submits that a regulatory process has been recognized by the courts as sufficient to discharge the Crown's duty of consultation in addressing the specific concerns of First Nations. In BC Hydro's view, the Commission hearing process provides all the elements of consultation including the provision of: adequate notice, necessary information in a timely fashion, an opportunity to express interests and concerns, and a commitment to ensure that the interests and concerns are seriously considered and where possible, demonstrably integrated into the Inquiry Panel's ultimate determinations. BC Hydro also reminds Participants that the Minister has indicated that BC Hydro may be responsible for consulting with First Nations in respect of the Inquiry Panel's determinations. Further, the BC Hydro and BCTC parallel consultation process provides a distinct and separate process for First Nations to access information in a timely fashion and to engage the Crown utilities, all under the supervision of the Minister and Ministry of Energy, Mines and Petroleum Resources ("MEMPR").

BCTC is in general agreement with the positions of BC Hydro and BCSEA (Exhibit B1-6). BCTC submits that, in the case of the Inquiry, the Crown's duty to consult is likely triggered as the nature of the strategic determinations will lead to specific future decisions concerning transmission projects. BCTC argues that, while the Commission does not and cannot owe an independent duty to consult, a meaningful consultation process has been developed through BC Hydro and BCTC's parallel consultation process, the Commission's process itself, and a potential review by the Commission of the parallel consultation process. BCTC contends that the Commission maintains the same jurisdiction within the Inquiry that it exercises in the context of other proceedings such as CPCN approvals. BCTC relies upon the *NEB* decision for the position that a quasi-judicial body cannot be impressed with a duty that will require it to treat one of the parties before it in a preferential manner.

In response to the contrary arguments of other Participants, BCTC asserts that the *Coopers & Lybrand* criteria demonstrate that the Commission is fulfilling a quasi-judicial role within the Inquiry as follows. First, the TOR require the Commission to make determinations and assume an adjudicative function as it is weighing various factors. These determinations will indirectly, and possibly directly, affect the rights of Participants. Second, a hearing will be conducted for the purposes of receiving evidence and submissions from Participants. Third, the Commission is directed in the TOR to consider several forms of evidence. Finally, the Inquiry will proceed in accordance with the powers and procedures the Commission has for all proceedings before it, pursuant to s.82(2) of the UCA. Further, BCTC agrees with BC Hydro and BCSEA that the ATA confers various quasi-judicial powers upon the Commission and makes it clear that a "decision" includes a "determination". BCTC submits that the chosen format of the inquiry process rather than an application process does not alter the quasi-judicial nature of the Inquiry or the Commission's obligations to maintain independence and impartiality.

The Ministry of Energy, Mines and Petroleum Resources agrees with the submissions of BC Hydro and BCTC and adopts their arguments as its position (Exhibit C60-2).

The Association for Mineral Exploration BC ("AME") submits that the Inquiry Panel's determinations do not contemplate specific conduct which may adversely affect Aboriginal rights and title (Exhibit C28-3). Instead, it is the subsequent stages of planning and execution of generation and transmission projects which will trigger a duty to consult.

The CEC submits that it is unnecessary at this point for the Inquiry Panel to determine whether it owes an independent duty to consult with First Nations (Exhibit C44-3). While the law concerning consultation is evolving, it remains unclear as to whether a process such as the Inquiry will give rise to a duty to consult. CEC submits that a decision on this issue would likely be subject to legal challenge which, in turn, will make it difficult for the Commission to meet its deadline under the TOR. If the Inquiry Panel does determine that it must answer this legal question, CEC adopts the position put forth by BC Hydro. With respect to the criteria of the *Coopers & Lybrand* test, CEC submits that disputes will arise within the Inquiry, a hearing is contemplated, and the economic rights of ratepayers are at stake (T3:476-77). Therefore, the Inquiry Panel must maintain its quasi-judicial role and behave in accordance with natural justice and procedural fairness. Regardless of whether a duty to consult exists on the part of the Inquiry Panel, CEC asserts that the effective participation of First Nations in the Inquiry must be developed.

A further position was put forward by BCOAPO. BCOAPO submits that while it may not be expressly set out in the TOR, one of the factors the Inquiry Panel must take into account in reaching its determinations is the implication of First Nation territorial rights and the subsequent right of consultation and accommodation of potentially affected First Nations (Exhibit C26-3). BCOAPO submits that the Inquiry Panel itself should collaboratively engage with First Nations, to determine how First Nations' concerns can be integrated into the Inquiry's analysis. This approach exceeds the standards of typical "consultation". BCOAPO further submits that the *Coopers & Lybrand* test is a dated analysis relying upon arbitrary categorization (T3:481-82). In the case of this Inquiry, it bears characteristics of both a judicial and non-judicial process. Accordingly, BCOAPO submits that the question be reformulated to examine the mandate of the Commission and which approach to address First Nations' issues best aligns with that mandate. In conclusion, BCOAPO asserts that both the purpose and mandate of the Inquiry gives rise to a need for substantive engagement of First Nations.

INQUIRY PANEL DETERMINATIONS

1. *Is a duty to consult with and, if necessary, accommodate First Nations, triggered with respect to the determinations of the Inquiry?*

With respect to whether the Inquiry triggers a duty to consult with and, if necessary, accommodate First Nations, the Inquiry Panel finds that the Crown has knowledge, real or constructive, of existing or potentially existing Aboriginal rights and title which may be adversely affected by the Inquiry determinations. The Inquiry Panel recognizes and agrees with the majority of Participants that the nature of the Inquiry and the determinations to be made, trigger the Crown's duty to consult and, if necessary, accommodate First Nations.

2. *If a duty to consult does exist, does the responsibility for fulfilling the duty lie with the Inquiry Panel?*

Upon consideration of the submissions and legal cases included in the Books of Authorities, the Inquiry Panel determines that it is acting in a quasi-judicial capacity and not as an administrative body acting as an agent of the Crown.

a) *Coopers & Lybrand* Criteria

Coopers & Lybrand offers guidance to the Inquiry Panel in resolving the issue of whether it is acting in a quasi-judicial capacity and not as an administrative body acting as an agent of the Crown by providing a non-exhaustive list of four criteria on this issue. Cases such as the *NEB* and *Carrier Sekani* decisions, address the nature of quasi-judicial tribunals but only in the context of whether a duty to consult applies to quasi-judicial bodies and contribute little if anything to assist in separating quasi-judicial functions from those which could be best described as administrative. Similarly, while the *Baker* case was relied upon by the FNEMC for the position that a high duty of fairness is owed to First Nations, the Inquiry Panel finds that the *Baker* decision does not determine whether the Inquiry Panel is acting in a quasi-judicial capacity or as an agent of the Crown. Rather, the Inquiry Panel finds that the *Baker* decision supports the proposition that the Inquiry Panel must make its own decisions impartially and in accordance with procedural fairness.

The Inquiry Panel notes, however, that in providing the criteria the Supreme Court of Canada takes great care in pointing out that none of the questions they pose are determinative: "these are all factors to be weighed and evaluated, no one of which is determinative" (*Coopers & Lybrand*, p. 105). The Inquiry Panel's views on the four criteria are summarized below:

1. *Is there anything in the language in which the function is conferred or in the general context in which it is exercised which suggests that a hearing is contemplated before a decision is reached?*

Section 10(c) of the TOR provides the Commission with procedural options ranging from workshops and mediation to written and oral public hearings. On May 4, 2009, following the first Procedural Conference, the Commission issued Order G-47-09 with an Appendix A outlining a preliminary Inquiry schedule which includes an oral public hearing phase for early March 2010. Although the Inquiry Panel will use workshops and other mechanisms as well, it finds that an oral hearing will be required to completely and fairly address all evidence being filed.

The oral hearing will be adjudicative in nature as Participants will be given an opportunity to cross-examine other Participants on the evidence filed and make submissions based on the filed evidence and testimony.

2. *Does the decision or order directly or indirectly affect the rights and obligations of persons?*

The rights and obligations of many persons, including both Participants and others not participating in the Inquiry, may be both directly and indirectly affected by the determinations of the Inquiry Panel. Under s.4 of the TOR, the Inquiry Panel must determine various needs including the need for and timing of, additional transmission infrastructure and capacity and the supply and delivery of electricity. These determinations will impact the development of future generation and transmission, affecting the rights and obligations of both the utilities and ratepayers. Additionally, to the extent that the Inquiry Panel's determinations impact future operational resource activities occurring within British Columbia and the traditional territories of many First Nations, these determinations may have the potential to adversely affect Aboriginal rights and title.

3. *Is the adversary process involved?*

The object of the Inquiry is to make determinations with respect to British Columbia's electricity transmission infrastructure and capacity needs for the next 30 years. When the procedures and processes of the Inquiry are viewed in their entirety, the Inquiry Panel finds that they provide for a structure that is adversarial in nature. To date there are 105 registered Participants who are participating in an active intervenor status. Many Participants represent interest groups whose various views on the Inquiry Panel's determinations are likely to conflict. Some Participants will file evidence while others will cross-examine on that evidence and present their own argument in March 2010 at the oral hearing. Following the oral hearing, the Participants will be provided an opportunity to file final submissions with the Inquiry Panel which will then render its determinations based upon the evidence and submissions received. The Inquiry Panel finds that in this regard, the Inquiry is similar to the adversarial nature of other Commission proceedings.

The Inquiry Panel agrees with the submissions of BCSEA in that the Inquiry Panel's determinations will flow from a proceeding which utilizes, and complies with, various powers and requirements set out in the UCA and the ATA that are indicative of a quasi-judicial proceeding.

Further, the Inquiry Panel accepts the submission of BC Hydro that the repeated references to "evidence" within the TOR (sections 7, 8, 9 and 10(a)), indicate an onus upon the Inquiry Panel to receive and evaluate evidence, and make findings based upon that evidence. Accordingly, the Inquiry Panel finds that its role within the Inquiry as determined by the TOR, UCA and ATA is one in

which it has been asked to exercise powers of a quasi-judicial nature because the Inquiry will examine matters which are adversarial in nature.

4. *Is there an obligation to apply substantive rules to many individual cases rather than, for example, the obligation to implement social and economic policy in a broad sense?*

The Inquiry Panel agrees with BCSEA, BC Hydro and BCTC that s.1 of the ATA directs that the “determinations” of the Inquiry are to be understood as “decisions” and not mere policy recommendations.

The Inquiry Panel further recognizes that its exclusive jurisdiction as confirmed in s.105(1) of the UCA is re-affirmed by s.5(7) of the UCA in that the Minister has no authority to reconsider, vary or rescind the Inquiry determinations and instead, may only declare that the Inquiry determinations cannot be altered later by the Commission itself. Accordingly, it follows that the determinations to be made by the Inquiry Panel are beyond mere policy advice and fall within the definition of “decision” in section 1 of the ATA.

By way of a summary comment, the Inquiry Panel finds that in most regards this Inquiry is quite similar to the other quasi-judicial proceedings of the Commission.

b) Legislative Intent

In assessing whether there is an independent duty to consult with First Nations, the Inquiry Panel is of the view that even more important than the four non-exhaustive criteria addressed above is the legislative intent: “Whether an administrative decision or order is one required by law to be made on a judicial or non-judicial basis will depend in large measure upon the legislative intention.” (*Coopers & Lybrand*, p. 503). The Inquiry Panel finds that it is bound by the UCA and the TOR that are the foundation for its mandate. In *Rigaux v. British Columbia (Commission of Inquiry into the death of Vaudreuil – Gove Inquiry)*, (1998) 155 D.L.R. (4th) 716, the BC Supreme Court emphasizes the importance of the boundaries of the legal mandate. At paragraph 25, the Court states: “... a commissioner’s jurisdiction is circumscribed by the terms of reference found in the governing statute and the instrument of appointment. Even if he or she has the noblest of motives, a commissioner has no discretion to exceed those terms of reference”.

In the case of the UCA, the Inquiry Panel agrees with the submission of BC Hydro that it “is of enormous significance that in May 2008, the Legislature amended section 5 [of the Act]” (T3:528). Prior to May 2008, the Commission could only investigate and report under s.5(1) of the UCA. In effect, the Commission’s role was limited to providing “advice” to the Provincial Government. With the introduction of the amendments, the Commission must now conduct this Inquiry where it will decide and make determinations of need based on findings of fact on evidence.

The Inquiry Panel finds that with respect to the TOR, s.10(a) instructs the Commission to invite and consider the submissions and evidence of various persons and entities, including First Nations. There is no specific requirement within the TOR of any further responsibility of the Commission to discharge the Crown’s duty to consult with and, if necessary, accommodate First Nations with respect to the Inquiry’s determinations. The Inquiry Panel finds that neither the TOR nor the UCA provide the Inquiry Panel with the power to make accommodation arrangements with First Nations on behalf of the Crown. The Inquiry Panel is of the view that s.10(a) only provides the Commission with an obligation to carry out certain procedural aspects of the consultation duty owed by the Crown.

In addition, the Inquiry Panel finds that the Deputy Minister's Letter provides further assistance in understanding the TOR and the Inquiry Panel's role within the Inquiry. In the letter, the Deputy Minister instructs that BC Hydro "undertake consultation with First Nations on the evidence and submissions presented to the BCUC by the BCTC and BC Hydro". The Deputy Minister further advises that the Minister will consider whether First Nations interests and concerns, in relation to the Inquiry and the potential impacts of the determination, will require further consultation before making a decision to order a regulation under s.5(7) of the UCA. While the Deputy Minister notes that the MEMPR is not requesting BC Hydro to undertake consultation on the impact of the Commission's determination at this time, he also states that "... I request BC Hydro undertake these consultations should they be required for the purpose of any decision the Minister may make regarding a regulation".

In conclusion, the Inquiry Panel finds that the legislative intent, which is implied by the recent amendments to the UCA, the TOR and the Deputy Minister's Letter, does not place upon the Commission an independent duty to consult with First Nations. The Minister has delegated the responsibility for current consultation to BC Hydro, and has requested BC Hydro to undertake further consultation if it is required for the purposes of a decision by the Minister regarding the Commissions' determinations. However, in the Inquiry Panel's view, the regulatory process that the Inquiry Panel is responsible for will fulfill certain procedural aspects of the consultation duty owed by the Crown.

3. If a duty to consult with and, if necessary, accommodate First Nations does exist, what is the scope and content of the duty to consult?

On the issue of the scope and content of the Crown's duty to consult, the Inquiry Panel is of the view that until evidence is received, no determination can be made on this issue. The Inquiry Panel adopts the statement of the Haisla and We Wai Kai Nations in that "[i]t is premature to determine, at this stage, where, on the spectrum enunciated in *Haida*, the Crown's duty to consult with respect to the potential impacts of the Inquiry will fall" (Exhibit C83-5, p. 7).

3.0 FIRST NATIONS ENGAGEMENT

Although the Inquiry Panel has determined that it does not owe an independent duty to consult with First Nations, the Inquiry Panel intends to provide First Nations with a meaningful opportunity to engage in the Inquiry through submissions, evidence, and presentations, and to bring their concerns and their perspectives to bear on the evidence and submissions of other Participants, as well as the Inquiry Panel's assessments and determinations.

The Inquiry Panel will develop, with First Nations and other Participants, comprehensive engagement processes which are intended to address the needs of First Nations and all other Participants in a transparent and open way. The Inquiry Panel expects that the procedures to be undertaken in the course of this Inquiry will make a significant contribution toward the Crown meeting its constitutional duty to consult with and, if necessary, accommodate First Nations as the electricity transmission needs, planning, and eventual project proposal stages unfold.

Some First Nations Participants argue that the Inquiry Panel must, or at least should, establish separate consultation processes such as a separate co-panel on First Nations issues, private meetings with First Nations, or a First Nations Advisory Panel to meet separately with the Inquiry Panel. The Inquiry Panel is acutely aware of its responsibilities to ensure natural justice by acting in an impartial, independent, and fair manner, and to avoid

any apprehension of bias. The Inquiry Panel therefore does not endorse those engagement suggestions that would conflict with its responsibilities to act in an impartial, independent, and fair manner. In addition to the written submissions on the Inquiry Panel's duty to consult and/or engage First Nations, the oral submissions received at the third Procedural Conference were particularly informative for the Inquiry Panel.

There is much that the Inquiry Panel is able to do within the confines of the TOR, the UCA and the ATA. Commissioner Anderson addressed this directly in an exchange with Squamish Nation et al. He asked: "If we don't have a duty to consult, does that by definition mean that we're not able to consult? What's precluding us from doing consultation in any event?" (T4:844). Some Participants addressed this question in their oral submissions.

Some First Nations Participants were concerned about such a consultation process, identifying that consultation cannot happen by accident and the consultation that they were proposing was a constitutionally protected consultation process pursuant to section 35 of the Constitution Act, 1982. The Haisla Nation and We Wai Kai Nation assert that "the consultation that could take place within the confines of a quasi-judicial process would be an impoverished consultation process that would not meet the honour of the Crown" (T4:850). The Lakes Division asserts that, "Even if you decide that you don't have the duty to consult, I still think there is a responsibility to ensure that we have both the opportunity and the capacity to present our evidence and submissions" (T4:851).

Other Participants submit that there is an opportunity for the Inquiry Panel to undertake extensive First Nations engagement within the jurisdiction afforded to it. CEC states that even though the Inquiry Panel is a quasi-judicial body with no independent duty to consult, "what could be more honourable for a representative from the Crown but to implement all meaningful stages and steps to ensure a deep engagement with First Nations in this proceeding?" (T4:854). This sentiment was echoed by several other Participants, with the caveat that the Inquiry Panel must ensure an open and transparent process. Some Participants pointed to the flexible nature of past Commission processes and the funding and procedural options available under the UCA.

The Inquiry Panel agrees that it is able to, and should, implement many of the Participant suggestions to provide enhanced First Nations engagement in this Inquiry. First Nations participation in the Inquiry is important since it could be anticipated that some of the Inquiry Panel's determinations on long term electricity transmission needs may eventually lead to future projects which may also impact Aboriginal rights and title. However, in considering the options available to it within the confines of its jurisdiction and the rules of natural justice, the Inquiry Panel has placed considerable weight on the purpose of this Inquiry, which is to make determinations with respect to B.C.'s electricity transmission infrastructure and capacity needs for a 30-year period. Moreover, the Inquiry Panel is not to make determinations on the merits of specific generation projects or with respect to the specific routing or technology of transmission projects.

The Inquiry Panel is already committed to undertaking Regional Sessions in October and November of this year. These sessions in regional centres are open to all Participants and the public. As with Regional Sessions in other Commission hearings, the Sessions are relatively informal and Participants wishing to make statements without being cross-examined are allowed to do so.

Some Participants note that the available information base at the time of these Sessions will include the September information filings but not the evidentiary filings. Therefore, in addition to the normal process of written information requests and submissions, the Inquiry Panel intends to undertake a second round of Regional Sessions in January 2010 to ensure the opportunity to comment on actual proposals. The Inquiry Panel recognizes that some First Nations would prefer that it hold private meetings at their communities. The Inquiry Panel, however, must avoid any perception or apprehension of bias from private meetings. The Inquiry Panel

has identified some initial actions it will consider, as discussed below, in order to improve the opportunities for First Nations to engage in the Inquiry. The Inquiry Panel also recognizes that it is still early in the Inquiry process and no evidence has yet been filed. Therefore, the Inquiry Panel may consider modification of and/or additional engagement activities as the Inquiry evolves.

1. First Nations Phase

Some Participants suggest that the Inquiry could be conducted in phases to allow for a specific phase focused on transmission and other issues important to First Nations. The Inquiry Panel agrees. In addition, the Inquiry Panel will consider matters such as location(s) where this phase of the Inquiry should be held, whether these proceedings should be less formal and structured, and whether specific First Nations scenarios should be developed and reviewed in this phase. The Inquiry Panel welcomes submissions from Participants on this issue by October 7, 2009.

2. First Nations Consultant(s)

Many First Nation Participants and other Participants encourage the Inquiry Panel to obtain expert assistance regarding First Nations issues in this Inquiry. JIESC and other Participants suggest that, pursuant to s.8 of the UCA, the Commission could appoint or engage persons having special or technical knowledge necessary to assist the Inquiry Panel in carrying out its functions. The Inquiry Panel will therefore seek to engage a First Nations consultant or consultants to assist Commission staff and the Inquiry Panel to engage effectively with First Nations so as to better understand First Nations issues in this Inquiry. The Inquiry Panel welcomes proposals from Participants regarding the identity of potential consultants by October 7, 2009.

3. Participant Assistance Cost Awards (“PACA”)

Many Participants comment that the normal practice for PACA funding creates a barrier to effective participation by First Nations in the Inquiry. Often, First Nations do not have the financial resources to pre-fund the technical resources they need, even if they could anticipate PACA funding after the completion of the Inquiry. To overcome this barrier, some Participants suggest that the Commission’s PACA Guidelines are only guidelines and that they already provide latitude for pre-funding in exceptional circumstances.

The requests for funding are not only for legal counsel and case managers to participate in the Inquiry proceedings, but also to develop studies and evidence to submit to the Inquiry Panel. One concrete example was provided by the Lakes Division:

“We're just looking to be able to have some of the resources that both B.C. Hydro and BCTC have at their disposal, so that we can bring our evidence up to the same level so that we're on the same playing field with them.” (T4:851-852)

The Inquiry Panel wishes to overcome these barriers to effective participation in the Inquiry. It is considering an expedited PACA approval process and given the unique circumstances of this Inquiry, the Inquiry Panel will also consider detailed requests to pre-fund necessary studies in support of relevant evidence to be submitted to the Inquiry. The Inquiry Panel will provide more detailed comments soon in response to the PACA budgets filed by Participants in August.

4. Draft Report for Comment

Some First Nations Participants request time to review and comment on the draft Inquiry Report. Section 12 of the TOR already provides an initial period of 30 days to receive written comments on the draft Inquiry Report and a further period to allow comments on those initial written comments. Thereafter, the Inquiry Panel is to incorporate, as it considers appropriate, the comments and responses into the Inquiry Report.

Although some First Nations Participants preferred a 45 or even a 60 day comment period, the Inquiry Panel is of the view that it is bound by the time limit set in the TOR.

5. First Nations Advisory Panel (“Advisory Panel”)

The Inquiry Panel heard several variations regarding an Advisory Panel and how it would interact with the Inquiry Panel. Some of the suggestions were premised on the assumption that the Commission is an agent of the Crown and owes an independent duty of consultation to First Nations. The Inquiry Panel has determined it does not owe an independent duty to consult and must act within the confines of its jurisdiction as provided by the UCA and the TOR, and in accordance with the rules of natural justice. The Inquiry Panel accepts the arguments of JIESC and others that there is no jurisdiction for the Commission to appoint an Advisory Panel to sit as an equal or private advisor to the Inquiry Panel (T4:706,719,738).

Nonetheless, the Inquiry Panel is open to suggestions on how an Advisory Panel, acting as an independent Participant in this Inquiry, might assist the Inquiry Panel, First Nations Participants, and other Participants within this Inquiry. For example, how could an Advisory Panel assist the Inquiry’s engagement process, help with the First Nations phase of the Inquiry, and develop First Nations scenarios?

Several First Nations Participants suggest that it is too early for them to specify the makeup and role of such a panel, and offer to develop terms of reference and submit a formal proposal (T4:672,681). BC Hydro endorses the Nations’ suggestion for development of a transparent draft terms of reference to be circulated to all parties for comment (T4:740). BC Hydro submits that the composition of the Advisory Panel must include ratepayer participation (T4:741).

The Inquiry Panel agrees with the First Nations Participants that the makeup of the Advisory Panel should be limited to First Nations representatives. The Inquiry Panel encourages the First Nations Participants to propose terms of reference for an Advisory Panel, including membership, and a description of how an Advisory Panel could assist First Nations engagement in the Inquiry. The Inquiry Panel requests First Nations Participants to submit any proposal(s) no later than October 14, 2009.

6. BC Hydro/BCTC Parallel Consultation Process

The Inquiry Panel intends to keep itself informed of the adequacy of the BC Hydro and BCTC parallel consultation process. First Nations Participants were critical of the process to date, particularly with the quality of the information shared and a lack of meaningful discussion. BC Hydro responded to the criticism, stating:

“It is true that Phase 1 was largely the provision of – well, was the provision of information by the utility to First Nations, but that’s to be expected. We were explaining what the Section 5 inquiry is and how our process fed into that.

Phase 2 will be much more interactive so it won’t be just the utilities providing information. We’ll be welcoming feedback, and I’ve already told you that with respect to the resource options and in particular the filters, that’s something we’re looking to First Nations for in Phase 2.” (T4:866).

BC Hydro went on to explain that a number of First Nations had requested one-on-one consultation but that was not practical with over 200 First Nations and Tribal Councils. However, BC Hydro further stated that, as the potential determinations become more geographically specific, BC Hydro might depart from its regional sessions and meet with individual First Nations in those geographic regions.

The Inquiry Panel must remain adequately informed regarding the parallel process and therefore directs BC Hydro and BCTC to file a joint monthly report on the process commencing October 1. These reports are to be substantive reports on what has been undertaken in the preceding month and a description of what is planned in the upcoming months. The October 1 report should also explain how the Phase 2 sessions will be more interactive to engage First Nations in discussion of options and First Nations scenarios.



National Energy Board

Reasons for Decision

Esso Resources Canada Limited

Shell Canada Limited

Gulf Canada Resources Limited

GH-10-88

August 1989

Gas Exports

National Energy Board

Reasons for Decision

In the Matter of

Esso Resources Canada Limited

Shell Canada Limited

Gulf Canada Resources Limited

Application Pursuant to Part VI of the National
Energy Board Act for Licenses to Export
Natural Gas

GH-10-88

August 1989

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Abbreviations

A&S	Alberta and Southern Gas Co. Ltd.
Act, the	National Energy Board Act
AGT	Algonquin Gas Transmission
AIP	Dene/Metis Agreement-in-Principle
ANGTS	Alaska Natural Gas Transmission System
ANR	ANR Pipeline Company
Applicants, the	Esso, Shell and Gulf
Board, the	National Energy Board
CARC	Canadian Arctic Resources Committee
CIG	Channel Industries Gas Company
COGLA	Canadian Oil & Gas Lands Administration
Consumers	Consumers' Gas Company Ltd., The
CRND	Canadians for Responsible Northern Development
CYI	Council for Ykon Indians
Dene/Metis	The Dene/Metis Negotiations Secretariat or The Dene Nation and The Metis Association of the Northwest Territories
DIZ Society	Beaufort Mackenzie Development Impact Zone Society
DSTs	drill stem tests
EGS	Enron Gas Supply Company
EIA	export impact assessment
Enron	Enron Corp.
Esso	Esso Resources Canada Limited
ETNG	East Tennessee Natural Gas Co.
Foothills	Foothills Pipe Lines (Yukon) Ltd.
GMI	Gaz Métropolitain, inc.
GNWT	Government of the Northwest Territories
Greater Winnipeg	Greater Winnipeg Gas Company
GRI	Gas Research Institute
GSC	Geological Survey of Canada
Gulf	Gulf Canada Resources Limited
Hearing, the	GH-10-88 Hearing

ICG	ICG Utilities (Ontario) Ltd.
IGUA	Industrial Gas Users Association
IRC	Inuvialuit Regional Corporation
LDC	local distribution companies
LNG	liquified natural gas
MGT	Midwestern Gas Transmission Company
NEB	National Energy Board
NOVA	NOVA Corporation of Alberta
Ontario	Minister of Energy for Ontario
October 1986 Report	Canadian Energy Supply and Demand, 1985-2005, October 1986
PG&E	Pacific Gas and Electric Company
PITCO	Pacific Interstate Transmission Company
Quebec	Le Procureur général du Québec
Shell	Shell Canada Limited
September 1988 Report	Canadian Energy Supply and Demand, 1987-2005, September 1988
SoCal	Southern California Gas Company
SOCL	social opportunity cost of labour
TCPL	TransCanada PipeLines Limited
TEGPL	Texas Eastern Gas Pipeline Company
Tenneco	Tenneco Gas
Tennessee	Tennessee Gas Pipeline Company
Texas Eastern	Texas Eastern Transmission Corporation
Tuktoyaktuk	Hamlet of Tuktoyaktuk
Union	Union Gas Limited
WCSB	Western Canada Sedimentary Basin
WGML	Western Gas Marketing Limited
YTG	Government of the Yukon Territory

Units

$10^3\text{m}^3/\text{d}$	thousands of cubic metres per day
10^6m^3	million cubic metres
$10^6\text{m}^3/\text{d}$	millions of cubic metres per day
10^9m^3	billion cubic metres
bcf	billion cubic feet
EJ	exajoule = 10^{18} joules
GJ	gigajoule = 10^9 joules
hp	horsepower
km	kilometres
m	metres
mi	miles
MMbtu	million British thermal units
MMcfd	millions of cubic feet per day
MW	megawatt = 10^6 watts
PJ	petajoule = 10^{15} joules
Tbtu	trillion British thermal units
Tcf	trillion cubic feet

Conversion Factors

1 cubic metre of natural gas (101.325 kilopascals and 15°C)	= 35.301 cubic feet (14.73 psia and 60°F)
1 cubic metre of condensate (equilibrium pressure and 15°C)	= 6.29 barrels of condensate (equilibrium pressure and 60°F)
1 gigajoule (GJ)	= approx. 0.95 million Btu, or 0.95 thousand cubic feet of natural gas at 1000 Btu/cf
1 petajoule (PJ)	= approx. 0.95 trillion Btu, or 0.95 billion cubic feet of natural gas at 1000 Btu/cf
1 exajoule (EJ)	= approx. 950 trillion Btu, or 0.95 trillion cubic feet of natural gas at 1000 Btu/cf
1 metre	= 3.281 feet
1 kilometre	= 0.621 miles
1 km^2	= 0.386 square miles
1 mw	= 1341 horsepower

Recital and Appearances

IN THE MATTER OF the *National Energy Board Act* and the Regulations made thereunder; and

IN THE MATTER OF applications by Esso Resources Canada Limited, Shell Canada Limited and Gulf Canada Resources Limited for licences under Part VI of the *National Energy Board Act* to export natural gas from the Mackenzie Delta.

HEARD at Ottawa, Ontario on 10, 11, 12, 13, 24, 25, 27 April and at Inuvik, N.W.T. on 18, 19, 20 April 1989.

BEFORE:

J.P. Jenkins	Presiding Member
J.-G. Fredette	Member
D.B. Smith	Member

APPEARANCES:

D.G. Hart, Q.C.	Esso Resources Canada Limited;
D.G. Davies	Shell Canada Limited; and
	Gulf Canada Resources Limited
T. Detlor	Beaufort Mackenzie Development Impact Zone Society
F. Bregha	Canadian Arctic Resources Committee
G.F. Paschen	Canadians for Responsible Northern Development
C.C. Buchanan	Canadian Petroleum Association
J. Allen	Council for Yukon Indians
G.W. Bell	Dene/Metis Negotiations Secretariat
P.C.P. Thompson, Q.C.	Industrial Gas Users Association
J.M. Evoy	Northwest Territories Federation of Labour
A.A. Fradsham	Alberta and Southern Gas Co. Ltd.
S.G. Trueman	Amoco Canada Petroleum Company Ltd.
M.L. Pillman	
R.J. Harrison	ANR Pipeline Company
T.G. Kane	
J.H. Farrell	Consumers' Gas Company Ltd., The
A. Wyche	Enron Gas Supply Company
J. Lutes	Foothills Pipe Lines (Yukon) Ltd. and
B. Pierce	Westcoast Energy Inc.
L.-C. Lalonde	Gaz Metropolitan, inc.
R. Lassonde	

J.S. Bulger	
J.D. Brett D.M.S. Geller	Greater Winnipeg Gas Company and ICG Utilities (Manitoba) Ltd.
D.K. Wilson J.H. Smellie	ICG Utilities (Ontario) Ltd.
L. Shafer	Interprovincial Pipe Line Company
T. Zuorro R. Gruben	Inuvialuit Regional Corporation
P. Olson	Murphy Oil Canada Limited
J.W. Harrison	Norcen Energy Resources Limited
B. Christie	Northwest Territories Power Corporation
J. Hopwood, Q.C.	NOVA Corporation of Alberta
W.M. Smith, Q.C. D.L. Huard	Pacific Interstate Transmission Company and Southern California Gas Company
L. Meyer	Pan-Alberta Gas Ltd.
C. Worthy	Petro-Canada Inc.
D.G. Gibson	Polar Gas Limited
N.J. Schultz C. Latimer	Tennessee Gas Pipeline Company
A.S. Taber, Jr. J.F. Weiler	Texas Eastern Transmission Corporation
S. Koskie A.	TransCanada PipeLines Limited
A. Mudryj, Q.C.	Union Gas Limited
E.B. McDougall	Washington Natural Gas Company
J. McNamara	Alberta Petroleum Marketing Commission
R. Milner	British Columbia Petroleum Corporation
J. Hill	Town of Inuvik
R. Hill	Inuvik Chamber of Commerce
W. Firth	Hamlet of Fort McPherson
A. Aviugana	Mackenzie Delta Beaufort Sea Regional Land Use Planning Commission
S. Freitag	Government of the Northwest Territories
V. Black W. Whicher	Minister of Energy for Ontario
G.A. Trudel J. Robitaille	Le Procureur général du Québec
L. Cabott	Hamlet of Tuktoyaktuk

R. Pokiak	
T. Detlor	City of Yellowknife
G. Michener, Q.C.	Government of the Yukon
E. Blondin	On her own Behalf
T. Butters	On his own Behalf
J. Churcher	On his own Behalf
R. Binne	Porcupine Caribou Management Board
B. Archie	
J. Cardinal	Inuvik Native Band
R. Bruce	Old Crow Indian Band
S.K Fraser	Board Counsel

Chapter 1

Introduction

1.1 The Applications

By applications dated 21 September 1988, Esso Resources Canada Limited ("Esso") and Shell Canada Limited ("Shell") applied to the National Energy Board (the "Board" or "NEB") for licenses, under Part VI of the *National Energy Board Act* (the "Act"), to export natural gas from the Mackenzie Delta to the United States. Similarly, by an application dated 8 February 1989, Gulf Canada Resources Limited ("Gulf") applied to the Board for a licence, under Part VI of the Act, to export natural gas from the Mackenzie Delta to the United States.

Esso, Shell and Gulf (collectively called the "Applicants") requested licenses for the period commencing 1 November 1996 and ending on the 31 October 2000, provided that if the exports commence by 31 October 2000, the licence term would extend for a period of 20 years from November 1 of the year in which the exports commenced.

Esso proposes to export 144 billion cubic metres (5.1 trillion cubic feet), Shell proposes to export 25 billion cubic metres (0.9 billion cubic feet) and Gulf proposes to export 91 billion cubic metres (3.2 trillion cubic feet) of natural gas from reserves in the Mackenzie Delta.

These are the first applications the Board has dealt with for the export of natural gas from the Mackenzie Delta and as such are the first export applications dealing with major frontier development.

The Applicants have entered into Precedent Agreements with several buyers in the United States who have expressed an intention to enter into long-term contracts by 30 June 1990 for the purchase of a share of the gas. Some Canadian customers have had discussions with the Applicants regarding the purchase of Delta Gas.

New pipeline facilities would have to be built to connect Mackenzie Delta reserves to existing systems in southern Canada. The Applicants stated that, if an independent pipeline company were unable to offer satisfactory and competitive service in a timely manner, one of them would be prepared to play a lead role in developing an acceptable system.

The Applicants stressed that to support such a transportation facility, it would be necessary to operate a large volume system at initial full capacity. Introduction of such a volume directly and physically into the domestic market, in the Applicant's view, would result in the displacement or the disruption of supplies from the conventional production areas of western Canada. According to the Applicants, direct access to the much larger U.S. market is, therefore, essential for the development of Delta gas and associated pipeline facilities.

The Applicants contended that securing export licences is a necessary first step in the lengthy process of obtaining other regulatory approvals, finalizing marketing and transportation arrangements and actually producing the gas.

Interventions were received from some 60 interested parties including companies, associations, individuals and provincial governments. Many of these parties participated in the public hearing which was held in Ottawa from 10 to 13 April 1989, in Inuvik from 18 to 20 April 1989, and again in Ottawa on 24, 25 and 27 April 1989. The Board also received several letters of comment.

1.2 The Market-Based Procedure

Section 118 of the Act requires the Board, in considering an application for a licence to export gas, to have regard to all considerations that appear to it to be relevant. In particular, the Board must satisfy itself that the quantity of gas to be exported does not exceed the surplus remaining after due allowance has been made for reasonably foreseeable Canadian requirements, taking account of trends in discovery.

In complying with the requirements of Section 118 of the Act, the Board uses its Market-Based Procedure. This procedure includes consideration of complaints, if any, under the complaints procedure; an export impact assessment ("EIA"); and other factors which the Board considers relevant in its determination of the public interest including net benefits to Canada, the Applicants' supply as it relates to reserves and productive capacity, upstream and downstream transportation arrangements and markets.

The *complaints procedure* provides an opportunity for Canadian gas-users to object to an export proposal on the grounds that they have not been able to contract additional gas supplies under similar terms and conditions, including price, to those in the export licence application.

Several views were put forward regarding the complaints procedure and whether or not it could work in the unique circumstances of these applications. This is discussed in more detail in Chapter 5.

The purpose of the *export impact assessment* is to allow the Board to determine whether a proposed export is likely to cause Canadians major adjustment difficulties in meeting their energy requirements at fair market prices.

The Board considers several *matters of public interest* to be relevant in examining these applications, including:

- specific Northern issues such as the Dene-Metis land claim and benefits to Northerners;
- the Applicants' reserves and productive capacity, including the potential for additional gas supply in the Mackenzie Delta-Beaufort Sea region and the supply costs of northern gas;
- the anticipated transportation and other costs related to at least one possible pipeline facility for movement of the gas;
- the nature of the markets and associated gas sales arrangements including local supply for Northerners; and
- the net benefits to Canada from the sale of the proposed exports.

1.3 Canadian Arctic Resources Committee Motion

Canadian Arctic Resources Committee ("CARC") filed a motion which was dealt with at the outset of the hearing requesting that the Board not make a determination about whether or not the proposed exports are in the public interest. CARC suggested that the Board could not make an informed decision regarding whether the applications before it were in the public interest without hearing detailed evidence on pipeline routing, design and costs. As well, CARC believed that granting export licences now would be inconsistent with the Board's surplus determination policy.

The Board denied CARC's Motion because it believed that the request went to the very question which the Board would have to determine at the end of the bearing. The Board stated that a determination as to whether the proposed exports were in the public interest could only be made after hearing and testing the Applicants' case and the evidence and submissions of Intervenors.

Chapter 2

Gas Supply

2.1 Established Reserves

The Applicants provided estimates of reserves for those fields from which each intends to produce natural gas for its proposed export. The Board has analyzed each Applicant's supply data and prepared its own estimate of established gas reserves. Table 2-1 compares the Board's reserves estimates with those of the Applicants.

The Board's analysis involved a detailed review of the available geological and engineering data for both the Applicants' fields and the Delta region. Extensive reliance was placed upon the Applicants' submitted geophysical data and interpretations, as well as analogies to other known areas such as the American Gulf coast. Gas reserves were identified as associated, non-associated or solution.

Probability curves were used to estimate the established gas reserves. A typical probability curve represents all possible reserves estimates, because of the range of all input variables, including area, pay thickness, porosity, gas saturation, recovery factor, gas deviation factor, temperature, pressure and surface loss. A reserves estimate in the low probability range (10 percent) has more uncertainty and higher risk, and thus is more speculative than a reserves estimate in the high probability range (90 percent). The low probability reserves estimate is usually much larger than the high probability reserves estimate. The Board adopts the industry practice of using the median or most likely probability. In most cases, the 50 percent probability reserves estimate was adopted.

Table 2-1

**Comparison of Estimates of Established Reserves
March, 1989**

	Billions of Cubic Metres (Bcf)							
	Non-associated ¹		Associated ²		Solution ³		Total	
Esso	139.8	(4,935)	4.7	(166)	0.0	(0)	144.5	(5,101)
Gulf	93.0	(3,283)	18.3	(646)	8.0	(282)	119.3	(4,211)
Shell	29.1	(1,027)	0.0	(0)	0.0	(0)	29.1	(1,027)
Applicants' Total	261.9	(9,245)	23.0	(812)	8.0	(282)	292.9	(10,339)
NEB Total	263.2	(9,291)	22.4	(791)	10.5	(371)	296.1	(10,453)

1 Non-associated gas is that gas not in contact with crude oil in the reservoir.

2 Associated gas is that gas, commonly known as gas cap gas, which overlies and is in contact with crude oil in the reservoir.

3 Solution gas is that gas in solution with crude oil in the reservoir at original reservoir conditions and which is normally produced with the crude oil.

The larger, well controlled and well defined gas fields exhibit less variance between the high and low probability estimates than do the small, less well defined gas fields. Likewise, for the large gas fields there is excellent agreement between the Applicants' and the Board's estimates of established gas reserves while there are large differences in gas reserves estimates for some of the small sparsely controlled gas fields. Nevertheless these differences are not numerically large and are often compensating. In total, despite the inherent uncertainties in estimating established reserves in multi-zone, faulted reservoirs such as those in the Delta, there is excellent agreement between the Applicants' and the Board's estimates as shown in Table 2-1 and Tables 2-2 through 2-4.

Esso

Esso's reserves estimate of 144.5 10⁹m³ (5.1 Tcf) includes both associated and non-associated gas reserves, but does not include solution gas reserves. The associated gas reserves represent about 3.3 percent of Esso's total supply. In developing production forecasts, Esso assumed that economically producible oil reserves would have been depleted before production of the associated gas cap would begin. The Board considers this to be a fair assumption. However, in the Board's opinion, the associated gas reserves in the Arnak, Hansen and Itiyok Fields are too small to be deemed established, and only the non-associated gas reserves in those fields are included in Tables 2-1 and 2-2. The differences in the gas reserves estimates for the Arnak and Hansen fields are due mainly to the area factor; as well, the areas determined by Esso for some of the Kadluk pools seem excessive.

Esso used gas recovery factors ranging from 75 percent for relatively thin gas sands overlying water, to 89 percent for thick sands with no aquifers. Reservoirs with down-dip water zones were assigned recovery factors between these two values, depending on the distance from and the quality of the aquifer.

Table 2-2
Comparison of Estimates of Established Reserves - Esso
March, 1989

Billions of Cubic Metres (Bcf)					
Field	Gas Type	Esso		NEB	
Arnak	Non-associated	0.6	(21)	0.5	(18)
	associated	0.8	(28)	0.0	(0)
Hansen	Non-associated	0.9	(32)	6.4	(226)
	associated	0.7	(25)	0.0	(0)
Issungnak	Non-associated	29.0	(1,024)	27.8	(981)
	associated	2.7	(95)	3.8	(134)
Itiyok	Non-associated	2.6	(92)	4.1	(145)
	associated	0.5	(18)	0.0	(0)
Kadluk	Non-associated	6.6	(233)	5.0	(177)
Mallik	Non-associated	2.8	(99)	1.4	(49)
Netserk	Non-associated	3.9	(138)	2.3	(81)
Taglu	Non-associated	86.5	(3,053)	86.5	(3,053)
Tuk Cret.	Non-associated	6.8	(240)	6.4	(226)
Total	Non-associated	139.8	(4,935)	140.4	(4,956)
Total	all types	144.5	(5,100)	144.2	(5,090)

Note: Figures may not add due to rounding.

Gulf

Gulf estimates that the three fields in its application contain $119.3 \times 10^9 \text{m}^3$ (4.2 Tcf) of established gas reserves (Table 2-3). This volume includes associated, non-associated and solution gas reserves. Gulf has applied to export only its non-associated gas reserves which it estimates at $93.0 \times 10^9 \text{m}^3$ (3.3 Tcf). Gulf used a recovery factor of 80 percent for all pools in its application. This estimate may be slightly conservative.

In the Ya Ya North and Ya Ya South fields, Gulf used water saturations between 70 and 80 percent for some reservoirs with gas flow rates as high as $158 \times 10^3 \text{m}^3/\text{d}$ (5-6 MMcfd) with no water recovery.

These anomalously high apparent water saturations may be due to the shaly nature of the particular reservoirs, and are likely the reason for the conservative gas reserves estimates.

Shell

Shell included only non-associated gas reserves in the Niglintgak and Kumak fields in its application; these reserves, totalling some $29.1 \times 10^9 \text{m}^3$ (1.0 Tcf), are shown in Table 2-4.

Shell used a recovery factor of 85 percent for all but the "G" sand in the Niglintgak field even though its studies indicated some reservoirs may have recovery factors as high as 90 percent.

Table 2-3

**Comparison of Estimates of Established Reserves - Gulf
March, 1989**

Billions of Cubic Metres (Bcf)					
Field	Gas Type	Gulf		NEB	
Amauligak	Non-associated	37.0	(1,306)	37.5	(1,324)
	associated	18.3	(646)	18.6	(657)
	solution	8.0	(282)	10.5	(371)
Parsons	Non-associated	51.7	(1,825)	51.0	(1,800)
Ya Ya North	Non-associated	1.6	(56)	2.1	(74)
Ya Ya South	Non-associated	2.7	(95)	3.3	(116)
Total	Non-associated	93.0	(3,283)	93.9	(3,315)
Total	all types	119.3	(4,211)	123.0	(4,342)

Table 2-4

**Comparison of Estimates of Established Reserves - Shell
March, 1989**

Field	Gas Type	Billions of Cubic Metres (Bcf)			
		Shell		NEB	
Niglintgak	Non-associated	27.5	(971)	27.5	(971)
Kumak	Non-associated	1.6	(56)	1.4	(49)
Total		29.1	(1,027)	28.9	(1,020)

A recovery factor of 75 percent was assumed for the "G" sand because the thin gas column appears to be underlain by water.

Summary

A comparison of the reserves estimates, presented in Tables 2-2 to 2-4, shows that each Applicant has sufficient reserves to satisfy its export request.

2.2 Possible and Potential Reserves

The Applicants each carry some possible reserves on their controlled lands in the Mackenzie-Beaufort region, although none were included in their proposed export volumes. Gulf and Shell stated that an estimate of their possible reserves would equate to a few percent of their total estimated established reserves and stated that they also expect some appreciation of reserves on their lands. Esso, however, has identified both possible and potential reserves totalling some $120 \times 10^9 \text{m}^3$ (4.2 Tcf) in its fields; it estimates that, at a reasonable risk level, it expects $57 \times 10^9 \text{m}^3$ (2.0 Tcf) could be added to its fields.

At this time each of the Applicants is both carrying out and planning exploration and drilling programs on the lands they hold in the region. They noted that after 1991, with the expiry of existing land rights, future exploration activity would be in part dependent upon what mechanisms exist for land sales.

The Applicants concurred with estimates, published by both the Canadian Oil & Gas Lands Administration ("COGLA") and the Geological Survey of Canada ("GSC"), of $1\ 600 \times 10^9 \text{m}^3$ (56.5 Tcf) of undiscovered potential for the Mackenzie-Beaufort region. Table 2-5 is a summary of the GSC estimates. The data in Table 2-5 are based on the assumption that $1\ 630$ to $2\ 070 \times 10^9 \text{m}^3$ (57.5 to 73.1 Tcf) of gas may exist in the Mackenzie-Beaufort region at a 75 to 25 percent probability range with a mean expectation of some $1\ 926 \times 10^9 \text{m}^3$ (68.0 Tcf) in the various areas of the region.

The Board believes that the most likely source of additional reserves in the near term will be the "Onshore & Shallow Offshore" and the "Offshore Delta" areas of the region. Although the "West Beaufort" and the "Deep Water & Other" areas are the least explored and have numerous untested

structures, severe conditions, such as water depths to 100 metres (330 feet) and winter ice, may make it impossible to produce reserves economically in those areas. Nevertheless, even without the potential reserves from these two areas, there would still remain 1 038 10⁹m³ (36.6 Tcf) of discovered and undiscovered gas resources in the remaining areas.

The construction of a pipeline into this region would undoubtedly stimulate exploration and development of the undiscovered gas potential. Even a conservative realization of undiscovered potential would keep gas flowing at the proposed rates for many years beyond the export period.

Table 2-5

**Mackenzie Delta - Beaufort Sea
Natural Gas Resources at the Mean Expectation Level¹**

Billions of Cubic Metres (Tcf)

Area	Discovered		Undiscovered	
Onshore & Shallow Offshore	211.9	(7.48)	409.6	(14.46)
Offshore Delta	93.2	(3.29)	322.9	(11.40)
West Beaufort	0.0	(0.0)	354.1	(12.50)
Deep Water & Other	<u>24.9</u>	<u>(0.88)</u>	<u>501.4</u>	<u>(17.70)</u>
Totals	330.0	(11.65)	1,588.0	(56.06)

¹ GSC open file 1926, Petroleum Resources of the Mackenzie Delta - Beaufort Sea, dated 1988.

2.3 Productive Capacity

Each Applicant provided forecasts of expected productive capacity from their lands in the Mackenzie-Beaufort region. By analyzing drill stem tests ("DSTs") the Applicants were able to assign suitable production rates to each field and determine a reasonable tie-in schedule to satisfy overall requirements.

The Board prepared projections of productive capacity from the established reserves listed in Tables 2-2 to 2-4 of Chapter 2.1 using both the basic reservoir and test data supplied by the Applicants and the Applicants' proposed tie-in schedules.

Table 2-6 is a comparison of the Applicants' and the Board's overall productive capacity projections with comparisons for each Applicant found in Appendix Tables A-1 to A-3.

Figure 2-1 compares the total proposed annual export levels with both the Applicants' and the NEB's projections of overall productive capacity.

Generally the Board's estimates of productive capacity fell short of the Applicants' estimates, particularly those of Gulf and Shell. The Board believes this is due primarily to the limited nature of the flow data available. Due to the cost of carrying out production tests in these remote areas, most test information was derived from DST data which tend not to give an accurate picture of well capability. The Board anticipates that before production commences more extensive flow testing would occur in these fields. Supply would, of course, be reassessed in any facility hearing for the transportation of the gas.

Most of the gas reserves supporting the Applicants' requests are contained in very good to excellent reservoirs which generally exhibit productive capacities much higher than a normal 20 year contract rate dictates. Zones have been tested at rates up to $1\,400\,10^3\text{m}^3/\text{d}$ (49.4 MMcfd) with calculated absolute open flows up to $20\,388\,10^3\text{m}^3/\text{d}$ (720 MMcfd).

Considering the production rates assumed by the Applicants, the size of the reserves, the nature of the reservoirs and the substantial potential for reserves additions in the area, the Board believes that the Applicants' projected rates can be achieved, and the Applicants will have sufficient supply to meet their export requirements.

Figure 2-1
Comparisons of Estimates of Productive Capacity
for the Mackenzie-Beaufort Region

FIGURE 2-1

COMPARISONS OF ESTIMATES OF PRODUCTIVE CAPACITY FOR THE MACKENZIE-BEAUFORT REGION

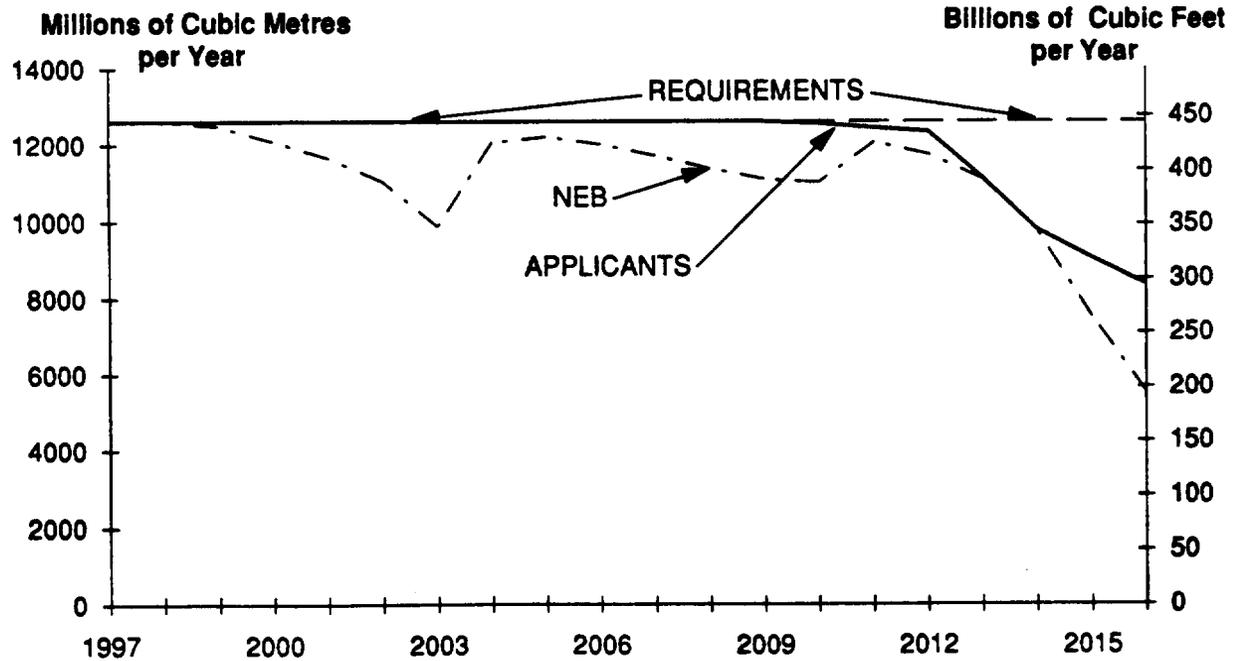


Table 2-6**Comparison of Estimates of Productive Capacity for the Mackenzie-Beaufort Region**

Year	Applicants		NEB	
1997	12 619	(445)	12 619	(445)
1998	12 619	(445)	12 619	(445)
1999	12 619	(445)	12 489	(441)
2000	12 619	(445)	12 090	(427)
2001	12 619	(445)	11 671	(412)
2002	12 619	(445)	11 062	(390)
2003	12 619	(445)	9 877	(349)
2004	12 619	(445)	12 064	(426)
2005	12 619	(445)	12 207	(431)
2006	12 619	(445)	12 023	(424)
2007	12 619	(445)	11 722	(414)
2008	12 619	(445)	11 392	(402)
2009	12 619	(445)	11 100	(392)
2010	12 557	(443)	11 020	(389)
2011	12 444	(439)	12 067	(426)
2012	12 351	(436)	11 742	(415)
2013	11 137	(393)	11 114	(392)
2014	9 807	(346)	9 787	(345)
2015	9 052	(320)	7 505	(265)
2016	8 355	(295)	5 520	(195)

2.4 Natural Gas Costs

The export applications provided the first opportunity since the Mackenzie Valley Hearing¹ to examine, in the context of a formal bearing, the cost of natural gas from the Mackenzie Delta and the Beaufort Sea. The Applicants' gas cost information was used to determine gas supply costs for the benefit-cost analysis of the export applications.

The Applicants submitted estimates of production costs which include costs of development wells, gathering lines, processing plants and later in the project term, the construction of offshore islands. Estimated unit production costs and the first year of production for each Applicant's pools are shown in Table 2-7. The unit costs for Esso and Shell pools are as submitted; Gulf unit costs are Board estimates based on data submitted by Gulf. On a volume weighted basis, unit production costs average \$1.00/GJ (\$1.05/MMbtu). Estimated costs for Esso were slightly below this amount; Gulf costs were somewhat higher. All costs incurred prior to 1989 are sunk costs and are thus not included in these estimates.

The Applicants also submitted cost estimates for two new pipeline systems to transport the gas to Caroline, Alberta, and from Caroline to the U.S. border. Unit transportation costs, which account for pipeline capital and operating costs, were \$1.33/GJ (\$1.40/MMbtu) of delivered sales gas from the Delta to Caroline and \$0.24/GJ (\$0.25/MMbtu) from Caroline to the U.S. border. This is the uniform charge in 1988 dollars needed to provide for return of capital and operating costs and a real return to capital of eight percent.

The Applicants' estimated weighted direct costs for natural gas from the Mackenzie Delta/Beaufort Sea region delivered at Caroline, Alberta, are the sum of unit production and transportation costs, or \$2.33/GJ (\$2.4/MMbtu).

Although the unit costs as calculated above are a convenient way to summarize cost information, the time profile of actual capital and operating expenditures is required for a benefit-cost analysis. The financial viability of a project is influenced by capital costs, the greatest portion of which is incurred at the front end of a project, and by pipeline tolls which, on a cost of service basis using the conventional straight line depreciation method, are higher earlier in the life of a pipeline. The Applicants estimated a cost of service toll for a new pipeline from the Delta to Caroline in 1988 dollars to be \$2.28/GJ (\$2.40/MMbtu) in 1997, \$1.97/GJ (\$2.0/MMbtu) in 1999, and \$1.74/GJ (\$1.84/MMbtu) in 2001.

The applied-for gas exports are expected to be produced from 260 10³m⁹ (9.18 Tcf) of discovered reserves. The Applicants submitted that additional gas likely would be discovered and produced in the area once a transportation system were in place. As noted, this view was based on the GSC's assessment of the area's technical potential.

¹ National Energy Board, Reasons for Decision Northern Pipelines, June 1977.

Table 2-7**Unit Production Costs and
Probable First Year of Production**

\$1988/gigajoule (\$1988/MMbtu)

Pool	Unit Production Costs ¹		First Year of Production
Esso			
Taglu	0.54	(0.57)	1997
Tuk	1.41	(1.49)	2004
Mallik	1.66	(1.75)	2005
Hansen	3.20	(3.37)	2005
Issungnak	1.45	(1.53)	2006
Netserk	4.24	(4.47)	2009
Kadluk	2.69	(2.84)	2010
Itiyok	5.97	(6.30)	2012
Arnak	8.99	(9.48)	2013
Shell			
Niglintgak	1.02	(1.08)	1997
Gulf²			
Parsons Lake	1.03	(1.09)	1997
East Amauligak	1.17	(1.23)	2004
Ya Ya	1.69	(1.78)	2007

1 Unit production costs spread development, capital and lifting costs over the estimated production period of each pool at a real discount rate of eight percent per year. Taglu, Niglintgak and Parsons lake account for 57 percent of the total gas volumes. Reserves estimates for each of these pools are provided in Tables 2-2 to 2-4.

2 Estimated by the Board from data submitted by Gulf.

The Applicants estimated finding costs of future discoveries to be \$60 million for onshore discoveries in the 100-300 petajoule (95-285 Tbtu) range. Development and production costs for these new discoveries would be comparable to costs for similarly sized fields included in the applications.

Views of the Board

The Board finds the development, production and exploration cost estimates submitted by the Applicants to be reasonable. The Board also agrees that additional discoveries in the Mackenzie Delta and Beaufort Sea are likely if gas from the discoveries can be marketed.

For the benefit-cost analysis, the Board requires estimates of the cost of natural gas from different producing regions, and estimates of volumes that could be produced at various costs.

To arrive at the volumes for the benefit-cost analysis, the GSC's estimates of technical potential must be reduced by an estimate of uneconomic volumes. In the Board's opinion, only gas from discoveries in the onshore/shallow offshore areas of the Mackenzie Delta and in the offshore Delta is likely to be developed, given the Applicants' range of gas price projections or those published in the Board's September 1988 Report *Canadian Energy Supply and Demand, 1987-2005* ("September 1988 Report"). The GSC's estimates of potential for these regions must be reduced further to reflect the unattractive full-cycle economics of small discoveries.

The Applicants' estimated finding costs for new gas are somewhat higher than those for past discoveries. The Board examined the record of discoveries and associated costs in the onshore and offshore areas and concluded that because of the immature stage of exploration it is difficult to identify a trend in finding costs. However, based on the experience to date, the Applicants' estimates of the cost of new discoveries in the onshore/shallow offshore areas of the Mackenzie Delta appear to be within a plausible range.

The Board also estimated the cost of new discoveries in the offshore Beaufort, by increasing the Applicants' finding costs from \$60 to \$90 million for discoveries in the 100-300 petajoule (95-285 Tbtu) range to reflect the higher costs of offshore drilling. Development and production costs in the range defined by Esso's Issungnak and Kadluk fields were assumed to be representative of the costs of developing similar sized fields in the future.

Development of only the larger pools is expected in the Applicants' low price case. In the Applicants' high price case, all onshore pools, and offshore pools as small as Esso's Kadluk discovery appear viable. Somewhat higher gas prices were projected in the September 1988 Report. Higher gas prices could make smaller pools more attractive to develop. However, the Board notes that the cost of finding and producing gas increases as pool size decreases. In the Board's opinion, onshore discoveries smaller than 40 petajoules (38 Tbtu), and offshore discoveries smaller than 150 petajoules (143 Tbtu), are unlikely to be developed for production.

The Board's estimates of costs and potential supply of gas from the onshore/shallow offshore areas of the Delta, and the offshore Delta for the benefit-cost analysis are shown in Table 2-8. The cost of gas from new discoveries (undiscovered potential) includes finding, development and production costs, and only the operating cost of the pipeline from the Mackenzie Delta. The pipeline's capital costs are spread over the Applicants' applied-for export volumes and therefore are not included as a direct cost for new discoveries.

Table 2-8

Gas Supply and Direct Cost Estimates

	Supply Petajoules (Tbtu)		Direct Costs¹ \$1988/gigajoule (\$1988/MMbtu)	
Discount rate		6%	8%	10%
Applicants' Supply²	9 187	2.08	2.33	2.61
	(8,728)	(2.19)	(2.46)	(2.75)
Estimated Undiscovered Economic Potential³				
Onshore and	12 367	2.35	2.60	2.76
Shallow Offshore	(11,749)	(2.48)	(2.74)	(2.91)
Offshore Delta	10 526	2.82	3.12	3.42
	(10,000)	(2.97)	(3.29)	(3.61)

1 Estimated costs per gigajoule of sales gas delivered to Caroline, Alberta; the cost of fuel gas is included in the cost estimates; reserves are reduced by estimated fuel volumes to Caroline.

2 Excludes associated and solution gas from Amauligak.

3 Established reserves not dedicated to the export project are included in the undiscovered potential.

Chapter 3

Markets and Gas Sales Arrangements

The Applicants submitted that the applications to export Mackenzie Delta gas to the United States are a culmination of many years of activity and investment in the Delta area. The Applicants stressed that applications for licences are the first step in the lengthy process before gas begins to flow to market and securing the export licences would enhance the Applicants' opportunity to negotiate with U.S. buyers. In this Chapter, the general U.S. market background is discussed followed by a discussion of the evidence on potential individual buyers' markets and the contracting process.

3.1 U.S. Markets

The Applicants submitted that by the mid to late 1990s, the demand for natural gas in the United States will certainly exceed the available American supply, and it was for this reason that major companies such as Enron Gas Supply Company ("EGS"), Texas Eastern Transmission Corporation ("Texas Eastern"), Pacific Interstate Transmission Company ("PITCO") and Tennessee Gas Pipeline Company ("Tennessee") have entered into Precedent Agreements expressing their interest to purchase Delta gas.

While both Alberta and Southern Gas Co. Ltd. ("A&S") and ANR Pipeline Company ("ANR") have entered into Precedent Agreements with the Applicants, they were not active participants at the hearing and did not specify the volumes they intended to contract.

The Applicants submitted that in the present market environment it would be difficult to secure firm purchase contracts with U.S. buyers without having an export licence. The Applicants also submitted that the export market was essential to the development of Mackenzie Delta gas. The Applicants cited the large expenditures to be made by themselves and others, totalling \$4.8 billion for field facilities and \$6.1 billion for pipelines, and testified that, for the project to be economic, the facilities had to be operated at essentially full capacity from the outset.

In support of their applications, the Applicants submitted a forecast of U.S. natural gas supply and demand to the year 2020. The forecast adopted the 1988 Gas Research Institute ("GRI") baseline projections which run to the year 2010. DataMetrics Limited extrapolated the forecast to the year 2020. In the GRI study, United States demand is projected to grow from 18.99 EJ (18,006 Tbtu) in 1988 to 21.06 EJ (19,970 Tbtu) in 2020. Production from the Lower 48 states, estimated at 17.61 EJ (16,701 Tbtu) in 1988, is projected to peak at 17.83 EJ (16,906 Tbtu) in the year 2000 and decline thereafter to 16.26 EJ (15,421 Tbtu) by 2020. Net Canadian imports are expected to range from a low of 1.261 EJ (1,196 Tbtu) in 1988 to a high of 2.026 EJ (1,921 Tbtu) in 2020. The remainder of United States demand is expected to be satisfied by LNG imports, Mexican imports, and gas from Alaska and other unspecified sources.

The underlying assumptions of this GRI forecast were that world oil prices would be between \$20 U.S. per barrel and \$30 U.S. per barrel (1987 dollars) to the year 2000 after which they would exceed \$30 U.S. per barrel. In terms of the basic structural aspects of energy demand, GRI assumed declines in energy intensity reflecting continued improvements in energy efficiency and output shifts away from

energy intensive activity. GRI also assumed that drilling costs and activity were unlikely to return to rates prior to 1981 but would be held down by gas prices in competition with residual fuel oil.

On a regional basis, the GRI study indicated that the supply to the Northeast region would have an increasing reliance on LNG imports and Alaskan gas commencing between 2005 and 2010.

The Southern region showed sustained erosion of the reserves to serve other areas in the U.S. After 2005, the production in the South would decline, and its ability to supply other regions would drop to the point where the South would require 211 petajoules (200 Tbtu) of imports from Mexico and offshore LNG supplies.

The West Coast showed a gradual increase in imports to 2005 after which imports were largely displaced by Alaskan gas. However, a witness for the study entitled "Assessment of California Natural Gas Demand and Supply: 1987-2017", prepared for one of Applicants' buyers, testified that the Alaskan gas "would not be coming on-line during the period, or would be going via an alternative route to non-U.S. sources... The most probable market for Alaskan gas is the Far East".

The Great Lakes region showed a progressively increased level of Canadian imports throughout the projected period.

The projected supply to the Midwest would be from the Rocky Mountain Forerange where there is considerable productive capacity not yet matched by pipeline facilities.

To date, the Applicants have entered into Precedent Agreements with a number of U.S. buyers (Table 3-1).

The evidence indicated that the Applicants had received interest in 17.0 to 25.5 10^6m^3 (600 to 900 MMcfd), approximately 50 to 75 percent of the 34.0 10^6m^3 (1,200 MMcfd) applied-for export volumes. For the balance, 17.0 to 8.5 10^6m^3 (600 to 300 MMcfd), the Applicants will pursue further negotiations with American and Canadian customers until all of the applied-for volumes are signed up.

Each of the potential U.S. Buyers, whose markets are described below, indicated a strong interest for Canadian gas, for a 20-year term with a uniform volume throughout the term. Some buyers, however, were more flexible than others regarding the possible start-up date, the length of the term, and the volume levels throughout the term.

EGS is a wholly owned subsidiary of Enron Corp. ("Enron") formed to acquire supplies of gas from diverse sources to satisfy the existing and projected needs of Enron, an amalgamation of Internorth Inc. and Houston Natural Gas. Enron is composed of four major pipeline companies: Northern Natural Gas, Houston Pipe Line, Florida Gas Transmission and Transwestern Pipeline. Enron is also joint owner and operator of the Northern Border Pipeline. The Enron system serves the fastest growing markets in the United States, namely Texas, California, Florida and the upper Midwest. Also, it offers direct access to virtually all gas supply basins in the U.S. as well as direct access to Canadian and Mexican supplies. Unlike other pipeline systems, Enron has chosen to retain and expand its merchant function rather than become solely a transporter of natural gas.

Enron stated that its level of Canadian gas supply was probably in the range of 5 to 8 percent of its total supply. However, Canadian gas is really only available to the Northern Natural Gas pipeline system where Enron estimated it to be some 15 to 18 percent of system supply.

Table 3-1

Volumes Expected to be Taken Pursuant to Precedent Agreements

Applicants	U.S. Buyers	10⁶m³/d	(MMcfd)
Esso/Shell/Gulf	EGS	5.7 to 8.5	(200 to 300)
Esso/Shell/Gulf	PITCO	2.8 to 8.5	(100 to 300)
Esso	Texas Eastern	4.2	(150)
Gulf	Tennessee	4.2	(150)
Esso	A&S	Unknown	
Esso	ANR	Unknown	
Total		17.0 to 25.5	(600 to 900)

Note: The Precedent Agreements indicate an intention to purchase a portion of the volumes available for sale.

PITCO is a subsidiary of Los Angeles-based Pacific Enterprises whose primary activity is the importation of natural gas from Canada and Southeast U.S. to Southern California for its affiliate and sole customer Southern California Gas Company ("SoCal"). SoCal is the largest U.S. public utility, serving the city of Los Angeles as well as 531 other communities. Presently, Canadian gas makes up 100 percent of PITCO's supply.

A division of Texas Eastern, Texas Eastern Gas Pipeline Company ("TEGPL"), operates an interstate natural gas pipeline which extends from the Texas/Mexico border to the New Jersey/New York area. Its major service area is the Mid-Atlantic where it sells or transports gas to local distribution companies as well as to other interstate pipelines. TEGPL's major customer is Algonquin Gas Transmission ("AGT"), a wholly-owned subsidiary, which serves the New England states. Texas Eastern believes that there will be continued growth in the Northeast markets for natural gas, primarily to meet electric generation and firm cogeneration loads.

In 1987, TEGPL's total throughput was approximately 29 688 10⁶m³ (1,048 Bcf), of which approximately 2 percent was supplied from Canada.

Tennessee is one of four major pipeline companies administered by Tenneco Gas ("Tenneco"). The other companies are Midwestern Gas Transmission Company ("MGT"), East Tennessee Natural Gas Co. ("ETNG") and Channel Industries Gas Company ("CIG"). Tenneco's market area stretches north from the Gulf Coast to New York, Pennsylvania, West Virginia and the New England states.

Presently, Tenneco imports Canadian gas at Niagara Falls, Ontario and Emerson, Manitoba. It also plans to have increased access to Canadian gas through its participation in the proposed Iroquois/Tennessee system and through an interconnection with the proposed Champlain pipeline.

MGT consists of two separate pipeline systems - a northern system supplied by Canadian gas and stretching from Emerson, Manitoba through Minnesota and Wisconsin, and a southern system, not served by Canadian gas, running from the interconnections with Tennessee Gas Pipeline at Portland, Tennessee to the Chicago, Illinois area which is the company's major market. Neither ETNG nor CIG are presently served by Canadian gas.

Tennessee stated that on a dedicated supply basis, Canadian gas represented some 6.7 percent of its current supply.

A&S, an Alberta based company, is a wholly owned subsidiary of Pacific Gas and Electric ("PG&E") which serves northern California. In 1988, A&S exported $10\,877\,10^6\text{m}^3$ (384.7 Bcf) of natural gas to PG&E.

ANR is a major U.S. pipeline system serving the central U.S. In 1988, ANR imported $736\,10^6\text{m}^3$ (26 Bcf) of natural gas from Canada.

While EGS, PITCO and Tennessee were all interested in 20-year contracts with a constant annual level throughout the term, none of them would reject the opportunity to buy Delta gas if the term were shorter and the annual quantities less. However, these buyers considered that a step-down in annual quantities would be less desirable because such a step-down would adversely impact the economics of future pipeline facilities. Generally, the U.S. buyers agreed that a delay in the proposed 1996 start-up date of the project, a shortening of the 20-year term, or a reduction in term volume, would reduce the overall attractiveness of the project. It was stated that in some instances, these factors could persuade certain U.S. buyers to seek alternative sources of supply.

Texas Eastern was not prepared to clearly define any flexibility in the $4.2\,10^6\text{m}^3/\text{d}$ (150 MMcfd) volume in the Precedent Agreement and, at this time, was not interested in entering into a contract for less than twenty years.

Views of the Board

The Board concurs with the Applicants that access to the export market is essential to the development of Mackenzie Delta reserves.

The Board notes that the GRI study, adopted by the Applicants to illustrate the natural gas supply/demand balance for the lower 48 states, indicates that the U.S. market regions, particularly those dependent on Canadian supplies, show a great need for Canadian natural gas. The Board accepts the Applicants' position that the U.S. markets are in need of natural gas imports from Canada and will continue to be so.

While the Applicants have entered into Precedent Agreements with potential U.S. buyers, the Board notes that there are no firm contracts for the volumes proposed for export. The Board agrees, however, that the granting of an export license would provide the Applicants a better opportunity to contract.

The Board recognizes that the potential U.S. buyers are established importers of Canadian natural gas; the evidence indicates that those buyers are major participants in the United States gas market. The Board is satisfied, therefore, that there is a reasonable expectation that U.S. buyers will have sufficient markets to accommodate the level of exports contemplated in the applications.

3.2 Contracts

The Applicants submitted several Precedent Agreements with U.S. buyers expressing the buyers' intentions to enter into sales contracts for Mackenzie Delta gas. The Applicants acknowledged that, while these arrangements do not constitute executed export contracts, they illustrate a strong interest in the United States for Delta gas.

The Precedent Agreements with the U.S. buyers commit the Applicants and the purchasers to enter into contracts for a portion of the Delta gas volumes by a specified future date. The term of those contracts would be twenty years from the date of first delivery. The agreements indicate that the buyers expect to purchase a share of the gas available for sale and state that the buyers' share will be specified in the contracts.

The Precedent Agreements also state that the contracts to be negotiated will provide that demand charges would be paid by the buyers based upon tolls and tariffs as approved by the Board and any other governmental authority having jurisdiction. The buyers' payments of such charges would be subject to U.S. regulatory and governmental authorizations satisfying the buyers that they could recover the costs in their rates.

The agreements state that the point(s) of export shall be mutually agreeable to all parties.

The Precedent Agreements contain a provision for termination without liability upon sixty days written notice if either party believes that the gas reserves in the Beaufort would be insufficient to support the contract. The agreements could also be terminated if either party believes that the costs to produce and transport the gas to market would result in either an uneconomic project or uncompetitive gas prices. If either party believes that it would not be possible to obtain, in a timely manner, all the necessary regulatory approvals on acceptable terms and conditions, the agreement could be terminated. Finally, if both the buyer and seller could not enter a contract incorporating these terms and such other terms as either party deems necessary, the agreement could be terminated.

Both the agreements and the contracts can be assigned to any affiliate or subsidiary of either buyer or seller so long as the assignee adopts and is bound by the terms and conditions expressed in the agreement or contract.

The Applicants described the approach they plan to follow for negotiating final gas sales contracts and stated that they expect negotiations with Canadian and U.S. buyers to occur concurrently. The Applicants undertook to keep the Canadian marketplace informed about the progress of their

negotiations with U.S. buyers. As well, each Applicant undertook to file export contracts with the Board. In the applications, it was assumed that the contracts would be negotiated by 30 June 1990 but, during the hearing, parties conceded that this date could be delayed by up to a year or more.

The Consumers' Gas Company Ltd. ("Consumers") stated that there should be some assurances from U.S. buyers that they would be allowed, through their regulatory process, to make commitments to recover the demand charges on the pipeline. The Minister of Energy for Ontario ("Ontario") held a similar view mentioning that the commercial viability of the project depended on the ability to pass through Canadian and U.S. pipeline demand charges.

Views of the Board

These Precedent Agreements are an expression of interest to purchase a portion of Delta gas and do not represent firm contracts. The Board agrees that any licence which might be issued by the Board should include a condition requiring the filing of each executed export contract for review and approval by the Board, to ensure that the contracts are consistent with the evidence submitted at the hearing.

When filing contracts, either separately or collectively, the Applicants would be required to advise all parties to the hearing of the filing of such contracts and would be required to serve copies of the filing on those parties who so requested it.

The Board would review the terms of export contracts to ensure that they represented substantive commercial arrangements consistent with the licence and the evidence provided at the hearing. Consideration would also be given to the degree of commitment to pass through demand charges.

If the Board were satisfied with a contract, and no complaints had been filed and sustained, the contract would be approved and the volumes relating to that contract could be exported. The complaints mechanism is more fully discussed in Chapter 5.

Chapter 4

Transportation

Transportation of Delta gas to market would require new pipeline facilities. Before such a pipeline could be constructed, however, an application would have to be made to the Board for a certificate to construct and operate the pipeline. The Board would then hold a hearing to consider that application for a pipeline certificate. At that hearing, the Board would examine and make findings on the economic, technical, environmental and socioeconomic issues related to the pipeline.

Nonetheless, in this proceeding, to satisfy itself about whether the proposed exports are in the public interest, the Board indicated its intent to consider all relevant public interest matters. These included the broad issue of the cost of transporting Mackenzie Delta gas to market.

The Board's evaluation of the Applicants' benefit cost analysis required the identification of all incremental costs associated with the proposed exports. Incremental pipeline costs, an important component of this analysis, were thus examined in this export licence proceeding.

For the purpose of analyzing project economics, the Applicants estimated pipeline costs for a hypothetical pipeline following the Mackenzie Valley route and a new pipeline with separate legs from Caroline to Monchy, Saskatchewan and from Caroline to Kingsgate, B.C. These costs were used by the Applicants in their benefit-cost analysis and are summarized in Table 4-1 below:

Table 4-1

Pipeline Costs¹

Facilities	Capital Costs (\$ millions 1988)	Operating Costs (\$ millions 1988/year)
Delta to Caroline	4,889	66.0
Caroline to U.S. Border	1,007	6.7

¹ Undiscounted and excluding interest during construction.

The Applicants also indicated that capital cost estimates for three known alternative pipeline proposals "generally support(ed)" their own estimates.

The Applicants provided evidence on a preliminary design concept for these hypothetical facilities including a breakdown of the capital costs into the main elements, the annual fuel volumes, a breakdown of annual operating costs and details of the methodology used to prepare the conceptual design and to estimate the associated capital and operating costs along with a statement of major assumptions.

While the Applicants did not provide specific cost estimates to move gas to Niagara, they did include the Niagara volumes in their benefit-cost and financial analyses.

The Dene/Metis Negotiations Secretariat ("Dene/Metis") expressed concerns that the Applicants did not include socioeconomic costs in their capital cost estimates.

Foothills Pipe Lines (Yukon) Ltd. ("Foothills") did not oppose the issuance of the proposed export authorizations "if properly conditioned", and "provided that all present and future Board orders relating to the exports remain fully consistent with the bilateral agreements, regulatory authorizations, and legislation relating to the construction and operation of the ANGTS." Foothills further emphasized that it "would oppose the applications if the proposed exports were part of any scheme to construct a pipeline system across the North Slope of Alaska and Canada to the Mackenzie Delta in order to provide for transportation of both Alaskan North Slope gas and Delta gas along the Mackenzie Valley. Foothills remains opposed to a North Slope pipeline for Alaskan gas because such a pipeline would be totally inconsistent with ANGTS". Foothills hence requested that the following statement be inserted in any licences which might be issued: "... the granting of the export licences herein is consistent with the commitments of the two countries in that Agreement and, in particular, the route selected for the transportation of Alaska gas described therein".

In response to a question from Ontario, the Applicants indicated that "the normal requirements of a future facilities application would include a re-examination of the benefit-cost implications of the project".

Views of the Board

The Board notes that none of the interested parties questioned the capital cost estimates, the operating cost estimates or the conceptual pipeline design provided by the Applicants. The concerns that were expressed regarding route selection and socio-economic costs would be thoroughly covered in any future facilities hearing.

The Board is also of the view that, to assess the benefit-cost of these export applications now, it is reasonable to base, provisionally, pipeline cost estimates on a hypothetical pipeline following the Mackenzie Valley route and on a new pipeline with separate legs from Caroline to Monchy and Kingsgate. Although other transportation alternatives have already been identified, they all involve similar pipeline lengths.

The Board is satisfied that the proposed conceptual design should be fully capable of moving the specified volumes. The Board recognizes, however, that these hypothetical facilities estimates are provided only to demonstrate project viability. Technical feasibility, design optimization and pipeline costs would be examined in more detail as part of any future facilities hearing.

The Board also notes that:

- the Applicants' estimates are based on what they consider to be a viable transportation system;
- the capital cost estimates for this hypothetical pipeline system attempt to reflect a normal level of pipeline construction activity, rather than the low activity and the correspondingly lower prices for materials and labour that have been in place over the last few years;

- the Applicants have made an effort to set the contingency factor at a level they consider adequate to account for the uncertainties about the route, the timing and the conditions of construction of such a pipeline; and
- the Applicants did not attempt to identify the cost savings or economies of scale that might accrue to upgrading existing facilities and assumed that a new dedicated pipeline would be built south of Caroline.

Based on the above, the Board concludes that the Applicants' capital cost estimates are adequate to conduct a benefit-cost analysis of the proposed exports under Part VI of the Act.

In the Board's opinion, the Applicants' estimates of fuel consumption to Kingsgate and Monchy are realistic. Operating costs for this hypothetical pipeline system have not been examined in detail, and uncertainties in estimating unit operating costs remain. Consequently, sensitivity analyses of how the net benefits to Canada could be affected by higher operating costs and by changes in capital cost estimates were conducted. The results are presented in the benefit-cost Chapter of this report.

Turning to the Foothills request, the Board is of the view that it would not be necessary or desirable to recognize in any licences which might be issued existing bilateral agreements respecting the ANGTS. None of the interested parties submitted evidence suggesting that the granting of export licences would interfere with the ANGTS treaty. The Board believes that the granting of any export licences would not be inconsistent with the commitments of Canada and the United States in the ANGTS treaty. The Board is also of the view that it would be inappropriate to recognize any specific pipeline route in any licences which might be issued, as that matter is beyond the scope of this proceeding. That is, in the Board's view, a facilities matter which would be thoroughly addressed in any future facilities hearing.

Chapter 5

Availability of Gas to Canadians

Three issues were raised at the hearing concerning the availability of gas to Canadians.

The first related to the Applicants' negotiations and discussions with potential buyers. The hearing addressed the timing of negotiations, the Applicants' expected date for execution of signed purchase contracts and how Canadian companies could accommodate this schedule.

The second issue, relating to the Precedent Agreements and execution of signed export contracts, was the Board's Complaints Procedure, and how various parties felt it could work, given the character of these applications.

The third issue was the availability of Delta gas supplies to meet the requirements of Northern communities.

Contract Negotiations

The Applicants expressed their willingness to conclude long-term sales contracts with any customer who is prepared to purchase Delta gas on competitive terms and in a timely manner. As noted in Chapter 3 they have signed Precedent Agreements with several potential U.S. buyers and have, in most instances, met with and discussed the requirements of major Canadian natural gas distributors for Delta gas. While Esso, Shell and Gulf expect to execute signed contracts by 30 June 1990 they admitted that negotiations might delay this target date by one year to 30 June 1991. However, they also indicated that they expect potential Canadian and U.S. buyers to negotiate concurrently, in order that interested buyers from both countries would be prepared to execute signed contracts according to this schedule. Once contracts were executed, the Applicants would dedicate the contracted volumes to the specific buyers and such base volumes would not be available to other parties in the future.

Several major Canadian distribution companies Gaz Métropolitain inc. ("GMi"), The Consumers' Gas Company Ltd., Union Gas Limited ("Union"), ICG Utilities (Ontario) Ltd. ("ICG") and Greater Winnipeg Gas Company ("Greater Winnipeg") presented witness panels, at the request of the Board. As well, these companies and the Industrial Gas Users Association ("IGUA") responded to a Board Information Request, relating to requirements for Delta gas in their franchise area and to their discussions with the Applicants in this respect.

The applications included letters of support from several Canadian local distribution companies ("LDCs"), indicating their interest in the project as a means to develop additional natural gas supply sources. At the time of the GH-10-88 Hearing ("the Hearing"), no Precedent Agreements had been signed with potential Canadian customers, although Union indicated its intent to sign. Consumers initially expressed the view that it was unwilling to commit to a Precedent Agreement, on the assumption that commercial contractual terms would be specified. However, on review of the Precedent Agreement signed by the Applicants and potential U.S. buyers, Consumers stated that it may reconsider its position. Consumers viewed such a Precedent Agreement as simply a statement of intent to purchase the gas when it flows, if it is competitive with other sources of gas in Consumers' market and if regulatory bodies would permit recovery of costs in Consumers' rates.

The extent of discussions between the Applicants and the individual utilities, prior to the hearing, varied. In most instances (Consumers, ICG, Union, GMi), discussions were of a preliminary nature, with no reference to minimum contract volumes, terms, or start dates acceptable to the Applicants. However, Greater Winnipeg had not had discussions with the Applicants.

No distributor at the Hearing felt constrained by the terms of its existing contracts from negotiating for purchases of Delta gas. In particular, all utilities expressing an interest in Delta gas viewed the non-self-displacement provision in their recently signed contracts with Western Gas Marketing Limited ("WGML") as a business agreement which was not necessarily a constraint to negotiating for other supplies. Each company did, however, outline the characteristics of its own market environment which affected the extent of its negotiations with the Applicants.

Two companies stated that they would not be pursuing acquisition of Delta gas supplies to meet the needs of their franchise area.

Greater Winnipeg testified that it is unable at this time to determine whether it would require Delta gas. Its market is small and the company feels that there may be sufficient supplies available from conventional areas to meet its requirements. As Greater Winnipeg's current supply arrangement with its sole supplier WGML expires in 2003, the company does not expect to seek incremental supplies until about the year 2000, at which time, under normal supply/demand conditions it would renegotiate its gas supply. If the supply situation appeared less favourable over time, Greater Winnipeg would go to the market at an earlier date to negotiate for supplies after 2003. At such a time, Greater Winnipeg would assess all available gas supplies to select its supply source(s). For these reasons, Greater Winnipeg Gas is not prepared to enter into an agreement with the Applicants by the 30 June 1990 (or 1991) date.

GMi stated that Delta gas was one of several alternative potential supply sources which might be required sometime between 1996 and 2003 at which time its long-term contracts, currently supplying 47 percent of its market, expire. However, GMi stated that it has chosen not to pursue a portion of the Delta gas volumes under consideration for export, as it believes that alternate supply sources might be less expensive. Further, GMi does not make supply decisions for the large portion of its clients who arrange for their own gas supply.

At the hearing, the remaining three Ontario distributors expressed an interest in the Delta gas volumes. Consumers ultimately indicated that there is a possibility of it signing a contract with the Applicants prior to 1991. Close to 50 percent of Consumers' market is currently supplied through long-term contracts of 10-15 years duration. Consumers felt that the size of contracts being discussed by potential buyers, 1.4 to 4.2 $10^6\text{m}^3/\text{d}$ (50 to 150 MMcfd), is well within Consumers' capability and could be accommodated in its portfolio of gas supplies. In terms of factors which might inhibit Consumers' negotiations with the Applicants, the company mentioned regulatory approvals by the Ontario Energy Board to recover costs, and the distributor's requirement to serve the core market, although there is still some fluidity and uncertainty in the size and composition of this market.

Consumers views Delta gas as one of several supply sources potentially available to it. In terms of its current contracting practices, Consumers said that the surplus in natural gas markets has allowed it, in the recent past, to meet its needs with shorter term contracts, more so than under tighter market conditions. As supply tightens and there is a perception of shortage, Consumers stated that "each

responsible buyer (will) have to lengthen its planning horizons and, obviously, take some longer-term risks".

ICG recently concluded a 15-year contract with WGML and indicated that prior to the expiry of this contract in 2003, it did not anticipate any substantial need for Delta gas. However, ICG stated that it would be difficult to quantify its need for Delta gas after 2003 as its residential and commercial sector was not experiencing much growth, while 70 percent of its supply requirements are tied to commodity industries which are typically subject to wide fluctuations in activity. Although ICG does not expect to be in a position to execute a signed contract by the 1990-91 deadline, it has asked the Applicants to keep it informed, so that it can maintain an on-going review of the market situation. While it is the Applicants' stated objective to execute signed contracts for the full 260 10⁹m³ (9.2 Tcf) by 1990-91, at which time contracted volumes would be dedicated to buyers, ICG's view was that there would have to be drastic changes in the marketplace between now and 1990-91 for this to be achieved. ICG also stated that it would be concerned if by 1990-91 the full 260 10⁹m³ (9.2 Tcf) were committed to the export market.

During the course of the Hearing, Union expressed a desire to sign a Precedent Agreement and to pursue negotiations to execute a signed contract by 1990-91, although it questioned whether the Applicants would be in a position to specify contractual terms and conditions by that time. Union argued that "... it appears premature at this time for the Applicants and others to enter into meaningful Precedent Agreements, let alone sales contracts." Union said that the evidence confirmed that Union and other domestic gas users are expected to require Delta gas to meet future requirements. Union's present estimate of annual requirements for Delta gas from 1996 is in the order of 850 10⁶m³ (30 Bcf).

Thus, while GMI and Greater Winnipeg clearly stated that they will not pursue negotiations with the Applicants for the applied-for volumes, Union indicated an intention to enter negotiations, and Consumers and ICG expressed a desire to continue discussions, although they are unsure whether they would enter into agreements by the stated deadline.

Complaints Procedure

Each Applicant expressed an intention to file executed export contracts with the Board to allow Canadians to review the terms and conditions to determine whether there was a basis for complaints. However, the Applicants attached several caveats to this statement. They would expect interested Canadian buyers to have been attempting to buy and to have been negotiating with the Applicants up to the time export contracts are executed. They would not accept that Canadian buyers remain inactive until the export contracts were filed, and at that time express an interest based on the terms and conditions negotiated in the executed contracts. Further, the Applicants expressed the view that they would expect dissatisfied potential buyers to have exhausted their opportunities for obtaining gas elsewhere in Canada and in the United States and to be able to demonstrate, as a result, that they were unable to purchase gas on similar terms and conditions.

The Applicants were questioned on their interpretation of "similar terms and conditions" as specified in the Complaints Procedure. Esso indicated that although most people would consider price as one of the most important terms and conditions, other factors, such as the degree of commitment to demand charges and the financial integrity of the buyers, would also be important components of the contract. Gulf expressed the view that identical netbacks from all buyers would not be necessary, due to

differing regional markets and competing fuel situations. However, in the event of a complaint, the Board would determine whether, in fact, the terms and conditions were similar.

The Applicants view an export licence as a means of establishing nondiscriminatory access to the marketplace - in both the U.S. and Canada - and were concerned that a requirement to satisfy the Complaints Procedure prior to the issuance of a licence would be a setback to the project. Shell stated that U.S. buyers have indicated in discussions that they have "little time to spend with people who come to them to sell gas who do not have an export licence", and that the lack of an export licence places Canadian producers at a disadvantage in marketing their natural gas.

Esso, Shell and Gulf expressed a willingness to negotiate with potential Canadian buyers concurrently with U.S. buyers, to ensure that potential buyers have sufficient information to negotiate and to avoid a situation of possible complaints once executed contracts are filed with the Board.

In the absence of export contracts with specific terms and conditions, the Applicants admitted that the Complaints Procedure, as established by the Board, cannot operate. They indicated that they would accept, as a condition of any licence they might be issued, a requirement to file executed export contracts with the Board for review by Canadian buyers to determine whether there were bases for complaints. Provided that the negotiating process envisaged by the Applicants were followed, the Applicants would be willing to accept this condition to satisfy the Complaints Procedure.

All local distribution company intervenors (except GMi) were asked their views on the working of the Complaints Procedure in the context of these Applications. (GMi stated clearly that it was not interested in negotiating for the Delta gas volumes under application and therefore it would have no basis for complaints.) Greater Winnipeg was concerned that the Complaints Procedure is not forward-looking, in that it does not concern itself with the situation which might arise 15 years from now. Greater Winnipeg said that if it were not interested in buying gas right now, it should have no basis for a serious complaint; it was nevertheless concerned that export licences could tie up large volumes of gas, leaving little uncontracted gas available when Greater Winnipeg returns to the market to negotiate its supplies for the post 2003 period.

Consumers viewed the Complaints Procedure as a means by which the Board could ensure that Canadians and Americans have equal opportunity to purchase gas on competitive terms and conditions, through concurrent negotiations with an Applicant Consumers felt that it would be very difficult for potential buyers to complain effectively, at this time, since the Precedent Agreements do not specify contractual terms and conditions. Complaints could not be retroactive, but would occur only at the time final contracts were presented to the Board. Given these difficulties with the Complaints Procedure, the long lead time and the unique nature of this project, Consumers did not think that "the Board is in the position of determining whether a definite licence could be granted at this time".

ICG expressed views similar to Consumers' on the complaints mechanism. While ICG did not believe it had a basis for complaints during the Hearing, as it currently has a long-term supply for gas, it also observed that there are no terms and conditions attached to the U.S. Precedent Agreements. ICG requested equal opportunity to purchase Delta gas, although admitting that under the current market situation it is not prepared to enter into a Precedent Agreement with the Applicants.

Union Gas found the Complaints Procedure to be fundamentally unworkable in the context of this Hearing, and expressed concern about whether it could ever be effective. Union stated that while it is

concerned about the gas market 12-15 years from now, it cannot complain today about what might happen at that time, since it is not in a position to buy gas supply to start flowing in 12-15 years. Union has not contracted on such a basis, as it states that producers are generally unwilling to agree to such terms, preferring contracts which commence in the short term. Union is, however, prepared to consider contracts with the Applicants for volumes commencing in 1996.

Union questioned whether the Board could deem the Complaints Procedure to be satisfied if there were no complaints, when there may be buyers who did not come forward due to lack of knowledge or understanding of the gas market. Union's interpretation of the Complaints Procedure is that a complaint can exist only if the buyer cannot purchase gas from any source at that point in time on similar terms and conditions. However, Union's concern is that the Complaints Procedure does not effectively deal with situations which could arise over the long run. It also suggested that the Market-Based Procedure should pay more attention to uncontracted gas, rather than gas supplies.

IGUA, in response to an Information Request issued by the Board, stated that industrial gas users seldom have a supply contracting horizon greater than five years, and therefore it is unreasonable to expect them to predict and contract for specific volumes of gas to protect their needs to 2016. IGUA further stated that it was concerned that Delta supplies must be available for use by the Canadian market as the need arises. IGUA members had not had any discussions with the Applicants, nor were they prepared to enter into a Precedent Agreement or contract by 30 June 1990. IGUA, in declining the Board's request to present a panel, responded that it is not possible for industrial gas users to complain, due to their practice of contracting for a period of five years. IGUA suggested that the Board make "the export licence subject to conditions that will operate to assure that Canadian users will have access to the gas under licence when it has been determined, by the National Energy Board, that the gas is needed to serve the reasonably foreseeable requirements of Canadians".

Apart from concerns about the effectiveness of the Complaints Procedure, and comments relating to contractual terms, as discussed above, no local distribution company or provincial government opposes the project. Several intervenors provided suggestions as to how to satisfy the Complaints Procedure in the context of this Hearing.

Both ICG and Consumers emphasized that they were requesting equal opportunity and not preferential treatment relative to potential U.S. purchasers of the gas. Consumers recommended that the Board approve in principle and issue a conditional licence which would require the Applicants to file executed contracts. At such a time, if there were no complaints, the Board could issue a definite licence.

ICG referred to the Board's GHR-1-87 Decision where it states, with respect to the Complaints Procedure that "much might hinge on the equivalence of the contractual terms in the export arrangement". Based on this and on Section 118 of the Act, ICG concluded that the Board "effectively has no choice but to provide in its Decision for a review of any and all export contracts which may be executed between now and the June 1991 date suggested by the Applicants, prior to issuing any unconditional export licence".

Ontario submitted that "for the Complaints Procedure to work effectively, gas sales contracts need only be filed subsequent to the Board's granting this export licence".

Union, in argument, suggested that the Board attach conditions to any licence which would require the Applicants to inform potential Canadian buyers of their intentions; conduct reasonable negotiations with potential Canadian gas purchasers; and inform the Board where such negotiations are not successful and contracts are to be signed for the export of gas. Union also indicated that it would support Consumers' proposal of approval in principle followed by a definitive licence once complaints are satisfied. Union stated that since it feels it is premature to enter into sales contracts "... the Board must give more attention to the Export Impact Assessment, and in particular, to the amount of uncontracted gas available for Canadian users, along with other factors it considers relevant, in carrying out its mandate under Section 118(a) of the National Energy Board Act".

Le Procureur général du Québec ("Quebec") recommended that the Board issue a conditional licence which would require the Applicants to determine the requirements of both U.S. and Canadian consumers for the gas, after which a definitive licence could be issued. Quebec asked the Board to take into consideration certain differences between Canadian and U.S. natural gas markets. In particular Quebec noted that in Canada certain "noncore" customers are responsible for securing their own supply of natural gas. In the case of Quebec, where such customers comprise 53 percent of the gas market, this makes it difficult for the province to contract now for a twenty year period beginning in 1996, due to the instability of these customers' demands. Quebec also stated that it encouraged the Board to review its existing procedures used to protect Canadian requirements, as Quebec feels that this procedure may not allow all Canadians the same opportunity to obtain secure supplies of natural gas. Quebec did not provide any elaboration of its argument.

Views of the Board

The Complaints Procedure is intended to ensure that Canadians have an equal opportunity to purchase natural gas on terms and conditions similar to those offered other participants in the country's natural gas markets.

The Applicants filed Precedent Agreements which had been signed with several U.S. companies and there was an indication that certain Canadian distributors might be interested in signing similar agreements. However, no executed contracts with well-defined terms and conditions have been negotiated by the Applicants. The Board agrees with all parties who expressed views that the Complaints Procedure cannot fully operate in the absence of contracts with specific terms and conditions. Potential buyers must be able to review the terms and conditions of executed contracts to determine whether, as a result of their negotiations with the Applicants, or from other sources in the market, they were able to purchase gas on a similar basis.

Given current arrangements in Canada's natural gas markets, the Board recognizes the possibility that Canadian purchasers may face constraints, not necessarily faced by potential American buyers, in negotiating or entering into contracts with defined time periods or volumes. Most distribution companies intervening at this Hearing had recently negotiated long-term gas supply arrangements with WGML, which extend for the next ten to fifteen years. As these volumes account for from less than 35 to as much as 100 percent of distributor requirements, the scope for making large commitments for Delta gas by these distributors is reduced during the period of the contracts with WGML. These contracts also include non-self displacement provisions.

However, no intervenor identified any condition or constraint, in its existing contracts, to which they had not agreed in the course of normal business practice.

The Board agrees with those intervenors who expressed the view that the timing of deliveries under this project, with natural gas volumes to begin flowing only in 1996, is unusual. As such, it does represent a change in contracting practice, as distributors are accustomed to contracting for delivery commencing in the short term reflecting most producers' desire to have gas flow begin as soon as possible. However, the Board views individual contracting practices - whether they be for short-term contracts only, or for a single long-term contract from a single supplier - as a reflection of the consumer's assessment of risk. IGUA members' practice of contracting for a five-year period reflects their business assessments of the risks and costs associated with various contract terms. Similarly, those consumers who choose to contract for their own supply of natural gas through direct sales or similar arrangements, also make their own assessment of the costs and risks associated with different contract terms. While the Complaints Procedure is intended to allow the Board to determine that all parties have had equal opportunity to contract for natural gas, it is not intended to provide preferential arrangements for consumers whose assessment of market risks leads them to choose contract terms different from those negotiated between other parties in the natural gas market.

The Board agrees with the Applicants that Canadian potential buyers must be prepared to negotiate in the same time frame as U.S. purchasers, and concurs with parties to the Hearing who requested equal, but not preferential treatment with a view to concurrent negotiations. The Board is encouraged that the Applicants will provide all interested parties with equal opportunity to negotiate for volumes of Delta gas on similar terms and conditions.

In order to ensure that potential buyers are fully informed on the progress and expected filing date of executed export contracts, and to facilitate concurrent negotiations of potential Canadian and U.S. buyers with the Applicants, the Board would require, as a condition of any licence which might be issued, that the Applicants advise potential Canadian buyers who have declared an interest in buying gas from the Mackenzie Delta region of the quantities available for sale and give them an opportunity to purchase gas from the Mackenzie Delta region on terms and conditions, including price, similar to those under which the gas would be exported.

Several intervenors and the Applicants recommended that the Board include in an export licence a condition requiring filing of all executed contracts for review by Canadian consumers, to determine whether, among other things, there is a basis for complaints. However, no intervenor objected to the project on the grounds that it was currently prevented from having equal opportunity to buy this gas.

The Board recognizes that in the absence of contracts containing terms and conditions of the proposed export, the Complaints Procedure cannot operate as it would if there were contracts before the Board underpinning the applications. Therefore, the Board agrees with proposals to include a condition in any licence which might be issued,

requiring filing of all executed contracts, and providing a timely opportunity thereafter, say 60 days, for interested parties to complain.

Such a licence condition would allow Canadian customers to review the terms and conditions of signed export contracts in order to determine whether they were able to execute agreements similar to the export arrangements. It would not, however, provide preferential treatment. The Complaints Procedure provides for a one-time opportunity to register complaints about relative contract terms and conditions for domestic and export proposals. It does not provide an opportunity for potential buyers to complain at some future date during the life of the contract.

If on reviewing the terms and conditions of the executed export contracts, a potential buyer felt it had a basis for a complaint, it must be prepared to prove to the Board that it had been attempting to buy gas and had been negotiating with the Applicants. Furthermore, the buyer would have to demonstrate to the Board that it had pursued other possible sources of natural gas supply and was, as a result of such efforts, unable to obtain gas supplies on similar terms and conditions.

The Board is satisfied that with these conditions, the objectives of the Complaints Procedure could be fulfilled.

Gas for Northerners

The Applicants testified that they were prepared to negotiate contracts to supply gas to markets which could develop in the North and that the price, exclusive of transportation costs, would be significantly lower than the comparable price in southern Canada (i.e. southern Canada price less transportation costs).

One of the stated purposes of the proposed Northern Accord between the Government of Canada and the Government of the Northwest Territories ("GNWT") is "to achieve the orderly development of oil and gas resources for the benefit of Canada as a whole and the Northwest Territories in particular." In this connection, several submissions by Northerners expressed the view that Mackenzie Delta gas should be made available for local use at reasonable prices.

In its submission, the Northwest Territories Federation of Labour said that energy costs were a major contributor to the high cost-of-living in the Northwest Territories, and suggested that the Board should look carefully at whether Northern communities would benefit from the proposed exports by receiving access to affordable supplies. The Northwest Territories Legislative Assembly also referred to the importance of cost and security of energy supply to Northern residents. The Town of Inuvik said that it wished to have access to Delta supplies at reasonable rates as did the City of Yellowknife and the Hamlet of Fort McPherson.

The Hamlet of Tuktoyaktuk ("Tuktoyaktuk"), a community of about nine hundred people, felt that the Applicants should be required to serve the energy needs of its citizens and others in the Western Arctic, at the earliest possible time. Canadians for Responsible Northern Development ("CRND") held a similar view. Tuktoyaktuk mentioned that the North experienced high energy prices and that development of gas reserves in the Mackenzie Delta should result in a reduction in costs. The Northwest Territories Power Corporation suggested that natural gas should be made available to any

approved local distributor at a price no greater than the fieldgate price to exporters. Tuktoyaktuk indicated that the substitution of gas products, such as propane, for existing fuels could provide an extremely desirable benefit for residents of the Western Arctic. To this end, Tuktoyaktuk recommended that studies be undertaken to determine the feasibility of using propane and other gas products.

In its submission, the Inuvialuit Regional Corporation ("IRC") reported that energy costs in the North were two to three times higher than in other parts of Canada and that the availability of less expensive supplies from the Mackenzie Delta would be an important benefit to Northerners. In this connection, the IRC mentioned that the price of energy to final users could be reduced by some 30 to 40 percent in communities such as Inuvik. The IRC felt that the Applicants should be required to provide sufficient volumes of gas to satisfy the Northern demand and that this should be a condition of the licence. With regard to the price to be paid for the gas, the ERC suggested that it be based on the market price at the Canada/U.S. border, less transportation costs from the border to the point at which the Northern community accesses the gas. The potential benefits of using propane were outlined, particularly in communities that could not be economically served by pipeline.

Views of the Board

The Board recognizes that Northerners have experienced high energy prices for many years and that the supply of Mackenzie Delta gas and perhaps propane could substantially reduce costs. The Board notes that additional study needs to be undertaken by Northerners to determine the most economic fuel to be used in various communities. For those close to the pipeline, it could be natural gas while communities further away might decide to use propane. In any case, the volumes of gas to be used in the North would be relatively small compared with the quantities that would be transported to southern markets.

Based on the Applicants' stated undertakings, the Board expects that appropriate supply agreements will be negotiated with Northerners, with terms and conditions that would yield a price significantly less than the comparable price in southern Canada. The Board notes that the IRC and the GNWT would have access to gas supplies arising from royalty and working interest arrangements and that, if required, these sources, although not likely available until after 2003, could substantially meet the Northern demand at that time. The Board concludes that it would be difficult to include in any licence which might be issued a meaningful condition requiring the Applicants to supply natural gas to Northern residents because neither the routing of a pipeline nor the volumes of gas which might be required to serve Northern residents are known. In addition, such a condition is not necessary because of the Applicants' stated undertakings to provide gas to Northerners. This matter could be re-examined at the time of any future facilities application.

Chapter 6

Export Impact Assessment

The EIA helps the Board to determine whether a proposed export is likely to cause Canadians difficulty in meeting their future energy requirements at fair market prices. An applicant is required to assess the ability of Canadian natural gas producers to meet Canadian and export requirements for gas; the impact of the proposed export on domestic natural gas prices; and the ability of Canadian consumers to adjust, if necessary, their energy consumption patterns without substantial difficulty.

The burden of proof is on the applicant to demonstrate to the Board that the proposed export will not likely lead to any major difficulty for domestic consumers in meeting their energy requirements at market prices. The EIA presented in support of the proposed gas export addressed the required issues.

In their initial applications the Applicants submitted an analysis which addressed some of the issues required by the EIA. In response to information requests issued by the Board, the Applicants conducted a quantitative analysis of the impact of exporting Delta gas on the total Canadian and North American gas production. This information indicates that total Canadian production would increase by no more than 500 Bcf/yr. The Applicant's project would develop in the range of 400-460 Bcf/yr.

In this quantitative analysis the Applicants stated that, while the simulations did not explicitly reflect the supply costs of Delta gas, the analysis was consistent with the costs shown in Table 6-1. These show the cost of Delta gas delivered to Caroline to be less than the price of Alberta gas over the entire period, and below Alberta average and marginal gas costs over most of the period. The supply costs for Delta gas shown in this table are broadly consistent with those discussed in Chapter 2.4 Natural Gas Costs.

The Applicants expressed the view that the impact of Delta gas would be to modestly lower North American gas prices in the late 1990s and beyond as compared to the level such prices would reach otherwise. This view was based on the general proposition that there will be competitive natural gas price formation in an open North American natural gas market, such that regional prices will adjust freely to balance supply and demand for gas. Without Delta gas, the Applicants argued that the market would call on the next higher cost source of gas, leading to higher gas prices.

Table 6-1
Comparison of Supply Costs¹

Year	1988 U.S. \$/Mcf			
	Alberta Marginal Cost	Alberta Average Cost	Delta Gas Cost Delivered to Caroline	Alberta Average Price
1997	2.23	1.77	2.68	2.94
2002	3.48	2.86	2.13	4.28
2007	4.76	4.12	1.90	5.59
2012	6.13	5.45	1.59	6.98
2017	7.70	6.91	1.35	8.25

¹ From Ex. B-83, Response to I.R. No. 83, Page 5 of 10. Delta Gas Cost Delivered to Caroline reflects declining real transportation costs (i.e. not averaged, or levelized.)

In response to a Board Information Request, the Applicants provided quantitative information supporting its argument that natural gas prices would be lower with Delta gas than without it. The analytical framework which the Applicants used presupposes an open interconnected market without barriers to trade. In this framework, the introduction of new supplies to the North American market should have an impact on regional price formation throughout North America. The size of this impact is related to the size of the new supply relative to that of the market into which it is introduced.

The proposed supply of natural gas from the Delta region represents a relatively small portion of total North American future gas production (see Table 6-2 and Table 6-3). According to this analysis, Canadian burner-tip gas prices would be 3.6 percent and 2.8 percent lower in 1997 and 2017 respectively with Delta gas than without it (see Table 6-4), inducing an additional 1.7 percent consumption of natural gas over the projection period (see Table 6-5). This occurs because the proposed exports displace the next costlier gas which would have been selected were it not for the availability of Delta gas.

Table 6-2**Canadian Gas Production**

Tcf/Year

Year	Without Delta Gas¹	Assumed Delta Gas Volumes	With Delta Gas²	Difference³ (Level)
1997	4.436	0.400	4.636	+0.200
2002	4.495	0.400	4.749	+0.254
2007	3.962	0.400	4.463	+0.501
2012	3.375	0.400	3.805	+0.430
2017	3.063	0.400	3.504	+0.441

1 From Ex. B-66, Response to NEB I.R. No. 59, Report No. 19

2 From Ex. B-72, Response to NEB I.R. No. 77, Attachment A, Page 1 of 4, Report No. 19.

3 "With Delta Gas" less "Without Delta Gas".

Table 6-3**Total North American Gas Production**

Tcf/Year

Year	Without Delta Gas¹	Assumed Delta Gas Volumes	With Delta Gas²	Difference³ (Level)
1997	19.504	0.400	19.644	+0.140
2002	19.015	0.400	19.194	+0.179
2007	17.332	0.400	17.888	+0.556
2012	17.121	0.400	17.338	+0.217
2017	16.748	0.400	17.016	+0.268

1 From Ex. B-66, Response to NEB I.R. No. 59, Report No. 1 and No. 19

2 From Ex. B-66, Response to NEB I.R. No. 59, Report No. 1 and Ex. B-72, Response to NEB I.R. No. 77, Attachment A, Page 1 of 4, Report No. 19.

3 "With Delta Gas" less "Without Delta Gas".

The Applicants also concluded that Canadian consumers are capable of adjusting to changes in underlying market conditions in a measured, not traumatic, way.

Views of the Board

While the Board may not necessarily agree with all aspects of the methodology applied to determine the impact of Delta gas on natural gas prices, demand and supply, the Board does not disagree with the Applicants general conclusion. The Board agrees with the conclusion that the proposed export is likely to have a small downward impact on domestic natural gas prices, given the continuation of an open market trading environment.

Adjustments in the gas market could be difficult to achieve if large increases in gas prices were predicted, causing gas users to want to switch to other fuels. However, availability of Delta gas is expected to moderately reduce gas prices; therefore little or no disruption of consumer habits is anticipated on this account.

In light of the above assessment, the Board agrees that the applied-for export volumes are not likely to cause Canadians difficulty in meeting their future energy requirements at fair market prices.

Table 6-4**Canadian Burner-tip Prices¹
With and Without Delta Gas**

1988\$ US/Mcf

Year	Without Delta Gas	With Delta Gas	Difference² (%)
1997	5.22	5.03	-3.6
2002	6.67	6.50	-2.6
2007	8.16	7.89	-3.3
2012	9.53	9.27	-2.7
2017	10.96	10.66	-2.8

1 Form Ex. B-33, Response to I.R. No. 29, page 7 of 12, Table R-29-3.

2 "With Delta Gas" less "Without Delta Gas" as percentage of "Without Delta Gas" case.

Table 6-5**Canadian Gas Consumption¹
With and Without Delta Gas**

Tcf/Year

Year	Without Delta Gas	With Delta Gas	Difference² (%)
1997	2.557	2.597	1.6
2002	2.692	2.736	1.6
2007	2.781	2.832	1.8
2012	2.949	3.000	1.7
2017	3.166	3.220	1.7

1 Form Ex. B-33, Response to I.R. No. 29, page 11 of 12, Table R-29-7.

2 "With Delta Gas" less "Without Delta Gas" as percentage of "Without Delta Gas" case.

Chapter 7

Benefit-Cost Analysis

In support of their applications, Esso, Shell and Gulf submitted the benefit-cost analysis which is summarized in Table 7-1. The initial analyses provided for the Esso and Shell applications were based on the world oil price assumptions and the domestic demand projections included in the Board staff's October 1986 Report Canadian Energy Supply and Demand, 1985-2005 ("October 1986 Report"). When the benefit-cost analysis was updated to include the Gulf volumes, the results were provided both under the initial October 1986 Report assumptions and those of the September 1988 Report. The summary provided here discusses the results based on the more recent September 1988 Report.

The Applicants' analysis indicates that the applied-for exports would yield net benefits to Canada ranging between \$1.3 billion (PV\$)¹ and \$2.5 billion (PV\$) in their low and high price cases² respectively, with all project benefits and costs discounted at 8 percent real.

The Applicants' low and high world oil price scenarios are distinguished by different assumptions about future natural gas prices, costs and demand. The Applicants' estimate of gross social benefits consisted of natural gas revenues associated with the sale of the proposed exports at the Canadian border plus the revenues from the sale of by-products obtained by gas processing. Since no export sales contracts have been signed as yet, there are no identified export points. For the purposes of illustrating the project economics, the Applicants' analysis assumed that initially export volumes would be 223 PJ (212 Tbtu) per year at Kingsgate, 223 PJ (212 Tbtu) per year at Monchy and 41 PJ (39 Tbtu) per year at Niagara. The distribution of exports by border point was held constant over the project term.

¹ PV\$ mean 1988\$ discounted at 8 percent real.

² *Low and high price cases* refer to a low world oil price scenario and a high world price scenario.

Table 7-1

**Proposed Mackenzie Delta Export
Esso/Shell/Gulf Benefit-Cost Analysis**

(billions of 1988\$, discounted at 8%)

	Low World Oil Price	High World Oil Price
Export Revenue	8.4	11.3
Condensate Revenue	0.7	1.1
Less:		
Production Costs	2.5	2.5
Gas Transmission Costs	4.1	4.1
Condensate Transportation Costs	<u>0.3</u>	<u>0.3</u>
Equals		
Net Direct Benefits	2.2	5.5
Plus Indirect Adjustments:		
Labour Externality	0.2	0.2
Duties, Foreign Financing		
Flows and Foreign Exchange Externality	0.4	0.6
User Costs	<u>-1.5</u>	<u>-3.7</u>
Net Indirect Adjustments	-1.0	-3.0
Equals:		
Net Social Benefits	1.3	2.5
Benefit/Cost Ratio	1.16	1.24

Export revenues were then estimated for two projections of natural gas prices at Kingsgate, Monchy and Niagara. These projections were predicated on the high and low world oil price assumptions contained in the September 1988 Report. Export sales revenues were estimated to be \$11,344 million (PV\$) and \$8,368 million (PV\$) in the high and low price cases.

The only by-products assumed in the analysis were the condensate removed from the Esso and Gulf volumes at the field processing plants. The initial condensate volumes of $1\ 170\ 10^3\text{m}^3$ ($7,359\ 10^3$ barrels) per year were assumed to decline after 2005 to reflect, first, the changing content of the reserves scheduled to be connected and, then, the declining gas volumes. Condensate prices were assumed to be constant in real terms and to equal $\$221/\text{m}^3$ (\$35/barrel) (1988\$) in the high price case

and \$143/m³ (\$23/barrel) (1988\$) in the low price case. By-product revenues were estimated to equal \$1,105 million (PV\$) and \$715 million (PV\$), in the high and low price cases.

Production costs associated with the development wells, gathering lines, processing plants and, later in the project term, offshore islands needed to support the proposed export volumes were estimated to equal roughly \$2,520 million (PV\$). Unit social supply costs¹ at the plant-gate associated with the Esso, Shell, and Gulf volumes were assumed to equal \$1.00/GJ (\$1.05/MMbtu) (PV\$). All costs incurred prior to 1989 are sunk and thus were excluded from this estimate.

As discussed in Chapter 4, delivery of the gas and condensate to markets would require the construction of separate new pipeline facilities. The benefit-cost analysis included a cost of \$3,341 million (PV\$) for a hypothetical natural gas pipeline with a capacity of 489 PJ (465 Tbtu) per year from the Mackenzie Delta to Caroline Alberta. The non-fuel operating costs included in this estimate were \$66 million (1988\$) per year. Fuel loss was assumed to be 3.8 percent.

The present value of capital and operating costs for transmission of the proposed exports from Caroline to the U.S. border was estimated as \$716 million (PV\$). This was based on the cost of a hypothetical pipeline having two legs, one from Caroline to Kingsgate and one from Caroline to Monchy as discussed in Chapter 4. The estimate included fuel volumes of 1.4 percent to be purchased from southern Canadian supply sources and valued at average Alberta netbacks according to the two price case projections.

The condensate was assumed to be shipped via a new condensate pipeline from the Mackenzie Delta to Norman Wells where it would supplement prospective declining volumes in the existing Interprovincial Pipe Line (NW) Ltd. Norman Wells pipeline. Total incremental costs were estimated as \$286 million (PV\$).

The Applicants' benefit-cost analysis included a number of adjustments to commercial market values where it was thought that those values did not reflect the true value of the resource to Canada.

¹ *Social Supply Costs* are the sum of capital and operating costs per unit of production, exclusive of royalties, taxes, subsidies, or incentive payments, discounted at the estimated social opportunity cost of capital in Canada.

The Applicants assumed that development-related jobs represented temporary employment and that operating jobs represented permanent employment. In addition, a category of semi-permanent jobs was identified to reflect the lengthy duration of the development of additional natural gas fields in the Delta. The Applicants assumed that the "social opportunity cost of labour" ("SOCL")¹ was 90 percent of the private wage bill for development, 70 percent of the operating labour cost, and 80 percent of the labour costs of developing future natural gas fields in the Delta. These adjustments were based on labour market information available in 1984. The Applicants noted that although the decline in unemployment rates since 1984 would compress the adjustment, the high unemployment in northern regions would tend to maintain it at the higher level. The resultant reduction in labour costs was \$158 million (PV\$).

In a social benefit-cost analysis, only actual costs and benefits to Canada are included; the means of paying for or receiving them are not. These payments are transfers between receivers and providers of goods and services rather than actual costs or benefits. To include both costs and transfers would be double counting. Therefore, the Applicants excluded property taxes, provincial and federal income taxes and any royalty payments as these items were not considered to represent the cost of government services accorded the project, but rather transfer payments². In addition, duty flows to the federal government from the import costs associated with the project were estimated by the Applicants to be \$39 million (PV\$) and were subtracted from the costs.

The project would generate U.S. currency flows for Canada. The Applicants adopted a premium of 5 percent for foreign exchange³ which was applied to gross border revenues less imports and net foreign financing flows. The social value of foreign exchange was estimated as \$396 million (PV\$) and \$545 million (PV\$) in the low and high price cases, respectively.

¹ The *SOCL* is the value attached to the activity in which workers would have been engaged in the absence of the project. In general, the *SOCL* is different from the financial cost of labour because of taxes, unemployment insurance payments, and the level of unemployment. The *SOCL* varies according to whether jobs are permanent or temporary. If the project involved the transfer of previously employed workers, then the *SOCL* would be the social value of the associated lost output. This can be approximated by the gross-of-tax wage of the vacated position. For previously unemployed workers hired for the project, the net-of-tax wage rate, which is the amount seen by the workers and which enticed those workers to offer their services, less their net-of-tax unemployment benefits, is the maximum value of the *SOCL*. This would be a maximum value because it is possible that the workers in question would have accepted a job at a lower wage rate, if one had been offered, indicating that this was the opportunity cost of their time. In addition, the economic impact of creating temporary jobs differs significantly from that of creating permanent jobs. The creation of temporary jobs might entice into the labour market workers who, once the jobs terminate, would be eligible for unemployment benefits they would not have enjoyed in the absence of the project. These additional unemployment insurance benefits are a social cost of the employment of these workers. The creation of permanent jobs, on the other hand, would generally reduce the number of temporary workers and thus the magnitude of future unemployment benefits. Thus the *SOCL* for permanent jobs would be less than the *SOCL* for temporary jobs. Whether a job is temporary or permanent depends on the duration of the employment.

² The recovery of sorts underlying these transfers are implicitly accounted for in the discount rate, which provides a rate of return to all of society's capital committed to the project.

³ Some argue that a foreign exchange adjustment to costs and benefits demonstrated in non-Canadian currencies is required because tariffs, subsidies and duties reduce the market-determined value of foreign exchange below what it would be without these items. Thus it is argued that any inflow of foreign exchange resulting from increased exports provides a benefit if it causes an appreciation of the exchange rate thus offsetting the distortionary impact of tariffs, subsidies and duties.

The Applicants indicated that environmental costs were included in their analyses, but noted that it is difficult to separate the costs for environmental protection from the costs resulting from the use of good engineering practice in the design and construction of a pipeline or production facilities. The pipeline cost estimates included \$180 million (1988\$) for environmental protection and restoration. In addition, the Applicants stated that the 21 percent contingency for unanticipated costs included in the cost estimate was intended, in part, to cover such items. The Applicants noted that they have not attempted to assess the environmental and socioeconomic impacts of the hypothetical pipeline as these would be addressed in any future facilities application under Part III of the NEB Act.

The Applicants estimated the user costs¹ associated with the applied-for exports based on the supply cost estimates, incremental conventional reserves, and demand projections included in the September 1988 Report with some modifications. The September 1988 Report provides unit costs of reserve additions in Western Canada but it does not provide costs for frontier reserves in the Mackenzie Delta/Beaufort Sea region. For gas from these frontier reserves, the Applicants modified the Board's supply cost curve to include 9 EJ (8,550 Tbtu) of Mackenzie Delta gas at \$2.33/GJ (\$2.45/MMbtu) (1988\$) delivered to Alberta and an additional 10 EJ (9,500 Tbtu) of Mackenzie Delta/Beaufort Sea gas valued at \$2.51/GJ (\$2.64/MMbtu) (1988\$) in the low price case and at \$2.57/GJ (\$2.71/MMbtu) (1988\$) in the high price case. The Applicants' analysis assigned the values of \$4.78/GJ (\$5.03/MMbtu) (1988\$) and \$6.66/GJ (\$7.01/MMbtu) (1988\$) in the low and high price cases respectively for all other frontier reserves.

To do their user cost calculation, the Applicants' "base case" used the domestic demand projections for natural gas included in the September 1988 Report and added currently authorized natural gas exports. The "with-export case" consists of their project volumes plus their "base case" volumes. The user cost is calculated as the difference in present worth cost between the "base case" and the "with-export case", less the difference in direct production cost. Because licensed natural gas export volumes in effect at the time of the analysis drop off sharply after 1994, this methodology results in a "base case" demand estimate in which exports of natural gas fall below 500 PJ (475 Tbtu) by 1998 and continue declining to 121 PJ (115 Tbtu) by 2004.

The Applicants' analysis was undertaken at 6, 8 and 10 percent real discount rates.

The Applicants concluded that benefits ranging from \$1.3 billion (PV\$) in the low price case to more than \$2.5 billion (PV\$) in the high price case based on the projections in the September 1988 Report, clearly make the proposed project a desirable one from a Canadian public interest perspective.

The Dene/Metis noted that, in their view, there was not enough evidence before the Board in the benefit-cost analysis to determine whether the issuance of the export licences would be in the public interest.

The Dene/Metis stated that the Applicants' benefit-cost analysis excluded socioeconomic considerations such as the impact on cultures, education and public health. Furthermore, the Dene/Metis stated that the analysis did not include any adjustment for cumulative regional impacts. It

¹ New exports necessitate the development of more expensive gas reserves to meet domestic and other export demand sooner than would be the case in the absence of the new exports. The associated increase in the cost of meeting these other demands is called the *user cost* of the new exports.

noted that not only would there be impacts associated with these particular applications but the construction of any pipeline would result in subsequent additional oil and gas developments and further impacts. The Dene/Metis maintained that a complete analysis required all of these impacts to be included. The Dene/Metis also questioned whether the Applicants' analysis included a sufficient amount for environmental costs.

In summary, the Dene/Metis stated that the global benefit-cost analysis approach adopted by the Applicants might be appropriate for the expansion of southern pipelines and exports from the south, but it was not appropriate for frontier regions because the benefit-cost approach ignores the cumulative regional impacts. In the South such impacts might be insignificant but in the North the impacts could be significant and could require mitigative measures which still might not eliminate the potentially negative impacts. The Dene/Metis maintained that there might be net benefits to Canada but these should be weighed against the potential costs to be borne in the region and, in particular, to be borne by the Dene/Metis.

Views of the Board

The Board usually evaluates an applicant's benefit-cost analysis by preparing its own assessment to reflect differences in judgement about certain assumptions. The results of the Board's benefit-cost analysis of the proposed exports are shown in Table 7-2.

Table 7-2

**Proposed Mackenzie Delta Export
NEB Benefit-Cost Analysis**

(billions of 1988\$, discounted at 8%)

	Low World Oil Price	High World Oil Price
Export Revenue	9.3	12.9
Condensate Revenue	0.7	1.1
Less:		
Production Costs	2.5	2.5
Gas Transmission Costs	4.1	4.2
Condensate Transportation Costs	<u>0.3</u>	<u>0.3</u>
Equals		
Net Direct Benefits	3.1	7.0
Plus Indirect Adjustments ¹ :		
Labour Externality	0.2	0.2
User Costs	<u>-2.2</u>	<u>-5.9</u>
Net Indirect Adjustments	-2.0	-5.7
Equals:		
Net Social Benefits	1.1	1.3
Benefit/Cost Ratio	1.13	1.10

1 The indirect adjustments include an amount of \$39 million (PV\$) for net duties.

As noted above, the Applicants' projections for their average natural gas export price were based on data contained in the September 1988 Report. These prices were projected to reach \$3.77/GJ (\$3.97/MMbtu) (1988\$) in the low price case and \$5.12/GJ (\$5.39/MMbtu) (1988\$) in the high price case by 2005. Thereafter, the Applicants have assumed that the average price falls to \$3.59/GJ (\$3.78/MMbtu) and \$4.91/GJ (\$5.17/MMbtu) by 2016 in the low and high price cases respectively. In its analysis, the Board has used similar prices to the Applicants' to 2005. Thereafter, the Board's prices continue to grow consistent with the increasing marginal costs of reserves required to meet the Board's demand projections. These demand projections

are higher than the Applicants' because they include a projection of exports. Table 7-2 shows that the Board's assumptions result in a higher projection of export revenues than those included in the Applicants' analysis. The Applicants' analysis, as noted above, includes an average fuel loss of 5 percent for gas delivered to Niagara. Since a benefit-cost analysis is based on incremental benefits and costs, the Board believes that a marginal fuel use of 10 percent should be used. Assuming the Applicants' estimate of 1.1 percent fuel loss for exports at Kingsgate and Monchy and the above 10 percent for exports at Niagara and using projections for an Alberta price consistent with the low and high world oil price scenarios, the Board has estimated fuel costs as \$154 million (PV\$) and \$219 million (PV\$) in the low and high price cases, respectively.

As discussed above, the Applicants' analysis includes a foreign exchange adjustment valued at \$396 million (PV\$) in the low price case and \$545 million (PV\$) in the high price case. The foreign exchange adjustment is only justified if it is believed that tariffs, subsidies and duties are in fact distortionary in the sense that they introduce a wedge between the foreign and domestically denominated prices generated in a properly functioning market. However, it is equally arguable that they were introduced to correct past market imperfections. Furthermore, the foreign exchange adjustment implies that tariffs, subsidies and duties will continue to exist throughout the analysis period. The validity of these assumptions is not at all clear given the Free Trade Agreement with the United States and the potential for the removal of trade restrictions with other countries pursuant to GATT¹ negotiations. The Board is not convinced that adjusting foreign exchange earnings to reflect a social premium is necessarily justified. Therefore, no adjustment has been included in the Board's analysis.

Socio-economic impacts, such as the impacts on culture and life styles, are generally very difficult to quantify. One socioeconomic impact explicitly quantified in the Applicants' analysis was a benefit from northern job creation which was included in the labour cost adjustment (SOCL discussed above). In addition, the Applicants' pipeline cost estimate includes a 21 percent contingency which is intended, in part, to cover environmental and socioeconomic costs associated with the hypothetical pipeline. However, it is not clear what portion of this contingency related to these costs, or was a pure reserve for unexpected pipeline engineering and construction cost escalation. The Board used the Applicants' pipeline cost estimate in its analysis and performed sensitivity tests about this estimate.

The Board notes that during the examination of any pipeline application, there would be a detailed review of the plans designed to enhance benefits and mitigate negative impacts for groups such as the Dene/Metis. Moreover, since the Applicant's plans for development and production of the gas fields, as well as any pipeline proposal would be at a more advanced stage at that time, there may be more information available which would help to quantify socioeconomic, infrastructure and environmental impacts that might be associated with production activities and pipeline construction and operation. To the extent that these can be quantified, they would be included in the benefit-cost analysis of that proposed pipeline.

¹ General Agreement on Tariffs and Trade.

The Board does not agree that the methodology used by the Applicants in calculating user costs is appropriate. In the Board's view, the Applicants' forecast of export demand in the absence of the proposed exports understates the exports that are likely to flow during the forecast period. Indeed, the Applicants' forecast assumes that pipeline facilities would be under-utilized as existing licences expire and that alternative export market opportunities for Canadian natural gas would not exist.

In the Board's view, a further undesirable aspect of using only licensed exports for the demand forecast would be the potential for unequal treatment of export applicants; i.e. two license applicants with the same volumes and contractual pricing arrangements would be evaluated differently if it happened that the level of licensed exports were different at the time each application was received.

User costs arise because increased production from existing reservoirs accelerates the time frame in which higher cost reservoirs must be exploited. Thus, user costs are a function of the expected gas production profile over time and bear no direct relation to the level of licensed exports, because what is licensed now is not necessarily what would reasonably be expected to flow in the future. In the Board's view, in the context of a market-oriented export policy environment, the correct approach is to use a reasonable projection of export demand in the absence of the applied-for exports and, as with other components of the analysis, to conduct tests of the sensitivity of the estimates of user costs to lower or higher values of future exports.

In justifying their use of licensed exports, the Applicants stated that they did not believe that the costs and benefits of their proposal should be influenced, in the context of the user cost calculation, by yet to be approved exports; hence, in their view only domestic demand and authorized exports should be considered for this purpose. Furthermore, the Applicants referred to the Board's letter of 19 December 1984 on benefit-cost procedure. The intention of this letter was to standardize the assumptions to be used for the benefit cost analyses of certain competing facilities applications at that time; it was not intended to be a directive from the Board on methodology to be used in future facility or export applications. Moreover, in the letter it is stated that "assumptions must be made with respect to future domestic and export requirements for Canadian natural gas with (Incremental Case) and without (Base Case) the incremental natural gas sales." In the Board's view, given the current policy context, it is appropriate to consider "export requirements" to mean a reasonable projection of total ongoing natural gas exports.

In estimating user costs, the Board used projections of domestic and export demand contained in the low and high cases of the September 1988 Report. The applied-for export volumes were then deducted from these projections to determine the production profile in the absence of the export. The total incremental production costs attributable to the applied-for export were then calculated as:

- (1) the net present value of the total production costs of all projected production with the proposed export; minus

(2) the net present value of the total production costs of all projected production without the proposed export.

The total incremental production costs consist of the direct cost of the exports and the associated user costs. Therefore, subtracting the Applicants' own direct production costs from total incremental production costs yields the estimated user costs attributable to the applied-for export. The Board's methodology yielded higher user costs than those estimated by the Applicants, because cumulative production is greater using an estimate of expected export flows rather than the estimate of licensed export flows.

In deriving the unit supply costs used to estimate incremental production costs, the Board assumes that industry will respond to the challenge of lower oil prices by reducing costs through technological developments and other cost cutting means. Thus, the Board's estimated unit supply costs are lower in the low price case than in the high price case. In its "base case" benefit-cost analyses (both the low and high price cases) the Board has used the Applicants' estimates of the costs of their gas, \$2.33/GJ (\$2.45/MMbtu) (1988\$), in other words, there was no differentiation in the cost of the Applicants' gas under the two price cases. For other Delta gas, the Board has used the estimated volume and unit supply costs discussed in Chapter 2 for the low price case. Consistent with the September 1988 Report methodology, the unit supply costs of the other onshore and offshore reserves shown in Table 2-8 were increased by 20 percent for the high price case.

The Board's analysis assumes that Mackenzie Delta gas would be produced even if the proposed exports were not approved. In the "without export" case this frontier gas is assumed to commence production in 2004 and 1999 for the low and high price cases respectively. In these years the social cost of the frontier gas, \$2.33/GJ (\$2.45/MMbtu) assuming a twenty-year recovery of pipeline cost, is competitive with the social cost of the marginal southern Canadian supply source. The impact of the proposed exports would be to advance the construction of a northern pipeline so that this gas could begin production in 1997. Thus under the export case these facilities are "prebuilt" and the associated costs are recovered from the proposed exports. Once these exports terminate, the pipeline facilities would be available to meet other demand. The capacity of this pipeline is assumed to be 487 PJ (463 Tbtu) per year in both the "with" and "without export" cases.

Table 7-3

**Proposed Mackenzie Delta Export
Sensitivity Analysis of Net Benefits**

(billions of 1988\$, discounted at 8% real unless otherwise indicated)

	Net Benefits	
	Low World Oil Price	High World Oil Price
Social Discount Rate		
6%	2.0	1.7
8% ("Base Case")	1.1	1.3
10%	0.5	0.9
Pipeline Costs		
30% Capital Cost Increase	0.7	1.2
30% Capital Cost Decrease	1.5	1.4
Operating Cost Increase	0.6	0.8
Proposed Export Points		
Including Incremental Facility		
Expansions to Niagara	1.0	1.2
Assuming all Gas Exported		
at Kingsgate and Monchy	1.0	1.2
User Costs - Level of Exports		
Pipeline Capacity	1.2	2.7
Exports of 1.8 EJ Per Year	0.8	0.7
Exports of 2.0 EJ Per Year	0.6	0.2
User Costs - Unit Supply Cost		
20% Increase in WCSB ¹ Additions Supply Costs	0.2	0.7
Higher Backstop Values	1.0	0.9
Gas Export Prices		
Applicants' Prices	0.2	-0.2
Prices increased by 10%	2.0	2.5
Prices decreased by 10%	0.2	0.0

¹ Western Canada Sedimentary Basin

The Board has undertaken a number of sensitivity analyses related to the social discount rate, pipeline costs, proposed export points, user costs, and gas export prices. The results are summarized in Table 7-3 and are discussed below.

The Board has tested the sensitivity of the net benefits to real social discount rates of 6, 8 and 10 percent. The costs associated with any new pipeline facilities occur during the initial years of the analysis while the gas export revenues are earned in later years. As the discount rate falls, the present value of the revenues increases by relatively more than the present value of the pipeline facilities costs. Thus net benefits increase as the discount rate is reduced. User costs are also incurred in the latter part of the analysis period and thus they tend to offset the increases in the present value of revenues as the discount rate falls. Since the user costs are relatively higher in the high price case, this offsetting means that the spread of net benefits is less under the high price case than under the low.

As discussed in Chapter 4, there is some uncertainty about the capital and operating costs of hypothetical pipelines from the Delta to Caroline and from Caroline to Kingsgate and Monchy. To test the sensitivity of the estimated net benefits to changes in pipeline construction costs, the Board used a range of plus or minus 30 percent for capital costs. In addition, holding capital costs at base case values, annual operating costs were increased from \$66 million (1988\$) to \$147 million (1988\$) per year for the pipeline from the Delta to Caroline and from \$6.7 million (1988\$) per year to \$20 million (1988\$) per year for the pipeline from Caroline to Kingsgate and Monchy. As shown in Table 7-3, a 30 percent increase in the costs of constructing a pipeline from the Delta to Caroline would still yield net benefits to Canada, in both the low and high price cases. However, the net benefits would be reduced to \$0.7 billion (PV\$) and to \$1.2 billion (PV\$) in the low and high price cases respectively. A 30 percent decrease in pipeline construction costs would increase net benefits to \$1.5 billion (PV\$) and \$1.4 billion (PV\$) in the low and high cases. Increases in operating cost for the pipeline would reduce net benefits to \$0.6 billion (PV\$) and \$0.8 billion (PV\$) in the low and high cases respectively.

Although the Applicants' analysis assumed that an additional 41 PJ (39 Tbtu) per year of natural gas would be exported at Niagara, it did not include any incremental capital costs associated with expanding TransCanada PipeLines Limited's ("TCPL's") system to Niagara. The Board believes that, if the assumption is that solely on account of this project, incremental gas is to be exported at Niagara, an allowance for pipeline facilities should be included in the analysis. The Board has conducted a sensitivity analysis of including an advancement over the applied-for twenty year licence term of approximately 170 km (106 mi) of loop and 40 MW (53,640 hp) of compression for TCPL totalling approximately \$212 million (1988\$) and a further \$38 million (1988\$) on Foothills/ NOVA from Caroline to Empress and \$19 million (1988\$) on Union. It was assumed that the overall fuel requirements to transport gas from Caroline to Niagara would be 10 percent. These assumptions result in a slight reduction of the net benefits to \$1.0 billion (PV\$) and \$1.2 billion (PV\$) in the low and high price cases, respectively as shown in Table 7-3.

Alternatively it could be assumed that the hypothetical pipeline provides sufficient capacity so that all of the gas could be exported at Kingsgate and Monchy. In this case, there would be no requirement for expansions of TCPL, Foothills, NOVA, or Union as discussed above. Export revenues, however, would fall from \$9.3 billion (PV\$) to \$9.1 billion (PV\$) and from \$12.9 billion (PV\$) to \$12.7 billion (PV\$) in the low and high price cases respectively. The cost of transportation fuel from Caroline to Monchy and Kingsgate would be reduced by \$61 million (PV\$) to \$94 million (PV\$) in the low case and by \$86 million (PV\$) to \$133 million (PV\$) in the high case. This would result in a slight decrease in net benefits of \$21 million (PV\$) and \$9 million (PV\$) in the low and high price cases versus the previous case which included the costs of incremental facilities to transport the gas to Niagara. The impact of this assumption on the net benefits of the project relative to the base cases is a reduction in these net benefits of \$135 million (PV\$) in the low price case and \$123 million (PV\$) in the high price case.

The Board conducted analyses to test the sensitivity of the net benefits to the choice of the gas production profile used in the user cost calculation. For the first sensitivity, it was assumed that in the "without-project" case exports would fill existing pipeline capacity as domestic demand increases. In this scenario exports decrease but by less than they would using only 'authorized exports'. The Applicants' exports were treated as incremental to these volumes. User costs under the low price case fall from \$2.2 billion (PV\$) to \$2.1 billion (PV\$). Under the high price case, user costs fall from \$5.9 billion (PV\$) to \$4.5 billion (PV\$). Net benefits increase as shown in Table 7-3.

Further sensitivities of net benefits to the choice of the gas production profile were also performed. The projection of export volumes was increased to 1.8 EJ (1,710 Tbtu) and 2.0 EJ (1,900 Tbtu) per year for both the low and high price cases. In both the September 1988 Report and the base case benefit-cost analyses shown in Table 7-2, the projection of export volumes were 1.5 EJ (1,425 Tbtu) per year. The impact of the increased export projections was an increase in the user costs. Under the export projection of 1.8 EJ (1,710 Tbtu), user costs increased to \$2.5 billion (PV\$) and \$6.5 billion (PV\$) in the low and high price cases. Under the export projection of 2.0 EJ (1,900 Tbtu), user costs increased to \$2.7 billion (PV\$) and \$7.0 billion (PV\$) in the low and high price cases respectively. Increases in the user cost resulted from an accelerated depletion of the various supply sources since the total gas demand was greater, all other things being equal. In the low and the high price cases, gas from backstop reserves was required 2 years earlier and 3 years earlier with additional annual exports of 300 PJ (285 Tbtu) and 500 PJ (475 Tbtu) respectively. As shown in Table 7-3, an increase in projected exports reduces the net benefits.

The sensitivity of the net benefits to a 20 percent increase in the Board's estimates of supply costs of both WCSB reserves additions and gas from the frontier regions, was also tested. In this case, the supply costs of the established reserves and the backstop

value¹ were kept unchanged from the base case levels of \$0.71/GJ (\$0.75/MMbtu) and \$4.78/GJ (\$5.03/MMbtu) and \$0.78/GJ (\$0.82/MMbtu) and \$6.66/GJ (\$7.01/MMbtu) (1988\$), in the low and high price cases, respectively. This test resulted in an increase of \$883 million (PV\$) and \$625 million (PV\$) in the total of direct production and user costs associated with the export in the low and high price cases, respectively. As shown in Table 7-3, an increase of 20 percent in the supply costs, holding the backstop value and the cost of established reserves constant, would reduce the net benefits to \$0.2 billion (PV\$) and to \$0.7 billion (PV\$) in the low and high price cases, respectively.

Because of the significance of the user cost and the influence of the backstop value, the Board has assessed the impact of changes in the backstop value on the estimated user costs and on the project's net benefits. In the low case, the backstop value was increased to \$5.00/GJ (\$5.26/MMbtu) from \$4.78/GJ (\$5.03/MMbtu) (1988\$). This increased the total incremental gas costs (production and user costs) by \$0.2 billion (PV\$) and reduced the net benefits to \$1.0 billion (PV\$). In the high case, the backstop value was increased to \$7.00/GJ (\$7.37/MMbtu) from \$6.66/GJ (\$7.01/MMbtu) (1988\$). This generated an increase of \$0.4 billion in total incremental gas costs (production and user costs) and reduced the net benefits to \$0.9 billion (PV\$).

The Board also has examined the sensitivity of the net benefits of the proposed exports to changes in export prices. Several alternatives for export prices were considered. For the first price sensitivity, the Board used the Applicants' export prices, which were lower than the Board's after 2005, to evaluate the export revenues and fuel from Caroline to the U.S. border. The impact is a reduction in gas export revenues from \$9.3 billion (PV\$) to \$8.4 billion (PV\$) in the low price case and from \$12.9 billion (PV\$) to \$11.3 billion (PV\$) in the high price case. The fuel from Caroline to the U.S. border was reduced by \$16.5 million (PV\$) and \$27.5 million (PV\$) in the low and high price cases, respectively. This sensitivity would reduce the benefits to \$0.2 (PV\$) and -\$0.2 billion (PV\$) in the low and high price must, respectively, again confirming the importance of the revenue estimates to the project viability evaluation.

The Board has also analyzed the impact of an increase of 10 percent and a decrease of 10 percent in the average export price. Under the increase of 10 percent net benefits increase to \$2.0 billion (PV\$) and \$2.5 billion (PV\$) in the low and high price cases respectively. Under the 10 percent decrease in prices net benefits are reduced significantly, falling to \$0.2 billion (PV\$) in the low price case and being eliminated in the high price case.

In conclusion the Board finds that the proposed exports would likely provide net benefits under most reasonable assumptions. Two of the major uncertainties in the

¹ The *backstop* values reflect the value of the most easily substitutable energy source which is expected to be available in unlimited quantities in the future. The backstop in the 1988 Supply/Demand Report is light fuel oil in the low world oil price case and gas either from the frontier regions or from alternative sources such as coal gasification in the high world oil prime case.

analyses, at this time, are the lack of export sales contracts specifying export prices and the absence of detailed information on the required northern pipeline. However, before any exports would flow, a pipeline would have to be constructed. The required pipeline would be the subject of a future bearing under Part III of the NEB Act. The Board's review, at that stage, would include a benefit-cost analysis of the proposed facilities, taking into account all relevant project associated factors as understood at that time including the prices specified in the export sales contracts.

Chapter 8

Northern Issues

8.1 Dene/Metis Land Claim

Recent History

In the federal government's White Paper of 1969¹, the government was prepared to resolve outstanding "lawful obligations" so treaties could be "equitably ended", and the special status of Indians could be terminated.

In August 1973, the Minister of Indian Affairs and Northern Development, issued a statement describing the government's positions for remedying two basic problems arising from the initiation of treaties. The first position concerned the government's lawful obligation to Indian People arising from grievances concerning the nonfulfillment of existing Indian treaties, the administration of reserve lands and other assets under the *Indian Act*, and other formal agreements. That position was referred to as "specific" claims policy.

The second position concerned the continuing use and occupancy of traditional lands - where no treaty, formal agreement or specific legislation had ever been signed or passed. The government recognized the native right to the land resource (traditional use) and to the need for settlement (occupancy). As continuing use and occupancy could include such items as:

- (i) protection of bunting, fishing, and trapping;
- (ii) land title;
- (iii) money; or,
- (iv) other rights and benefits, in exchange for a release of the general and undefined Native title;

the position came to be referred to as "comprehensive" claims.

Comprehensive Native North of 60°

The Western Arctic Claims Agreement, i.e. the Inuvialuit Final Agreement of 1984, is the first and, so far the only settlement concluded under the 1973 federal comprehensive claims policy. The Agreement extinguishes the aboriginal claim of the Inuvialuit of the Western Arctic in exchange for their ownership of certain lands; hunting, fishing, and trapping rights; and 45 million dollars. It also provides for the protection of social and cultural rights. The Agreement was negotiated and signed by the Committee for Original Peoples' Entitlement representing the Inuvialuit and by the Government of Canada.

¹ Department of Indian Affairs and Northern Development, 1969. *Statement of the Government of Canada on Indian Policy*. Ottawa: DIAND

Three other comprehensive claims north of the 60th parallel are now under negotiations (See Map). Those claims were put forward by:

- (i) the Council for Yukon Indians ("CYI");
- (ii) the Dene Nation and Metis Association of the Northwest Territories ("Dene/Metis"); and
- (iii) the Tungavik Federation of Nunavut (representing the Inuit of the Central and Eastern Arctic).

When a land claim is accepted for negotiation, the government requires that the negotiation process and settlement formula be complete, so any land claim settlement will be final. The negotiations are designed to deal with matters arising from the notion of aboriginal land rights such as, lands, cub compensation, wildlife rights, and may include self-government institutions on a local basis.

The 1973 policy statement indicated two new approaches with respect to comprehensive claims. First, the federal government was prepared to accept land claims based on traditional use and occupancy. Second, the federal government was willing to negotiate settlements of such claims although any acceptance of such a claim would not be an admission of legal liability.

The Dene/Metis Land Claim

In 1985, the Dene/Metis filed with the government, "The Dene/Metis Comprehensive Land Claim". Since then, the negotiators on both sides have worked upon a number of sub-agreements covering various aspects of the claim issues. Those sub-agreements were initialled as agreement was reached, and the summation of those was incorporated in the Dene/Metis Agreement-in-Principle ("AIP") signed in September, 1988.

That AIP has set down the framework of conditions which must be followed in the formulation of a Dene/Metis Final Agreement.

The claim area (see Map), covers 1 165 495 km² (450,000 square miles). Throughout that area, the Dene/Metis have exclusive right to hunt and fish, subject to certain wildlife management restrictions.

A second tier of land rights includes exclusive surface-rights ownership. The Dene/Metis may select an amount of land, not yet specified, which may be of significance to traditional hunting patterns. Ownership of those lands would require that the Dene/Metis allow other parties, who own the sub-surface rights, to enter and use the surface lands based upon a lease or rental system.

A third tier of ownership is totally exclusive. The Dene/Metis, through subsequent negotiation, will be allowed to select a limited amount of land around each community. The amount of land would vary with negotiation and would include ownership of surface and subsurface rights. By that form of ownership, the Dene/Metis would be in a position to:

- (i) totally protect cultural features;
- (ii) establish areas for community growth; and
- (iii) develop the natural resources in a commercial or industrial fashion.

Comprehensive Land Claims In Canada North of 60° 1



Legend

- 1 Council for Yukon Indians
- 2 Inuvialuit Settlement Region
- 3 Dene Nation
- 4 Metis Association of the Northwest Territories
- 5 Tungavik Federation of Nunavut

1 Apart from the Inuvialuit Settlement Region, areas represent only approximate boundaries of the various interests.

A fourth tier includes accessing an economic interest in the resources of the entire 1 165 495 km² (450,000 square miles). The Dene/Metis would negotiate a specific interest in the Norman Wells oil reserves and development and, as well, would have an opportunity to negotiate a blanket interest, or overall percentage, of natural resource development revenue.

The AIP contains 35 other sub-agreements, each of which must be negotiated to mutual acceptance before a Final Agreement can be achieved. The Dene/Metis expect that the Final Agreement will be reached by 1991.

Meanwhile, an Interim Protection Agreement is in place which will freeze land use on lands as they are selected by the Dene/Metis during the negotiation process.

Dene/Metis Evidence

In the evidence placed before the Board, the Dene/Metis stated that they are currently in the midst of negotiations, working from the 36 sub-agreements toward a Final Agreement.

The Dene/Metis made the point that for past projects there was insufficient lead time for them to make their preparations for taking advantage of the opportunities which a northern project might provide. At present, their time and resources are fully extended in their comprehensive claim negotiation.

To the time of this hearing, land selection has been concentrated in the Delta region, and approximately 3,900 square miles have been selected. There remain four other Dene/Metis regions in which land selection has yet to be negotiated.

Without completion of their land claim, the Dene/Metis will not know which lands they will own, nor in which of the four categories of ownership those lands will fall. With the Final Agreement, they feel there would be included sufficient cash payments to fund the establishment of businesses to meet the new opportunities. The Final Agreement will also be the key to the creation of Dene/Metis institutions for land-use and resource planning and management.

The Dene/Metis expressed their concern that approval of the export application would lead quickly to an application for a pipeline. With their resources already fully occupied, they would be unable to adequately negotiate their Final Agreement, and consider it to be unfair to add the additional burden of a pipeline review.

The Dene/Metis requested that no commitments be made with respect to the development of Mackenzie Delta gas which could prejudice the settlement of their comprehensive claim. Two years from the signing of the AIP in September 1988, has been set as the period required to reach that Final Agreement. In that respect, the Dene/ Metis requested that licences for the gas export not be given at this time, or at least be conditioned to delay implementation. A delay of many years was not anticipated, but rather of one or two years.

In examining potential buyers of the gas to be exported, the Dene/Metis explored the possible consequences of a delay in the approval of the gas export applications. The buyers were looking to secure gas for 1996, and felt that delays beyond that would create some uncertainty in their planning. Foothills felt the market would still be there. The Inuvialuit and the GNWT felt there was no need to delay or condition any licences for export.

In their final argument, the Applicants addressed the Dene/Metis suggestion for a licence condition delaying the approval until native land claims have been settled. The Applicants indicated that the evidence showed such a delay would cause considerable uncertainty with respect to project timing, and difficulty in marketing Delta gas.

The Dene/Metis reiterated their fear that approval of a gas export licence now would prejudice their comprehensive claim negotiations. They described how Dene/Metis management organizations will not come into force until implementation of the Final Agreement, how capital to fund development projects will be available only upon signing the Final Agreement, and how other compensation and benefits will accrue only upon completing the Final Agreement. The status of the Dene/Metis land selection and protection was outlined, and the finality of that selection was emphasized.

The negotiations to achieve those benefits are now underway, and it was described as a painstaking exercise. The Dene/Metis are being asked to make decisions that they will have to live with for centuries. The Dene/Metis expressed the high stakes for them, the high level of their priority, and how outside pressures could disrupt and prolong the negotiation process. The granting of an export licence at this time, they felt, could jeopardize both land claims and self-government negotiation.

The Dene/Metis, therefore, requested a relatively short postponement of the export licences. They saw little risk that markets would be lost through a delay of two to four years.

Views of the Board

The Dene/Metis have requested that any facilities application be delayed until their land claim negotiations are settled, either by denying this application or by means of a condition to the licence.

The Board understands that the Dene/Metis have approximately two years during which to complete their negotiations to develop the clauses of their AIP into a Final Agreement. Organizing their infrastructures and policies will follow after that.

The Board notes that there is already in place an Interim Agreement that will freeze land-use upon lands selected as that occurs. To some extent that has been done, and land selection is actively being negotiated.

The major concerns of the Dene/Metis revolve around potential problems associated with an application, to construct the facilities to move natural gas volumes to market, before their claims negotiations are finalized. In considering the timing of a facilities application, the Board notes the Dene/Metis wish to have their negotiations completed before the filing of the application and not just prior to construction.

It is clear that an early facilities application could further stretch limited Dene/Metis resources. That could also preclude sufficient lead time for the Dene/Metis to become organized to take best advantage of business and labour opportunities arising from pipeline construction.

The Board recognizes the importance of resolving native land claims. The applications under consideration are, however, solely for licences to export natural gas from the

Delta region, and not for the approval of pipeline facilities. On the basis of the evidence before it, the Board is not convinced that approval of gas export licences would prejudice the settlement of the Dene/Metis claim. An approval of export licences does not mean that consideration of a facilities application would follow shortly, thereby straining the resources of the Dene/Metis. Considerable preparatory work, including detailed discussions with all Northerners, would be required before an application.

On balancing the desires of the Dene/Metis, the Applicants and a strong expression of support from Northerners representing the majority of those concerned, the Board finds it neither necessary nor desirable to delay its decision with respect to the export applications, nor to add a condition delaying the implementation of any licences to export gas.

8.2 Benefits to Northerners

Beaufort Mackenzie Development Impact Zone Society

The Beaufort Mackenzie Development Impact Zone Society ("DIZ Society") supported the development of hydrocarbons from the Mackenzie Delta/Beaufort Sea area. However, its support was conditional upon the provision of employment and business opportunities for the North, and environmental protection.

The Society saw a need for ongoing training. It recommended that communities be kept well informed during the development process, and confirmed that the Society would be a good medium for the exchange of information.

Canadians for Responsible Northern Development

The CRND presented its views concerning training programs. It suggested that an apprentice - journeyman program could be feasible and beneficial in the North.

It also stated that early planning of development should be undertaken. It is concerned that Northern people might not benefit from the employment opportunities if there were not adequate planning. The CRND mentioned that during previous development Fort McMurray was left with infrastructure that was not needed once the project was over. Therefore, it had to pay for those facilities. The CRND would like to see measures taken now to ensure that this does not happen in the Delta.

Council for Yukon Indians

Several of the Yukon Indian Nations have unresolved transboundary claims which cover territory in the Mackenzie Valley watershed. The CYI believes that the export licences should not be issued until both the Yukon Indians and Dene/Metis land claims are settled. Therefore, it fully supports the Dene/Metis' position.

The CYI affirmed that it was strongly opposed to any development on the Yukon North Slope.

Dene/Metis Negotiations Secretariat

The Dene/Metis's concerns relating to the status of its land claim settlement and its ability to benefit from developments associated with the proposed exports were discussed in Section 8.1. In addition to these concerns, the Dene/Metis noted that the Dene/Metis will need training to qualify for employment. Because the training process was very late in the Norman Wells project and as a consequence was much less effective than it could have been, they have recommended that a planning process and implementation of training start well in advance of the construction of a pipeline.

Furthermore, the Dene/Metis was very concerned about the potential for cumulative regional impacts. According to the Dene/Metis, there will be regional impacts associated with these export applications but more impacts will result as a pipeline is built and more exploration takes place in the region and new transportation systems are developed. The Dene/Metis was concerned that the cumulative regional impacts might be sufficiently negative to conclude that the project is not in the public interest.

Northwest Territories Federation of Labour

The Northwest Territories Federation of Labour indicated that if certain conditions were met the issuance of licences to the Applicants would be acceptable. It would like any licences to include conditions related to socioeconomic matters such as training, employment, and impacts on communities.

The organization stated that employment of Northerners should be optimized. It noted however, that Northerners cannot compete with experienced workers from the South so they need adequate training to have an equal opportunity. In order to achieve the goal of optimizing employment, assessments of skills available, jobs available, training that is required and skills which are transferable after the development must be undertaken as soon as possible.

The Federation encouraged Northerners to apply for every job, the duties of which they could fulfil. It suggested that training should be partly financed based on a prorated amount of the total development by the Applicants but that planning should be a shared responsibility by governments, native organizations, industry and labour.

According to the Federation the training provided for the Norman Wells project was "too little, too late". Based on the Federation's experience with that project, the organization made several recommendations. The first was the need for a body to co-ordinate and monitor the project. Furthermore, it recommended that a Northern Employment and Training agency be put in place to be responsible for human resources. It also identified a need to define northern residency.

The Federation questioned whether the Federal and Territorial governments are ready for a major development. Its concerns were related to matters that affect working people, such as safety laws and fair wage laws, It believed that those issues should be addressed by these governments before any major development begins.

The Federation also expressed a desire to have energy supply available, at a reasonable price, in the North. However, it was concerned about who would pay for the laterals to make those supplies available to the communities.

Dene/Metis land claims have to be settled in order for the Federation to support these export applications.

Inuvialuit Regional Corporation

As noted in Section 8.1 the IRC was in support of the granting of gas export licences.

The IRC felt that it was important that governments put together new procedures such as aid programs, grant programs, education and training programs, so the people of the North would benefit from the project through business and employment opportunities.

The IRC stated that infrastructures would have to be developed by government at the community level. It recommended that government and industry should start now to develop means to coordinate the economic activity so that the construction activities related to developing and transporting the gas to market do not take place at the same time as the road construction.

A member of the Game Council appeared with the IRC. The Council has the overall responsibility for wildlife and environmental matters and was very concerned about environmental aspects of the export proposal. It stated that the Valdez experience demonstrated the inefficiency of existing measures in the event of a large-scale oil spill disaster. Therefore, it maintained that new contingency plans must be considered.

The IRC believes that Dene/Metis land claims and the Northern Accord will be settled on schedule. It stated that the industry has the responsibility to lobby various levels of governments for the settlement of the land claims.

Northwest Territories Power Corporation

The Corporation generally supported the applications to export natural gas from the Mackenzie Delta region to the United States.

It would, however, like the Board to attach conditions to any licences which might be issued. One of the conditions would be that natural gas be made available to the Corporation and distributors for the generation and distribution of electricity, at a price no greater than the export price excluding the transportation costs.

Another proposed condition was that an assessment of alternatives for powering the pipeline facilities be undertaken and that a preference be given to the electric alternative.

Town of Inuvik

The Town of Inuvik supported and recommended the approval of the applications to export natural gas.

According to the Town of Inuvik, local natural gas demand would not be sufficient to justify the production. Therefore, the region would only benefit if there were early production associated with the exports. It did not believe that exporting natural gas would compromise Canada's capacity to supply its future energy requirements.

The town identified some concerns which should be addressed during the period before the pipeline is built. In particular, the town believed that there must be benefits in terms of business opportunities and employment for local people.

The Town of Inuvik stated that it wanted to be kept well informed and involved and moreover, that it required financial aid for the construction of the necessary infrastructure. It also wanted to have access to natural gas at a reasonable rate.

It feared that hydrocarbon production from the Mackenzie Delta/Beaufort Sea might not begin until far in the future if there were any delay in issuing the licences.

Inuvik Chamber of Commerce

The Inuvik Chamber of Commerce supported the export applications provided that there would be benefits to Northern residents.

The Inuvik Chamber of Commerce stated that Northerners were ready for energy projects. They have political institutions and improved levels of education which would allow them to participate in the development process.

The Chamber of Commerce felt confident that the Dene/Metis land claim and the Northern Accord would be completed within the project schedule.

It suspected that with a project delay, Prudhoe Bay gas could come on stream earlier which they believed could postpone the development of Mackenzie Delta gas for a period of 15 to 20 years.

Hamlet of Fort McPherson

The Hamlet of Fort McPherson stated that it was difficult to separate the export applications from the specific transportation issues. It emphasized the importance of having adequate and timely training programs for native people and stated that no great effort was made in the past by oil companies to employ native people. The Hamlet suggested that the Applicants should be responsible for training since they know which skills are required for specific jobs. It believed that this responsibility should not be left to governments. Furthermore, the Hamlet suggested that the requirement to provide training be included as a condition of any export licences which might be issued.

Environmental concerns are of prime importance to the Hamlet, because its population relies on a clean environment for its livelihood which is based on hunting. Therefore, it suggested that stringent controls and safety measures should be imposed upon the required transportation system to prevent any kind of environmental disaster.

According to the Hamlet, no export licences should be granted until native people have reached a land settlement which will enable them to participate in development.

Mackenzie Delta/Beaufort Sea Land Use Planning Commission

The land use planning commission is preparing a regional land use plan for the Mackenzie Delta-Beaufort Sea area which will be completed by 1990. It would like their plan to be included in the decision-making process by the Board in subsequent hearings related to pipelines.

Government of the Northwest Territories

The Government of the Northwest Territories supported the applications filed by Esso, Shell and Gulf. The GNWT's support was based on the assessment that there would be benefits for Northerners from the oil and gas development in the Mackenzie Delta/Beaufort Sea area.

It stated that training of Northerners and the identification and development of infrastructure requirements are priorities. Unfortunately, it noted the GNWT cannot finance the additional programs, services and infrastructure required to respond to the impacts of gas and oil development. Some funding arrangements will have to be made and put in place before the commencement of pipeline construction.

The GNWT believes that the Dene/Metis will have reached an agreement with the Federal government by the time the construction starts. It said that the Northern Accord has to be in place before the production starts. The GNWT maintained that it is the Northern Accord and the settled land claims that will give native people and the GNWT the resources to manage development to their benefit.

Even though pipeline issues were not part of this hearing, the GNWT wanted to make their position known in this regard. It stated that it would support a transportation system that would maximize opportunities for employment, training and business development, advantages for northern energy supply and incentives for infrastructure development. The environmental impact which has been and will always be a major concern to Northerners, would also have to be minimal. The GNWT also remains firmly opposed to any development on the North Slope of the Yukon.

Hamlet of Tuktoyaktuk

The Hamlet supported the issuance of export licences with conditions related to the provision of gas to communities in the Western Arctic area. It stated that there are skilled personnel in the North, but there is a need for training, not only for labourers but at the managerial level as well.

The Hamlet hopes that the impact that industry has on their community infrastructure (e.g. roads, harbour and the airport) will be given some consideration. In the past, they noted, they have not received any compensation for the infrastructure costs induced by local development.

City of Yellowknife

The City of Yellowknife recognized that this development proposal would have significant impacts on the Northwest Territories' economy.

The City recommended the approval of the export licences provided that the Applicants would make energy supply available to northern communities and that efforts would be made to maximize business opportunities and employment during the construction and operation phases.

Government of the Yukon Territory

The Government of the Yukon Territory ("YTG") supported the export applications provided that the following concerns are addressed. The YTG expects that development in the Yukon would provide regional benefits for the people of the Yukon in terms of jobs, training and revenues. The YTG stated that development is necessary to strengthen the Yukon economy but development must be oriented in accordance with the lifestyles of the people in the Territory.

The Government of the Yukon also had concerns related to the environment and the facilities for transportation of the natural gas. Effectively, the YTG remains opposed to any pipeline route which would cross the North Slope of the Yukon, and its support for the export applications depends upon a requirement that diverse routes be explored at a subsequent hearing.

Furthermore, the YTG wants future oil and gas exploration in the Yukon restricted until the Northern Accord is finalized and then only if it does not jeopardize the Yukon land claim agreement.

The YTG believes that these concerns, if addressed, will ensure an effective development and benefits for the people of the Yukon.

Ethel Blondin, M.P. Western Arctic

Ms. Blondin supported the export applications. She was concerned, however, that Canadian requirements for gas should not be threatened by the approval of these export licences. In her view, the Northern Accord and the Dene/Metis land claim are important outstanding issues which should be settled, but should not be preconditions to the issuance of export licences.

Ms. Blondin thought that the development of the Mackenzie Delta/Beaufort Sea hydrocarbons would generate jobs for Northern people.

She stated that on-going training for Northerners must start now and that industry should provide employment at every level that is in accordance with the needs and special way of life of Northerners.

Tom Butters, M.L.A. Inuvik

Mr. Butters, a member of the Legislative Assembly of the NWT, appeared on his own behalf. He supported continued resource development in the Mackenzie Delta/Beaufort Sea area. However, he felt that some conditions should be applied to maximize economic opportunities for Northern residents and to minimize adverse environmental and social impacts.

He stated that a preference should be given to Northerners for training and employment. The Applicants should provide assistance to local businesses so they are aware of, and prepared for, contract opportunities. He suggested that the DIZ Society be involved in the review of socioeconomic matters to ensure that local benefits are maximized.

Mr. Butters was also concerned about the environment. He recommended that the Environmental Screening and Impact Assessment Board and the Department of Energy, Mines and Petroleum Resources play an important role in evaluating and managing environmental impacts. With this involvement, Northerners would be assured that the developments will be sensitive to local concerns.

Mr. Butters stated that a Mackenzie Valley route would be the most efficient option. He believed that it could lead to improved transportation infrastructure in the North.

Jonathan Churcher

Jonathan Churcher, a citizen of Inuvik, advanced an innovative idea to the Board related to his environmental concerns. He suggested that the Board weigh criteria related to the Applicants' historical environmental performance and future financial and policy commitments to global alternative energy research and development in all its export licence and pipeline certificate decisions.

Porcupine Caribou Management Board

The Porcupine Caribou Management Board had concerns regarding any development projects on lands utilized by the caribou herd including the calving grounds and the migration routes.

Inuvik Native Band

The Inuvik Native Band said that many people among Native groups supported the export applications because they believed that there was going to be a pipeline built now.

The Band believes that the project should go ahead but that companies should recognize the need for co-operation with its people both in terms of routing and economic benefits because the pipeline would be built on their land. The Chief of the Band said that his people are interested in getting jobs with the oil companies.

Old Crow Indian Band

The Vuntut Gwitchin Band Council of Old Crow expressed concerns with respect to the export licences under consideration. The principal concerns expressed were related to the pipeline routing. They fear that these applications might result in a big push to connect Alaskan gas across the Yukon North Slope and emphasized that there should be no construction on the Yukon North Slope nor along the Dempster. According to the Band, different pipeline routes must be considered by the NEB in order to evaluate the benefits to the Band. It will support a Mackenzie Valley pipeline if land claims are settled and if there is participation by the Dene/Metis in business and employment opportunities.

Views of the Board

The Board believes that if the export project is to provide maximum benefits to the North and its people, there is a fundamental need for a good working relationship and understanding between the people of the North and the Applicants.

Furthermore, the Board not only agrees with the necessity for early planning in terms of establishing training programs and identifying business opportunities and infrastructure requirements, but it also considers this essential. The Board encourages the Applicants to work with government agencies, communities and associations, like the DIZ Society, at an early stage in the project to ensure that everyone involved is well informed during the development process and as a result is able to optimize their participation. The Board considers that a manpower training and employment program

should be developed in an integrated fashion reflecting the overall development activities in the North. The Board concludes that it would not be appropriate to include a condition, in any export licence which might be issued, that would require the Applicants to provide training programs and employment.

The Board recognizes that there will be some impacts on northern infrastructure associated with development and production of hydrocarbons. Some of these impacts are quantifiable; some others are not. As discussed in Chapter 7, the Board has satisfied itself that the project's net benefits are sufficiently large to cover all these costs. However, the Board does not have the power to determine who will pay these costs. That power resides with other government agencies.

Various parties expressed concerns related to the route for the pipeline and the potential environmental impacts associated with the construction and operation of the pipeline. Details of pipeline routing and environmental impacts are matters which would be rally addressed in a hearing under Part III of the NEB Act before any pipeline were constructed.

Chapter 9

Other Issues

The Council of Canadians

In its written submission to the Board, the Council of Canadians reached five conclusions concerning the licensing of exports of Delta gas:

- First, that there is "no pressing need for the application(s) to be approved at this time. (They) should therefore be denied because (they) threaten long-term Canadian energy security and our future industrial development."
- Second, it concluded that "the free trade agreement does not preclude restraints on energy exports provided the established proportion of Canadian production going to exports is maintained. The NEB Act does not bar the Board from managing new export licenses such that this proportion is kept at an acceptably low level".
- Third, the Council of Canadians recommended that "any future applications should only be considered at a time when all long-term economic aspects have been fully considered, as well as the environmental and social impacts of development, and the interests of northern communities".
- The Council's last two conclusions related to its recommendation that exports be restricted to no more than 40 percent of Canadian production, namely: "Restraint should now be placed upon export licence(s) from conventional reserves to ensure that the proportion of Canadian gas production sold in the United States does not exceed 40%" and:
- "Any future licence granted with respect to frontier reserves (such as the Mackenzie Delta, the Beaufort Sea, the Arctic Islands, or the Atlantic offshore fields) should specify that exports shall not exceed 40% of production, in order to ensure that Canada's future energy needs will be met even in emergency circumstances".

The Council of Canadians expressed concern that granting the licences would lead to an increase in the proportion of Canadian gas production delivered to the export market which, in the event of a supply emergency under the Free Trade Agreement, would lead to an onerous obligation to supply gas to the U.S. market, at a time when Canadians might be in need of secure energy supplies.

It submitted that Canadian natural gas demand projections were likely underestimated and stated that if demand were higher than that projected by the Board staff in the September 1988 Report, exports would have to be reduced and new gas reserves developed to meet this demand, relative to the export and reserves levels shown in that report. The Council of Canadians provided this as an example, rather than an actual forecast.

The Council of Canadians noted that while the Canadian gas supply situation is "much better" than the gas supply outlook for the United States, it is concerned that the depletion of Canadian discovered reserves has been high and that the rate of discovery of new gas reserves in conventional areas in Canada shows a continuing long-term declining trend.

Based on these observations about Canadian gas supply and demand, the Council of Canadians concluded that while they "do not believe that Canada is facing an immediate natural gas supply crisis ... the end result of all these (export) projects will inevitably make it harder and more expensive for Canadians to use their own natural gas".

With respect to the timing of the development of Arctic gas resources, the Council of Canadians was not against development or export of such resources, provided that exports were restricted to 40 percent of production and long-term economic, social and environmental impacts were fully considered. The Council of Canadians stated that the present deregulated approach to energy exports and the Free Trade Agreement have caused the Applicants to apply for export licences at this time, since Canadian energy policy may change at a future date, implying a less favourable environment for new exports.

Views of the Board

The Board notes that the Council of Canadians did not produce evidence to show that a threat to Canada's energy security would, in fact, arise from licensing the export of Delta gas.

The Board has assessed the Applicant's EIA and has accepted their conclusion that the export of the proposed volumes would not likely cause Canadians difficulty in meeting their energy requirements. The Board evaluates Canadian energy supply and demand on an on-going basis, and could advise the government if it anticipated circumstances in which trade restrictions would be warranted.

While the Board recognizes the Council of Canadians' concerns over the impact of the development of Delta gas on the environment and social structure of the North, it points out that the applications under consideration are solely for licences to export natural gas and not for the approval of pipeline facilities. Northern issues, such as the importance of resolving native land claims and social and environmental issues associated with the construction of a natural gas pipeline in the North, are more fully addressed in Chapter 8 where similar arguments, raised by the Dene/Metis and other northern residents, are discussed.

While the Council of Canadians implied that restricting exports to 40 percent of production would remove or lessen the threat to security of supply, it provided no evidence or argument supporting the choice of 40 percent as the appropriate level for restriction. It did not demonstrate in its evidence any particular relationship between the level of Canadian requirements for natural gas, domestic security of energy supply and a restriction of exports to 40 percent of production. The Board is also of the view that a restriction now, at the level suggested, could well delay delivery of Mackenzie Delta gas to Southern Canada and would not be in the public interest.

Chapter 10

Disposition

Section 118 of the Act requires that the Board, in considering an application for a licence to export gas, have regard to all considerations which it deems relevant. Section 118 of the Act also requires that the Board license for export only those volumes of natural gas which do not exceed the surplus remaining after making due allowance for reasonably foreseeable Canadian requirements, taking into account trends in discovery.

The Board complies with the requirements of Section 118 of the Act by using its Market-Based Procedure. Under this procedure, the Board considers complaints by Canadian users taking into account current conditions in Canadian gas markets and the EIA. In its determination of the public interest, the Board also examines all other relevant factors including whether the proposed export is likely to result in net benefits to Canadians, the nature of the gas supply, and transportation and sales arrangements to ensure that the application represents a substantive commercial arrangement.

The evidence and argument of the Applicants and the intervenors on the applications as well as the views of the Board on the various factors relevant to the Board's decision have been discussed in detail in the previous chapters. What follows is a summary of the Board's key findings.

The Board's assessment of the gas supply available to support the applications is set out in Chapter 2. The Board believes that the Applicants' projected production rates can be achieved and that they have sufficient supply to meet their proposed export requirements.

With respect to markets, the Board concurs with the Applicants that access to the export market is essential to the development of the Mackenzie Delta reserves for an in-service date in the late 1990s. While export contracts with firm terms and conditions have not yet been entered into, the Applicants have signed Precedent Agreements with several potential U.S. buyers who have expressed an interest in purchasing a portion of the gas proposed for export. Those potential buyers are established importers of Canadian natural gas who are major participants in the United States gas market. The Board is satisfied that there is a reasonable expectation that U.S. buyers will have sufficient markets to accommodate the level of exports contemplated in the applications. To ensure that final export arrangements were consistent with the evidence submitted at the hearing, the Board would require, as a condition of any licence, that Board approval of any executed export contract be obtained before volumes associated with that contract could be exported.

Turning to the question of the complaints procedure, the Applicants and most parties to the hearing recognized that, in the absence of export contracts with specific terms and conditions, the complaints procedure, as established by the Board, cannot operate. The Applicants indicated that they would accept, as a condition of any licence that might be issued, a requirement to file executed export contracts with the Board for review by Canadian buyers to determine whether there was a basis for complaints. This proposal was examined at the hearing and no party raised any serious objection. The Board is satisfied that the objectives of the Board's complaint procedure could be met if any licence were to contain the conditions described in the section containing the Views of the Board in Chapter 5. These conditions relate to the requirement to keep potential Canadian buyers advised of the quantities of Delta gas available for sale and to provide them with an opportunity to purchase such gas

on terms and conditions, including price, similar to those under which the gas would be exported. Export contracts would have to be filed with the Board for approval and an opportunity provided for interested parties to complain. Parties would be expected to govern themselves according to the principles and procedures described in Chapter 5.

Regarding the EIA, while the Board does not necessarily support all aspects of the methodology applied by the Applicants to determine the impact of the export of Delta gas on natural gas prices, demand and supply, the Board agrees that the applied-for export volumes are not likely to cause Canadians difficulty in meeting their future energy requirements at fair market prices.

The Board's benefit-cost analyses indicate that the proposed exports would likely provide net benefits under most reasonable assumptions.

These export applications raised matters of public interest related specifically to the North, such as the Dene/Metis land claim, benefits to Northerners, and gas for Northerners.

The Dene/Metis requested that, to avoid prejudicing their land claim, any facilities application should be delayed until the claim is settled, either by denying these applications or by means of a condition to any licence. The Board recognizes the importance of resolving native land claims. The applications under consideration are, however, solely for licences to export natural gas from the Delta region, and not for the approval of pipeline facilities. On the basis of the evidence before it, the Board is not convinced that approval of gas export licences would prejudice the settlement of the Dene/Metis claim. An approval of export licences does not mean that consideration of a facilities application would follow shortly, thereby straining the resources of the Dene/Metis. Considerable preparatory work, including detailed discussions with all Northerners, would be required before an application. Having weighed all relevant factors, the Board is of the view that a delay of the decision or a licence condition, as requested, would not be necessary or desirable.

On the question of benefits to Northerners, the Board is of the opinion that proper planning should occur to ensure that Northerners are in a position to take full advantage of available benefits. The Board encourages the Applicants to work with government agencies, communities and associations, like the DIZ Society, at an early stage in the project to ensure that everyone involved is well informed during the development process and as a result is able to optimize their participation. The Board considers that a manpower training and employment program should be developed in an integrated fashion reflecting the overall development activities in the North. The Board concludes that it would not be appropriate to include a condition in any export licence that would require the Applicants to provide training programs and employment.

In respect to the availability of gas for Northerners, the Board concludes that it would be difficult to include in any licence which might be issued a meaningful condition requiring the Applicants to supply natural gas to Northern residents because neither the routing of a pipeline nor the volumes of gas which might be required to supply Northern markets are known. In addition, such a condition is not necessary because of the Applicants' stated undertakings to provide gas to Northerners. The Board expects such undertakings to be fulfilled.

Based on the foregoing, the Board is satisfied that the requirements of Section 118 have been met and, accordingly, has decided to issue licences for the requested volumes and term. Governor in Council approval of the licences is required before this decision comes into effect. Appendix I contains the terms and conditions of the proposed licences.

R. Jenkins
Presiding Member

J.-G. Fredette
Member

D.B. Smith
Member

Appendix I

Terms and conditions of the Licence to be issued to Esso Resources Canada Limited

1. The term of this licence shall be for the period commencing 1 November 1996 and ending on 31 October 2000, provided that if exports have commenced by 31 October 2000, the term shall extend for a period of twenty years from 1 November of the year in which such exports commenced.
2. The quantity of gas that may be exported under the authority of this licence shall not exceed $144 \times 10^9 \text{m}^3$ during the term of this licence.
3. The licensee shall advise potential Canadian buyers who have declared an interest in buying gas from the Mackenzie Delta region of the quantities available for sale from time to time, and concurrently with negotiating export contracts, shall give such potential Canadian buyers an opportunity to purchase gas from the Mackenzie Delta region on terms and conditions, including price, similar to those under which the gas would be exported, provided that such Canadian buyers demonstrate an intention to buy such gas within a reasonable time after being so advised.
4. The licensee shall file with the Board executed contracts for the sale of gas associated with the export and shall not export gas related to any contract until such contract has been approved by the Board.
5. When contracts for the sale of gas associated with the export are filed with the Board, the licensee shall advise all parties to the hearing of the filing of such contracts and shall undertake such other notification with respect to the filing as the Board may deem appropriate. Interested parties will have sixty days from the date of filing of the export contracts with the Board, or such other time as the Board may authorize, to register complaints that they have not been afforded an opportunity to purchase gas on terms and conditions, including price, similar to those under which the gas would be exported.
6. The gas exported under the authority of this licence shall be gas produced in the Mackenzie Delta region described in the licensee's application.

Terms and conditions of the licence to be issued to Shell Canada Limited

The terms and conditions of the licence to be issued to Shell Canada Resources Limited are the same as the terms and conditions of the licence issued to Esso with the exception of Condition 2, which shall read as follows:

2. The quantity of gas that may be exported under the authority of this licence shall not exceed $25 \times 10^9 \text{m}^3$ during the term of this licence.

Terms and conditions of the licence to be issued to Gulf Canada Resources Limited

The terms and conditions of the licence to be issued to Gulf Canada Resources Limited are the same as the terms and conditions of the licence issued to Esso with the exception of Condition 2, which shall read as follows:

2. The quantity of gas that may be exported under the authority of this licence shall not exceed $91 \times 10^9 \text{m}^3$ during the term of this licence.

Appendix II

Table a2-1

**Comparison of Estimates of
Esso's Productive Capacity**

Millions of Cubic Metres (Bcf)

Year	Esso¹		NEB	
1997	7 198	(254)	7 198	(254)
1998	7 198	(254)	7 198	(254)
1999	7 198	(254)	7 198	(254)
2000	7 198	(254)	7 198	(254)
2001	7 198	(254)	7 198	(254)
2002	7 198	(254)	6 992	(247)
2003	7 198	(254)	6 164	(218)
2004	7 198	(254)	6 994	(247)
2005	7 198	(254)	7 198	(254)
2006	7 198	(254)	7 198	(254)
2007	7 198	(254)	7 198	(254)
2008	7 198	(254)	7 198	(254)
2009	7 198	(254)	7 198	(254)
2010	7 198	(254)	7 198	(254)
2011	7 198	(254)	7 198	(254)
2012	7 198	(254)	7 198	(254)
2013	6 088	(215)	7 159	(253)
2014	4 840	(171)	6 548	(231)
2015	4 157	(147)	4 736	(167)
2016	3 522	(124)	2 945	(104)

¹ Includes processing and pipeline fuel and losses.

Table a2-2**Comparison of Estimates of
Gulf's Productive Capacity**

Year	Millions of Cubic Metres (Bcf)			
	Gulf ¹		NEB	
1997	4 120	(145)	4 120	(145)
1998	4 120	(145)	4 120	(145)
1999	4 120	(145)	4 032	(142)
2000	4 120	(145)	3 638	(128)
2001	4 120	(145)	3 290	(116)
2002	4 120	(145)	2 980	(105)
2003	4 120	(145)	2 699	(95)
2004	4 120	(145)	4 120	(145)
2005	4 120	(145)	4 120	(145)
2006	4 120	(145)	3 992	(141)
2007	4 120	(145)	3 740	(132)
2008	4 120	(145)	3 454	(122)
2009	4 120	(145)	3 208	(113)
2010	4 120	(145)	2 977	(105)
2011	4 120	(145)	4 120	(145)
2012	4 120	(145)	3 866	(136)
2013	4 120	(145)	3 332	(118)
2014	4 120	(145)	2 662	(94)
2015	4 120	(145)	2 226	(79)
2016	4 120	(145)	2 064	(73)

¹ Plant gate sales gas.

Table a2-3
Comparison of Estimates of Shell's
Productive Capacity

Year	Millions of Cubic Metres (Bcf)			
	Shell ¹		NEB ²	
1997	1 301	(46)	1 301	(46)
1998	1 301	(46)	1 289	(46)
1999	1 301	(46)	1 255	(44)
2000	1 301	(46)	1 249	(44)
2001	1 301	(46)	1 178	(42)
2002	1 301	(46)	1 090	(38)
2003	1 301	(46)	1 013	(36)
2004	1 301	(46)	947	(33)
2005	1 301	(46)	881	(31)
2006	1 301	(46)	827	(29)
2007	1 301	(46)	779	(27)
2008	1 301	(46)	735	(26)
2009	1 301	(46)	688	(24)
2010	1 239	(44)	841	(30)
2011	1 126	(40)	740	(26)
2012	1 033	(36)	673	(24)
2013	929	(33)	623	(22)
2014	847	(30)	582	(21)
2015	775	(27)	543	(19)
2016	713	(25)	510	(18)

1 Shell's forecast Niglintgak only.

2 NEB forecast includes Kumak.



NATIONAL ENERGY BOARD
REASONS FOR DECISION

In the Matter of an Application under
the National Energy Board Act

of

Interprovincial Pipe Line (NW) Ltd.

OH-2-80

March 1981

NATIONAL ENERGY BOARD

REASONS FOR DECISION

In the matter of an application under
the National Energy Board Act
of

INTERPROVINCIAL PIPE LINE (NW) LTD.

March 1981

Ce rapport est publié
dans les deux langues
officielles.

RECITAL AND APPEARANCES

IN THE MATTER OF the National Energy Board Act and the Regulations made thereunder, and

IN THE MATTER OF an application by Interprovincial Pipe Line (NW) Ltd. for a Certificate of Public Convenience and Necessity under Part III of the National Energy Board Act, and for an Order under Part IV thereof respecting rates, tolls and tariffs, filed with the Board under File No. 1755-J1-42.

HEARD IN Edmonton, Alberta on:

7, 8, 9, 10, 14, 15, 16, 17 and 31 October 1980 and

IN Yellowknife, Northwest Territories on:

20, 21, 22, 23, 24, 25, 27, 28 and 29 October 1980, and

IN Ottawa on:

4, 5 and 12 November 1980.

BEFORE:

R.F. Brooks	Presiding Member
J. Farmer	Member
J.L. Trudel	Member

APPEARANCES:

J.B. Ballem, Q.C.	)	for Interprovincial Pipe
Richard Smith	)	Line (NW) Ltd.
H.V. Page		for the Alberta Chamber of Resources
D. Nickerson		for Amoco Canada Petroleum Company Ltd.
F.J. Bregha	)	for the Canadian Arctic
A. Lucas	)	Resources Committee
D.J. Gamble)	
M. Betts		for Chieftain Development Co. Ltd.

M.A. Ballantyne	)	for the City of Yellowknife
J.A. Olthuis	)	for the Committee for Justice and Liberty Foundation
S.T. Goudge	)	for the Dene Nation
J. Bayly)	
R. Salter	)	for the Dene Tha' Band
R. Herman)	
R. Justus)	
J. Simonetta)	
J.E. Lowman	)	for Esso Resources Canada
E. Ryan	)	Limited
C. Donahue	)	for Foothills Pipe Line (Yukon) Ltd.
J.G. Gilmour	)	for the Government of the
S. Johnson	)	Northwest Territories
R. MacPherson)	
F. Hasey	)	for the Hay River Area Economic Development Corp.
E. Ryan	)	for Imperial Oil Limited
R. Hill	)	for the Inuvik and District Chamber of Commerce
S.T. Goudge	)	for the Métis Association of
J. Bayly	)	the Northwest Territories
R. Mercredi)	
J. Blackstock	)	for the NWT Grade Stamping Agency
J.B. McWilliams	)	for Rainbow Pipe Line Company Ltd.
D. Northrop)	for the Town of Inuvik
A. Plum)	
A. Biguë)	for the National Energy Board
K.J. MacDonald)	
A.R. Macdonald)	

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ABBREVIATIONSFor Names

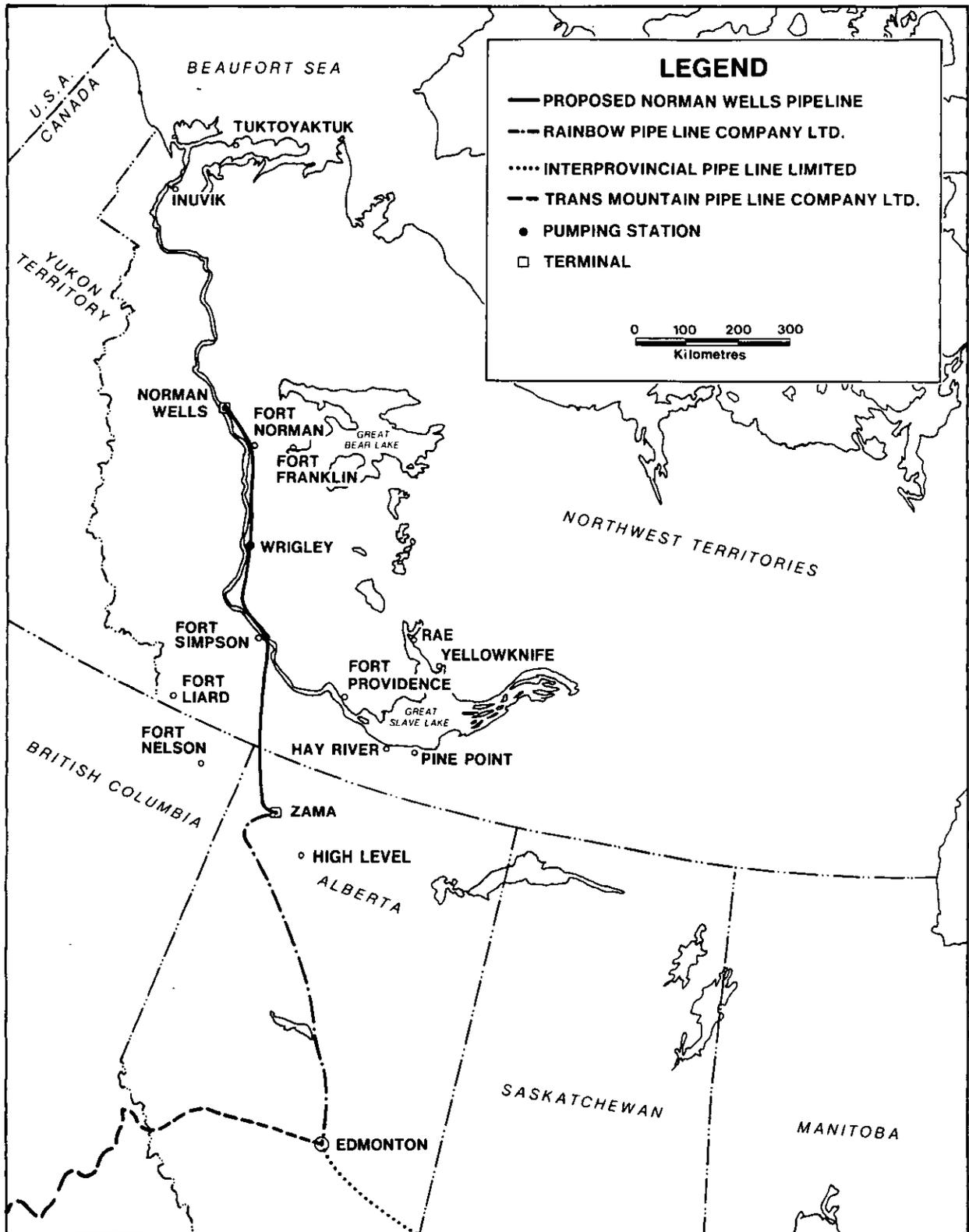
Act	-	National Energy Board Act
Applicant, IPL(NW) or Interprovincial (NW)	-	Interprovincial Pipe Line (NW) Ltd.
Band	-	Dene Tha' Band
Board	-	National Energy Board
CAGPL	-	Canadian Arctic Gas Pipeline Limited
CARC	-	Canadian Arctic Resources Committee
CJL	-	Committee for Justice and Liberty Foundation
CSA	-	Canadian Standards Association
COPE	-	Committee for Aboriginal People's Entitlement
DINA	-	Department of Indian Affairs and Northern Development
Esso Resources	-	Esso Resources Canada Limited
Foothills	-	Foothills Oil Pipe Lines Ltd.
Foothills (Yukon)	-	Foothills Pipelines (Yukon) Ltd.
GNWT	-	Government of the Northwest Territories
Imperial or Imperial Oil	-	Imperial Oil Limited
IBP	-	International Biological Program
IPL Interprovincial	-	Interprovincial Pipe Line Limited
Métis Association	-	Métis Association of the Northwest Territories
1972 Pipeline Guidelines	-	Expanded Guidelines for Northern Pipelines

Rainbow or Rainbow Pipe Line	-	Rainbow Pipe Line Company Ltd.
Regulations	-	Regulations Respecting Oil Pipelines (SOR/78-746) 28 September 1978
U.S.	-	United States

For Technical Terms

°C	-	degrees Celsius
ERW	-	electric resistance welding
HVP	-	high vapour pressure
km	-	kilometre
kmp	-	kilometre post
kW	-	kilowatt
m	-	metre
m ³	-	cubic metre
m ³ /d	-	cubic metre per day
mm	-	millimetre
mPa	-	millipascal
NGL	-	natural gas liquids
OD	-	outside diameter
W/m°C	-	watts per metre per degree Celsius

INTERPROVINCIAL PIPE LINE (NW) LTD.



CHAPTER 1
THE APPLICATION

1.1 The Applicant

Interprovincial Pipe Line (NW) Ltd., a company incorporated under the Canada Business Corporations Act, is a wholly-owned subsidiary of Interprovincial Pipe Line Limited, and is a company within the meaning of the National Energy Board Act.

1.2 The Application

The application, dated 14 March 1980, is for a certificate to construct and operate a buried oil pipeline 323.9 mm in diameter and extending some 866 km in length from Norman Wells in the Northwest Territories to Zama in northern Alberta. The proposed pipeline would be used to transport crude oil and natural gas liquids produced by Esso Resources Canada Limited from the expansion of its facilities at the Norman Wells oil field to existing Canadian markets.

The proposed pipeline system, with an estimated capital cost of \$360 million, would comprise three pumping stations and all receiving, delivery and other facilities necessary to provide an initial designed capacity of 5000 m³/d. The installation of additional pumping stations could raise this capacity to approximately 7150 m³/d.

The route of the proposed pipeline from Norman Wells to Fort Simpson would follow the east bank of the Mackenzie River and would use already cleared rights-of-way for much of its length. South of Fort Simpson the proposed pipeline would cross the Mackenzie River and would run in a southeasterly direction to Zama where it would connect with the existing facilities of Rainbow Pipe Line Company Ltd. Figure 1.2 is a map showing the proposed pipeline system.

The application states that, based on the receipt of necessary governmental and regulatory approvals in 1980, the Applicant planned to have the pipeline completed and in operation in the fourth quarter of 1983.

The Applicant also applied for an order establishing the form and content of the rates, tolls and tariffs for the transportation service it would perform.

CHAPTER 2
INTERVENTIONS

2.1 Summary of Written Interventions

The following is a summary of the written interventions filed with the Board. Views of intervenors concerning specific topics are presented more fully in subsequent chapters of this report.

Alberta Chamber of Resources: an organization of more than 300 resource companies, intervened in favour of the application as the joint projects of IPL (NW) and Esso Resources would offer many tangible economic and social benefits for Canada and the affected region.

Amoco Canada Petroleum Company Ltd.: intervened in the proceedings as a major producer of oil and gas in Canada.

Canadian Arctic Resources Committee: an independent national association of citizens promoting the balanced development of the Canadian North, opposed the application at this time since, in its view, it does not meet the federal government's 1972 Pipeline Guidelines and prejudices the aboriginal claims of the native people of the Mackenzie Valley. CARC stated that the application failed to demonstrate that the Applicant has sufficient knowledge to build and operate the proposed pipeline in an environmentally and socio-economically acceptable manner.

Moreover, CARC submitted that the federal government has a moral and legal obligation to settle the aboriginal claims of the native people of the Mackenzie Valley before allowing the project to proceed.

Chieftain Development Co. Ltd.: a company engaged in the exploration, development and production of natural gas and oil, supported the proposed pipeline project.

City of Yellowknife: stated that the purpose of its intervention was to address the matter of development in the North and its socio-economic impact on Yellowknife and the North in general.

Committee for Justice and Liberty Foundation: a national public interest group, opposed the application as the proposed pipeline would adversely affect the socio-economic and environmental well-being of CJL members, all Canadians and, by extension, the well-being and basic rights of the native people of the western Arctic.

Dene Nation: an organization of the aboriginal people of the Mackenzie Valley, opposed the application. It believes that the proposed pipeline would have extreme and irreversible adverse effects on the social, economic and environmental well-being of its people.

The Dene Nation stated that approval of the application would not be in the public interest and was contrary to the public convenience and necessity while the settlement of land claims between its people and the Government of Canada remained unresolved.

Dene Tha' Band: representing native people living in the project's impact area in northern Alberta, anticipated that the construction of the proposed pipeline would result in a reduction of economic activities in the traditional resource harvesting patterns of its members. This would be due to disruption of the land and waters traditionally used by it for trapping, hunting, fishing and gathering.

The intervention stated that, without commitments and guarantees for employment and business development opportunities to offset the loss of traditional economic activities, the Band foresaw (a) an increase in the proportion of its population dependent upon federal government transfer payments, and (b) increased demands on the Band government to

provide goods and services, which would make it more difficult for it to realize its developmental goals and plans.

Esso Resources Canada Limited: operator of the Norman Wells oil field, fully endorsed the application and, subject to regulatory approvals for the project, was planning substantial investments to further develop the Norman Wells field.

Foothills Oil Pipe Lines Ltd.: a Canadian company formed for the purpose of transporting crude oil, including that found in Alaska and in northern Canadian frontier areas, requested intervenor status as the results of the IPL (NW) application could have a bearing on future decisions regarding the transportation of other American and Canadian northern petroleum reserves to southern markets.

Foothills Pipelines (Yukon) Ltd.: a Canadian company engaged in the transportation of natural gas, including that found in northern frontier areas, intervened on the basis that the results of the IPL (NW) application could have a bearing on future decisions regarding the transportation of other northern petroleum reserves to southern markets.

Government of the Northwest Territories : identified five issues it wished to address concerning the application, namely:

- (1) that no framework existed whereby the Government of the Northwest Territories may receive an identifiable share of the federal royalties generated by the development of non-renewable resources in the Northwest Territories;
- (2) that the application did not indicate an increase in energy supply to the local population on completion of this project;
- (3) that there is a lack of any comprehensive long-term plan for the development of renewable and non-renewable resources in the Northwest Territories by the federal government;

- (4) that there is no northern-based authority, planned or in existence, which can effectively control and regulate the development of non-renewable resources and at the same time represent the interest of the people of the Northwest Territories; and
- (5) that to date there has been no satisfactory resolution of the outstanding claims for the aboriginal rights of the Dene Nation or the Metis Association.

Hay River and Area Economic Development Corp.: intervened in favor of the Norman Wells project.

Imperial Oil Limited: an intended shipper of crude oil and natural gas liquids from the Norman Wells field, fully endorsed the application.

Inuvik & District Chamber of Commerce: outlined several reasons for the support of an early decision for the implementation of the project. One reason stated was that there would be direct economic benefits for local residents through employment, business opportunities, and spin-off effects.

Metis Association of the Northwest Territories: intervened as a representative of the aboriginal peoples of the Mackenzie Valley not covered by the Indian Act, or the terms of Treaties 8 and 11.

Minister of Energy for Ontario: stated that the Province of Ontario favoured a national policy designed to achieve crude oil self-sufficiency at an early date. Moreover, the development of Canadian crude oil reserves and their connection to the interprovincial transportation system would be in the public interest, provided the project could be built and operated without unacceptable social and environmental impacts.

NWT Grade Stamping Agency: an organization promoting the interests and protection of the rights of those engaged in the forest industry within the Northwest Territories, gave its conditional support to the project provided that local businesses would be protected and afforded an opportunity to participate.

Rainbow Pipe Line Company Ltd.: a company which operates a pipeline for the transmission of crude oil from Zama to Edmonton, Alberta, intervened on the basis that the construction of the proposed pipeline would have a direct impact on the volumes of crude oil transmitted through its facilities.

Town of Inuvik: stated that a motion in support of the Norman Wells oil field expansion and pipeline construction (Motion 80-2512, dated 26 August 1980) had been adopted unanimously by the Town Council. One main reason stated in support of the application was that the project could increase employment, investment and business opportunities for Northerners. Moreover the project could act as a catalyst to promote northern developments and to provide a needed boost to morale in an economically depressed area of Canada.

Village of Fort Simpson: stated that it was conditionally in favour of the application.

CHAPTER 3
NORMAN WELLS SUPPLY

3.1 History and Background

The Norman Wells field was discovered in 1920; however, production did not commence until 1932 when a pilot topping plant was built. The 2500-hectare field, located onshore and underneath the Mackenzie River, first produced from wells on the mainland. Later, production facilities were installed on Bear and Goose Islands. Currently, production from these islands is barged to the mainland in summer and in the winter is transported via a temporary pipeline laid on top of the river ice. Since the major portion of the field lies under the river, it is largely undrilled.

The Norman Wells oil field is in a limestone reef which is tilted to the southwest. The reef has two main depositional environments, the reef margin and the reef interior. Currently, there are 70 producing wells at Norman Wells, but usually only about 44 are producing at any one time. The oil flows to the surface without assistance from pumping facilities, and some of the wells on Goose Island have produced at rates in excess of $60 \text{ m}^3/\text{d}$ for extended periods of time. Generally, wells located on the reef rim or in areas of thick carbonate sands with good primary and secondary porosity have about twice the production capability of reef interior wells. Cumulative production to date amounts to about $3.7 \times 10^6 \text{ m}^3$ and daily average production approximates $477 \text{ m}^3/\text{d}$.

The gas-oil ratio has gradually increased over the years. At present, the production of $303 \text{ m}^3/\text{d}$ of crude oil results in the production of approximately $162\,000 \text{ m}^3/\text{d}$ of natural gas. This gas, rich in natural gas liquids, is currently being flared with only a small percentage consumed locally.

A local refinery produces naphtha, middle distillates, and heavy distillates. Since no local market exists for naphtha and heavy distillates, the naphtha products

are reinjected into suspended producing wells on the mainland and the heavy distillates are flared.

A partial waterflood scheme is currently being instituted on the mainland area of the field. This project should serve as a pilot for a proposed field-wide pattern waterflood. Sufficient results from the pilot flood should be available by the year 1983 to enable the operator to have definitive criteria for assessing and formulating the most effective depletion method for the reservoir.

3.2 Reserves

3.2.1 Evidence of the Applicant. The evidence of the Applicant on the reserves and production forecasts included input from the operator of the Norman Wells oil field, Esso Resources. Esso Resources estimated that the original oil-in-place in the Norman Wells reservoir was in the order of $100 \times 10^6 \text{m}^3$. The proposed expansion of the mainland waterflood to a field-wide waterflood scheme should increase the recoverable reserves from 17 percent to 42.9 percent. The field has produced $3.7 \times 10^6 \text{m}^3$ of crude oil to date, and accordingly Esso Resources estimates that approximately $39.2 \times 10^6 \text{m}^3$ of recoverable reserves remain.

3.2.2 Views of the Board. The Board has analyzed the reservoir data from the Norman Wells field and estimates that the initial recoverable oil reserves are $39.9 \times 10^6 \text{m}^3$, or 41.2 percent of the estimate of the original oil-in-place of $96.9 \times 10^6 \text{m}^3$.

3.3 Production Forecast

3.3.1 Evidence of the Applicant. The proposed field-wide pattern waterflood would consist of 133 injector wells and 119 producing wells. A fracture pattern in the reservoir and a related directional permeability trend is considered to be the dominant factor governing the waterflood, and extensive well tests and oriented cores have shown the orientation of this

system to be about N30° E. Esso Resources is proposing a five-spot production pattern with a one-to-one injector - producer ratio and a well-spacing of 6.2 hectares (15.3 acres) per well. This would result in 119 five-spot patterns, each consisting of 12.4 hectares in area, elongated in the direction of the fracture orientation for maximum sweep efficiency.

As reservoir characteristics are different in the reef margin and reef interior areas, Esso Resources simulated well performance under waterflood with a computer model in each of these areas. To arrive at a production forecast for all reef margin wells, Esso Resources applied the results of the reef margin model to all wells in the reef margin by assigning weighting factors based on the calculated porosity thickness value of each well. The same procedure was followed for the reef interior wells, and the total gross pool production forecast was arrived at by combining the two forecasts.

In discussing its production forecast, Esso Resources recognized that reservoir simulation is not a precise tool and that reservoir simulation results are sometimes optimistic as to recovery levels and production rates. For this reason, based on its experience, Esso Resources adjusted the production forecast from the simulation model downward by 30 percent. Esso Resources maintained that such a reduction in simulation rates would yield a conservative forecast of reservoir capacity and that this was confirmed by a comparison of the simulated prediction of production with the actual initial production rates of existing wells. Estimated production to the year 2022 is provided in Table 3.3.1. If the forecast production rates were not attained, Esso Resources would conduct individual well workovers or stimulations to maximize a well's productivity.

Esso Resources also provided a production forecast of natural gas liquids which indicated that expected supply would decline from about 840 m³/d in 1984 to 610 m³/d in 1990 and to 395 m³/d in the year 2000. During the initial five

TABLE 3.3.1

Norman Wells Field
 Estimated Field Production Rates and Pipeline Throughputs
 Full Scale Waterflood Project
 m³/d

Year	Reef Margin Oil		Reef Interior Oil		Total Pool Oil		Natural Gas Liquids Pro- duction Rate	Norman Wells Refinery Demand	Pipeline Throughputs Crude Oil and NGL
	Ideal Well	Total	Ideal Well	Total	Gross	Actual (70%)			
1984	99	4000	37	1640	5640	3950	840	318	4497
1986	99	4000	37	1640	5640	3950	765	318	4422
1988	99	4000	37	1640	5640	3950	690	318	4347
1990	98	3950	37	1640	5600	3900	680	318	4187
1992	95	3850	37	1640	5500	3850	610	318	4108
1994	86	3450	37	1640	5100	3550	560	318	3819
1996	81	3250	37	1640	4910	3450	510	318	3610
1998	70	2800	37	1640	4460	3100	460	318	3242
2000	59	2370	37	1640	4010	2800	395	318	2859
2002	43	1730	36	1610	3340	2350	335	318	2322
2004	32	1280	35	1540	2820	2000	270	318	1939
2006	24	960	33	1470	2430	1700	225	318	1576
2008	19	770	31	1360	2130	1500	195	318	1387
2010	16	640	29	1070	1910	1350			
2012	14	580	24	1050	1630	1150			
2014	12	500	21	910	1410	1000			
2016	11	430	17	770	1200	850			
2018	9	380	14	620	1000	700			
2020	8	330	12	530	860	600			
2022	7	290	10	430	720	500			

years, when the gas-oil ratio is high but declining, production of NGL relative to oil production would remain high.

NGL production is expected to decline in line with crude oil production after the gas-oil ratio has been stabilized by the waterflooding.

After commencement of the full-scale waterflood in 1983, Esso Resources anticipates a subsequent rapid rise in crude oil production rates of 3950 m³/d in the year 1984. It further expects that this rate would be stable for approximately five years declining slowly thereafter. After making allowance for NGL production of 840 m³/d and net refinery requirements of crude oil of 318 m³/d, the initial pipeline throughput volume would be in the order of 4497 m³/d in 1984, declining to 1387 m³/d in the year 2008.

The required facilities to initiate the waterflood project would include 190 new wells for reservoir production and water injection. Wells would be drilled from existing land areas and from six artificial islands constructed in the Mackenzie River. Surface facilities, for gathering of production, would consist of flowlines to satellite batteries at each well cluster and gathering lines from batteries to a central processing facility on the north shore of the Mackenzie River to the west of the existing Norman Wells townsite.

Before proceeding with the waterflood project, Esso Resources was required to obtain the approval of its field development plan by the Department of Indian and Northern Affairs, under Section 6 of the Canadian Oil and Gas Production Regulations. A letter giving tentative approval of the plan by DINA, with several conditions appended, was filed by the Applicant.

3.3.2 Views of the Board. Esso Resources used simulation models in forecasting reservoir performance for the Norman Wells field. The Board agrees with Esso Resources that

reservoir simulation models are not a precise tool for forecasting reservoir performance and that results may be optimistic as to recovery levels and production rates.

Esso Resources' use of porosity thickness as a weighting factor in determining well productivity implies a linear relationship between permeability and porosity that has not been demonstrated. The Board agrees with Esso Resources that the presence of a well developed northeasterly fracture pattern in the Norman Wells field should provide a directional permeability trend that should prove to be the dominant factor governing the field's productive mechanism. The Board, however, has some concern that this facet may not have received sufficient attention in the mathematical reservoir model. The relatively close well-spacing of 6.2 hectares per well proposed by Esso Resources alleviates the Board's concern to some degree.

The Board has some doubt that the reservoir would respond to the waterflood as well as anticipated by Esso Resources. However, the Board noted that several of the conditions imposed by DINA to the tentative approval of the field development plan would result in a better understanding of the reservoir characteristics, and accordingly, a better definition and control of the potential problems associated with the waterflood program. The Board considers that the performance of the waterflood would be a significant factor in overall pool performance and would support Esso Resources' plan to monitor the performance of this flood, particularly prior to full-scale production start-up in 1984.

As the proposed pipeline would depend solely on the production from the Norman Wells reservoir, the Board prepared its own supply forecast based on an analysis using conventional methods with available core and relative permeability data. The Board estimates that the initial crude oil productive capacity of the fully developed waterflood would be 3500 m³/d. This capacity could be maintained for approximately 13 years,

after which it is expected to be followed by an effective production decline of 6.1 percent per year to abandonment at a water-oil ratio of 21. This forecast accounts for all of the Board's estimated recoverable oil reserves ($39.9 \times 10^6 \text{m}^3$) by the year 2048. The Board's forecast, together with that of Esso Resources, is presented in Table 3.3.2.

As Table 3.3.2 shows, the two forecasts do not differ significantly; the Board's estimate is slightly lower than Esso Resources' during the early stage of the production cycle and slightly higher during the latter stage. The 30 percent reduction by Esso Resources of its simulated pool production forecast contributed significantly to the near coincidence of the two forecasts. The Board concurs with this adjustment and concludes that both forecasts are within the margin of error that could be assigned to either forecast methodology.

In summary, the Board believes that the proposed Esso Resources expansion program has a number of attractions, particularly from an energy conservation point of view. These include the availability to market of sizable volumes of NGL and heavy distillates which would otherwise be flared. In addition, gas-oil ratios would be greatly reduced under the proposed expanded waterflood scheme leading to substantial increases in recovery and rate of production of crude oil. To conclude, the Board is satisfied that the development proposal is realistic and the production forecast reasonable.

3.4 Economic Viability of Additional Crude Oil and Natural Gas Liquids Production at Norman Wells

3.4.1 Introduction. The economic viability of the Applicant's proposed system depends on the ability of Esso Resources to provide sufficient volumes of crude oil to the Applicant's system. For this reason the Board asked the Applicant to provide evidence supporting the economic viability of Esso Resources' proposed field development.

TABLE 3.3.2
PRODUCTION FORECASTS

<u>Year</u>	<u>Esso Resources Forecast</u> <u>Oil Production</u>		<u>NEB Forecast</u> <u>Oil Production</u>
	m^3/d		m^3/d
	<u>Gross</u> <u>(100%)</u>	<u>Expected</u> <u>(70%)</u>	
1984	5640	3950	3500
6	5640	3950	3500
8	5640	3950	3500
1990	5600	3900	3500
2	5550	3850	3500
4	5100	3550	3500
6	4910	3450	3500
8	4460	3100	3287
2000	4010	2800	2898
2	3340	2350	2555
4	2820	2000	2253
6	2430	1700	1986
8	2130	1500	1751
2010	1910	1350	1544
2	1630	1150	1362
4	1410	1000	1201
6	1200	850	1059
8	1000	700	933
2020	860	500	726
2	720	500	726

Note: All cases assumed cumulative $4 \times 10^6 \text{m}^3$ oil produced to 1984.

The factors which have impact on that viability are sales revenues available to Esso Resources on produced volumes of crude oil and natural gas liquids, investment and operating costs, and the fiscal system under which revenues are earned and costs are incurred. At this time there is uncertainty regarding estimates of the tariff on the Applicant's proposed system which, together with prices at Edmonton and tariffs on the Rainbow system, determine revenues at Norman Wells. Uncertainties are also present in the estimates of field investment, operating costs, and volumes which can be produced at Norman Wells.

3.4.2 Evidence of the Applicant. The Applicant, with the assistance of Esso Resources, provided the results of a cash-flow analysis that examined the economic viability of the proposed field development over the 1980-2008 period. The analysis was conducted over a range of possible circumstances which could adversely affect the field economics. Present values of net revenues accruing from crude oil and natural gas liquids sales were estimated for a base case and for each of the following three cases that differ from the base case:

- (1) estimated IPL (NW) tariff is increased by 20 percent;
- (2) field investment is increased by 50 percent; and
- (3) field production is reduced by 20 percent.

Each of these cases was evaluated using two different pricing scenarios at Edmonton. The Edmonton price forecast prepared by Foster Research was used as the base price scenario. A lower price scenario has the crude oil price averaging \$182/m³ in 1984, the first year of operation, and escalating thereafter at 10 percent per year until the year 2008. Esso Resources presented details of cases, with the base case with the Foster Research and lower pricing scenarios, listing all significant cash flow streams by year.

Revisions to the results of this analysis were made by Esso Resources during the hearing. The revised results for all cases are presented in the Table 3.4.2.

TABLE 3.4.2

Present Value of Net Cash Flow
(millions of current dollars)

	<u>Rate of Discount</u>	<u>Assuming Foster Research Crude Price Forecast</u>	<u>Assuming \$182/m³ + Escalation at 10%</u>
Base Case	15	660	421
	20	340	198
<u>Changes from the Base Case</u>			
(1) IPL (NW) tariff increases by 20%	15 20	633 322	394 181
(2) field investment increases by 50%	15 20	587 268	346 125
(3) field production decreases by 20%	15 20	460 278	269 104

On the basis of these results, which give positive net present value for all cases, Esso Resources concluded that its expansion of production at Norman Wells is economically viable. Although Esso Resources did not examine the possibility of all three adverse circumstances occurring together because it felt that this was improbable, it felt that the field would still be economically viable if such a case were to occur.

In conducting this analysis, Esso Resources used discount rates of 15 and 20 percent. Under cross-examination Esso Resources indicated that it would consider the expansion at Norman Wells a viable investment at a discount rate of 15 percent or more.

3.4.3 Views of the Board. The evidence submitted by the Applicant supports the conclusion that the planned field expansion at Norman Wells is economically viable given expected conditions and given a wide range of possible adverse

conditions. As part of the Board's assessment of the evidence, it conducted a discounted cash-flow analysis based on Esso Resources' estimates of investment, operating costs and production volumes, and having regard to the uncertainties inherent in estimates of future revenues and costs. Board staff have examined the economic viability of the field production under the following possible circumstances that differ by 10 to 50 percent from the base case:

- (1) tariffs on the proposed pipeline system increase;
- (2) field investment increases;
- (3) field operating costs increase; and
- (4) field production decreases.

Table 3.4.3 shows the present dollar values of the net cash flow streams calculated at varying discount rates and the current discounted cash flow rate of return for each of the cases examined. The only case in which the economic viability of the project becomes marginal occurs when production volumes are reduced by 50 percent, and a consequent 100 percent increase of the tariff is factored into the proposed pipeline system.

Based on an examination of these results, it is the Board's view that the expansion of Norman Wells producing capability is economically viable under any reasonably anticipated set of circumstances which could occur.

Because the project of IPL (NW) for the construction of the Norman Wells oil pipeline is linked to the project of Esso Resources for the expansion of its facilities at Norman Wells, should a certificate be granted, the Board would require the Applicant to file, prior to commencement of construction, documents to demonstrate to the satisfaction of the Board that all regulatory approvals had been obtained with respect to the Norman Wells oil field expansion project of Esso Resources.

TABLE 3.4.3

Economic Viability of Esso Resources' Proposed
Expansion of Norman Wells Production

<u>Case</u>	<u>Present Value of Net Cash Flow (millions of current dollars)</u>			<u>Discounted Cash Flow Rate of Return*</u>
	<u>Discount Rates</u>			<u>Current</u>
	15	20	25	
Base	379	154	42	28
<u>Changes from the Base Case</u>				
a) IPL (NW) tariff increases by:				
10%	367	147	37	28
15%	361	143	35	28
25%	350	135	29	27
50%	320	116	16	26
b) field investment increases by:				
10%	361	137	26	27
15%	352	128	18	26
25%	333	111	1	25
50%	278	59	(47)	22
c) field operating cost increases by:				
10%	375	152	41	28
15%	373	151	40	28
25%	369	149	39	28
50%	360	143	35	28
d) field production decreases by:**				
10%	307	112	15	26
15%	271	90	1	25
25%	193	41	(31)	22
50%	8	(72)	(106)	15

* defined as that rate of discount which reduces the present value to zero.

** a decrease in production volumes by x% results in the new tariff being equal to 1/(1-x) times the old tariff.

CHAPTER 4
MARKET AREAS TO BE SERVED

4.1 Evidence of the Applicant

The application by IPL (NW) stated that the proposed pipeline would connect the known crude oil reserves at Norman Wells with existing Canadian markets and cited the National Energy Board "Canadian Oil Supply and Requirements" report of September 1978 in support of the need to develop further domestic crude oil supply to meet Canada's long-term requirements. The Applicant's witness stated that the Norman Wells crude oil will be much needed in any supply projection which he could reasonably accept and indicated that the production of conventional crude oil will continue to decline. The witness also stated that the crude oil would probably be mixed with the Rainbow Pipe Line crude oil stream and be processed at Imperial or other refineries connected to the major trunk pipeline system.

4.2 Evidence of Intervenors

Intervenors did not question the availability of a market for the oil to be transported through the IPL (NW) pipeline, although it was argued by some that the relatively small volume of oil to be produced at Norman Wells could be saved by conservation in existing markets.

4.3 Views of the Board

The Board has considered various supply and demand projections and agrees with the Applicant's view that the supply of domestic light crude oil will continue to decline relative to Canadian demand. It is therefore reasonable to assume that a ready market would be available in Canada for the Norman Wells light crude oil to be delivered via the proposed IPL (NW) pipeline. As an alternative petroleum energy source, the natural gas liquids produced as a by-product of Norman Wells crude oil production would also find a ready market. The

market is expected to be available regardless of any steps taken to conserve oil since both are considered necessary.

An assessment is made in Chapter 11 of this report as to the merits of bringing Norman Wells crude oil to southern markets. At this point the Board concludes that a market would exist.

CHAPTER 5
FACILITIES

5.1 Right-of-Way

5.1.1 Evidence of the Applicant

5.1.1.1 Location. The proposed 323.9 mm diameter pipeline system originates at the production facilities of Esso Resources near Norman Wells, in the Northwest Territories, and terminates at the Zama Terminal of Rainbow Pipe Line in northern Alberta. The total length of the line is approximately 866 kilometres. Three pumping stations and other ancillary facilities are required.

5.1.1.2 Route Selection. The Applicant stated that the proposed route was selected to provide the best overall balance between environmental, technical, socio-economic, and capital cost considerations.

The Applicant indicated that in selecting the route, maximum use was made of existing cleared areas, such as highway alignments, telecommunication routes, and seismic lines to minimize environmental damage and to provide pipeline access. An interdisciplinary group was established to investigate technical considerations, which included minimizing the length of right-of-way passing through unstable soils, particularly in areas associated with permafrost soils and adjacent to water courses. Socio-economic factors that applied to the route selection included using certain portions of existing transportation corridors, and reviewing the discussions which were held at the community level to receive local input and to reflect local concerns about the route where possible.

The Applicant stated that, before selecting its final pipeline route, broad alternative pipeline corridors were laid out on 1:250,000-scale topographic maps with areas of major concern and control points identified. A corridor that did not contain any segment rejected by any member of the interdisciplinary group was then selected. The preferred

corridor was then studied in detail, and a tentative pipeline location was chosen on an engineering basis consistent with the location criteria and damage mitigation measures established for the project. The route location was then field-checked and, after refinement, was overlaid on 1:50,000 scale topographic maps, which were submitted as part of the application.

Starting in the Northwest Territories the Applicant described its proposed pipeline route in the following manner.

The originating station would be located adjacent to the Esso Resources plant facilities at Norman Wells. From there the pipeline would proceed in a generally southerly direction on the east side of the Mackenzie River, paralleling it with a separation from 1.5 to 10 km, to Fort Norman, a distance of approximately 79 km. Along this segment, the right-of-way of the proposed Mackenzie Highway would also be paralleled with a separation varying from almost 0 to 3 km. Of the first 79 km, 59 would be located on existing cleared right-of-way.

From Fort Norman to Wrigley, the proposed route would continue on the east bank of the river generally parallel to the route of the proposed highway. Approximately 156 of the 236 km in this section would be located on cleared land.

The route from kmp 315, Wrigley, to kmp 440, northwest of Fort Simpson, would parallel the Mackenzie Highway. At this point the highway crosses from the north shore to the south shore of the Mackenzie River, but the pipeline would continue southeasterly along the north shore of the river to kmp 515. Of the 200 km traversed in this section, 33 km would be on existing cleared alignment.

The line would then run along the north bank of the Mackenzie River to kmp 526 where the river would be crossed.

From there the route would continue in its southeasterly direction and at kmp 749 the Northwest Territories/Alberta border would be crossed. Forty-one of the 234 km in this section would be on existing cleared alignment.

From the border crossing to the Zama terminal, kmp 866, 28 of the 117 km are on cleared lands.

5.1.1.3 Plans, Profiles and Books of Reference. The Applicant testified that the final alignment of the pipeline would be located in the field prior to the finalizing of plans, profiles and books of reference. Work on finalizing the alignment would be based on a further review of aerial photographs.

5.1.1.4 Alternative Routes. The Applicant studied an alternative route, following the Mackenzie Highway to a point near Enterprise and then proceeding south paralleling the highway to a point east of Bistcho Lake and then southwest to the Zama terminal.

Although only one alternative route was discussed in the application, the Applicant testified that it had, in fact, considered four corridor alternatives. These were described as follows:

- (1) the proposed route along the east side of the Mackenzie River;
- (2) the route west of the Mackenzie River;
- (3) one similar to the proposed route along the east side of the Mackenzie River, but modified south of Fort Simpson to follow the Mackenzie Highway;
- (4) a route east of the Franklin Mountains.

Examination of an alternative route on the west side of the Mackenzie River was done using the results of studies conducted during the early seventies. The Applicant stated that locating the route on the west side had several disadvantages. One of the principal ones was that the tributaries located on the west side are fairly major rivers,

some having incised channels which, when crossed, would increase construction costs substantially. Also on the west side much of the soil would be of a gravelly or rocky nature which would make for more difficult ditch excavation and would require more padding operations. The west side also offered less available infrastructure than the east. The alternative corridor on the west side of the Mackenzie River was therefore eliminated for geotechnical and construction reasons, and no environmental studies were done.

The Applicant stated that the modified Mackenzie Highway route had the advantage of following an established transportation corridor and would provide better access to the pipeline. However, this alternative route would increase the length of the proposed pipeline by approximately 248 km, or 30 percent, and would require one additional pumping station. In addition to the higher capital costs of this proposal there would also be increased operation costs, maintenance staff, and land rentals. In the Applicant's opinion the advantages of easy access provided by the alternative corridor were outweighed by factors such as: more terrain requirements and additional vegetation disturbance along the longer right-of-way, greater wildlife habitat disruption, crossing additional fish habitat, and a greater potential for disturbing historic sites.

The fourth alternative corridor considered was the route east of the Franklin Mountains. IPL (NW) testified that this route was considered on the basis of geotechnical conditions, specifically that there would be a substantial decrease in the areas of permafrost encountered. However, the Applicant did not consider this alternative desirable due to the increased clearing of vegetation and disturbance to soils, as compared to the preferred route where approximately 64 percent of the right-of-way is already cleared.

5.1.1.5 Permanent and Temporary Land Rights. The Applicant indicated that the permanent pipeline easement would

generally be 20 m in width with additional temporary working space requested as required. It also stated that in areas of hilly or wet terrain, the right-of-way width could increase to a maximum of 30 m. The Applicant testified that this 10-m increase in right-of-way width would be acquired as temporary working rights.

The Applicant further stated that at major river crossings, additional right-of-way might be required to meet environmental restoration and revegetation requirements, but such additional requirements would be of short-term duration. The additional right-of-way, at major river crossings, would be required to ensure that possible future installations carried out by other companies would not be a disturbance to IPL (NW) installed pipeline.

5.1.1.6 Land Acquisition and Easement Agreements. IPL (NW) stated that it had applied for a right-of-way by way of a pipeline easement, and for rights-of-occupancy of other lands for the construction of three pumping stations to the Department of Indian Affairs and Northern Development, to the Commissioner of the Government of the Northwest Territories and to the Alberta Energy and Natural Resources Department.

IPL (NW) stated that the Alberta Energy and Natural Resources Department had acknowledged receipt of all the information required and had placed the application in abeyance pending the issuance of a certificate by the Board. The Applicant further testified that only an acknowledgement of its application had been received from the Department of Indian Affairs and Northern Development and from the Commissioner of the Government of the Northwest Territories.

To the best of its knowledge, the proposed pipeline route would not cross any private land in the Northwest Territories or in Alberta, and the Applicant foresaw no difficulties in being granted easement rights for its proposal.

IPL (NW) testified that no actual easement agreements had as yet been drawn up. The easement agreements

would contain provisions for single line rights. Any proposal to build additional pipelines would require further negotiations.

The Applicant agreed to file with the Board a copy of all easement agreements as received.

5.1.1.7 Siting of Stations. The Applicant indicated that three pumping stations would be needed, each requiring approximately one hectare of land.

IPL (NW) stated that the exact locations of Stations 2 and 3 had not been determined. Although the general location of Station 3 had been established by an on-site inspection, its final location could still change by approximately 300 m.

5.1.1.8 Land Use Conflicts. The Applicant testified that it was not aware of any mining development along the proposed pipeline right-of-way route, but that it had not checked for the existence of any mining claims along the route.

In its environmental impact assessment the Applicant's consultant, Hardy Associates (1978) Ltd., recommended that:

Liaison between project supervisory staff and local trappers and hunters should be planned. This liaison should include: an information exchange with trappers to identify in the field potentially sensitive areas and to enable the trapper to make changes in his trapping itinerary in response to project activities; reasonable compensation should be paid to trappers for loss of imputed income; a policy enforcing contractors to ensure that project workers avoid the potential for theft or vandalism of trappers' cabins, traps, traplines, trap sets or furs, and minor adjustments of pipeline route should be made in the field to alleviate hardships that might be caused by construction of the pipeline.(1)

IPL (NW) adopted this recommendation by its consultant.

(1) Application Vol. 3, Section 2, Environmental Impact Assessment, Hardy Associates (1978) Ltd., pp. 231-232

5.1.2 Views of the Board. The Board notes the statement by IPL (NW) that the final alignment of the pipeline would be located in the field prior to the finalizing of plans, profiles and books of reference. The Board would require the Applicant, should a certificate be granted, to conduct a field survey of the entire pipeline route on which the preparation of the plans, profiles and books of reference would be based.

The Board accepts the route selected by IPL (NW) on the basis of the evidence submitted and alternatives considered.

The Board accepts IPL (NW)'s general requirement for a 20-m wide easement, but is uncertain as to whether the additional lands required would be for permanent or temporary use. In the event a certificate were issued, the Board would require that IPL (NW) indicate on the plans, profiles and books of reference, filed pursuant to Section 29 of the Act, the requirements for all permanent and temporary rights-of-way.

Although the Applicant does not anticipate any problems in obtaining the necessary easement rights, the Board is concerned with the possibility of substantial delays in obtaining all necessary approvals for an easement for the pipeline right-of-way and the right-of-occupancy of other lands as required.

The Board accepts the undertaking of IPL (NW) to file copies of easement agreements. However, should a certificate be issued, the Board would require, pursuant to Section 29 of the Act, that IPL (NW) submit to the Board all signed easement agreements prior to the approval of plans, profiles and books of reference.

The Board recognizes the possible need for the relocation of pumping station sites during final design. In the event a certificate were issued, the Board would require that IPL (NW) indicate on the plans, profiles and books of reference, filed pursuant to Section 29 of the Act, the exact location of the three sites.

The Board notes the Applicant's statement that it is unaware of any active mining areas along its proposed route. Nevertheless, the right-of-way may be affected by mining claims. In the event a certificate were issued, the Board would require that IPL (NW) indicate on the plans, profiles and books of reference filed pursuant to Section 29 of the Act, the existence of any mining claims along the proposed route of the pipeline.

The Board accepts IPL (NW)'s measures to eliminate or reduce the potential impacts on hunting and trapping activities.

5.2 Pipeline Design

5.2.1 Facilities Design

5.2.1.1 Evidence of the Applicant. In designing the proposed pipeline system the Applicant indicated that the basic design parameters would be selected in accordance with the Board's Oil Pipeline Regulations. In particular, the line, which would carry high vapour pressure products, would be designed to comply fully with the requirements of Part X of the Board's regulations respecting the movement of high vapour pressure materials.

Specifically, the Applicant proposes to use a conventional buried mode design for the pipeline and intends to operate the pipeline at temperatures at or near ambient ground temperatures. This design philosophy was selected to minimize the thermal effects of the pipeline on the discontinuous permafrost found along the proposed route. This aspect of the design would be satisfied by controlling the input temperature at the Norman Wells end of the line through the use of chillers which would keep the oil and natural gas liquids at a level of approximately -1°C . The Applicant testified that the selection of a conventional buried pipeline design was both practical and economical and that the studies and evidence prepared for the project indicated that the line could be safely constructed and

operated. The Applicant also indicated that the data collected to date had not revealed any need for the pipeline design to include an elevated mode of construction. Further, the possibility of having to elevate the line once further analysis was done was considered highly unlikely. The Applicant, in several instances, indicated that further analysis, particularly in the areas of thaw settlement and frost heave, would be required to finalize the design.

As to the proposed pipeline's throughput capabilities, the Applicant selected a 323.9 mm diameter line with an estimated sustainable capacity of 5100 m³ per day under winter conditions. This compares with initial throughput requirements of 4300 m³ per day, allowing for a 15 percent surplus in daily pumping capabilities. In selecting the 323.9 mm diameter system, the Applicant also considered two alternative diameters for the proposed pipeline, one of 406.4 mm and another of 273.1 mm. The Applicant provided a comparison of the economics of the three diameters and concluded that the 323.9 mm diameter was the most economical.

The Applicant testified that the decline in the availability of crude oil throughput volumes expected over the life of the pipeline was not considered in selecting the proposed line size. It was also stated that these declining throughputs had not affected the final selection of the line size as the 323.9 mm diameter line maintained its economic advantages over the first fourteen years of the project. Another advantage of the line size chosen over a smaller diameter line was that less energy would be required to move the oil and consequently less energy would be imparted to the surrounding soil thereby minimizing the magnitude of potential thaw settlement problems.

The present proposal provides for the installation of three pumping stations. The initiating station would be located at Norman Wells with the two intermediate stations located at kmp 295 and at kmp 589 respectively. Each station

would be equipped with three pumping units providing an installed power rating of 3405 kw for the total system. Under normal conditions only two pumps would operate with the third available as standby. The Applicant provided data which graphically depicted the proposed system's ability to handle expected pumping requirements.

All pumps would be engine driven with the Norman Wells station using natural gas as fuel while the two intermediate stations would burn diesel fuel. The natural gas would be supplied by others at Norman Wells while the Applicant proposed to store diesel fuel on-site at each of the downstream stations. The Applicant indicated that the use of diesel fuel and natural gas as fuels for the pumping stations was the most economical from a practical and reliability point of view. Economic evaluations of the proposed design were provided by the Applicant.

The Applicant stated that all pumping facilities would be designed in accordance with the relevant codes and standards governing pumping stations. All major mechanical and electrical equipment would be housed in heated insulated buildings. Electric power would be purchased for the Norman Wells station while power would be generated on-site at the two downstream stations. All stations would be provided with alarm and control equipment designed to allow for a fail-safe mode of operation should an emergency condition arise.

5.2.1.2 Views of the Board. The Board recognizes that the Applicant has selected its general design parameters in accordance with the requirements of the governing regulations, codes, and standards and is satisfied with that aspect of the proposed design.

The Board agrees with the selection of a conventional buried mode design for the pipeline. However, it is evident from the information available to the Board that additional geotechnical and other studies would be required before the completion of final design. Such studies

would need to further address the ramifications of burying a pipeline in discontinuous permafrost. The Board would require that the final design reflect the results of these additional studies as more specifically discussed in the Geotechnical and Geothermal Design sections of this chapter.

The Board finds that the selection of a 323.9 mm diameter pipeline for the movement of the anticipated crude oil and NGL volumes has both economic and operational advantages over the two other pipe diameters considered for the project. Although the available throughput volumes would decline over the life of the project, the Board concludes that the economic benefits in the earlier years derived from the selection of the 323.9 mm diameter outweigh the marginal advantages of a smaller line in the future years. Moreover, the smaller line does not show advantages until 1998, 15 years after the proposed start-up of the line.

In analyzing the proposed pumping station configurations the Board has found the design to be satisfactory. The Board is satisfied that the system, as described, is capable of handling the expected pumping requirements and has enough flexibility to cope suitably with the range of flows that may be encountered during the operation of the pipeline.

It is obvious to the Board that the use of diesel fuel and natural gas as fuels for the pumping units is the most practical method of providing power. The lack of a reliable source of electric power along the proposed route combined with present day experience in the use of fuel powered engines support the proposed design. The Board, therefore, concludes that the use of engine-driven pump units is both economically attractive and technically feasible.

The Board notes that the details of the selection of station piping, alarm and control devices, and other ancillary facilities at the pumping stations are yet to be finalized and the Board would require that these final designs be submitted for approval prior to construction.

5.2.2 Stress Analysis and Materials

5.2.2.1 Evidence of the Applicant

5.2.2.1.1 Line Pipe. The Applicant indicated that 323.9 mm diameter Grade 359 MPa pipe would be used for the proposed pipeline. The wall thicknesses selected for the mainline are as follows:

<u>Location</u>	<u>Wall Thickness</u>
kmp 0 to kmp 345	6.27 mm
kmp 345 to kmp 584	5.33 mm
kmp 584 to kmp 661	6.27 mm
kmp 661 to kmp 866	5.33 mm

The selection of the pipe wall thicknesses resulted from a stress analysis performed by the Applicant. This analysis considered engineering stresses and strains that the pipe would experience as a result of anticipated loading conditions such as internal pressure, temperature differentials, differential settlement and overburden. The Applicant set allowable stress and strain limits based on design criteria outlined in the Board's Regulations and the CSA Z183 Standard and compared the results of the analysis with these limitations. The Applicant concluded that the proposed design satisfied code requirements.

Of particular concern, and the subject of much discussion respecting the stress analysis, was the effect of differential settlement. The Applicant was confident that it generally had selected "worst case" conditions in predicting the amount of differential settlement that could occur and that the analysis showed that the pipe, as selected, could withstand these settlements without structural damage. The Applicant, however, recognized a need to monitor the pipeline once installed to ensure that the predictions were accurate and to take corrective action should it become necessary.

The Applicant specified that the pipe to be used would conform to the requirements of the CSA Standards Z245-1 and Z245.5 covering ERW line pipe. Moreover, the Applicant provided line pipe specifications and indicated that all material specifications, manufacturing and testing would meet or exceed the requirements of all relevant codes, standards and applicable Board regulations. The pipe would be required to satisfy the notch toughness requirements for Category II piping as specified in CSA Standard Z245.5-M-1979.

5.2.2.1.2 Other Materials. The Applicant provided typical specification sheets for pumping station piping, valves, and fittings. The selection of these materials was in accordance with all the relevant codes and standards applicable to the service conditions identified by the Applicant for its project.

5.2.2.1.3 Quality Assurance. The Applicant indicated that during manufacture all of the pipe and major components (such as valves and fittings) would be subjected to independent in-plant inspection performed by the Applicant or its representative to ensure compliance with the applicable codes or regulations.

5.2.2.1.4 Availability. The Applicant testified that the production of line pipe would require about six months lead time under normal circumstances but, should the need arise, a shorter delivery schedule was possible. Other materials such as valves, fittings, flanges, etc., were felt to be regular shelf items.

5.2.2.2 Views of the Board. The stress analysis conducted by IPL (NW) considered most situations of single and combined stresses. The design criteria and stress and strain limits established for the analysis are judged by the Board to be viewed as reasonable.

The Board is concerned by the lack of site-specific data on loading conditions resulting from thaw settlement and frost heave although this concern would in part be offset by the monitoring program proposed by the Applicant. The Board, however, would require that site-specific data be obtained and that analyses be performed to ensure the adequacy of the final design. Further, any monitoring program would be required to have well-defined parameters as to measuring procedures, critical values of pipe movements, and mitigative and corrective procedures. A more detailed discussion of this is found in the Geotechnical section of this chapter.

The selection of line pipe and other material properties and specifications have been well documented by the Applicant. The Board is satisfied that the materials would meet applicable code and regulation requirements and pose no delivery problems.

5.2.3 Geotechnical and Geothermal Design

5.2.3.1 Geotechnical Assessment

5.2.3.1.1 Evidence of the Applicant. In its geotechnical assessment of the proposed pipeline route, the Applicant reviewed existing literature pertaining to the general area between Norman Wells and the Zama Terminal. The data itemized in the application included the following:

- (1) previous studies by Canadian Arctic Gas Study Limited, Foothills Pipe Lines Ltd., Beaufort-Delta Oil Project Limited, and Mackenzie Valley Research Project
- (2) previous studies by the federal Departments of Public Works, Indian and Northern Affairs, and Energy, Mines and Resources
- (3) review of existing government aerial photographs, air photomosaic maps and topographic maps
- (4) a review of 1:50,000-scale terrain-typed photomosaic maps compiled from the Beaufort-Delta Oil Project.

The Applicant indicated that the above data were used to establish the terrain conditions along a general routing for the proposed line. Air photos reviewed by the Applicant were used to identify the location of cleared rights-of-way that would be suitable for use along various alternative routes.

The proposed pipeline route lies within the discontinuous permafrost zone. Based on the studies carried out by Canadian Arctic Gas Study Limited, the Applicant divided the proposed route into the following three climatic regions:

- Region 14 - Norman Wells (kmp 0) to south of Police Island, (kmp 110) - 93 percent permafrost.
- Region 15 - south of Police Island (kmp 110) to Willowlake River (kmp 376) - 77 percent permafrost
- Region 16 - Willowlake River (kmp 376) to Zama Terminal (kmp 866) - 34 percent permafrost.

The Applicant's analysis of the geotechnical data indicated widespread distribution of permafrost in Region 14, a sporadic distribution of permafrost in Region 16 and a transition zone, Region 15. It was noted in the application that a marked change in permafrost occurrence was identified near the Ochre River.

For the purpose of compiling a geotechnical assessment of the proposed route, the Applicant followed a study procedure which included the evaluation of sensitive terrain areas. The Applicant described terrain sensitivity as a measure of the degree of reaction of terrain to man-made disturbances. The review of terrain-typed air photomosaic maps, in conjunction with the studies previously mentioned, enabled the Applicant to establish a geotechnical mapping of the proposed route and to identify the various terrain units to be traversed. These terrain units were categorized as to their sensitivity which allowed the Applicant to develop a preliminary geotechnical assessment. The Applicant concluded that performing its

construction work in winter after the terrain surface was properly frozen would generally have a minimal effect on terrain units along the proposed route.

The Applicant testified that for approximately 32 percent of the proposed route the subsurface information reviewed related to boreholes placed up to ten km away from the proposed line location. Further, boreholes, in certain instances, were at a higher elevation than the proposed route. The Applicant contended that significant terrain changes would not be apparent in a five km shift of location. The Applicant further stated that the discrepancy in elevation was of little consequence and "better" terrain would likely be located at the lower elevation of the pipeline route. The Applicant indicated a smaller percentage of permafrost would likely be encountered at lower elevations and no significant changes in permafrost characteristics would be noted.

The Applicant described proposals for a further site-specific borehole analysis of terrain along the pipeline route, as these would be required to obtain sufficient final design information. The Applicant stated that the areas along the route where adequate subsurface information was lacking were "basically all along the route."

5.2.3.1.2 Views of the Board. The Board recognizes the preliminary nature of the geotechnical assessment presented by the Applicant and is satisfied with this phase of the analysis.

The Board is of the view that a complete and comprehensive terrain investigation is fundamental to the Applicant's accurate geotechnical assessment of the proposed route. The Board agrees with the Applicant that further geotechnical assessment through the analysis of site-specific subsurface investigations should be an initial step in the formulation of final designs. Of particular concern is the corroboration of the Applicant's

geotechnical mapping of terrain units with geophysical data gathered at sites coincident with the final pipeline location. The Board would require the identification and assessment of areas sensitive to terrain degradation and the field investigations for the evaluation of:

- (1) slopes which may become instable;
- (2) river crossings and approaches thereto; and
- (3) interfaces of frozen/unfrozen soil where special designs may be required.

5.2.3.2 Geothermal Analysis

5.2.3.2.1 Evidence of the Applicant. The Applicant presented, as part of its geotechnical assessment of the pipeline route, a geothermal analysis of terrain on the proposed route. In its analysis, a review of ambient and ground temperatures was undertaken and used as input for establishing a pipeline temperature profile. The amount of permafrost and unfrozen ground, along with the effective summer and winter temperatures, were estimated for the purpose of this study. The analysis of pipeline temperature was conducted to determine the length of unfrozen ground which would warm the pipe contents to the point where thawing of adjacent frozen soil would occur. A second objective of the analysis was to establish the length of frozen ground which would produce the opposite result. Consequent to the above, the potential for frost heaving and thaw settlement was reviewed and evaluated. The Applicant stated that the results of the above studies were used as an input in the evaluation of various routing options.

Based on the work undertaken by Canadian Arctic Gas Study Limited and the Applicant's own computer simulation of ground temperature profiles, various conditions along the route were examined to assess the

potential for permafrost degradation. From these studies the Applicant concluded the following:

- (1) the temperature of the pipeline would be controlled by adjacent ground temperatures; and
- (2) pipeline temperature would increase quickly when passing through warm adjacent ground and decrease slowly as the pipeline passed into cooler permafrost areas.

The Applicant stated that, as a result of the above, the temperature of the pipeline would be maintained close to ground temperatures and thermal input would be minimal. An exception to this conclusion was cited for the case of the pipe passing through several kilometres of continuously frozen into unfrozen ground and then back into frozen ground. These cases were presented as those in which frost heave in the former case, and thaw settlement in the latter, might be encountered. Further discussions regarding these contingencies are contained in the respective sections of this report.

A survey of ground temperatures, measured at 0.5 m depth, along with thermal conductivity values were presented in the Applicant's proposal. The thermal conductivity value, "k", was represented as a constant 1.696 W/m °C over the entire length of the pipeline route. The Applicant agreed that the numerical value for thermal conductivity varied directly with soil properties and terrain conditions. The Applicant suggested a more accurate representation of thermal conductivities might have been gained by tailoring the value of "k" closely to changing soil types. It was further stated that thermal conductivity values, in spite of the care taken to determine them, were only accurate to ± 10 to 15 percent. The calculation of heat flow "q" was found to be insensitive to changing "k" values. The Applicant maintained that the value of 1.696 W/m °C used for thermal

conductivity in its heat flow analysis was valid for preliminary purposes.

The Applicant, in its analysis of the effects of thermal input of the proposed pipeline to its surroundings, described a "worst case" approach. In its view, the predominant factor causing permafrost degradation was increased heat flow from the ground surface. It was stated that increased heat flow from the surface, due mainly to clearing of right-of-way and construction disturbance of surface strata, would be the major initiator of thaw settlement. The analysis submitted by the Applicant indicated that the effect of warm oil flowing through the pipeline would be substantially less than those of heat input from the above.

To establish its worst case analysis, the Applicant considered the case of permafrost degradation occurring as a result of clearing the right-of-way surface. The above condition was then compounded in the analysis by the addition of a "warmed" pipeline temperature acting on the permafrost layer. The reverse situation was applied for the case of the pipeline freezing an existing unfrozen strata. The Applicant indicated that the results of the analysis predicted a small drift in ground temperature, rising slightly when passing from frozen to unfrozen strata and falling slightly in the case of unfrozen to frozen. Regarding the length of line in either frozen or unfrozen strata, the Applicant indicated that a distance of 100 km of frozen soil interfacing with the same length of unfrozen soil was used in the above analysis.

The Applicant predicted that actual line performance would fall between the maximum and minimum temperature ranges. The Applicant further contended that actual field conditions would not reproduce the severity of the conditions used in the simulation.

5.2.3.2.2 Views of the Board. In light of the preliminary nature of the Applicant's geotechnical analysis and given

the exceptions noted in the Applicant's evidence, the Board had concerns regarding the long-term effects of the pipeline on frozen/unfrozen interfaces in the discontinuous permafrost zones. The Board's reservations stem from the Applicant's statement that the reaches of frozen and unfrozen areas as well as the incidence of these reaches had not yet been ascertained. While the Board concurs with the Applicant's contentions regarding the thermal performance analysis for the proposed line, it has concern respecting the extent to which field extremes may be inconsistent with the Applicant's analysis. It is the Board's view that to assess and mitigate the problems anticipated in traversing discontinuous permafrost zones, an evaluation of the extent and incidence of frozen/unfrozen reaches should be attempted, possibly leading to a more accurate forecast of field conditions. The Board would require that the final design incorporate any additional information compiled from this endeavour.

5.2.3.3 Thaw Settlement

5.2.3.3.1 Evidence of the Applicant. Following the analysis of the effects of the pipeline passing through the discontinuous permafrost zone, the potential for frost heave and thaw settlement was evaluated by the Applicant. The Applicant contended that in the instance of the pipe traversing a stretch of unfrozen ground, and then entering a frozen section, the potential for the pipe to thaw the surrounding permafrost required further investigation. Based on the results of preliminary studies, the Applicant identified sensitive terrain areas with respect to thaw settlement, thawing of permafrost slopes and frost heaving. These areas were indicated on the Applicant's geotechnical maps.

It was noted in the application that high terrain sensitivities existed in glaciolacustrine deposits with high ice contents. If disturbed this material could experience thermokarst subsidence in flat areas. The

Applicant further submitted that frozen and unfrozen organic deposits were rated at high sensitivities in their study. It was believed that although organic surface deposits could recover from disturbances by regrowth, underlying strata might experience an increase in sensitivity and thermokarst subsidence could result.

The Applicant stated, on the basis of the borehole information it reviewed, that a great majority of the holes drilled near the selected prime route exhibited low to medium ice contents. The Applicant identified areas of potentially sensitive terrain along the route as those areas which might contain medium to high ice content. It also stated that special mitigative measures with respect to thaw settlements in these areas would be required.

From the results of its geothermal analysis, the Applicant concluded that the pipeline temperature was controlled by the temperature of its environment. Further, it was stated the pipeline would warm quickly but would cool slowly. On the basis of the above a minimal thermal impact would be exerted by the pipeline. An exception would be the case of the pipeline passing through long unfrozen sections and then into frozen reaches. The potential for thaw settlements in this case was identified in the application.

The Applicant stated that not all disturbed right-of-way examined along the prime route area showed signs of permafrost degradation. Given the results of its geothermal analysis, the Applicant contended that since the thermal input from the pipeline was deemed minimal, permafrost degradation along the proposed route would be similar to that of a cleared area. Where the pipe was warmed up by long unfrozen terrain stretches, the Applicant indicated that some additional thawing under the pipe would occur in addition to that attributable to surface disturbance when it passed through continuous permafrost zones.

The Applicant submitted that, for most of the terrain units along the proposed route, the anticipated

magnitude of thaw settlement was less than 0.8 m. This figure was based on the contention that most soils along the route contained low to medium ice contents. The Applicant indicated that a main exception to the above would be in areas of thick organic peat plateau, particularly a 65 km stretch south of the Ochre River. For this area the Applicant submitted that a thaw settlement magnitude of 1.0 to 1.2 m could be expected. The Applicant stated that further field and laboratory work would need to be undertaken in order to locate exact areas where settlements of up to 1.2 m could be expected. In its view no mitigative measures for settlements of this magnitude were necessary. It stated that from a pipe integrity point of view a 1.2 m settlement was not critical. The design of the pipeline and the selection of pipe sizes and wall thicknesses were checked using the 1.2 m differential settlement as a design parameter. For differential settlements of a magnitude greater than 1.2 m to occur two to three years would be required, allowing sufficient time for detection and corrective action. A differential settlement magnitude which might be deemed critical to the integrity of the line was defined as that settlement which would deform the pipe to its critical radius of curvature at the points of contraflexure.

The Applicant stated that, given the period of time required for settlements to develop due to thawing of a magnitude critical to the pipe, a program of monitoring and observation would be established. It contended that settlement areas of a critical nature would manifest themselves as areas of depression up to 30 m or more in length. Areas such as these, if they developed along the route, would be detected by the Applicant's proposed overflights or ground walks along the line. The Applicant stated that 15 cm settlement could be detected in an overflight survey.

The Applicant stated that no attempt to rectify a detected settlement would be made until the radius of curvature of the pipe in the suspect area had been measured. Should the measured value of the radius of curvature be less than the critical radius of curvature, no repairs would be initiated. The environmental complications caused by a repair attempt during the thawing seasons were given as the reason for reluctance to restore areas of differential settlement.

The Applicant stated that much more detailed "as built" plans would be compiled for the proposed line. The drawings would accurately locate the original position of the pipe in the soil so that comparisons of movements could be made against an accurate bench mark. To measure the radius of curvature of the pipe in a suspect area electromagnetic surveys or probing were planned by IPL (NW). The proposed frequency of field surveys was an overflight once per week, valve inspections monthly and a field walk or settlement observation survey on an annual basis.

The Applicant acknowledged that consequent to thaw settlements or differential settlements occurring along the route, depressions in the terrain surface would result. A water ponding effect in these depressions would tend to disrupt the drainage patterns in certain areas and also contribute to further degradation of permafrost in underlying strata.

Regarding its ability to measure radii of pipe curvature in water-filled areas and to detect critical settlement locations, the Applicant stated that large water ponds would serve to highlight critical areas. Measurement of deflected pipe curvature would proceed after draining of the ponds. The potential for increased permafrost degradation was not considered to be a major concern by the Applicant. Attempts to restore the right-of-way by repairing or regrading a depression would not be made.

The Applicant indicated that no areas adjacent to the pipeline would be included in the monitoring program. A special case might be considered if a slope adjacent to the pipeline was in danger of failure. However no lateral observations would be routinely included.

The Applicant contended that, given the predictions of 0.8 m settlement for most terrain units and 1.2 m settlement for the organic peat areas, its proposed monitoring of right-of-way performance would be adequate to ensure the integrity of the pipeline.

5.2.3.3.2 Views of the Board. The Board is generally satisfied with the Applicant's analysis of thaw settlement. However, the Board has some concern with those areas, as yet unidentified, where thaw settlement magnitudes might exceed those predicted. A subsurface investigation would be necessary to provide a data base for the quantifying of high, medium and low ice contents and a subsequent verification or revision of settlement magnitude prediction. Further, the areas along the pipeline route where settlement problems might be expected would need to be located and any special consideration to be applied reflected in the final design. The results of the above investigations would also allow for the location of areas in which settlements of a critical magnitude might occur within a shorter time frame than two to three years.

The Board accepts the Applicant's contention that the major source of heat effective in degrading permafrost would, for the most part, be supplied from the disturbed right-of-way surface. The Applicant's contention, that by using previously degraded rights-of-way a small amount of additional thawing under the pipe would occur, appears consistent with the analysis reviewed by the Board. The Board concurs with the Applicant's proposal to use existing rights-of-way whenever possible.

Of concern to the Board is the Applicant's intention to not attend to settlement sites unless the magnitude of settlement is approaching a critical depth. The Applicant has indicated that due to terrain disturbances which would be caused by a restoration attempt, the above approach was adopted. The Board's concern is for the environmental ramifications of not attending to settlement sites. This concern is further addressed in Chapter 7 of this report.

The Board accepts the Applicant's proposal to monitor the performance of the line during operation. The Applicant's program, if diligently followed, would allow for identification of problem areas and provide adequate lead time for restoration to be initiated. However, the Board notes that even with a monitoring program in place the need for further site investigations and analysis of subsequent data would not be alleviated. It is the Board's view that with monitoring through overflights and walking the right-of-way sufficient data on settlement conditions could be compiled and the pipe integrity could be maintained.

5.2.3.4 Frost Heave

5.2.3.4.1 Evidence of the Applicant. The Applicant presented the results of its geothermal analysis relating to the potential for freezing of unfrozen soils around the pipe. Based on the results of its analysis, the Applicant concluded that a frost bulb which would develop around the pipe would extend to a depth of about 1 m below the pipe should the line pass through a stretch of permafrost and then into an unfrozen soil section. Further, it contended that the frost bulb would thaw completely over a spring and summer season. The Applicant also stated that although the results of the geothermal analysis indicated that the pipe temperature would be dominated by its environment, for the

purpose of the above analysis cold pipeline temperatures were used. On the basis of the foregoing, the Applicant concluded that frost heaving would not be a design or operating problem.

An exception to its conclusion was with respect to frost heave design considerations at a few river crossings where, upstream from the crossing, a long section of frozen soil was encountered. Such situations were a definite possibility for the most northerly portions of the route; the Applicant would provide for them by using an insulating barrier around the pipeline, virtually eliminating freezing under the conditions postulated. It further indicated that to date none of these areas had been identified.

The Applicant stated that most soils along the pipeline route could be considered frost-susceptible with the exception of gravel deposits located at some river crossings. An analysis was provided which, on the basis of a number of different assumptions, indicated that the magnitude of frost heaving could range from 8 to 30 cm. Further, it stated that terrain freezing would only occur in areas where the pipeline passed from a lengthy permafrost section into a stretch of unfrozen soil. Frost heaving resulting from freezing of the soils by the pipe would only occur in frost-susceptible soils with access to groundwater. It was the Applicant's contention that a displacement of the pipeline resulting from a frost heave of the magnitudes predicted would not affect the integrity of the line. Moreover, seasonal freezing cycles would not produce a compounded displacement of the pipeline given the complete annual thawing of frost bulbs which might form around the line.

5.2.3.4.2 Views of the Board. The Board is satisfied with the Applicant's frost heave analysis. It notes, however, that areas of lengthy permafrost sections either adjacent

to rivers or bounded by unfrozen soils are, as yet, unidentified. It is the view of the Board that, given the detection of these areas, mitigative measures as proposed by the Applicant should adequately protect the integrity of the line.

5.2.3.5 Slope Stability

5.2.3.5.1 Evidence of the Applicant. The thawing of permafrost slopes was cited as one of the most troublesome geotechnical concerns associated with the construction of the proposed pipeline. The Applicant stated that slope stability was a part of the design that was very sensitive to changes in information or conditions found in the field. In other words, conditions encountered during construction would have considerable bearing on the slope stability design.

The Applicant presented a summary of measures which it had established for stabilizing slopes where there were problems due to the thawing of permafrost. These were presented with respect to slope angle. They mainly involved excavating soils around the pipe and replacing them with granular materials to ensure adequate drainage of the slope. The Applicant stated that the rate of thawing on permafrost slopes directly affected the quantity of water liberated. Free moisture in the soil reduces the shear strength of the soil mass on the slope thereby increasing its potential instability. By providing increased drainage capabilities on slopes, shear strength reductions could be minimized. For those slopes of angles greater than 20°, site-specific designs were suggested. From an analysis of terrain units along the route the Applicant indicated that no prevalent modes of mass-wasting phenomenon were noted. From observations made of an area 100 m wide, the Applicant submitted that no large slides had been observed on the route.

In its application, IPL (NW) indicated that the most unstable slopes were those in ice-rich, fine-grained soils. Prevalent modes of slope failure in permafrost areas were stated as active layer detachment slides, retrogressive thaw-flow slides, and slumping of slopes. The Applicant stated that, due to construction disturbances and clearing of vegetations on slopes, the active layer would be thickened. It was reasoned that, given the increased permafrost degradation due to surface disturbances, the potential for an active layer detachment slide would be increased. The Applicant indicated that, should such a slide be initiated, its magnitude or depth would be greater than that occurring in nature. Due to an eventual termination of thaw front advancement, the increased slide potential would not magnify with time. As is generally the case, a slope failure in permafrost areas would be accompanied by a retrogressive phenomenon and with time the area of influence would tend to become quite large. The Applicant submitted that this would be the result should a slope failure on the right-of-way be left unchecked or no attempt made at restoration. At sites of detected slides an attempt at slope stabilization would be made. The primary mitigative efforts would take the form of excavation of permafrost soils on the failure site and replacement with gravel providing better drainage, removal of debris, and installation of insulation barriers to decrease the rate of thawing.

The Applicant addressed the concern of a winter construction program on slopes resulting in a large scale failure. It was stated that although this was not expected to occur, on some slopes an increase in the potential for slope failure might result from the operation of the pipeline during thawing seasons. Should such problems materialize they should be identified by the line performance and right-of-way monitoring programs.

Slope stability design was indicated as very sensitive to information gained from the field. In outlining a proposal for site investigations along the route, a program of identifying sensitive slopes from actual borehole drillings was presented. Of particular concern to the Applicant was that portion of the route between Norman Wells and the Willowlake River area where virtually all of the sensitive slope areas are located. The Applicant stated that, without the proposed site investigations, particularly sensitive slopes could not be identified. The actual position of the pipeline on a given slope was plus or minus 300 m. At present, areas of increased slide potential could not be identified. The results of the proposed future borehole investigations would be required for design purposes.

5.2.3.5.2 Views of the Board. The Board concurs with the Applicant's view that further investigations are required to ensure an adequate slope stability design. As indicated by the Applicant a number of concerns exist in this area, and it is the Board's view that comprehensive slope designs are fundamental to the integrity of the line. Sufficient site-specific information acquired with respect to terrain types would allow for the formulation of slope designs tailored to field conditions. Further, the subsurface assessment of slopes would allow for the predictions of slide potentials, the assessment of potential retrogressions in the event of a slide, and the establishment of factors of safety for various slide modes on steep slopes.

The Board agrees with the Applicant's proposal to monitor the performance of slopes. Initiating restoration attempts at sites of slope failures as quickly as possible would serve to mitigate the retrogressive effects of a slide.

The Board is satisfied with the Applicant's suggested contingency plans for restoration of slope failures. The Applicant's proposals to increase subsurface drainage on slopes and to inhibit thawing on slopes where necessary appear consistent with attempts to mitigate those factors which contribute to slope instability. The Board agrees that with additional subsurface information on slopes along the route, the Applicant would be in a position to assign specific mitigative measures to individual slopes along the route. By doing so, any restoration attempts on slopes so identified would immediately attack those conditions which directly contributed to the instability problem.

5.2.3.6 Drainage and Erosion Control on Slopes

5.2.3.6.1 Evidence of the Applicant. Drainage and erosion control measures for most areas along the right-of-way would follow standard pipeline practices. A surface layer of peat which covers the right-of-way for virtually its entire length was cited as being highly erosion resistant. The Applicant contended that sufficient volumes of water flowing at high enough velocities to erode the interwoven organic mat were not likely to occur. The case of sloping terrain in areas of till plains was brought to the Applicant's attention. An example of existing erosion problems was presented from the text of a report entitled "Terrain Evaluation - Mackenzie Transportation Corridor, Central Part."⁽⁶⁾ The authors of that report contended that the main hazard in sloping till plains was erosion caused by disturbance of natural drainage patterns. Alterations of the terrain which tend to concentrate the face water into a channel would have marked effects on the erosion of the slope. Erosion along the right-of-way, if left unchecked, would progress with every season. The Applicant agreed with the findings of the report but

outlined proposals to mitigate the erosion problem. The Applicant added that the authors of the report were using examples of eroded areas left unrepaired. This would not be the case in the proposed project.

A diligent program of monitoring by operations and maintenance staff was proposed as an important part of mitigative measures. With the site-specific erosion and drainage control measures proposed and diligent monitoring, the Applicant contended that erosion on the right-of-way would be minimized. The erosion monitoring program would be instituted for the first three years after construction. This was deemed the most critical period.

An area requiring special consideration regarding drainage control was that relating to depressions left along the right-of-way subsequent to the thawing of permafrost. In sloping terrain a system of small dykes was proposed to prevent flowing surface water from attaining erosive velocities. On gentle slopes, 3° or less, dykes placed at 300-500 m spacings were proposed. On slopes greater than 3° a granular capping on the dykes was proposed. The drainage and erosion control measures for a group of about "20 special slopes" would require site-specific investigation and design.

5.2.3.6.2 Views of the Board. The Board is satisfied with the Applicant's approach to the control and mitigation of drainage and erosion concerns. It is the view of the Board that the integrity of the proposed line could be adequately assured through the diligent application of the proposed methods. The environmental ramifications of the Applicant's drainage and erosion control measures and the Board's views regarding this facet are presented in Chapter 7 of this report.

5.2.3.7 River Crossing Design

5.2.3.7.1 Evidence of the Applicant. In its application IPL (NW) categorized river crossings along the proposed

route as "major crossings" where widths were in excess of 275 m, as "intermediate crossings" where widths were from 45 m to 275 m, and as "minor crossings" where widths were less than 45 m. A total of 2 major, 4 intermediate, and approximately 65 minor crossings were identified. Typical preliminary designs for the major river crossings on the Mackenzie and Great Bear Rivers along with intermediate crossings on the Ochre and Willowlake Rivers were submitted.

In its application, the Applicant stated that little difference exists in the climatic conditions between Fort Simpson and Norman Wells. The mean annual precipitation for the area was given as 330 mm, most of which falls as rain. The runoff ratio for the terrain of the drainage basins was submitted as being from 0.2 to 0.5. Major peak flows in the upper Mackenzie region were stated as prevalent during late May or early June, usually resulting from snowmelt. Peak flows on individual rivers were given as occurring during ice jam break-up conditions. The Applicant acknowledged that summer hydrographic peaks could sometimes exceed spring flood peaks given conditions of intense local rainstorms.

Typical design data including hydrologic conditions, channel bank descriptions, drainage basin areas and design flood discharges were presented by the Applicant for the two major and two selected intermediate river crossings. The approximate locations of the proposed pipeline crossings of the rivers were also indicated.

The Applicant indentified three potential hazards which might lead to exposure of the pipeline due to abrasive stream flows:

- (1) exposure on a river bed due to general bed degradation or local scour at the crossing location;
- (2) bank erosion which had progressed beyond the sag points of the river crossing; and
- (3) exposure resulting from erosion of a flood plain through which the pipeline passes.

The Applicant submitted that the above hazards would be considered in establishing the depth of cover, location of sag points and elevation of the line in a channel bottom at the river crossings. At the Great Bear River crossing the soil material of both banks was assumed. The bank material for the Mackenzie River was established by boreholes on the south bank of the river only. The bank material on the Ochre River was established by boreholes on both sides of the river, while at the Willowlake River only one bank had been investigated. The design floods for the Mackenzie River and Willowlake River were submitted as 100-year and 40-year floods respectively. Design flood data for the Ochre River were not included. The 50-year flood was used for the Great Bear River.

Although typical construction procedures for minor river crossings were filed in the application, it was stated that the actual crossing design of a given water course would be finalized on the basis of site-specific information not yet available.

The Applicant stated that a geophysical investigation of river crossing approaches was required to finalize a given crossing location, design and configuration but that to date no contracts for this work had been let. At present the final location of the pipeline on a given river reach could not be established to a tolerance of less than ± 300 m, the proposed line corridor width. Dependent on the results of the proposed site-specific investigations, river crossings locations would be finalized for design and location. The slopes of river banks were stated as being of particular concern, particularly in relation to the sensitivity of these slopes to disturbance from such operations as preclearing. The proposed geophysical investigation of river crossings would specifically address this concern. Further subsurface investigations were proposed by the Applicant for the purpose of determining, from a geotechnical viewpoint, the

feasibility of using a specific location as a watercrossing approach. Special design features or possibly relocations of proposed crossing sites would be considered as more subsurface information becomes available.

The Applicant stated that for a few of the river crossings the potential for scouring of the river bed had been investigated. This problem would be further investigated when site-specific surveys of the river crossings were made.

The Applicant expressed a "fairly high level" of confidence in its ability to design the required river crossings. In support of this it was stated that, with reference to the information reviewed by the Applicant, a substantial amount of data was available for design purposes. The flood plains of the northern rivers were not frozen. The design of these river crossings would not involve the use of any new concepts. The design of the river crossings along the proposed route was reasoned not to be substantially different from those presently in place on the Applicant's existing pipeline system. In addition, it was stated that a large amount of borehole data from nearby locations was reviewed. From this review, the Applicant claimed that there existed a good indication of terrain to be encountered. The Applicant maintained that its designs of northern river crossings were based on well-established river engineering design methods.

5.2.3.7.2 Views of the Board. The need for further detailed, site-specific investigations of river crossings along the proposed route is obvious. A comprehensive evaluation of subsurface conditions on slopes and river approaches prior to establishing final design criteria would be required.

The Board views the sensitivity of slopes at crossing approaches and the identification of long frozen sections upstream of crossings as critical to the final

location and design of river crossings. The Board would require that the above information form an integral part of the data on which final designs would be based.

The Applicant stated that further information concerning hydrology data, depths of seasonal scour and river dynamics would be required prior to establishing a given river crossing design. The Board concurs with the Applicant. It was the Applicant's contention that well-established river engineering concepts would be employed and that no new concepts would be required. The Board, while accepting the Applicant's statements, believes that field conditions encountered might not necessarily be those anticipated. The Board therefore would expect that field conditions would have to be reflected in final design.

5.2.4 Construction

5.2.4.1 Evidence of the Applicant. The Applicant proposes to construct the pipeline facilities over three winter construction seasons with some work being performed during the summers between January 1981 and November of 1983. During the first winter season (January-April 1981) the Applicant originally proposed to preclear those sections of the right-of-way where construction was scheduled to take place during the winter of 1981-82, and to carry out line surveying operations. However this schedule was based on the Applicant receiving regulatory approvals by November 1980. As it became obvious that regulatory approvals could not be forthcoming by November 1980, the Applicant indicated at the hearing that the time allotted for the preclearing operations might be reduced. The opportunity to integrate northern businesses into the construction program would likely also be reduced correspondingly. Preclearing not done in the winter of 1981 would be done immediately prior to construction in the winter of 1981-82. This would then change the Applicant's construction philosophy, in that a large part of

the reasoning for preclearing was based on the contention that advanced clearing would promote earlier permafrost degradation and considerable drying of the right-of-way prior to construction. This in turn would lead to smaller initial settlements following pipeline installation. Therefore, if clearing one year in advance of construction were not possible, larger thaw settlements in the first year of operation could be expected. The Applicant did not believe this to be a problem.

The Applicant also indicated that because approximately 70 percent of its right-of-way in the section between Norman Wells and the Willowlake River would follow existing cut lines, and this was not the most settlement-prone area, the problem of first-year thaw settlement would be minimal.

The Applicant indicated that water, road, rail and air transportation systems, construction manpower and equipment, and other logistical support exist in sufficient quantities to permit the construction of the pipeline on schedule, as most had been upgraded in anticipation of the northern gas pipeline construction. All permanent materials required to complete the pipeline would be strategically stockpiled during the summer and fall of 1981 and winter of 1981-82.

The construction would be broken into six pipeline spreads, four to be completed by the winter of 1981-82 and the remaining two during the winter of 1982-83. Pumping stations would be constructed during the summers of 1982 and 1983, while maintenance depots, valve sites and communication facilities would, in general, be constructed at the same time as the adjacent pipeline; however, in some instances, summer construction might be employed. The Applicant indicated that the pipeline would be placed under cathodic protection immediately upon installation. The Applicant also indicated that measures would be taken to ensure the integrity of the pipeline during the period between installation and start-up.

The Applicant proposed to use conventional winter construction techniques with special measures to protect the pipe in areas of high potential settlement. These special measures would include the use of padding or loose native material to provide crush space for the pipe in the event of settlements. The Applicant proposed no special measures to crush, dry or store spoil for this purpose as it believed that the soil should be in an acceptable condition upon removal from the trench.

Construction workers would be housed in self-contained camps providing all necessary personnel requirements.

The Applicant was questioned on the effect the completion of the Mackenzie Highway would have on the construction of the pipeline. The Applicant responded that all construction plans and cost estimates were based on the permanent highway not being there.

5.2.4.2 Views of the Board. The Board finds that the proposed construction procedures are within the limits of conventionally available pipeline construction techniques. The Board believes that, given the relatively small diameter of pipe and the absence of overly sophisticated design requirements, the installation of the pipeline is technically feasible.

The Board, however, is concerned about several problems, unique to the area under consideration, that might arise during the construction of the pipeline. The shortness of daylight hours in the winter, the harsh climate, the difficulty of access to the right-of-way, the need for construction camps, and the sensitivity of the terrain are considered to be among some of the special problem areas. Should a certificate be granted, the Board would require that detailed construction procedures and specifications that address these special concerns be in place well ahead of any pipeline construction.

With respect to the scheduling of construction, the Board is satisfied that the time allotted for the completion of the project is reasonable and has taken into consideration the potential for delays that might arise during the actual construction. Although the estimated construction time appears reasonable in an absolute sense, the Board is not optimistic that all necessary authorizations and permits would be granted or that the additional studies leading to approval of final design would be completed in time for the construction to begin in accordance with the proposed timetable. The large number of environmental studies that the Applicant has undertaken to perform reinforces this view. The Board would require that a reassessment of the present timetable be made and that any modifications to the construction schedule and consequent effects on costs be submitted to the Board.

5.2.5 Operation and Maintenance

5.2.5.1 Evidence of the Applicant. The Applicant proposes to operate its pipeline in a manner similar to that utilized on the main IPL system. Its Edmonton office would provide all policy and procedure formulation, technical and environmental support, approval and implementation of all capital and operating budgets, as well as revision and updating of operating and maintenance procedure manuals. It would also oversee the general operation of the pipeline. The field division office, located in Norman Wells, would house the pipeline control centre and be generally responsible for the day-to-day operation of the system. The pipeline itself would be divided into three operating districts, each responsible for approximately one-third of the pipeline. District offices are proposed in Norman Wells, Fort Simpson, and Zama. It is proposed to use self-contained remote maintenance depots to provide more effective implementation of operation and maintenance procedures.

The pipeline system would be remotely operable from the Norman Wells control centre. All pumping stations, maintenance depots, remote valves and terminals would be

connected to this control centre. This would be done using a conventional computer assisted supervisory control similar to that found on other pipeline systems.

The Applicant proposes to use a sophisticated "transient" leak detection system which makes use of the computer, the control system and the three basic equations which govern the flow in a pipeline: continuity, momentum, and energy equations. Also included is the equation of state for the product being moved. The proposed peak detection system should be insensitive to transient effects such as those caused by flow changes, pumping starts and stops, and should detect a leak of as low as one-half of one percent of flow as well as provide an indication of its location.

Communications facilities would be provided by the local telephone companies, namely Northwest Tel and Alberta Government Telephones. Additional services would be required to prevent overloading of existing communications facilities. These services would be installed by the local telephone companies which indicated that they could be installed on time.

Under cross-examination the Applicant indicated that it had considered the use of line fill for fuel at the more remote stations. However, since crude oil requires elaborate engine designs to make it acceptable, and the NGL batches are off-specification and not usable without expensive upgrading facilities, it was considered uneconomical to use these products as fuel. The Applicant also considered using the pipeline to deliver diesel fuel to the stations but rejected this idea as too expensive because of fuel losses due to contamination. The Applicant now proposes to truck fuel to the Fort Simpson Station, to barge fuel to an unloading site near Wrigley, and to transship the fuel to the pumping station in an above-ground pipeline.

The Applicant also proposes to use diesel-powered electric generators at pumping stations and maintenance bases. Valves sites would be equipped with propane-burning generators. All would have a backup system.

The Applicant proposes to hire local residents for its pipeline crews where qualified personnel exist; otherwise it proposes to hire qualified personnel where they are available.

The Applicant was not in a position at the time of the hearing to provide the Board with detailed repair or maintenance procedures. The Applicant indicated that these procedures were not available because it had no operating experience in this region. It proposed to use the experience gained in the first construction season for developing procedures for operation and maintenance.

The Applicant indicated that it has contacted other companies operating pipelines in this area to determine what special conditions exist and what special measures or procedures are required for operation and maintenance. The specific concerns identified by the Applicant as a result of these discussions were primarily related to access, transportation, and working conditions. The Applicant has considered the types of transportation modes available for access to the right-of-way during both the summer and the winter months. Vehicles considered included both tracked and rubber-tired vehicles, amphibious vehicles and helicopters. No decision has been made yet on the type of equipment that would be used.

When questioned on the effects of spilled oil on permafrost, the Applicant responded that there would be a slight thickening of the active layer which would not be detrimental either in peat bogs or mineral soils covered with peat.

The Applicant indicated that the frequency of routine inspections would vary for different facilities. For pumping stations three routine visits per week, for remote maintenance bases weekly visits, and for valve sites monthly visits were considered adequate. At river crossings twice-yearly inspections were thought to be sufficient to maintain the integrity of the pipeline considering that a large number of functions would be monitored remotely.

The Applicant proposed to undertake a summer ditch and right-of-way maintenance program using borrow pits, remote maintenance bases, and valve sites for equipment and material storage. The purpose of this program, as stated by the Applicant, was to stabilize those areas where slumping had occurred due to winter construction, snow conditions, or ice content of soils.

Gravel or till material stored along the right-of-way would be hauled to areas where it was required. This program is also proposed to function as an erosion control program in critical areas. The Applicant did not have detailed procedures for this work.

In summary, the Applicant had considered the problems involved in operating and maintaining a pipeline in this region; however, it had not developed any detailed procedures nor did it feel capable of doing so at the time of the hearing.

5.2.5.2 Views of the Board. The Board believes that IPL (NW) has available to it the expertise and experience to implement satisfactory operational procedures for the proposed pipeline system. The Board is satisfied with the Applicant's proposed use of remote monitoring, computer-assisted control and leak detection systems.

The lack of adequate communication facilities in the NWT for use on the pipeline system is of concern to the Board. The Board would require assurances that proper services would be in place for both the construction and operational phases of the proposed pipeline and that present levels of service would not be adversely affected by the additional demands of the project.

It is the view of the Board that detailed and well-documented operation and maintenance procedures are essential for the proper operation of a pipeline system. This is particularly so when the pipeline is to operate in an area where access to the right-of-way is limited and where climate

and terrain sensitivities preclude the use of conventional maintenance procedures. The Board recognizes that experience related to the repair and maintenance of pipelines in the North is limited. The Applicant has indicated that it has no practical experience in this area and that it will rely on experience gained during the construction phase of the project to develop maintenance procedures. The Board also notes that the Applicant has given general consideration to emergency repair techniques, routine inspection procedures, and the use of summer and winter transportation vehicles.

The Board is satisfied that the Applicant has recognized the special problems associated with the operation and maintenance of the pipeline system. Although the Applicant has been unable to provide detailed operating and maintenance procedures, the Board is of the opinion that these procedures can be developed. The Board would require that an orderly evolution and development of detailed procedures be initiated by the company and that these procedures be submitted to the Board prior to line start up.

5.3 Cost of Facilities and Canadian Content

5.3.1 Cost of Facilities

5.3.1.1 Evidence of the Applicant. The Applicant estimated the total capital cost of the proposed Norman Wells pipeline to be \$357 million.

The total estimated capital cost of these facilities was detailed according to Table 5.3.1

In the determination of the escalation component of \$61 million, the Applicant stated that it had escalated the 1979 dollar cost base at a rate of 11 percent per annum to the appropriate year of expenditure for goods and services in accordance with the construction schedule presented in its application.

In the determination of the interest during construction (AFUDC) component of \$62 million, the Applicant stated that it had calculated this amount using a rate of

TABLE 5.3.1

NORMAN WELLS PIPELINE PROJECT

Capital Cost Breakdown in Accordance with NEB
Oil Pipeline Uniform Accounting Regulations

Plant Account	Description	Estimated Costs (\$million)	Materials, Supplies & Equipment	Construction Charges	Engineering & Management	Contingency
153	Pipe Lines	154	45.0	98.0	11.0	
156	Buildings	10	4.5	5.5		
158	Pumping Equipment	2	2.0			
159	Station Oil Lines	1	.5	.5		
160	Other Station Equipment	4	2.5	1.5		
161	Oil Tanks	1	1.0			
163	Communication Systems	6	3.0	3.0		
185	Vehicles and Other Work Equipment	5	5.0			
190	Engineering and Management	21			21.0	
	Contingency	30				30.0
	Escalation	61				
189	Interest During Construction (AFUDC)	62				
Total Estimated Capital Cost		\$357	63.5	108.5	32.0	30.0

12.6 percent per annum, compounded semi-annually, applied to the estimated yearly escalated construction expenditures.

Evidence adduced in the hearing indicated there are several factors which provide an incentive for the Applicant to construct the line with a minimum of cost overruns. First, Imperial has the right to audit all construction expenditures and may disallow any expenditures which are considered to be imprudently incurred. Second, the Applicant has indicated that as part of the normal management function, it is very concerned with cost overruns. Third, the Board has the authority, in establishing rates, to review capital expenditures. Finally, the most effective incentive is that Imperial is operating on a net-back concept of pricing whereby its net revenues from the Norman Wells field are affected by the tariff.

5.3.1.2 Views of the Board. The Board is satisfied with the total estimated capital cost of \$357 million for this project. As well, the Board is of the opinion that IPL (NW) would have an incentive to ensure good cost control during the construction of the proposed facilities. For its own purposes the Board would require that IPL (NW) submit for Board approval project cost control plans and procedures.

5.3.2 Canadian Content

5.3.2.1 Views of the Applicant. With respect to its Canadian content policy IPL (NW) stated that IPL had encouraged Canadian industry in the past and, through its United States subsidiary had encouraged Canadian industry to export goods and services to the United States. The Applicant did not have written procedures to identify Canadian suppliers but took into account such factors as source of material inputs and manufacturing location. It was the Applicant's position that by dealing with the same companies used in previous projects, high Canadian content and industrial benefits could be achieved.

Although such considerations as timing requirements and price had to be considered in addition to Canadian

content, the Applicant's policy was to not purchase such equipment as valves and other specialized equipment offshore (presumably, if available in Canada); in fact, it was common practice for the Applicant to pay a small premium for Canadian goods and services other things being equal.

The Applicant also stated that it would give instructions to its contractors to use Canadian materials, equipment, and services whenever possible and that this practice would be consistent with its efforts to achieve high local participation. Although these procedures had not been detailed, the Applicant undertook to incorporate them in its construction practices.

The overall Canadian content was estimated to be 94 percent (total capital expenditure of \$234 million, excluding interest during construction). Although preliminary, it was the Applicant's position that this estimate was reasonable.

The non-Canadian content portion of the proposed project consisted mainly of materials imported to produce line pipe and equipment required for construction and pipeline maintenance. Although of lesser importance in dollar terms, the pumping equipment was estimated to have a relatively high import content (about 60 percent) because of the need to import the diesel engines which are not manufactured in Canada.

The Applicant stated that line pipe would be obtained from either or both of the two major Canadian pipe manufacturers, that valves and fittings would be supplied from Canadian sources and that Canadian contractors would be used.

5.3.2.2 Views of the Board. The Board is satisfied with the analysis that IPL (NW) has conducted with respect to Canadian content and accepts the level of Canadian content estimated as reasonable. The Board notes, however, that the Applicant's estimate is preliminary and that the Canadian content achieved on this project could be different from that

estimated. Should a certificate be granted, the Board would request the Applicant to file a report with the Board, within twelve months after the granting of leave to open, indicating the Canadian content achieved in comparison to that estimated for each "NEB Plant Account" in Requisition No. 23, Appendix A of Exhibit 15, and the reasons for any variations.

5.4 Connecting Facilities

5.4.1 Evidence of the Applicant. The liquids that are to be transported in the proposed pipeline would originate at Norman Wells and would be produced by Esso Resources. Esso Resources proposed to separate the liquids into crude oil and natural gas liquids, cool them to the requisite temperatures, and tender them to IPL (NW) for transport to the markets.

At the Zama terminal the pipeline would connect with the facilities of the Rainbow pipeline system. The crude oil and natural gas liquids would then be transported to the Edmonton area. The Applicant testified that the natural gas liquids would be moved by a new pipeline from the Rainbow system to new cavern storage facilities to be constructed at Esso Resources' Redwater gas plant. At Edmonton, facilities are presently available to deliver the crude oil streams to the Trans Mountain Pipe Line Company and IPL pipeline systems. The Applicant indicated that both of these pipeline systems had adequate spare capacity to handle the Norman Wells projected volumes.

The present Rainbow pipeline system does not have the capability to handle the batches of NGL that the proposed pipeline would carry. However, the Applicant led evidence to the effect that Rainbow Pipe Line would be prepared to install the necessary facilities.

5.4.2 Views of the Board. The Board is satisfied that connecting facilities would be available to handle the crude oil and the products that are to be transported in the proposed pipeline.

CHAPTER 6
FINANCIAL MATTERS

6.1 Introduction

The Applicant led evidence on its overall financial responsibility including its proposed financial structure and method of financing. An essential component of the Applicant's ability to finance the pipeline is the "Norman Wells Pipeline Agreement."

This agreement is a three-party agreement between Imperial Oil Limited, Interprovincial Pipe Line (NW) Ltd., and Interprovincial Pipe Line Limited, and addresses financial and tariff matters. The provisions of the agreement that pertain to tariff matters are discussed in Chapter 12.

6.2 Evidence of the Applicant

6.2.1 Project Financing. The Applicant indicated in direct evidence that the project is structured so that it could be financed on a single project basis. The main feature of this type of financing is that a separate company is formed to own, construct, finance, and operate the project. The revenue from the project should be sufficient to meet all operating costs, debt service charges and repayment, as well as produce a return for the project shareholders.

IPL decided that the pipeline company should be a wholly-owned subsidiary for the following reasons:

- (1) from a regulatory point of view it would be simpler because the proposed pipeline would serve a single shipper from a single oil field;
- (2) because the project is located in a frontier area, the risks associated with it are different from those associated with IPL's present pipeline operations and consequently should not be shared by IPL's present users; and

(3) the proposed method of financing would not create a reduction of the debt capacity of the parent since the required credit support would be provided by the main shipper, whom the line is built to serve.

The financial witness for the Applicant stated that the project, given its size, the time frame over which the debt would be raised, and the credit support provided by the full cost of service tariff, could be financed within the context of the Canadian market. In making this statement the witness recognized that the two parties involved with this project have two of the strongest credit ratings in the Canadian market place.

6.2.2 Project Cost. The Applicant, through negotiation with Imperial, which is to provide the credit support, determined that a reasonable financial structure would be a 75/25 debt-equity ratio. If the project costs do not exceed the estimated \$360 million, the capital structure of the company at the completion of the construction would be as follows:

	<u>Amount</u> <u>(\$ millions)</u>	<u>Percentages</u>
Long-term debt	270.0	75
Equity	<u>90.0</u>	<u>25</u>
Total	<u>360.0</u>	<u>100</u>

It is also expected that cost overruns would be financed on the same basis. If there were substantial cost overruns, the Applicant indicated that some other financial structure might be selected. However, this would have to be negotiated with Imperial and was considered to be highly speculative.

6.2.3 Debt Financing. The Applicant's financial witnesses stated that debt financing could be raised either by a public or a private placement of securities in Canada. These conclusions were based upon the facts that the project would be relatively small in the context of the Canadian market, the time over which the debt is to be raised would be comparatively long, and credit support would be provided through the existence of a cost of service tariff and minimum bill which would ensure that the interest charges and principal would be paid. This type of credit support would be needed to meet the requirements of financial institutions who are likely to invest in the project, but who are restricted by legislation as to the type of securities in which they may invest. By issuing a first mortgage bond, the debt of the pipeline would be fully secured and eligible for investment by the financial institutions. Further, credit support would be provided by Imperial, a company with a "triple-A" credit rating.

The financial witnesses noted that the debt financing plan had not been finalized and that IPL (NW) would have considerable flexibility as to how it would finance the project. The Applicant stated that it would raise its long-term debt financing in such a way as to minimize costs.

6.2.4 Equity Financing. The equity financing that would have to be provided by IPL is about \$90 million. The Applicant's financial witnesses stated that the intention of IPL was to finance the equity component from internally generated funds. Even if there were cost overruns, IPL did not expect to need outside financing, unless the overruns were substantial. In addition to its share of the initial capital cost to construct the pipeline, IPL might be required to provide operating funds to enable IPL (NW) to meet some specific situation for which IPL (NW) would not be able to raise funds.

6.3 Views of the Board.

The Board finds that the project financing approach as outlined by the Applicant is reasonable. It is satisfied that IPL has the ability to finance the equity component from internally generated funds, and recognizes that IPL (NW) would have considerable flexibility in financing the debt portion of the project. The general plan as outlined during the hearing would be acceptable. However, any certificate which might be issued would require that IPL (NW), before commencing construction, file with the Board proof that adequate financing was in place.

CHAPTER 7
ENVIRONMENTAL MATTERS

7.1 Construction Planning

7.1.1 Evidence of the Applicant. The Applicant stated that the proposed construction schedule would provide for the completion of the pipeline at least one full summer season prior to operation. This would allow for monitoring of the stability of the pipeline for a full thaw season prior to it being placed into service.

Any summer construction would be confined to pumping stations, maintenance facilities, the Great Bear River and Mackenzie River crossings and other work which could be carried out with minimal impact on terrain. The Applicant undertook to complete further studies on the two major river crossings scheduled for summer construction.

The Applicant would give due consideration to the concerns expressed by its consultants in planning its construction schedule; for example, the timing of construction activity between Norman Wells and the Blackwater River to minimize impact on moose migrating to and from winter range on the Mackenzie River islands; the timing of construction and barge traffic to avoid disturbance of waterfowl staging on the Mackenzie River during spring and fall migration; and the avoidance of disturbances to raptors during the nesting period in the vicinity of their nest sites.

CARC cross-examined the Applicant with respect to locations where it might be practical or acceptable to construct the pipeline when the ground would not be frozen. The Applicant testified that it was not proposing any mainline construction in the summer. The Applicant was further questioned on the effect on the construction schedule should regulatory permits not be received until the late winter of 1980-81 instead of 1 November 1980 as originally planned.

The Applicant replied that it would have to reduce the amount of time allotted to pre-clearing and it would be more difficult to integrate northern businesses with the main construction in the following year.

CJL cross-examined the Applicant with regard to the possibility of summer construction north of Fort Simpson. The Applicant testified that it had no plans to construct the mainline north of Fort Simpson during the summer but observed that there might be some tie-in work required during that season.

7.1.2 Views of the Board. The Board accepts the undertaking of the Applicant to incorporate into its construction scheduling the recommendations of its consultant to minimize environmental impact. The Board agrees with the Applicant that scheduling mainline construction for winter would minimize surface damage but that potential adverse impacts on mammals, fish and raptors would have to be mitigated. The Board notes that the Applicant would be conducting further environmental studies and has undertaken to incorporate the results into the development of its construction scheduling. The Board is of the opinion that the Applicant's environmental policies and procedures would effectively control the construction-related effects upon raptors, waterfowl, mammals and fish, recognizing that further studies would be undertaken to define site-specific mitigative measures. Should a certificate be granted the Board would require that, prior to commencement of construction, the Applicant file for Board approval a complete revised construction schedule including the specific mitigative measures to be developed and incorporated as a result of the further environmental studies.

7.2 Terrain Mapping

7.2.1 Evidence of the Applicant. The Applicant submitted environmental and geotechnical maps for its proposed route at a scale of 1:250,000 and, at the request of the Board, maps at a larger scale (1:50,000). In addition, the Applicant provided terrain maps and borehole information from the CAGPL project in support of the current application. In testimony, the Applicant indicated that it had drawn from all available data sources in the region in its assessment of the terrain, including terrain maps of the Geological Survey of Canada. The Applicant stated that it did not intend to prepare additional terrain maps since in its opinion no further field work was necessary at this stage.

7.2.2 Views of the Board. The Board is of the opinion that the terrain maps compiled for the CAGPL project and submitted in support of the application provided a description of the terrain adequate for the environmental assessment of facilities, construction activities and other activities which affect the terrain.

The Board notes that the geotechnical maps indicate where various terrain boundaries intersect the proposed route but do not show the areal distribution of terrain units and their relation to adjacent units.

The Board is of the opinion that terrain maps providing the detail of the CAGPL maps would be required along the Applicant's entire route and in areas of associated activities, that is, roads, borrow operations, stockpile areas, wharves, staging areas and other facilities and activities with impact on the terrain.

The Board further notes that the proposed pipeline follows fairly closely the CAGPL route for considerable distances, particularly that portion of the route from Fort Simpson to Zama Lake. However, the proposed route does diverge

from the areas covered by the CAGPL mapping in many locations and in some instances for long distances. This is especially true in the northern part of the route from Norman Wells to Wrigley, which is the portion of the route lying within permafrost, where sensitive soils predominate and where the Applicant indicated that additional field investigations to identify permafrost conditions, sensitive slopes, and areas requiring drainage and erosion control measures would be required. The Applicant stated that its design is most sensitive to terrain information in this area. From Norman Wells to Wrigley, approximately half of the route is covered by the CAGPL terrain mapping. The Board would require that the Applicant provide, prior to the commencement of any stockpiling, clearing, or construction-related activities, terrain mapping for those portions of the route not already covered by the CAGPL maps, and also for those areas where associated facilities or activities would be built or carried out.

7.3 Terrain

7.3.1 Evidence of the Applicant. The Applicant stated that it would minimize terrain disturbance in permafrost areas by maintaining the vegetative mat during clearing operations to minimize permafrost degradation. This would be achieved by scheduling pipeline construction during the winter months when the terrain is least sensitive, by hand-clearing on sensitive slopes, by using shoes on bulldozer blades to prevent disruption of the organic mat, and by using sleds when burning slash. By its original schedule it would have one year prior to construction on the right-of-way, thereby permitting thaw-sensitive soils to undergo settlement prior to construction. This would have reduced the likelihood of differential settlement and subsequent stress on the pipe.

To reduce the possibility of stress on the pipe and to mitigate terrain problems related to permafrost, two major concepts were incorporated in the pipeline design. The first was to make use of existing cleared rights-of-way as much as possible, as these areas have already undergone some thaw and settlement. The second was to operate the pipeline at ambient ground temperature to reduce the possibility of either thaw settlement or frost heave caused by the operation of the pipeline either above or below the temperature of the frozen ground.

With respect to the maintenance of the right-of-way during the operational phase of the pipeline, the Applicant indicated that it was not concerned with settlement resulting from the thawing of sensitive soils, unless settlement was "differential settlement" and gave rise to undue stress in the pipe.

IPL (NW) indicated that its monitoring program would be designed to detect differential settlements of 1 foot (30 cm) or more over a linear distance of 100 feet (30 m) and that remedial work would be undertaken if the integrity of the pipe were threatened.

The Applicant indicated that the major terrain problems would be related to thaw settlement, slope stability and drainage, and subsequent erosion in permafrost areas. No work had been carried out to delineate the extent or nature of these problems. The Applicant had, however, undertaken a three-week geophysical and soil-sampling program to delineate permafrost and the amount of permafrost degradation in discontinuous permafrost north of the Willowlake River. The results of this survey were not made available.

7.3.2 Views of the Board. The Board notes the Applicant's intentions to minimize terrain disturbance especially in areas of permafrost and on sensitive soils.

The Board also notes that the Applicant has not carried out studies to indicate where sensitive terrain and soils exist or where problems requiring mitigative measures or special construction procedures exist.

The Board further notes the Applicant's design philosophy of locating its pipeline on previously cleared right-of-way, of operating it at ambient ground temperatures, and of developing plans for remedial and rehabilitation procedures after having gained experience during the first year of construction.

In the Board's view the Applicant could have drawn upon the extensive plans and remedial and rehabilitation procedures that were developed by CAGPL and Foothills for the Northern Pipelines hearing.

It is the opinion of the Board that uncontrolled drainage on the right-of-way and the resulting erosion could be a major environmental problem. It is the Applicant's responsibility to maintain the right-of-way during the operation of this pipeline during all seasons of the year.

Should a certificate be granted the Board would require that the Applicant submit for Board approval a reassessment of its plans for minimizing terrain damage. This likely would require a reassessment of existing literature, additional field work with respect to route selection and river crossing sites, and the development of standard procedures for construction specifications concerning the maintenance of slopes and the terrain in general.

7.4 Use of Existing Cut Lines

7.4.1 Evidence of the Applicant. The Applicant proposes to use existing rights-of-way to the maximum extent possible in the northern portion of its route where permafrost conditions prevail. For example, the route would follow existing seismic lines and other previously cut lines where vegetation cover had been removed.

The Applicant stated that, because permafrost thaw settlement had already taken place in these areas, soils sensitive to thaw settlement would have had a number of years to drain, settle and adjust to their new thermal conditions. By routing the pipeline along these cut lines, the potential thaw settlement problems would be minimized. Therefore, every effort would be made to locate the pipeline on previously cleared land.

7.4.2 Views of the Board. The Board notes that the Applicant has pursued the "use of existing right-of-way" concept without full examination of its environmental implications or in some cases other possibilities for route location. For the most part seismic lines and other cut lines are only a portion (1/3 to 1/2) of the total width required for the pipeline right-of-way. Thus, additional clearing would be required to bring the "existing right-of-way" to the width of 20 m that the Applicant requires.

Soils on this widened portion of the existing right-of-way would be subject to thaw settlement in the same way as soils on entirely new right-of-way. The Board notes that the Applicant's proposed use of existing cut lines has caused it to exclude an assessment of actual soil conditions. The Board is of the opinion that in areas of discontinuous permafrost along the proposed route a further assessment of terrain types and soil conditions would be required in order to assist in the development of mitigative measures which would minimize the potential environmental impact resulting from thaw settlement.

7.5 Borrow Resources

7.5.1 Evidence of the Applicant. IPL (NW) provided information on quantity and quality of granular material and fill required for the construction of its facilities. It indicated that these materials would be taken from pits or

prospects which were previously investigated and reported on by others. A synopsis of the major environmental elements, concerns, and development recommendations were included in these reports.

The Applicant stated that these sources had not been subjected to any geotechnical or environmental field investigations, but that these studies would be carried out as part of its final design.

The Applicant indicated that it would, to the extent possible, make use of excess material from the pipe trench before opening borrow sources.

The Applicant stated that, with the exception of two pits which would require short all-weather roads temporary roads would be used to transport these materials. The Applicant did not identify which pits would be required for maintenance purposes during the operational phase of the project.

The Applicant stated that there would be only minor environmental impact from pit operations. The Applicant, in support of its application, submitted data from DINA's report series "Granular Materials Inventory" prepared by Pemcan Services. These reports contained a general assessment of material quantities and qualities and provided environmental highlights. General development and rehabilitation guidelines to minimize environmental impact were also given for each pit. In the case of pits 214 and 174, development was not recommended for environmental reasons, while development and rehabilitation restrictions were noted for many of the other pits.

The Applicant recognized the need for a complete geotechnical, development and environmental assessment of each pit and undertook to develop these prior to opening the pits.

7.5.2 Evidence of Intervenors. The GNWT accepted the Applicant's statements on the availability of granular materials. However, since there was no indication of volumes

of granular materials needed along the route, it was difficult to estimate the specific requirements of the Applicant. It was noted that one pit proposed for development by the Applicant should not be developed because of potential environmental impact.

7.5.3 Views of the Board. The Board is of the opinion that the Applicant's requirements for borrow material could be supplied from known sources and prospects. However, in some areas considerable haul distances would be required because of a lack of certain materials.

With respect to the use of local soil, the Board has some concerns should significant quantities of excavated material have to be disposed of, because of high ice content or poor grade.

The Board notes the Applicant's undertaking to carry out detailed rehabilitation and revegetation plans.

The Board also notes that although preliminary geotechnical and environmental data developed by previous investigators were submitted, the Applicant has not itself undertaken geotechnical and environmental assessments of borrow operations.

The Board further notes that the recommendations contained in the DINA granular materials reports have not been adopted by IPL (NW). The Board would require that they be adopted and implemented in the development of pits.

In addition, the Board notes the Applicant's undertakings to carry out further field investigations with respect to borrow operations and to make an environmental assessment of each site.

Should a certificate be issued, the Board would require that these assessments, the proposed mitigative measures and the rehabilitation procedures for each borrow area be submitted for Board approval prior to the commencement of clearing of any sites for development.

7.6 River Crossings

7.6.1 Evidence of the Applicant. The Applicant classified river crossings into three groups for design purposes: major, intermediate and minor. It stated that it intended to construct its major river crossings, which are the Mackenzie and the Great Bear Rivers, in the summer, while all other river crossings would be constructed in winter.

Consultants on fish and aquatic habitat recommended that the preferred time for crossing a number of the intermediate streams, namely Birch Island Creek, Blackwater River, Willowlake River, River Between Two Mountains, and the Petitot River, would be mid-summer. The Applicant stated that it intended to cross these rivers in the winter as the problems of access and terrain damage during summer were probably of a greater magnitude than the concerns about disturbing fish.

The Applicant indicated that further studies would have to be undertaken at river crossing sites to assess the suitability of the crossing with respect to terrain, geotechnical, and hydrological problems, and concerns related to aquatic life.

With respect to slope stability, particularly at river crossings, the Applicant indicated that this was an area which would require additional study.

The final location of the right-of-way at river crossings would be determined only after the studies had been conducted. At river crossings where clearing might be considerably wider than the normal right-of-way in order to provide working room, the Applicant indicated that it would not undertake pre-clearing due to the sensitivity of the areas.

The Applicant mentioned that no new concepts or design methods were required for river crossings and that it would use the data from the CAGPL reports.

7.6.2 Views of Intervenors. Intervenors expressed concern about the lack of site-specific designs for river crossings and about the possibility that the Board might approve the project before crossing designs were filed, a situation which might not allow intervenors an opportunity to make comments. Intervenors were concerned about the sensitivity of many of the valley slopes to thawing, about erosion and in some cases about the possibility of instability. They also felt that the impact of siltation caused by construction and possible erosion of adjacent slopes could have an adverse impact on fish and their habitat.

7.6.3 Views of the Board. The Board notes that the Applicant has not finalized its river crossing locations and that these locations would only be finalized after site-specific geotechnical and aquatic studies were completed.

The Board further notes that in many cases it may be necessary to relocate river crossings, owing to the environmental sensitivities of river valleys. This would only be known, however, after the results of field studies were available.

The Board would require that the results of the studies be submitted to the Board prior to construction. In addition, all the final locations and designs of river crossings would have to be submitted to the Board for approval prior to the commencement of construction.

7.7 Reclamation

7.7.1 Evidence of the Applicant. The environmental consultant for the Applicant established broad objectives for dealing with reclamation. These were to identify and evaluate means of stabilizing disturbed areas to control erosion and, after construction, to facilitate recovery to a natural cover of stable vegetation. A preliminary reclamation plan was included

in the application, which discussed the types of disturbances caused by the project and the types of procedures that could be used for reclamation. The Applicant tabled information on potential applications of seed mix for areas of low to high erodibility along the proposed pipeline route.

The Applicant testified that reclamation procedures, which would include those for any abandoned facilities, would be established following the first year of construction. These procedures would be undertaken on a site-specific basis. The Applicant undertook to file the final reclamation plan with the Board should the project be approved. The Applicant acknowledged the importance of revegetating erosion-prone sites, such as slopes at river crossings immediately after construction.

The Dene Nation cross-examined the Applicant's environmental panel with respect to the availability and desirability of using native seed exclusively for revegetation purposes. The environmental consultant testified that native seed would not all germinate in the first year or two, whereas the imported or cultivated varieties of grasses would. The consultant recommended native species as a second crop sown at the same time to ensure adequate erosion control.

7.7.2 Evidence of the Intervenors. CARC stated that inspectors should be present during the final restoration of the right-of-way to ensure that the proposed rehabilitation measures are followed. CARC also testified that detailed slope stabilization and right-of-way rehabilitation measures would need to be developed during the planning stages of pipeline development and shortly after final selection of the route.

7.7.3 Views of the Board. The Board notes the importance of reclamation procedures to ensure long-term terrain stability and mitigate environmental concerns resulting from terrain disturbance. The Board accepts the general reclamation

objectives established by the Applicant and notes the importance of scheduling and site-specific information for successful reclamation procedures. The Board also notes that the Applicant did not present a plan for the reclamation of sites disturbed by accidental spills of harmful materials. The Board would require that the Applicant file, for Board approval, prior to commencement of construction, a statement of reclamation measures to be taken in the event of accidental spills of fuels, lubricants and toxic chemicals. Further the Board would require, following the completion of the first winter of construction, a comprehensive reclamation plan for the right-of-way and for all other disturbed sites.

7.8 Archaeology and Historical Resources

7.8.1 Evidence of the Applicant. The Applicant acknowledged the importance of historical resource conservation, particularly in the Mackenzie Valley. The Applicant provided background information on heritage resources, identified known resources along the route and rated sections of the proposed route on a scale of priorities for heritage conservation measures. General conservation measures regarding both existing and potential sites were outlined and included as recommendations. The Applicant undertook to implement the mitigation measures recommended by its archaeological consultant, which include:

- (1) surveying the proposed route and making an inventory of the sites;
- (2) assessing all discovered sites to determine potential significance; and
- (3) avoiding or recovering by excavation, sites assessed as significant.

The Applicant testified that its archaeological consultant for Alberta considers that no further field work is required. The archaeological surveys recommended for the

Mackenzie Valley would be undertaken before construction commenced, with the more important sites to be checked before final route alignment.

Should an archaeological site be encountered during construction, operations would cease at the site until the area had been cleared. The Applicant accepted its archaeological consultant's recommendation to have archaeological crews accompany ditching and other construction or excavation activities to provide surveillance for any archaeological sites and proposed to include the other recommendations made in the consultant's report during route realignment.

The Dene Nation cross-examined the Applicant's environmental panel with respect to the contacts undertaken by the archaeological consultant during the course of its work along the proposed route, and the legislative requirements of the federal government for excavation of archaeological sites.

7.8.2 Views of the Board. The Board accepts the undertakings of the Applicant to implement the recommendations of its archaeological consultant and is of the opinion that they would be sufficient to mitigate the impact of the pipeline on historic and archaeological sites.

7.9 International Biological Program

7.9.1 Evidence of the Applicant. The Applicant testified that it had not had any discussions with the appropriate authorities regarding the interaction of its proposed pipeline project with the Brackett Lake IBP site. Should a certificate be issued, the Applicant would undertake to discuss with the organizations concerned with Brackett Lake the kind of monitoring program that they might wish to implement on the pipeline right-of-way.

7.9.2 Views of the Board. The Board notes the significance of the Canadian ecological reserves to the International Biological Program and accepts the Applicant's undertaking with respect to the Brackett Lake IBP site.

7.10 Wildlife Resources

7.10.1 Evidence of the Applicant. The Applicant provided a description of the existing conditions along the proposed pipeline route for waterfowl, raptors, other birds, and mammals. The assessment was based on a review of existing information on wildlife populations in the Mackenzie Valley and northern Alberta, a review of information on project design and scheduling, and consideration of potential interactions between project activities and wildlife populations. In August 1980, a survey of raptors' nests along the proposed pipeline route was conducted. The Applicant accepted the recommendations of its consultant to undertake further wildlife studies. The Applicant also undertook to visit all resource management offices of the appropriate governments before starting the survey to obtain the latest information concerning wildlife in a particular area. Potential impacts of the project on wildlife were categorized as follows: effects of habitat alteration, sensory disturbance, waste disposal, hazardous substances, and increased access.

To minimize alteration of habitat and creation of new access, the pipeline right-of-way, access roads and other facility sites would be located on previously disturbed areas whenever possible. The location of borrow pits would be established to avoid key habitats. The consultants concluded that the impact on wildlife populations due to habitat alteration would be very localized and would affect an insignificant proportion of wildlife populations.

Sensory disturbance of wildlife might result from blasting, mobile equipment and pumping stations. The Applicant undertook to plan blasting outside the critical periods for raptors and waterfowl. Aircraft would be restricted to minimum flight altitudes of 600 metres, with lower flight levels restricted by location and time of year. Pumping stations

would be designed and situated to take noise emissions into consideration. The consultant stated that the amount of habitat likely to be avoided by wildlife near pumping stations would be small. The Applicant undertook to draw to the attention of the barge company the concerns relating to staging waterfowl.

The consultant stated that proper waste disposal techniques along the pipeline route would minimize the creation of problems affecting mammals and it would consult with local authorities to determine the proper course of action to be followed. Fuels and other chemicals would be stored away from lakes, streams or other waterbodies and would be surrounded by containment berms.

CARC cross-examined the environmental panel with respect to recent changes in the distribution and abundance of wildlife population, the reliability of the data utilized by the consultant and the biological criteria used in evaluating alternative routes.

The GNWT cross-examined the Applicant regarding the information base for the wildlife assessment, the importance of Mackenzie River Islands for moose, the possibility of alterations to alignment and the location of facilities due to wildlife considerations, the establishment of access roads, aircraft disturbance, blasting, and the availability of the latest information concerning wildlife.

7.10.2 Views of the Board. The Board notes the Applicant's identification of potential impacts on wildlife and its proposed mitigative measures. The Board is of the opinion that the Applicant's environmental policies and procedures would reduce the potential impact on wildlife populations along the proposed route to an acceptable level. The Board also notes that further wildlife studies would be undertaken to verify mitigative measures and incorporate site-specific information.

The Board would require the Applicant to submit for approval, prior to commencement of construction, the reports on the additional field studies undertaken.

7.11 Aquatic Habitat and Fish Resources

7.11.1 Evidence of the Applicant. The Applicant stated that the proposed pipeline corridor had been the subject of numerous studies in relation to various development projects along the Mackenzie Valley. The consultant testified that much is now known about fish populations and other aspects of aquatic systems in the study area.

Following an assessment of the potential consequences of pipeline construction, the consultant stated that there would be some unavoidable effects on aquatic environments, but that the proposed pipeline should have no measurable, long-term effects on aquatic habitat or on fish populations in particular. The major effects of the pipeline on aquatic environments would be those that occur during the construction phase and immediately afterwards until a vegetative cover is reestablished. The consultant recommended that contingency plans be developed to ensure that any terrain instability that developed would be rapidly repaired. The consultant stated that during the operating phase, proper disposal of wastes, storage of stocks of fuel, fertilizer and toxic chemicals in safe, permanent locations would prevent damage from these sources. The Applicant recognized the concern for fish survival under siltation conditions and submitted that scheduling most of the mainline construction during the winter would minimize the concern. The two major river crossings, the Great Bear and the Mackenzie upstream of its confluence with the Liard, are proposed for summer construction. Further field work would be required to confirm the appropriate timing. The consultant recommended detailed site-specific studies of proposed pipeline-crossing sites and the locations of ancillary

facilities before finalizing the route and before commencing construction. The Applicant undertook to refine its knowledge of late winter conditions in some rivers in the vicinity of pipeline crossings.

Other potential adverse impacts on aquatic resources were identified by the consultant. These were: reductions in oxygen concentrations, spills of toxic chemicals, water withdrawal, culverts, oil spills, blasting and excessive angling. The Applicant undertook to follow the recommendations of its consultant with respect to oxygen levels with the exception of the requirement to re-aerate the test media. The Applicant testified that the test water would not pose a deoxygenation problem to flowing streams, because only limited volumes of test media would be required for the 12-inch (323.9 mm) line and the test water would be naturally aerated by flowing over organic terrain before reaching the stream. The Applicant further stated that the recommendations on toxic chemicals, water sources, culverts, oil spills and blasting would be implemented. The recommendations for regulating angling were considered inappropriate or unnecessary as major construction activities would be carried out in winter periods. The Applicant undertook to conduct a fish survey late in the winter of 1980-81 and an additional survey prior to construction so that any annual variation in the distribution of open water could be identified and changes in alignment made.

The Applicant testified that for testing purposes it did not plan to use methanol or any other freezing point depressant. There is a possibility that, following the testing and dewatering of the pipeline, there could be an additional pass of methanol to dry the line. The wash material would be collected in drums at the end of the test sections and disposed of using approved methods.

The Applicant's environmental panel was cross-examined by CARC with respect to government departments contacted during the aquatic resource studies, identification of critical areas and the adequacy of spill contingency plans.

The Dene Nation cross-examined the environmental panel with respect to the existence of information gaps for fish species inhabiting the streams of the Mackenzie Valley, the potential effects of oil spills on aquatic communities, the importance of the Great Bear River to grayling populations, the effect of blasting at the Great Bear River crossing, a list of fuels and toxic substances to be used during construction, operation and maintenance, the effects of turbidity on migrating fish and of equipment crossing flowing streams.

7.11.2 Evidence of Intervenors. CARC led evidence which stated that the environmental assessment identified most potential impacts on fish resources and fish habitats which could result from the project. However, CARC stated that the assessment did not provide sufficient detail on the project and its alternatives, the fish resources and fish habitat, the prediction of potential impacts of the project and its alternatives, or on the proposed mitigative measures or contingency plans. CARC's witness stated that the use of appropriate construction techniques, construction schedules, pipeline alignment and mitigative measures could reduce to acceptable levels many of the potentially adverse impacts of the project on fish resources and habitat if sufficient site-specific information were available.

7.11.3 Views of the Board. The Board notes the potential impacts on the aquatic habitat and fish resources which could result from the project as detailed by the Applicant and intervenors. The Board accepts the mitigative measures and the undertakings of the Applicant, including further site-specific studies, as capable of reducing the potential adverse impacts

of the project on fish resources and aquatic habitat to acceptable levels. Should a certificate be granted, the Board would require, prior to commencement of construction, that the Applicant file for Board approval the further site-specific studies which the Applicant undertook to provide as well as a description of the proposed mitigative measures to be adopted.

7.12 Raptors

7.12.1 Evidence of the Applicant. The Applicant has acknowledged the concerns associated with the disturbance of birds of prey and undertook to bring to the attention of the appropriate authorities, before the start of construction, any areas where potential impact might arise. Those aircraft flights with no specific requirements for low-level flying would be made at minimum flight altitudes of 600 metres. Flights at lower levels would require clearance from the environmental inspector and be governed by an environmental field manual outlining restrictions on low-level flights by location and time of year. The Applicant undertook to consider raptor nesting areas when locating the pipeline route, permanent facilities (for example, pumping stations) and temporary facilities (for example, construction camps and borrow pits). A raptor nesting survey was conducted in August 1980, which recommended site-specific mitigative measures for potential impacts should the nests be within 3.2 km of pipeline associated activities.

CARC cross-examined the Applicant's environment panel on its concerns for the minimum distance that the pipeline should be built from raptor nest sites. CARC also questioned the Applicant on the potential for disturbing nesting raptors in close proximity to the line during routine aircraft patrols of the route.

The Dene Nation raised concerns with respect to raptors. The Applicant's environmental witness acknowledged that there was a concern regarding the possibility of

disturbance of early nesting raptors by construction activity. The Dene Nation expanded the scope of the disturbance problem to include the operational overflights. The question of jurisdictional responsibility for raptors in the Northwest Territories was also raised by the Dene Nation. The environmental witness for the Applicant testified that the raptor survey had been submitted to the GNWT Department of Renewable Resources.

The GNWT cross-examined the environmental witness with respect to the requirement for more detailed work on the raptor survey. The Applicant's witness agreed that it would be useful to identify the species which are occupying the nest sites identified in the survey. The GNWT raised the need for buffer zones around raptor nest sites. The environmental witness stated that a general buffer zone would not be adopted; however, if nests were within 3.2 km of activity, there should be a site-specific review and recommendations made to ensure that the impact would be minimized.

7.12.2 Views of the Board. The Board accepts the Applicant's undertakings to mitigate the impact of construction, operation and maintenance of the proposed pipeline on raptors. The Board notes that the Applicant has undertaken to involve the appropriate regulatory authorities in order to establish site-specific mitigative measures for raptor nest sites.

The Board would require, however, that the Applicant undertake to identify the species of raptors using the nest sites identified during the August raptor survey. This information would be required in order to incorporate the early (February) and late (April) breeding periods for various raptor species and a consideration of the endangered status of the peregrine falcon into the site-specific mitigative measures. The Board would require that the final program of mitigative measures for raptors be filed for Board approval prior to

construction. The Board is cognisant of the sensitivity of the information and feels confident that the Applicant would take adequate measures to ensure the confidentiality of this data.

7.13 Environmental Orientation

7.13.1 Evidence of the Applicant. The Applicant undertook to introduce an environmental awareness program to ensure that all personnel employed on the project were made aware of environmental concerns and the procedures for mitigating adverse environmental impacts.

The Applicant stated that an environmental procedure manual would be prepared. This would contain the site-specific environmental concerns and operational requirements for mitigating environmental impact. The Applicant had not yet developed this material, nor could it outline what would be contained in the manual.

The Applicant undertook to hold discussions with construction contractors to explain the company's plans, procedures and undertakings for the protection of the environment.

7.13.2 Evidence of Intervenors. The GNWT felt that, with respect to the Applicant's orientation programme, it would want to have an input into the development and implementation of a training program, the training of a surveillance team and those who would be involved in conservation education efforts. Because of the lead time required to have staff in place, it would be unable to meet the Applicant's proposed schedule.

The Dene Nation expressed concern about the Applicant's timely implementation of the environmental awareness program since it had not yet been set up.

7.13.3 Views of the Board. The Board accepts the commitment of the Applicant to implement an environmental training and awareness program for personnel involved in the project and to

prepare an environmental manual to meet the site-specific concerns related to the project.

The Board notes that the Applicant has not yet developed an outline of what would be contained in its environmental procedures manual nor has it established the procedures or mechanisms by which this would be attached to contract documents or communicated to their contractors.

The Board would require that the Applicant's environmental awareness program and its environmental procedures manual be developed and submitted, for Board approval, prior to the start-up of construction or construction-related activities.

7.14 Construction Inspection

7.14.1 Evidence of the Applicant. The Applicant stated that it would have a senior environmentalist on its construction staff who would have field representatives on all pipeline construction spreads to monitor construction on a day-to-day basis. The staff would report through their respective spread offices. The authority to give instructions or to shut down construction would rest with the spread office.

With respect to questions raised by intervenors on the environmental reports of the Ontario government "Environmental Study of the IPL-Montreal-Sarnia Extension" and "Sarnia to Montreal IPL-Field Observations" by the Environmental Protection Service, the Applicant stated that it would take into account many of the recommendations cited; however, it had not yet incorporated them into specific plans.

7.14.2 Evidence of Intervenors. CARC's witnesses expressed concern that the Applicant's environmental guidelines might not be rigorously enforced. It cited the example of IPL's construction of the Montreal-Sarnia line, where in its opinion communication problems and inadequate numbers of environmental inspectors were the principal reasons for inadequate environmental guideline enforcement.

CARC's witnesses expressed concern that IPL (NW), in preparing the environmental specifications manual, would not sufficiently detail some procedures, thus leaving too much latitude to the contractor for field decisions. It cited the construction of the IPL Montreal-Sarnia line as an example.

The GNWT also expressed concern about the environmental consequences of decisions made in the field and the necessity for on-site inspection by qualified personnel.

7.14.3 Views of the Board. The Board accepts the Applicant's undertaking to have environmental staff as part of its construction team. The Board further notes that the Applicant has not yet detailed the organization of its environmental staff, its functions, or its communication or reporting network.

The Board agrees with the intervenors on the importance of adequate inspection and the necessity for establishing special construction procedures to mitigate environmental impact.

Should a certificate be issued, the Applicant would be required to submit to the Board for approval the organizational structure of its environmental staff showing the staff qualifications, responsibilities and functions, their reporting network and the staff training program prior to commencement of any clearing or construction activities for the project.

7.15 Environmental Monitoring and Surveillance

7.15.1 Evidence of the Applicant. The Applicant undertook to inspect the right-of-way following construction and to carry out restoration work as required. The Applicant stated that the proposed pipeline would be patrolled by aircraft on a weekly basis. There would be two thorough inspections of the entire right-of-way each year for the first three years, which would include environmental and reclamation considerations. The Applicant proposed to undertake a remedial program of limited

trench backfill in the initial summer season following pipeline construction along each spread. This operation would also control erosion in critical areas where water might be diverted from the ditch line or right-of-way.

7.15.2 Evidence of Intervenors. CARC presented evidence based on the IPL Sarnia-Montreal project that recommended that regular monitoring studies be made to check the effectiveness of mitigative measures for all stages of pipeline development.

7.15.3 Views of the Board. The Board accepts the undertakings of the Applicant with respect to the environmental monitoring and surveillance of the proposed pipeline. The Board also is of the view that a comprehensive and coordinated monitoring program is necessary to maintain the integrity of the line and to ensure the success of proposed mitigative measures. The Board would require the Applicant to file for approval, prior to leave to open being granted, the complete monitoring and surveillance schedule proposed for the pipeline system.

7.16 Contingency Plans

7.16.1 Evidence of the Applicant. Under cross-examination, the Applicant stated that it would base its plans on its experience over the last 30 years of pipeline operation in southern Canada. It felt confident that it could develop such plans prior to the fall of 1983, before the start of operation. IPL (NW) submitted an outline of the proposed contingency plan. It did not submit a detailed contingency plan for oil spills, nor did it have specific plans for handling other project-related emergencies.

IPL (NW) stated, however, that the proposed line would be equipped with a leak detection system and that its on-line volume balance calculations would be able to detect leaks of 0.5 percent of the flow to within 10 km of a leak site.

The Applicant indicated that it would have oil spill equipment at the three pumping stations and at intermediate sites.

The Applicant stated that the clean-up of spilled oil would depend on the season and terrain and on the presence of ice on rivers and lakes. It briefly described what it would undertake to do on several terrain types. Recovered oil would be reinjected into the pipeline where possible. Contaminated oil and oil soaked mixtures would be burned.

With respect to the probability of an oil spill, the Applicant referred to IPL's operating record of the existing 12-inch (323.9 mm), 148 km line from Westover to Buffalo over a 16-year span and on the experience with the Lakehead line.

7.16.2 Evidence of Intervenors. In its evidence, CARC outlined the basic components of a contingency plan and what was required to prepare such a plan. It stated that such a plan should be prepared with a knowledge of the environmental sensitivities and described the Applicant's capability to protect these resources. Its witness stated that the Applicant needed to detail specific spill scenarios and counter-measure capabilities. It also felt that the preliminary work required to prepare a satisfactory oil spill contingency plan had not been done adequately.

In CARC's testimony major concerns were mentioned. Among these were: size of possible spills, leak detection, location of leaks in winter or in deep peat, capability to respond in winter or during freeze-up or break-up and availability of training and trained personnel.

In the absence of a contingency plan for oil spills, CARC felt that an adequate assessment of the environmental impact could not be made. CARC expressed the opinion that the Applicant's commitment to provide a contingency plan for oil spills prior to commencement of operation was inadequate.

In evidence the GNWT stated that the contingency plans should be part of the application and that providing the contingency plan prior to commencement of operation would be inadequate. It further stated that the contingency plans should be available at the application stage.

The GNWT stated that contingency plans were required not only for oil spills but also for hazardous chemicals, road construction and adverse weather conditions and their effect on the construction schedule and possible forest fires.

7.16.3 Views of the Board. The Board notes that IPL (NW) undertook to provide detailed contingency plans prior to the start of operation of its proposed pipeline.

The Board would require the Applicant to provide, for review and approval, its contingency plans regarding, inter alia, the handling and storage of fuels, lubricants and toxic chemicals, forest fires and changes in construction scheduling. The Board would have to be satisfied on these plans before it would allow construction to proceed.

With respect to contingency plans relating to product spills during pipeline operation, the Board would require that these be provided for approval prior to leave to open being granted should a certificate be issued.

7.17 Further Environmental Studies

7.17.1 Evidence of the Applicant. The Applicant stated that the additional field investigations recommended by its consultant would be undertaken prior to final design and construction. These investigations would determine the routes of access roads and the location of borrow sites to minimize disruption of wildlife habitat.

The Applicant acknowledged that a considerable amount of detailed field work would have to be done prior to the start of construction. The Applicant undertook to carry out such

work and testified that there was sufficient time to accomplish the studies prior to the scheduled start of the main construction.

The Applicant stated that office studies such as monitoring programs, contingency plans and operation and maintenance procedures would be provided to the Board prior to start-up.

The Applicant further stated that field studies on archaeology, slope stability, thaw settlement and borrow pits would be done concurrently with project development.

7.17.2 Evidence of Intervenors. CARC expressed concern with respect to the adequacy of the Applicant's environmental work. It was CARC's view that sufficient detail was not provided on the project and its alternatives, the prediction of potential impacts, the proposed mitigative measures, or on contingency plans.

It was CARC's opinion that the Applicant had not spent sufficient time in preparing its assessments, had not done required site-specific field work and in general had not presented its case for review.

CARC felt that the Applicant's environmental assessment was seriously deficient in many areas. Further, CARC found it difficult to rely on the Applicant's good intentions to supply adequate levels of information since the Applicant had failed to demonstrate these intentions by preparing a thorough environmental impact assessment. CARC submitted that the Applicant had not adequately made its case, and therefore suggested that the issuance of a certificate should be withheld until the Applicant had demonstrated its ability to construct and operate the pipeline in an environmentally acceptable manner.

The Dene Tha' Band stated that it had a close relationship with the environment and that its concerns had not been adequately dealt with due to the lack of environmental information.

It also stated that the outstanding information should be filed as part of the application so that intervenors might be given the opportunity to assess the information and determine whether the Applicant would take adequate measures to minimize negative environmental impact.

The GNWT indicated that they were not satisfied with the degree of information provided by the Applicant, particularly with that relating to contingency plans.

The GNWT pointed out the desirability of having the chance to review additional information and feared that intervenors might not have the opportunity to review additional information submitted to the Board either after the hearing phase or following certification of the project.

7.17.3 Views of the Board. The Board accepts the Applicant's undertaking to provide additional detailed information based on further design work or additional studies.

The Board notes that a considerable number of additional site-specific studies are required in many areas to establish environmental conditions, develop mitigative measures and establish maintenance and rehabilitation procedures.

Should a certificate be issued, the Board would require that IPL (NW) submit for Board approval, within two months after certification, a comprehensive schedule for filing with the Board those studies, programs, plans and procedures which IPL (NW) undertook during the hearing to carry out. The Board would also require the Applicant to forward the schedule concurrently to the intervenors of record at the hearing of this application.

IPL (NW) would be required to serve, concurrent with each filing with the Board, a copy of each study, program, plan or procedure on each intervenor of record who advises IPL (NW) of its desire to see the material. The Board would require IPL (NW) to develop a consultative mechanism for those parties wishing to comment on the material in order that the final

design as reflected in the construction contract specifications and the environmental procedures manual would take into consideration such comments.

IPL (NW) would be required to serve, concurrent with each filing with the Board, a copy of the construction contract specifications, environmental procedures manual, the environmental education program and environmental inspection program on each intervenor of record who advises IPL (NW) of its desire to see the material. At the time of the filing of such material the Board would establish procedures to be followed by those parties wishing to comment on the documents. The Board would consider applications from IPL (NW) for orders providing for relief from the requirement of serving on intervenors certain documents or portions thereof provided adequate reasons were given.

CHAPTER 8
REGIONAL SOCIO-ECONOMIC IMPACTS

8.1 Introduction

Most of the socio-economic impacts likely to result from the proposed project would be expected to occur within a corridor starting at Norman Wells, extending southeast along the Mackenzie River to a point east of Fort Simpson, following the west side of the river and bending towards Zama Lake in northern Alberta. This corridor generally encompasses areas and communities within some 120 km of either side of the pipeline route. Communities within or near this corridor could supply manpower, goods or services to the proposed project and are most likely to experience direct project-related impacts. Communities such as Yellowknife, Hay River and Enterprise, while excluded from this direct impact corridor, still fall within the project's broader impact area.

Of the total population of some 21,500 people in the entire impact area (1978), 17,500 reside in the Northwest Territories and 4,000 in northern Alberta. In the Northwest Territories, approximately 60 percent (10,500) of the impact area's population resides in Yellowknife and some 20 percent (3,500) in Hay River and Enterprise. About 35 percent of the impact area's population in the Northwest Territories is of native origin. In northern Alberta, half the population of the impact area resides in High Level and about 30 percent of the population is of native origin.

Focusing on the impact corridor in the Northwest Territories, approximately 4,000 people live within this narrow land area and some 75 percent of these are of native origin. The remainder, of non-native origin, reside predominantly in Fort Simpson and Norman Wells.

The economic activity of the impact area is narrowly based. Its major components include the public sector, the mining and the oil and gas industries, the renewable resource sector and a modest manufacturing, tourism and service sector.

8.2 Evidence of the Applicant

8.2.1 Information, Consultation and Liaison. The Applicant recognized the importance of making project-related information available to all interested parties on a timely basis. Should the project be approved, the Applicant would be developing comprehensive information programs to inform governments, local community bodies, northern residents and other interested groups about all aspects of the project that are likely to be of interest or concern to them.

Prior to the hearing, the Applicant had conducted some 45 community meetings. The Applicant chose not to involve its regional socio-economic consultant, Resources Management Consultants (Alberta) Ltd., in these meetings arguing that it would ultimately be the Applicant's responsibility to ensure that community information and consultation would be ongoing for the duration of the project. The objective of the community meetings, from the point of view of the Applicant, was not to solicit the communities' opinions on whether they would like to see a pipeline built, but rather to inform the population about the proposed project and to improve upon impact management strategies.

8.2.2 Impact on Employment. IPL (NW)'s basic employment policy with respect to the construction and operation of the pipeline is to maximize employment opportunities for northern residents, and it proposes to implement a number of programs to ensure that local residents have advance information about, and have the opportunity for project employment.

The proposed combined projects are expected to require an average of 284 workers per month for fieldgate facilities construction and 241 workers per month for pipeline and pumping station construction over a 34-month construction period. The combined manpower requirements are expected to peak at 1,344 workers during the second winter construction season. Labour demand would lie between 300 and 800 workers for 18 of the 34 months.

With respect to the operations and maintenance phase, the Applicant stated that the pipeline would create 29 full-time permanent positions of which 16 would be in Norman Wells, 9 in Fort Simpson and 4 in Zama City. An additional 121 people would be required for the maintenance and operation of the expanded producing fieldgate facilities. The Applicant viewed these areas as offering the most promising long-term employment opportunities for local residents.

In addition to the direct employment generated by the combined projects, the consultant estimated that indirect employment could reach 180 jobs during construction and stabilize at 65 jobs during the operations phase.

The Applicant estimated that during construction of the combined projects, some 150 of the 525 average monthly manpower demand could be met by Northerners. For the operations and maintenance phase, it estimated that 60 of the 150 permanent positions could be staffed by Northerners. These figures were viewed as conservative because the current rate of participation by Northerners in existing jobs at Norman Wells was already greater than that projected by the consultant for the combined projects.

The Applicant also expected that specialized manpower requirements for mainline construction would be primarily imported (from the south) and that northern labour participation would be largely derived from pre-construction and spin-off work via the involvement of northern contractors. As well, the Applicant stated that these contractors would be obligated to maximize the use of local manpower.

The Applicant did not intend to provide any training (other than on-the-job training in Esso Resources' case) for the skilled labour required on the construction phase of the project. Rather, its northern resident training programs would focus on the operations and maintenance phase.

Esso Resources indicated that it would be recruiting from the entire western Arctic. IPL (NW), on the other hand, planned to recruit northern residents primarily from

communities in the immediate vicinity of the pipeline during construction. For the operations and maintenance phase, however, IPL (NW) would recruit from throughout the Northwest Territories.

Should a certificate be granted, the Applicant would undertake to prepare and implement both a "Northern Resident Training and Employment Action Plan" and a "Manpower Recruitment and Delivery Plan." The Applicant would also undertake to provide and implement an orientation program for all operations and maintenance employees. In addition, contractors' manpower requirements and schedules would be provided to government agencies and other interested groups on a timely basis prior to the beginning of construction.

8.2.3 Impact on Local Business. As a general policy statement, IPL (NW) stated it would stimulate business opportunities and would be committed to communicating the need for and would establish a preferred position for northern businesses with respect to such opportunities.

It proposed to prepare a "Northern Business Opportunities Plan" which would identify and analyze potential business opportunities, disseminate opportunities and tendering procedures information, establish and maintain an up-to-date northern bidders list, and provide adequate lead time for northern businesses to tender on contracts.

The Applicant also undertook to include in this plan consideration for factors such as the small size of northern operators, distant suppliers, low capitalization, etc. On this point, the consultant indicated that much of this work still remained to be done.

IPL (NW) anticipated that northern businesses would participate mainly in the initial work (such as clearing), the spin-off type of work (such as road maintenance, expediting, and local transportation and civil works), and in the operations and maintenance phase. IPL (NW)'s consultant estimated that the potential for northern business

opportunities would be in the order of \$21 million during the construction period and could total \$2.3 million and \$200,000 annually for Norman Wells and Fort Simpson, respectively, in the longer run. IPL (NW), on the other hand, estimated the potential for local business opportunities during construction of the pipeline to be in the order of \$50 million (\$1979) in the Northwest Territories and close to \$8 million (\$1979) in northern Alberta. For the operations phase, IPL (NW) anticipated direct annual expenditures could reach \$5 million (\$1979) in the Northwest Territories and \$0.6 million (\$1979) in northern Alberta.

8.2.4. Impact on Population. An estimate of potential population impacts resulting from the combined projects was submitted with the proviso that it provided order of magnitude approximations, only to be used for preliminary assessment and planning purposes.

IPL (NW)'s consultant indicated that the population impact of the combined projects' construction phase would be both larger and more wide-spread than that associated with the operations and maintenance phase. It was also pointed out, however, that this construction phase population impact would be of a short duration. It was expected by the consultant that the combined projects' construction would attract slightly less than 300 people to the impact area, of whom about one-third would be located in Norman Wells, and the remainder distributed between Yellowknife, Hay River, Fort Simpson and to a lesser extent, Zama City. The consultant viewed the increase in Norman Wells to be significant.

During the operations and maintenance phase, the consultant estimated the permanent population increase in the Mackenzie Valley to be about 230 people. With some 70 percent of these establishing residence in Norman Wells, excluding 75 rotational operations and maintenance workers located in Norman Wells, this represented an increase of 60 percent over current population levels. Other permanent population increases would be distributed between Fort Simpson and Zama City.

8.2.5 Economic Impact

8.2.5.1 Overall Economic Impact. The Applicant was of the opinion that the combined projects would provide considerable economic benefits to the Northwest Territories particularly during the construction period. During the operations and maintenance phase, it anticipated that the combined projects would not significantly alter the basic economic structure of the Northwest Territories. In addition, it was stated that the combined projects would be a major contributor to economic growth and would provide economic benefits to the Northwest Territories at a time when the region appeared to be experiencing a lack of real economic growth.

Notwithstanding this, IPL (NW)'s consultant believed that, solely from a regional perspective, the economic impact of the combined projects was likely to be small, even during construction.

The Applicant's consultant indicated that there would likely be some upward pressure on prices and that this was more likely to occur during the construction rather than the operations and maintenance phase of the combined projects.

8.2.5.2 Sectoral Economic Impact. During the construction and operations and maintenance phases, the consultant felt that the forestry, trade, construction and service sectors, and the sand and gravel portion of the mining industry would experience a number of impacts both in the Northwest Territories and northern Alberta. The project was expected to stimulate additional oil and gas exploration activities. The effects of attracting or diverting Northerners from jobs in other sectors would also likely be felt in all sectors of the regional economy.

8.2.5.3 Impact on Transportation and Communications.

IPL (NW)'s policy on matters of transportation and communications was to avoid placing unacceptable traffic loads on the impact area's systems. Both IPL (NW) and Esso

Resources indicated that if the combined projects' shipping needs were identified as conflicting with an essential non-project demand, then they would place priority on ensuring that the non-project demand received priority treatment. Overall, the combined projects were not expected to tax existing transportation and communication systems with the exception of some possible short-term overloading in the trucking industry and the telephone system.

8.2.5.4 Impact on the Government Sector. Both Esso Resources and IPL (NW) believed that the proposed developments would be a significant source of revenues contributing toward economic self-sufficiency for the Northwest Territories. As for northern Alberta, it was expected that impacts on government at both regional and provincial levels would be small because of the project's small size and because these governments have had considerable experience with pipeline projects.

8.2.6 Impact on Renewable Resource Harvesting by Native People
The Applicant recognized both an economic and a socio-cultural dimension to renewable resource harvesting by native people. While trapping, fishing and gathering activities did not represent a major source of employment or income at the regional level, the Applicant recognized the importance of such activities for native people in small as well as large communities. In its view, such activities could represent as much as 50 percent of native people's total income (cash and non-cash).

IPL (NW)'s policy on matters relating to these activities was to endeavor to protect areas identified as having cultural or resource harvesting importance to Northerners. This policy included a commitment to work with the appropriate parties to avoid, whenever practical, damaging or precluding the seasonal use of such areas, and a commitment to make project employees aware of these concerns.

The consultant further mentioned that it did not view the combined projects as having a significant effect on renewable resource harvesting activities and could, depending on the response to rotational job opportunities, result in a net positive effect.

8.2.7 Some Aspects of Social Impact and Community Impacts.

The Applicant's consultant believed that the social effects of the combined projects would be directly related to the characteristics of the various communities involved. Communities in the impact area could be divided into two groups. One group including Yellowknife, Hay River, Norman Wells and Fort Simpson, represented the larger, more acculturated settlements which have significant white populations and considerable previous exposure to industrial development activity. The second group was comprised of smaller, predominantly native communities with much less experience with, and exposure to, acculturative influences. It was felt that these communities were the most sensitive to any negative social impacts resulting from development activities.

IPL (NW)'s consultant pointed out that the nature of the combined projects' plans and mitigative policies was such that the bulk of project activities, and virtually all of the population effects, would occur in and around the larger, more acculturated and less sensitive communities, thereby limiting the potential for adverse social impacts.

To minimize social and community impacts, the Applicant proposed to work closely with all parties concerned to ensure that the project did not place an unacceptable load on regional health care systems, on security and law enforcement, and on existing referral counselling services throughout the impact area.

In relation to Fort Simpson and Norman Wells, however, the Applicant's consultant felt that the combined projects' construction activities would cause socio-cultural impacts due primarily to contact between local residents and

southern workers. The consultant was of the opinion that the Applicant's proposed mitigative policies might help control, but would not eliminate, these concerns. Smaller native communities were expected to experience some increase in alcohol-related problems, heightened child welfare problems, an increase in the criminal offense rate and other social problems.

In terms of the operations and maintenance phase, it was anticipated that Norman Wells would experience the most pronounced social and community impacts primarily due to the proportionally large population increase. In smaller communities, it was anticipated that the operations and maintenance phase would not be as significant in terms of socio-cultural impacts since rotational employment should eliminate the need for migration and would allow workers enough time at home to maintain their existing socio-cultural patterns.

Impacts on northern Alberta would be similar in nature to those occurring in the Northwest Territories but were expected to be smaller.

8.2.8 Other Matters

8.2.8.1 Monitoring. IPL (NW) indicated it would develop and implement procedures for monitoring and reporting on the socio-economic effects of the project during construction and the initial years of operations and maintenance, and would cooperate with other monitoring programs instituted by local or other government bodies.

8.2.8.2 Compensation. IPL (NW) indicated it would compensate individuals for losses suffered as a result of construction, operations or maintenance of the project. IPL (NW) also stated it would work closely with government and other appropriate parties to develop and implement a practical and workable system of compensation prior to the beginning of construction. It would also review this system

with government and other appropriate parties on a regular basis during all phases of the project.

8.2.8.3 Impact of Project on Local Energy Use. IPL (NW) stated that a genuine concern expressed by communities during the community meetings centered on the cost of energy in these communities. IPL (NW) did not, however, have any plans to supply oil to communities along the pipeline route.

8.2.8.4 Position on Settlement of Land Claims and Aboriginal Rights. Although IPL (NW) recognized the concern as expressed with respect to land claims, it did not view their settlement as a pre-condition to proceeding with the project. Instead, it believed that both the project and land claim negotiations could proceed separately and concurrently. However, IPL (NW) did agree that in the absence of such a settlement there might be less local participation in the project.

8.2.9 General Position on Regional Socio-Economic Impact.

IPL (NW) stated that should the Board require as a condition of a certificate prior approval of the socio-economic plans recommended by its consultant, that it would be prepared to file such plans with the caveat that they cover the "key elements" of their programs rather than all the details. Its consultant stated that it considered these to be important elements in securing the benefits projected for the impact area.

IPL (NW) indicated that it considered the views of local elected representatives as important to the determination of the public interest aspect of the project. Its own view was that the project was both in the regional and national interests.

IPL (NW) believed that its project, in contrast to the Mackenzie Valley gas pipeline, was much smaller in scope and would result in less disruption.

IPL (NW)'s consultant also believed that the project would offer much needed economic opportunities to residents of the study area and would be of a scale which would preclude the wide reaching socio-economic disruptions often associated with so-called mega-projects located in a sensitive human environment such as that which currently exists in the North. They believed that the long-term benefits of the project would far outweigh its costs and that those short-term problems which would occur would be manageable.

8.3 Evidence of Intervenors

8.3.1 Alberta Chamber of Resources. The Alberta Chamber of Resources was of the opinion that the proposed project should be approved because it offered tangible social and economic benefits such as increased oil supply, improved balance of payments, and job and business opportunities to both Canada and the impact region. The witness for the Alberta Chamber of Resources adduced evidence showing that this position was also adopted by the City of Edmonton.

8.3.2 Canadian Arctic Resources Committee. CARC held the view that several fundamental public interest issues must be resolved before any pipeline project in the Mackenzie Valley could be approved. It listed these issues as the settlement of Dene land claims, the need for a land-use plan in the Mackenzie Valley to mitigate impacts associated with an energy corridor, and the need for the North to share more fully in the proposed project's benefits. CARC indicated that it was not opposed to the project in principle, but rather to the fact that approval at this time would impair the ability to deal with these issues.

CARC argued that the delay recommended by Mr. Justice Berger should be adhered to because the reasons for the proposed delay still exist. CARC did not share the Applicant's view that comparison of the IPL (NW) project with the previous Arctic Gas proposal was inappropriate, arguing instead that the

shape and size of industrial development did not alter the native people's beliefs nor their desire for self-determination.

CARC noted that the scale of the project would require consideration of the corridor concept, regional planning procedures, good monitoring and management of impacts. It was also of the opinion that although the Mackenzie Valley had already seen some development, the proposed IPL (NW) pipeline, more than any development that has been completed to date, would shape and influence the evolution of an energy transportation corridor in the Mackenzie Valley.

8.3.3 City of Yellowknife. Although the City of Yellowknife welcomed the potential opportunities of the proposed project, it felt that many details had yet to be worked out between the Applicant, the territorial and federal governments, and various interest groups before maximum benefits from the project would accrue to Northerners. It stressed the need for the Government of Canada to respond to the project-related concerns of the GNWT and indicated it would withhold its support until this was done. As well, the City of Yellowknife indicated it would require guarantees of meaningful participation for local businesses and northern residents as well as a guarantee of reliable, reasonably priced, future regional energy supplies.

8.3.4 Committee for Justice and Liberty Foundation. CJL opposed the project on the grounds that it would benefit neither Canadians nor residents of the Northwest Territories.

CJL argued that the lack of resolution of land claims meant that any decision affecting these lands would be an example of federal government lawlessness and of failure to negotiate in good faith with the Dene. National interest in promoting cultural diversity and social justice were also cited as reasons for rejecting the IPL (NW) application.

From a regional point of view, CJL's emphasis was on the "major blow which the pipeline would constitute to native

claims." It believed that proceeding with the pipeline at this time would prejudice Dene land claims by denying the Dene the political right to decide, to have institutions in place at an appropriate time, to negotiate with the companies, to plan and strengthen their economy prior to non-renewable resource development, and to have a full range of choices for land selection. It was also CJL's contention that the socio-economic study done by the Applicant's consultant was inadequate, particularly in terms of field work. It believed that the pipeline would provide few jobs and would act as a catalyst to further development.

8.3.5 Dene Communities. As part of the case presented on behalf of the Dene Nation, representatives and chiefs from most Mackenzie Valley communities from the Mackenzie Delta region to the area around Great Slave Lake and Fort Smith, presented the views of the native people to the Board. They agreed that the proposed project should not proceed until questions of land claims and aboriginal rights were settled. The size of the pipeline was not viewed as an important consideration. They pointed out that the Dene people had not benefited from past developments. Therefore, they felt they could not agree to further development until they had control over such developments.

They also explained the relationship between the Dene people and the land as well as the differences between Dene and non-Dene values. They felt that the land had to be protected since it was "their bank" and ensured their survival.

The representatives and chiefs felt that all had been said to Mr. Justice Berger a few years ago. Nevertheless, they believed that the issues raised by the proposed project were sufficiently important for them to appear before the Board despite the fact that they should have been out on the land.

8.3.6 Dene Nation. The Dene Nation believed that it was not in the interest of the Dene for the proposed project to proceed

at a time when current priorities in the North were to settle aboriginal rights and to determine the type of government they wanted for the North. Under present conditions, the Dene Nation believed that the proposed project would open the way to further development and would add to existing problems in the North.

The view was also held that Mr. Justice Berger's ten-year moratorium should be applied. Having expressed all its views to Mr. Justice Berger, the Dene Nation questioned the need for the Board's hearing on the IPL (NW) project.

The Dene Nation indicated that they were not against development per se, but rather that they wanted to ensure that maximum benefits would accrue to the Dene when resource development occurred. The Dene Nation pointed out that the non-Dene were well-cushioned against the negative socio-economic impacts resulting from development, while the Dene were not.

8.3.7 Dene Tha' Band. This Band was of the view that the project would have serious implications for the lands, lives and resources of the Dene Tha' people. It anticipated that the impact of the proposed project would be no different from the usual negative effects of development in general.

The Dene Tha' Band stated that some 24 terms and conditions had to be met before they could support the proposed project. These touched upon such matters as compensation, employment, orientation-counselling, alcohol consumption, monitoring, access to communities, etc. Briefly summarized these were: that the Band (and its members) be assured that a fair and adequate compensation program would protect the economic life of the Band in general and trappers' incomes in particular; and that guarantees be given to the Band for specific and meaningful business contracts for actual pipeline construction and related activities. They also argued that both of the above should be in place prior to approval of the project.

The Dene Tha' Band also held the view that the socio-economic data base on the northern Alberta portion of the impact area was "deficient, inaccurate and out-of-date." They suggested that without a new socio-economic impact study, it would be impossible to predict with any accuracy the possible impacts, whether positive or negative, this project might have on the Band.

8.3.8 Government of the Northwest Territories. The GNWT's conditional support of the proposed project was in relation to the five concerns developed in concert with the Métis Association and the Dene Nation mentioned later. In terms of the preparation of a long-term plan in the Northwest Territories, it stated that although proceeding without such a plan might be in the national interest, it might foreclose the best options for renewable resource development which are of local and regional interest.

The GNWT further stated that, to date, it had not received either confirmation or rejection of the five conditions from the federal government.

Further, while the GNWT recognized that the project would offer various opportunities to northern residents, it also felt that if these five points of concern were addressed prior to project approval the gains to northern residents from the project could significantly increase.

8.3.9 Hay River and Area Economic Development Corporation. The Hay River and Area Economic Development Corporation was of the opinion that the proposed project would diversify and strengthen the area's economic base and hence would result in significant economic benefits to Canada, Alberta and the Northwest Territories. It did indicate, however, that it would like guarantees or very strong assurances that northern people would get every opportunity to participate in the proposed project.

8.3.10 Inuvik and District Chamber of Commerce. The Inuvik and District Chamber of Commerce supported an early decision for the construction of the Norman Wells pipeline. It submitted that there would be direct economic benefits for local residents through employment, business opportunities and spin-off effects such as an increased level of services in the Mackenzie Valley communities. In addition, it believed that the increased oil production from Norman Wells would contribute to the national energy policy of self-sufficiency as well as supply territorial needs. It also maintained that the approval of the project would assist the settlement of native claims in the Mackenzie Valley. It also contended that, should the Norman Wells project be approved quickly, it would provide the impetus needed for subsequent use of the Mackenzie Valley for the transportation of oil and gas from the Mackenzie Delta and Beaufort regions.

8.3.11 Métis Association of the Northwest Territories. The Métis Association withheld support for the proposed project pending federal government acknowledgement and action upon the five points jointly submitted by the Dene Nation, the Government of the Northwest Territories, and the Métis Association. These five points were:

- (1) the need to formulate a long-term plan for the development of non-renewable resources in the Northwest Territories;
- (2) the requirement for a northern based authority to control and regulate development to adequately serve the interests of the people of the Northwest Territories;
- (3) the requirement for a plan for the sharing of royalties;
- (4) the requirement for policies and programs to ensure the availability of energy supplies to meet the present and future needs of Northerners; and,
- (5) the requirement for some movement in the area of aboriginal rights and claims.

To the time of the hearing, the Métis Association indicated it had received no evidence of action on these five points.

While the Métis Association recognized that the project might be in the national interest, it felt it could not support the project until it had evidence that it would be in the regional interest, in the broadest sense.

8.3.12 NWT Grade Stamping Agency. The Agency supported the proposed project subject to the condition that Northwest Territories forest products suitable for use on the project be given first consideration, with an attendant commitment that employment for local people would be given first priority.

8.3.13 Town of Inuvik. The Town of Inuvik viewed the immediate development of the Norman Wells oil field expansion and pipeline project as a step towards revitalizing the depressed economy of the Mackenzie Valley and paving the way for economic self-sufficiency for the Northwest Territories.

It believed that the objectives of the Government of the Northwest Territories could and should be realized concurrently with the development of the Norman Wells project and were not pre-conditions for that development. It also maintained that the project should encourage the settlement of land claims.

8.3.14 Village of Fort Simpson. In its filed submission, the Village of Fort Simpson, which was not represented at the hearing, conditionally supported the project.

8.4 Views of the Board

8.4.1 Introduction. The Applicant provided the Board with an assessment of the regional socio-economic impacts of the proposed project on the impact area which focused on specific demands which the project would make on the area's people, facilities and resources. In contrast to this, many of the intervenors focused on questions of principle surrounding the project including the negotiation of aboriginal rights,

comprehensive land-use planning in the Mackenzie Valley, northern control over northern resources, and federal-territorial resource revenue sharing.

The Board is cognizant of both the existence and implications of these two different approaches. Because questions of feasibility and desirability are fundamental to an assessment of regional socio-economic impacts, the Board views these two approaches as complementary.

The Board's assessment of these impacts is based on several assumptions. These are:

- (1) that the Applicant would implement the policies, programs and commitments made in documents filed with the Board or statements made during the hearing;
- (2) that the Applicant would generally follow the spirit of recommendations made by its consultant where IPL (NW) has not specifically endorsed these; and
- (3) that Esso Resources would abide by the policy statements on the record and would generally follow the spirit of recommendations made by the consultant in relation to the fieldgate portion of the combined projects.

8.4.2 First Question: Regional Feasibility. By addressing feasibility, the region's capacity for handling project demands can be evaluated, and potential problem areas and possible mitigative measures identified.

It is the Board's view that both the nature of the expected regional socio-economic impacts identified by the Board in its "Northern Pipelines" decision, as well as the reasoning used to arrive at its assessment in that report, can be applied to the IPL (NW) proposal. However, in terms of project demands, the shorter construction period and the reduced scale of the IPL (NW) pipeline render its requirements much smaller than those of its proposed predecessors and thus its potential impacts less severe.

The Board is of the view that while the overall population impact of the proposed project falls within a

manageable range, the communities of Norman Wells and Fort Simpson could be potential problem areas. Norman Wells in particular could be expected to experience a significant population influx throughout the life of the project. This could be compounded during the construction phase because of the presence of a large construction work force in or close to the community. In Fort Simpson, although the absolute size of population increase might be manageable, the Board notes that this community is comprised of a majority of native people and the Board views any project-induced change in the population mix as having the potential for significant adverse social impacts. Further, while the Board does not believe that speculative in-migration would be a significant problem at the regional level, such migration would likely impact more on Fort Simpson because of its accessibility as a transportation center for the entire impact corridor.

With the possible exception of trucking and telephone systems, the Board does not anticipate any undue pressure on transportation and communication systems. It would appear that sufficient excess capacity exists in the marine (barging), rail, and road modes, while air capacity could be quickly expanded to accommodate the combined projects' demands.

Manpower demands on community infrastructure, services, facilities and resources would centre on Yellowknife, Hay River, Fort Simpson, Norman Wells, Zama City and perhaps High Level. Fort Simpson and Norman Wells would likely have the greatest demands placed on their social and economic infrastructure. The Board believes that with proper planning and consultation, major problems in these areas could be avoided.

It is also the Board's view that the combined projects would subject local economies to some inflationary pressures and that these would fall most heavily on people on fixed or less flexible and low incomes.

The Board is also of the opinion that the project would physically impinge upon the traditional and subsistence

activities of Northerners and could cause diversion of manpower away from this sector towards the project. Since this sector is sensitive to inflationary pressures and since the magnitude of losses is difficult to predict and determine, it would appear virtually impossible to mitigate or compensate for all project-induced impacts upon this sector.

The Board agrees with the GNWT regarding its need for additional funding to deal with those socio-economic impacts of the project that are within the legislative purview of the territorial government. The Board also concurs with the assessment of the Applicant's consultant that the provincial and regional governments of northern Alberta are able to handle the demands of the proposed project.

Should the combined projects proceed, in addition to expecting adherence to the commitments made by the Applicant and Esso Resources, the Board wishes to stress the need for continued, and in some cases, intensified, community consultation, liaison and information. The Board views as important the roles to be played by advisory councils and project liaison officers in key impact areas such as the communities of Norman Wells and Fort Simpson. This process would require the co-ordinated planning efforts of the proponents, communities, and the GNWT.

To ensure the priority of regional demands over project demands, to identify project problem areas, and to provide possible solutions, the Board sees the need for an effective monitoring system.

The Board notes that the fieldgate portion to be developed by Esso Resources could account for half the regional impact during construction and for even more during the project's operation. Although the Board has no regulatory control over the management of impacts associated with this portion of the combined projects, the Board anticipates that Esso Resources, to maintain good relations with the communities and the territorial government, would promote local participation, and implement measures to minimize negative impacts where possible.

In general, the Board is of the opinion that the proposed project would not unduly tax the infrastructure, services and facilities of the impact area's communities. It is also the Board's view that the commitments by both the Applicant and Esso Resources to implement the policies and mitigative measures identified would go some way towards reducing problems and costs.

8.4.3 Second Question: Regional Desirability. The Board is of the opinion that the benefits that would accrue from the combined projects to the impact area would be manifest mainly in terms of employment opportunities, business opportunities, and territorial government revenues.

The Board accepts the employment figures provided by the consultant. In general, the Board is also of the opinion that project-generated employment would provide some benefits to the impact area. However, the extent of these employment opportunities or benefits cannot be determined at this time. Further, the Board considers that non-natives, being presently more integrated into the wage economy, and currently possessing more of the skills and training to gain access to and retain these positions, are more likely to benefit from project-related employment than are native people.

In relation to local business participation, as no evidence was provided on the capabilities or likelihood of northern businesses attaining the levels of opportunities estimated by IPL (NW) and its consultant, it is not possible to determine or quantify the benefits associated with northern business involvement in the proposed project.

However, although potential levels of involvement remain indeterminate, the Board believes that some degree of northern business participation would occur. It anticipates that the bulk of these business opportunities would take place during the relatively short construction period. The Board expects that annual project expenditures during the operations phase would not be significant throughout the impact area, but

could represent sizeable business opportunities for Fort Simpson and Norman Wells.

Since the proportion of native-owned businesses in the Northwest Territories part of the impact area is relatively small, the Board is of the opinion that most of the project's business benefits would likely accrue to the non-native segment of the population.

As to the potential increase in revenues accruing to the territorial government, the consultant estimated these to be \$2.5 million during construction and \$1.9 million per year during operations and maintenance. Although the GNWT's estimates were somewhat lower, the Board observes that these returns are small in comparison to total territorial revenues. Expected impacts on government revenues in Alberta would also not be significant.

It was suggested that these revenues would constitute a step towards economic self-sufficiency for the Northwest Territories. Witnesses from the GNWT did not share this view and believed instead that once costs were taken into account, any positive returns flowing to the territorial government would be slight.

It is a matter of record that previously the views of intervenors given in a previous hearing were divided between a "no development until negotiation of aboriginal rights" position and a "development now" stance. In this hearing, the Board has noted a convergence of the views of some major intervenors. The Dene, the Métis Association, the GNWT and the Dene Tha' Band agreed that certain conditions had to be met before they would seriously consider giving their approval to the IPL (NW) proposal. Without these conditions, the intervenors believed that the project would have adverse social impacts for the region, would negatively affect native peoples' renewable resource harvesting, and would ultimately result in a loss of control by Northerners over developments which shape their lives.

The Board is aware that the native people in the Northwest Territories portion of the impact area feel that the

negotiation of aboriginal rights would be prejudiced if the project were to proceed under present conditions. The Board agrees with the Applicant that if the issues of land claims and aboriginal rights were settled, the proposed project would be more beneficial from the region's perspective. In the absence of a land claims settlement, the native people viewed themselves as ill-equipped to deal with the demands and impacts of the project. This was compounded by the fact that they subscribed to the corridor concept which considers the proposed project as the first step towards further developments in the Mackenzie Valley. Similarly, in order to mitigate against this type of development occurring on an ad hoc basis, the GNWT suggested the prior development of a comprehensive land-use plan for the Mackenzie Valley.

It is the Board's assessment that under present circumstances any gains resulting from all phases of the proposed project would be small. During the construction period the existing business community in the impact area stands to benefit most from the project.

The Board believes that such benefits as would accrue to the native people of the impact areas would likely result from additional employment as well as some business opportunities generated by the proposed project. However, because of their limited access to skilled positions as compared to non-natives, and because of their present opposition to the project, the benefits to the native population in the Northwest Territories and Alberta would be of relatively minor proportions. As a corollary, they are also most likely, and least able, to bear the greater burden of the costs, whether they be social, economic, cultural or political, associated with the project.

The Dene Tha' Band's position is similar to that of the Dene in the Northwest Territories with the exception that should sufficient employment and business opportunities be made available to them, they believed that the benefits of the project could outweigh its costs.

In summary, it is the Board's assessment that the project holds the potential for generating some benefits in the impact area. However, these benefits cannot be quantified at this time. As to the negative impacts, also unquantifiable at this time, the Board notes that some of these costs, by their nature, cannot be fully ameliorated through compensation or mitigation. Moreover, the Board is of the opinion that irrespective of the actual level of negative impacts, the distribution of those would fall most heavily on the native people of the impact area who are least equipped to participate in the positive impacts of the project.

During the hearing, the Applicant's consultant indicated that local views regarding the project were not apparent prior to the filing of the application and thus were not incorporated into their study. Given that the majority of the impact corridor's population is of native origin, and that their views were not incorporated, the Board finds it difficult to agree with the Applicant that the regional benefits of the project, as proposed, would outweigh the negative effects.

8.4.4 Conclusions and Recommendations. It is the Board's view that, provided certain measures are taken, the proposed project is feasible and could be built without unduly taxing the infrastructure, services, facilities and resources of the impact area. In terms of regional socio-economic desirability, the Board is of the opinion that the project would not necessarily provide the region with a net positive benefit, but rather that its modest potential benefits and potential liabilities would balance out.

Should a certificate be granted, the Board would require that the following conditions be met:

- (1) that the Applicant prepare and develop, prior to construction, the key elements of each of the socio-economic plans and programs which the Applicant undertook to carry out. These would include those dealing with information-consultation-liaison, cultural and traditional

resource harvesting, opportunities for Northerners and northern businesses, effects on communities, regional effects, compensation and monitoring. These would have to respond to the Board's concerns as noted in preceding pages.

Given the importance of these plans and programs to the impact area, the Board believes it necessary that these be subject to public scrutiny and approved by the Board prior to implementation. In addition, given the importance of the fieldgate facilities on the regional socio-economic impact assessment of the project, the Board suggests that the Applicant make every effort to secure Esso Resources' cooperation in the preparation of these plans and programs.

- (2) that the Applicant report to the Board, within six months following the first twelve months of pipeline operation, on the actual socio-economic impact of the combined projects during the construction period and the first year of operation.

Apart from the above conditions that would be imposed pursuant to the National Energy Board Act, the Board suggests that the Applicant, the GNWT, and the appropriate federal government agencies, prepare and implement a plan for monitoring socio-economic impacts at the regional level during construction. Such a plan should have the capability of seeing that corrective measures were taken as required. In the Board's view the monitoring system should, once in operation, be independent of the Applicant.

While the views of the Board on regional socio-economic impact included that part of the impact area which lies in northern Alberta, certain circumstances within the area make it unique. It is thus important that the Applicant's plans and programs adequately reflect the following matters as well as those already discussed.

Although sympathetic to the Dene views, the attitude and views of the Dene Tha' Band differed from the views of

native people in the Northwest Territories part of the impact area. One of the major conditions for the Band's support of the project was that it be provided with the possibility of meaningful participation. The Board would require that the Applicant update its socio-economic data base on the Dene Tha' Band and on other Bands in the area that could potentially participate in the project. While the Board recognizes that the Applicant's consultant prepared their impact assessment primarily on the basis of an existing literature review, its applicability to the Dene Tha' Band is in some doubt. In recent years in the Northwest Territories part of the impact area, various studies, inquiries and hearings have permitted pertinent and relatively up-to-date information to surface. This is not the case for the Alberta portion of the impact area.

Given the importance of accurate information as a basis for the preparation of the Applicant's plans, should a certificate be issued, the Board would require that prior to or concurrent with the preparation of other plans and programs for the project, the Applicant update and file with the Board its socio-economic impact assessment of the northern Alberta part of the impact area ensuring that every effort would be made to involve the residents of the area.

In addition, the Board recognizes the concerns of the Dene Tha' Band with respect to the Applicant's compensation plans and procedures. The Board would expect that the compensation plans to be developed by the Applicant in accordance with the foregoing condition (1) would address, as fully as possible, the Band's concerns as expressed at the hearing.

CHAPTER 9
LAND CLAIMS

9.1 Introduction

Mr. Justice Thomas R. Berger, in his report of April 1977, summarized the philosophy of native land claims in the following passages:

Their claims must be seen as the means to the establishment of a social contract based on a clear understanding that they are distinct peoples in history. They insist upon the right to determine their own future, to ensure their place, but not assimilation, in Canadian life....

Their concerns begin with the land, but are not limited to it: they extend to renewable and non renewable resources, education, health and social services, public and overarching all of these considerations, the future shape, order and the composition of political institutions in the North.(1)

Against this background, the settlement of claims can be expected to involve far more than just the signing of agreements. Mr. Justice Berger predicted that it might take a generation or more to define and redefine the relationship with the native people and their place in Confederation.

Mr. Justice Berger opened the Mackenzie Valley Pipeline Inquiry in March 1975. The project was to be a unique examination of the terms and conditions to be imposed on the construction of any pipeline. In evaluating these terms, Mr. Justice Berger was to consider the social, environmental and economic impact of a gas pipeline and that of an energy corridor across the northern territories. To the native people, the Berger Inquiry was the first attempt to listen to their needs and desires at a grass roots level.

Through discussions with the Indian people, Mr. Justice Berger discovered that the problem at hand was not simply a debate about a gas pipeline and an energy corridor, but rather

(1) The Report of the Mackenzie Valley Pipeline Inquiry (April 1977) Vol. One, Chap. 11, p. 163

a debate about the future of the North and its people. The overwhelming response of the native communities to the inquiry was that "no right-of-way be granted to build a pipeline until native claims along the route, both in the Yukon and Northwest Territories, have been settled."⁽²⁾ The paramount question then was not if or how to build a pipeline but whether the native people would be able to participate in determining what the future of the North should be. The pipeline was viewed by the Dene as an important and powerful bargaining point for achieving their principal goal of self-determination. Their fears of how large-scale resource development might affect the social, economic and environmental structures in the North are strong. The question of impingement on aboriginal rights is of paramount concern to the resident populations of the North.

9.2 Evidence of the Applicant

IPL (NW) stated that it had no official position on native land claims as this is a matter to be resolved between the federal government and the native people. With respect to the Berger Inquiry and its recommended 10-year moratorium, the Applicant viewed Mr. Justice Berger's recommendation as applying only to the construction of a large-diameter gas pipeline as proposed by Canadian Arctic Gas Pipeline Limited and Foothills Pipe Lines Limited. Approval of that project would have entailed a commitment by the Canadian and Northwest Territories' governments to a program of large-scale frontier development which could not have been avoided. The Applicant voiced its understanding that Mr. Justice Berger's recommendations were not adopted as official government policy. However, the Applicant realized that they could not be ignored. In the Applicant's view times have changed; current national considerations and the proposed project size make this an entirely different project from that considered by Mr. Justice Berger.

(2) Ibid.

In the Applicant's view, the present proposal is for a small-diameter oil pipeline. It involves no commitment to large-scale development in the Mackenzie Valley, being simply a facility for the transportation of crude oil produced from a single crude oil field. The proposed pipeline would not traverse the Mackenzie Delta but would run south from the Norman Wells field located in the Valley itself. The Applicant stated that the pipeline could be constructed using existing technology previously employed in the construction of small-diameter pipelines in northern Alberta. These differences mean that physical disturbances, size of the construction crew and equipment used, could have far less impact on the land and on the socio-economic considerations involved.

Further, the Applicant contended that the construction and operation of a small-diameter pipeline would provide a healthy stimulus contributing to an orderly development of the infrastructure and would provide experience applicable to managing and controlling possible future large-diameter pipeline construction through this area. The Applicant believed that stimulus to local employment and business should be positive and would not have major disruptive impacts on northern residents. The implications of insecurity of crude oil supply and the current economic costs to the nation of importing foreign oil are far more serious considerations today than they were at the time of the Berger Inquiry; the project must be considered in the light of these changed circumstances.

The Applicant also stated that it saw no reason why the project could not proceed while native land claims negotiations were still in progress.

The Applicant was of the opinion that this pipeline project had served as a catalyst to advance negotiations on aboriginal rights and the development of self-determination for the Northwest Territories since little progress had been made until the filing of the proposed project.

The Applicant testified that the land required for the pipeline right-of-way and ancillary facilities, although selected prior to the settlement of land claims, would not necessarily be excluded from any later selection of land for use by native people.

The Applicant did not deny the importance of aboriginal rights and regional self-determination and shared the hope of most Canadians that these matters would be resolved fairly and expeditiously. Moreover, the Applicant stated that it would abide by the results of the settlement as finally determined.

9.3 Views of Intervenors

9.3.1 Canadian Arctic Resources Committee. CARC stated that it did not oppose the principle of the pipeline's construction per se, providing certain conditions were met. CARC believed that the pipeline would be in the interest of all Canadians, including Northerners. One of the conditions stipulated would be the settlement of native land claims. CARC supported the Dene Nation's opposition to this project as it would, at a minimum, prejudice land claims negotiations, if not set them back for years.

CARC felt that DINA, responsible for advancing native interests, could not be expected to negotiate a fair claims settlement, as it stood to be one of the main beneficiaries of the Norman Wells expansion as a result of DINA's one-third interest in the field.

CARC further stated that it should be recognized that there are demands on the strip of land along each side of the Mackenzie River, other than as a transportation corridor. Native uses must be recognized; many Indian organizations would want to claim land along the river within their land claim settlement.

CARC agreed that it was not up to the Applicant or the Board to deal with the native land claims question and its eventual resolution.

CARC recommended that the Board rule, as it did three years ago in its "Northern Pipelines" decision, that until there is a settlement of the Dene claim, it is not in the public interest to proceed with the Norman Wells pipeline.

9.3.2 City of Yellowknife. The City of Yellowknife stated that its council had decided not to adopt a position on Dene or Metis land claims. It indicated, however, that it agreed with the concept that a just, fair, equitable and quick settlement of aboriginal rights was necessary.

9.3.3 Committee for Justice and Liberty Foundation. CJL stated that the proposed pipeline from Norman Wells to Zama threatened to prejudice and weaken the native land claim negotiations position of the Dene and Metis by eroding their aboriginal and human rights. In final argument, CJL stated that the evidence of the Dene Nation clearly established that the Dene claim would be prejudiced in the following ways:

The Dene are denied the political rights to decide whether a pipeline should be built on their land, that is, to have their political institutions in place before a pipeline decision is made.

The Dene are denied the right to negotiate with the companies to increase economic benefit and decrease social costs for the Dene from a pipeline should it be built and in general the right to regulate the companies, that is, to have their economic and regulatory institutions in place before the pipeline is built.

The Dene are denied the right to have a strengthened Dene economy in place in their communities in the renewable resource sector prior to any further major projects in the non-renewable resource sector; this right was cogently supported by Justice Berger.

Building a pipeline prior to a settlement of claims will increase the non-Dene population in the Mackenzie Valley thereby eroding the ability of the Dene to get a just settlement of their claims.

Insofar as any settlement is likely to involve a categorization of land, or a land selection process, the further alienation of land that inheres in the pipeline

project, both directly and indirectly by encouraging further exploration or by increasing the probability of a Mackenzie Corridor, constrains the choices left to the Dene and thereby prejudices their claim.

The ad hoc process of evaluation of specific projects like this pipeline runs counter to any overall process of economic planning for the Mackenzie Valley which the Dene might wish to introduce; the approval and building of this pipeline with the disorder it would create would decrease the prospects for orderly planning in the future and prejudice the effectiveness of a future settlement.⁽³⁾

CJL further submitted that the opportunity to work out a land claims settlement would be thoroughly undermined if a pipeline were allowed to proceed before a settlement with the people through whose historic homeland this pipeline would pass. CJL stated that a settlement which was to confer on the Dene people the right to influence what takes place on their land would hardly be a meaningful document should a project such as the Norman Wells oil field expansion and pipeline be initiated on their land without the concurrence of the Dene and the Metis.

It also stated that for the federal government to by-pass normal legal processes and permit a pipeline to proceed through land the ownership of which is a matter of serious legal dispute, is to set an example of lawlessness by its own behaviour which would serve as an unfortunate model for those whom it must persuade to use lawful means to secure their ends.

9.3.4 The Dene Nation and the Metis Association. The position of the Dene Nation and the Metis Association remains unchanged from that expressed by Mr. Justice Berger in The Report of the Mackenzie Valley Pipeline Inquiry: "In my judgement, we must settle native claims before we build a Mackenzie Valley pipeline."⁽⁴⁾

(3) Ibid

(4) Ibid p. 192

The Dene and Metis asserted that to certificate this project, in advance of the settlement of native land claims being settled, would prejudice their claims. In addition to the six enunciations of prejudice mentioned by CJL, the Dene and Metis indicated that the Mackenzie Valley pipeline hearings had diverted their attention from the settlement of their aboriginal claims and placed the Dene Nation and the Metis Association in an adversarial position in relation to other northern residents and later between themselves.

The Dene and Metis submitted that approval of the present project would not further advance the claim settlement process despite the Applicant's suggestion that it would. Rather, it would likely have a disruptive effect and again place the native people, the Dene and Metis, in adversarial positions vis a vis the government and industry. They believed that it would destroy what faith there is in the integrity of the government and its processes.

The Dene Nation and the Metis Association mentioned in evidence that they supported the orderly development of northern non-renewable resources, which would bring real and lasting benefits to the people of the Northwest Territories. To say that they were not interested in development at all would be incorrect. However, before any large-scale development proceeded, a just and equitable aboriginal rights settlement would have to be in place.

9.3.5 Government of the Northwest Territories. The GNWT supported the Norman Wells field expansion and the construction of a pipeline to carry the increased production to existing markets, but with conditions.

One of these conditions would be that meaningful progress should first be made on the negotiation of aboriginal claims. The GNWT believed that to proceed with this project without sufficient progress in the negotiations of aboriginal rights could once again produce the kind of social, cultural, economic and political upheavals which were prevalent in the

North in the mid-seventies. The GNWT was not proposing that rights negotiations be completed, that settlement acts be passed in national and territorial legislatures, or that their implementation be completed before this or any other project proceeded. Rather, it advocated a compromise position urging all parties concerned to proceed with negotiations to a point where native people felt that their rights would be protected.

The GNWT emphasized that its policy on native land claims was developed in concert with the leadership of the Metis Association and the Dene Nation who, together, represent at least half of the population of the western Northwest Territories.

9.3.6 Hay River and Area Economic Development Corporation.

The Hay River and Area Economic Development Corporation stated that the question of aboriginal rights and native land claims were matters to be negotiated simultaneously with orderly development in the Northwest Territories. It argued that this would be required to ensure that the North not be further depressed economically through lengthy negotiations for just and reasonable settlements.

9.3.7 Inuvik and District Chamber of Commerce.

The Inuvik and District Chamber of Commerce stated that the proposed pipeline project would assist in the settlement of native land claims in the Mackenzie Valley in the same way other resource projects did in James Bay, other areas of Quebec, and Alaska. In those areas, the actual settlement of native land claims was given impetus by impending industrial development. The Inuvik and District Chamber of Commerce was of the opinion that the Norman Wells project could open the door for claims action on a "settlement with development" or "development with settlement" basis. As an example, it cited the COPE claims agreement in principle, covering the western Arctic, under which native land claim negotiations and ongoing petroleum resource activities and other resource development in the Mackenzie Delta and

Beaufort Sea areas were being carried out simultaneously with mutual support.

It gave further evidence that the Minister of DINA had stated that industrial developments in the North could not be held up by land claims discussions and that no development would be allowed to adversely affect a land claim. The Inuvik and District Chamber of Commerce also mentioned that not being ready for development could no longer be accepted as an excuse for claims inaction when little is being done to get ready for negotiations.

9.3.8 Town of Inuvik. The Town of Inuvik agreed with the Inuvik and District Chamber of Commerce in its support of the immediate development of the Norman Wells oil field expansion and pipeline project and believed that the project should provide a forward thrust in land claim negotiations or settlements or both.

9.4 Views of the Board

Although the federal government may be currently considering treaty rights, ownership, territorial jurisdiction, and other related questions, these are not matters with which the Board is involved.

The Board recognizes the importance of native land claims. However, on the basis of the evidence before it, the Board is not convinced that approval of the proposed pipeline project would in fact prejudice the settlement of native claims.

CHAPTER 10
CORRIDOR CONCEPT

10.1 Introduction

One of the major concerns expressed at the hearing was that the pipeline proposed by the Applicant would only be the first of a series of developments in the Mackenzie Valley corridor, that is, "the thin edge of the wedge." It was felt that the influence of the first trunk pipeline would shape a transportation corridor system and provide direction to the environmental and social future of the region. In cross-examination, CARC introduced the "Expanded Guidelines for Northern Pipelines." IPL (NW) was later requested to state whether these guidelines had been taken into consideration in the preparation of its application to the Board.

10.2 Expanded Guidelines for Northern Pipelines (1972 Pipeline Guidelines)

The 1972 Pipeline Guidelines were intended to reflect the government's views, at that time, on the construction and operation of oil and gas pipelines in the Yukon and Northwest Territories. The proposed guidelines dealt with, inter alia, the corridor concept and its environmental and social implications. These provided for the establishment of a "corridor" to enclose trunk oil and gas pipelines as well as other utilities.

Control of pipeline routes was required to minimize environmental and social disturbance, to ensure maximum benefits to northern residents and communities, and to channel resource development in accordance with government priorities. In developing the concept of a pipeline "corridor," the government of Canada recognized the need for flexibility in the choice of pipeline routing to allow for resource and market locations, economic considerations, engineering and construction requirements, as well as the severity and sensitivity of Arctic terrain conditions.

The concept of "one trunk oil pipeline and one trunk gas pipeline" within a "corridor" was enunciated with the intention of confining any environmental and social disturbance resulting from trunk pipelines to a narrow zone. It was also recognized that restriction of both oil and gas pipeline construction activities to a narrow "corridor" would lead to increased concentration of land use and the possibility of unacceptable environmental and social disruptions. The routing of oil and gas pipelines close to other transportation-communication systems, and the probability of the subsequent development of such systems adjacent to pipelines, could have added to the problems of maintaining the environment. Even minor disturbances arising from adjacent development activities might have reinforced one another, to produce cumulative ecological disruptions. Moreover, local shortages of gravel or other granular materials could have resulted from close spacing of construction projects. In addition, under some circumstances, the differing terrain requirements of oil and gas pipelines might have prevented adjacent routings. Thus, caution would have had to have been exercised in the selection of specific routes or "corridor" boundaries.

These guidelines were not intended to be construed as replacements for the requirements of applicable acts, orders or regulations.

10.3 Evidence of the Applicant

The Applicant testified that the proposed pipeline route had been selected on the basis of the requirements for this particular pipeline and that the possibility of any future pipeline was not a criterion in route selection.

The Applicant further testified that it was familiar with the 1972 Pipeline Guidelines but it understood that these had been issued to indicate the general scope of the elements

that should be considered in designing a pipeline to be constructed in northern climates. At the time that these were developed two or more large-diameter pipelines were being considered simultaneously. Proposed were two major gas and oil trunk lines coming down from the Delta and along the Mackenzie River. The Applicant also indicated that during the early seventies there were no regulations or guidelines as to how such major trunk pipelines should be designed and constructed.

Under cross-examination the Applicant stressed that, unlike earlier proposals for major trunk gas and oil pipelines, its proposal was for a single 323.9 mm diameter line of pipe. However, the Applicant did agree that a future oil pipeline from the Beaufort Sea, along the Mackenzie Valley, could be a possibility.

The Applicant noted that the route selected for the Norman Wells line would not necessarily govern the location of any future pipeline should one be considered, and stated that the impact of each project would have to be judged on its own merits.

The Applicant also stated that, in the preparation of its application, it had complied with the Board's Oil Pipeline Regulations and environmental requirements contained in Part VI of the Schedule to the Rules of Practice and Procedure, presently in force.

The Applicant also submitted in evidence a letter from DINA setting out regulations to be followed in making an application for the construction of the proposed Norman Wells to Zama pipeline. The Applicant stated that the 1972 Pipeline Guidelines were not included in the lengthy list of regulations set out by DINA.

Nevertheless, the Applicant submitted that generally it had met the requirements of the 1972 Pipeline Guidelines although it did not look upon the guidelines as a current expression of government policy.

10.4 Evidence of Intervenors

10.4.1 Canadian Arctic Resources Committee. CARC stated that the 1972 Pipeline Guidelines must be adhered to not only for regulatory reasons but because they provided a good basis for planning the use of renewable and non-renewable resources in the region.

CARC recommended that the Board delay the issuance of a certificate to IPL (NW) until the company had complied with the 1972 Pipeline Guidelines. It recommended that the Board request the Applicant to assess the suitability of its proposed route for the nearby routing of other pipelines, in terms of the environmental, social, and terrain engineering consequences. The assessment should include an analysis of the cumulative environmental and social impacts of building several pipelines in the same corridor.

CARC further stated that the proposed Norman Wells pipeline must be seen as the first step in the creation of an energy corridor in the Mackenzie Valley. At the very minimum, the Norman Wells pipeline would establish a right-of-way for future pipelines. For this reason CARC suggested that the proposed pipeline must be located taking into account the possibility of a future parallel oil pipeline.

CARC's view was that the proposed pipeline's existence would stimulate oil exploration in the Mackenzie Valley since its existence would be taken into consideration in any oil transportation project originating in the Mackenzie Delta or Beaufort Sea areas.

In final argument, CARC stated that during the course of the hearing the following had become evident:

- (1) more pipelines would be built in the Mackenzie Valley;
- (2) the 1972 Pipeline Guidelines have not been "repealed";
- (3) those guidelines require the assessment of cumulative environmental effects;

- (4) cumulative environmental effects have not been assessed although the information to do so is available; and
- (5) without coordination through land use planning, each new initiative will compete for space and local resources.

CARC agreed that although the Board had promulgated a number of regulations since the 1972 Pipeline Guidelines were issued, these in many cases cover similar ground but do not specifically address the establishment of an energy corridor in the Mackenzie Valley, nor the cumulative and synergistic environmental and social effects which might ensue. It concluded, therefore, that the Applicant still had the responsibility to meet the 1972 Pipeline Guidelines.

Under cross-examination, CARC stated that the 1972 Pipeline Guidelines were just that, guidelines, and were never made regulations. CARC also agreed that the 1972 Guidelines invited public comment, which implied that further changes might be made. CARC was also aware that the Applicant had not been requested by the Board to comply with the requirements of the 1972 Pipeline Guidelines.

10.4.2 Committee for Justice and Liberty Foundation. CJL was of the opinion that the concluding judgements of the Board in its "Reasons for Decision, Northern Pipelines, 1977" and the conclusions of the Berger Commission, both of which were based upon substantial social, economic, and environmental impact studies, were applicable to the proposed Norman Wells pipeline. One of the premises upon which this contention rested was that the proposed oil pipeline must be viewed as part of a plan for the establishment of an energy corridor along the Mackenzie Valley.

In its final argument, CJL indicated that in its application before the federal environmental assessment and review panel, the Applicant had stated that the proposed

pipeline would provide a primary transportation route for subsequent oil and gas development, as well as the first-in-place development for a resource corridor in the Mackenzie Valley.

CJL believed that the studies and judgements of the Berger Commission and the Board in 1977 were not based on the construction of a single pipeline only. Rather, the primary concern was with the establishment of what Justice Berger called the "corridor concept," whereby the construction of one pipeline would open up a transportation and energy corridor through the Mackenzie Valley.

It was CJL's contention that the federal government's Pipeline Guidelines of 1970 and 1972 provided an outline for this concept. Together, these constituted what the Berger Commission called "the cornerstone of Canadian policy with regard to the construction of northern pipelines." The underlying assumption was that an oil pipeline would be constructed first followed by a gas pipeline in the Mackenzie Valley or vice versa. The guidelines envisaged, in addition to pipelines, a whole transportation corridor with roads, a railroad, hydro electric transmission lines, and telecommunication facilities. CJL believed that the cumulative impact of all the above facilities on the social, economic, and environmental future of the North would be enormous.

Thus, CJL argued that, regardless of its size, the proposed Norman Wells oil pipeline would likely serve as a triggering mechanism for the construction of a major energy and transportation corridor through the Mackenzie Valley. It further argued that the construction of the proposed oil pipeline would likely be followed by the construction of a gas pipeline and related transportation facilities. This, in CJL's view, was the reason why the 1972 Pipeline Guidelines called for an examination of the social, economic and

environmental consequences of an energy corridor rather than of any single pipeline project. As the Berger Commission noted, any attempt to break down the policy and to assess the impacts in a piecemeal fashion, should be resisted.

10.4.3 Dene Nation and the Metis Association. The Dene Nation and the Metis Association adopted CARC's statements on the corridor concept as enunciated in the 1972 Pipeline Guidelines.

The Dene Nation and the Metis Association indicated that these statements had been tabled in the House of Commons and therefore were an expression of government policy. They suggested that, although Board regulations now exist, the 1972 Pipeline Guidelines have never been repudiated and constituted a rational and prudent tool for the evaluation of the impact resulting from the construction of a northern pipeline.

In conclusion, the Dene Nation and the Metis Association stated that the Board, in conducting its assessment of this application, should review and apply the 1972 Pipeline Guidelines, the corridor concept which is integral to them, and the cumulative impact of several pipelines built and operating in the Mackenzie Valley.

10.4.4 Government of the Northwest Territories. The GNWT supported the expansion of the Norman Wells field and the construction of a pipeline to carry the increased production to existing markets, under five conditions.

One condition would be the establishment of a joint territorial/federal authority to prepare a non-renewable resource development plan for the Mackenzie Valley and Delta, as well as for the Beaufort Sea region.

The GNWT did not agree with the Applicant's position that the Mackenzie Highway Development Area adjacent to the Mackenzie Valley and along the planned route of the highway is, or was intended to be, a transportation corridor. Rather, it believed that it was established to allow the territorial

government to regulate secondary development associated with the highway and was not part of a land planning process.

The GNWT stated that by reacting to such proposals as the proposed Norman Wells to Zama pipeline, the federal government was deferring or abdicating its responsibility for comprehensive planning. Its opinion was that future pipelines or other linear developments were likely to follow the route of the first project. The territorial government considered that, if there were to be a transportation or energy corridor in the Mackenzie Valley, the best route should be selected prior to the building of the first pipeline and that the best route might not parallel the Mackenzie Highway route.

In conclusion, the GNWT sought the postponement of a federal decision to approve this project until its five conditions had been adequately addressed by the federal government and the people of the Northwest Territories.

10.5 Views of the Board

The Board acknowledges the intended purpose of the 1972 Pipeline Guidelines, as they pertain to trunk oil and gas pipelines within a "corridor." For the purpose of the exercise of its jurisdiction over the project for which certification is sought, the Board does not consider these guidelines to be binding on the Applicant. The Board notes that the Applicant's adoption of certain of the guidelines is useful to the project.

The Board is satisfied that evidence presented by the Applicant to meet the requirements of the National Energy Board Act, the Board's Oil Pipeline Regulations, the environmental provisions contained in Part VI of the Schedule to the Board's Rules of Practice and Procedure, and the provisions of the Board's Socio-Economic Guidelines, provide the appropriate basis upon which to assess the Applicant's proposal for the construction of the subject oil pipeline.

COST-BENEFIT ANALYSIS

11.1 Evidence of the Applicant

The cost-benefit study submitted by IPL (NW) assessed the net economic benefits to Canada of developing the Norman Wells oil reserves and marketing the product in eastern Canada by assessing the direct costs and benefits associated with the production facilities and those associated with the proposed project.

IPL (NW) evaluated the proposed project over the period 1980 to 2008. In calculating the direct benefits, IPL (NW) took into account revenues from the sale of crude oil and NGL together with the potential saving in oil import compensation payments resulting from the displacement of imported crude oil by similar volumes produced from Norman Wells.

Revenues from the sale of crude oil and NGL were based on prices in Montreal, netted back to Zama Lake by deducting the average tariff from Montreal to Edmonton and then deducting fractionation costs and the average tariff of Rainbow Pipe Line. The benefits from the savings in oil import compensation payments were calculated by multiplying the oil import compensation rate by the project's oil and NGL volumes, excluding ethane. The NGL volumes were converted to an equivalent amount of crude oil on the basis of heat content.

In determining total costs, IPL (NW) included the costs of production facilities, pipeline construction costs and operating costs over the life of the proposed project.

Alternatively, IPL (NW) considered not proceeding with the project at this time. This meant using the oil from Norman Wells at a time so far in the future that it would have a negligible present value.

On the above premises, the Applicant estimated that the net economic benefits to Canada of the proposed project would be \$1.4 billion (present value to 1980 in 1979 dollars

based on a ten percent rate of discount). Sensitivity analysis on the rate of discount indicated that the net economic benefits would rise to \$2.9 billion based on a five percent real rate of discount and drop to \$719 million based on a fifteen percent real rate of discount.

The Applicant noted that all the benefits and costs of a project cannot easily be quantified; therefore, the quantified net economic benefits plus non-quantified beneficial effects must be weighed against the non-quantified negative effects. Among the benefits not quantified in the analysis were security of supply, employment of otherwise unemployed resources and the effect on balance of payments.

The Applicant argued that, in the absence of the proposed project, a disruption of oil supply would result in a greater loss of consumer surplus than would otherwise be the case. It also argued that given the current level of unemployment in Canada, the IPL (NW) project might be able to employ previously unproductive workers in the economy, thus decreasing the opportunity cost of labour and increasing the net economic benefits of the project.

In relation to the Canadian balance of payments, the Applicant stated that the reduction in oil imports resulting from the project would reduce Canada's foreign exchange requirements. This saving would allow some appreciation of the Canadian dollar or would be available for other uses.

The environmental and regional socio-economic impacts were listed as unquantified social costs against which the net economic benefits of the projects must be weighed.

11.2 Evidence of Intervenors

CJL, in its final argument, stated that the cost-benefit analysis as a whole suffered limitations and that the Applicant's study in particular was "deeply flawed." The inability of analysts to quantify all costs and benefits, and the fact that cost-benefit analysis did not look at the regional or distribution effects of the project were given as examples of the limitation of cost-benefit analysis.

In relation to the IPL (NW) study, CJL argued that using a discount rate to arrive at net economic benefits is not equivalent to looking at alternative uses of capital. Thus, alternative uses of capital should have been explicitly considered. Investment in conservation measures was given as an alternative to the proposed project which in CJL's view would cost less, produce more permanent jobs and relieve our balance of payment problems.

11.3 Views of the Board

In the Board's view, revenue from the sale of oil and NGL at Zama Lake would be more accurately represented by deducting incremental rather than average tariffs to eastern Canada to arrive at the net back prices at Zama Lake.

The saving in oil import compensation payments estimated by IPL (NW) were based on crude oil and NGL volumes. In the Board's view, only the savings from crude oil volumes should be considered since Canada does not import substantial quantities of NGL.

Because of the small volumes that would be generated from this project, the Board does not consider the benefits from increased security of energy supply to be significant.

The Board also considers insignificant the increased net benefits derived by using opportunity cost of labour rather than the actual cost of labour.

The Board agrees with the Applicant that benefits from the effect of this project on the balance of payments are difficult to quantify.

Regarding the criticism of cost-benefit analysis as a whole by CJL, the Board recognizes that such studies provide one perspective (a national one) and do not deal with the distributional aspects of the project. Nevertheless cost-benefit analyses are important as an assessment tool and the Board notes that regional socio-economic and environmental studies were undertaken by the Applicant to provide other perspectives.

TABLE 11.2.3

Board's Estimates of Net Benefits to Canada
resulting from IPL (NW)'s project

(Present value in billions of 1979 dollars)

	Discount Rate		
	<u>5 Percent</u>	<u>10 Percent</u>	<u>15 Percent</u>
Base Case*	\$2.54	\$1.31	\$.71
<u>Changes to the Base Case</u>			
Capital & Operating Costs			
+10%	2.47	1.26	.67
+25%	2.37	1.18	.60
Production Volumes			
-10%	2.22	1.13	.60
-25%	1.73	.86	.43
Crude Oil Price			
+5% per annum	5.85	2.85	1.52

* Base case corresponds to the capital expenditure and production volumes in the application.

In the Board's view, it is neither necessary nor possible for cost-benefit analysis to consider all possible alternative uses of capital explicitly. Discounting the net economic benefits accomplishes this. The range of discount rates can be used to cover differing opinions of the opportunity cost of capital.

As part of the Board's assessment of the evidence, it made its own cost-benefit analysis of IPL (NW)'s proposed pipeline project. The Board compared the benefits and costs of the proposed project with the alternative of not proceeding with the project.

In estimating the net benefits, the Board considered the value of crude oil from Norman Wells to be the value of imported crude displaced by the project and the revenue from NGL sales domestically. The principal costs considered were construction costs of the proposed pipeline and production facilities, costs incurred to modify downstream pipelines, and the operating costs for the pipeline and production facilities.

On the basis of the above, the net economic benefits of IPL (NW)'s proposed pipeline project are \$1.3 billion (net present value at a ten percent discount rate in 1979 dollars). The sensitivity analysis carried out by the Board on discount rates, oil price, volume and costs indicated positive net economic benefits in all cases as may be seen from Table 11.2.3.

CHAPTER 12
TARIFF MATTERS

12.1 Introduction

The Applicant applied pursuant to Part IV of the Act for approval of the form and content of a "full cost of service" tariff and of the proposed rules and regulations governing the transportation of petroleum as set out in Schedules A and B to the "Norman Wells Pipe Line Agreement." The Applicant stated that the Board's decision on the application under Part IV of the Act was important since the form and content of the tariff, including the rate of return on equity that would apply over the life of the project, are cornerstones of the "Norman Wells Pipeline Agreement," and are fundamental to IPL (NW)'s willingness to construct the pipeline.

The integral parts of the agreement are the full cost of service tariff, which provides the credit support necessary to finance the pipeline, and the rules and regulations governing the transportation of petroleum.

The tariff issues raised through cross-examination at the hearing covered the following aspects of the agreement:

- (1) return on equity;
- (2) determination of shipper's allocable share of IPL (NW)'s actual full cost of service;
- (3) operating expense budget;
- (4) allocation of common costs between IPL and IPL (NW);
- (5) rules and regulations governing the transportation of petroleum;
- (6) extended outage.

12.2 Return on Equity

12.2.1 Evidence of the Applicant. The Applicant proposed a method of regulation representing a departure from the Board's traditional "return on rate base" method of regulation. IPL (NW) proposed that it earn a 16 percent constant dollar return on an equity amount defined in the "Norman Wells Pipeline Agreement."

This definition is as follows:

'Equity' means the sum of:

- (a) that portion of the cost of the pipeline system which shall be financed by common stock as provided for in Article 7 herein and properly recorded in Account 90;
- (b) the amounts relating to the pipeline system properly recorded in Account 91; and
- (c) the amounts properly recorded in Account 92 arising from:
 - (i) earnings retained for financing minor capital additions;
 - (ii) interest on the equity funds used during construction of the pipeline system; and
 - (iii) the difference between the full cost of service and the amount actually paid to IPL (NW) by shippers during the 'first operating year.'

The Applicant was questioned on the fact that, with the exception of the item referring to minor capital additions, the dollar value of equity as defined and its return would not change from the second year of the tariff onward. This appeared to lead to a situation where items would be included at full value in the equity base upon which return would be calculated despite the fact that they would have been recovered through depreciation and amortization in the cost of service. In response to this, the Applicant stated that it was contemplated that annual dividends would be equal to earnings and therefore the shareholders would not be receiving those amounts recovered through depreciation and amortization.

Concerning the return on equity, the Applicant stated in evidence that the "Norman Wells Pipeline Agreement," including the return component, was an integral part of the financing plan for the project. The Applicant also indicated that it had considered a rate base form of regulation, but concluded that such a method would increase the return required by equity investors.

12.2.2 Views of the Board. Although there was little evidence to support a departure from a return on rate base form of regulation, the Board does not find the Applicant's approach unreasonable. The Board recognizes that at present only one shipper, a party to the agreement, would be affected by the tariff.

With respect to the definition of equity, the Board is unable to conclude that the failure to adjust the amount in equity as defined would not lead to earning a return on amounts which would already have been recovered through the cost of service. Therefore, it would require that paragraph (c) of the definition of equity in the "Norman Wells Pipeline Agreement" be amended by inserting the words "the unamortized balance of" at the beginning of each of items (ii) and (iii).

The Board notes that a portion of the original equity investment as per paragraph (a) in the definition of equity is also recovered through depreciation. However, considering the magnitude of the recovery and the fact that the "Norman Wells Pipeline Agreement" was negotiated at arm's length between the shipper and the builder of the line, the Board holds the view that only the aforementioned change need be made to the definition of equity.

The Board accepts the method of regulation and the tariff, including the 16 percent return on equity, proposed in the agreement with the previously stated changes in the definition of equity. However, the Board, in arriving at just and reasonable tolls, must be concerned that the tariff will be fair to all parties rather than just the single prospective shipper and the project sponsor. Therefore in indicating its acceptance of the method of regulation the Board notes that the method may be reviewed at any time that it becomes evident that other shippers intend to use the pipeline.

12.3 Determination of Shipper's Allocable Share of IPL (NW)'s Actual Full Cost of Service

12.3.1 Evidence of the Applicant. Although the Applicant stated that the pipeline is to serve a single oil field and a single shipper, a number of provisions in the agreement have been written to accommodate more than one shipper. One such provision, which is perhaps the most significant, is the determination of a shipper's allocable share of IPL (NW)'s actual full cost of service.

This procedure is described in section 8(b) of schedule A to the agreement and reads as follows:

The shipper's allocable share of IPL (NW)'s actual full cost of service which shall be determined by multiplying such full cost of service by a fraction, the numerator of which is the volume of petroleum delivered by IPL (NW) to that shipper during the operating year and the denominator of which is the aggregate of volumes of petroleum delivered by IPL (NW) to all shippers during such operating year.

The Applicant stated under cross-examination that it had not discussed the agreement, nor the terms and conditions thereof, with any potential shippers other than Imperial.

12.3.2 Views of the Board. One matter of concern to the Board in relation to section 8(b) is that a shipper's actual share of the cost of service at year end could be considerably different from that projected at the beginning of the year, by virtue of the fact that a shipper's share of the actual cost of service for an operating year depends not only on its own performance, but also on the actions of all other shippers on the pipeline.

Since these provisions have not been discussed with potential shippers and since the present parties are in agreement, the Board would accept these as they are written until such time as additional shippers indicate a desire to use the pipeline and are in a position to express their views on these matters.

12.4 Operating Expenses

12.4.1 Evidence of the Applicant. The Norman Wells Pipeline Agreement stipulates that there would be a provisional toll based upon estimates of volumes and cost of service for a given year. Under cross-examination, the Applicant indicated that it had contemplated that the Board would have to approve the interim tariff (that is, the provisional toll), thereby approving the operating expense budget.

12.4.2 Views of the Board. The Board would require the Applicant to submit for review and approval its estimate of the full cost of service and the provisional toll prior to the beginning of each operating year.

However, since the Board is not convinced that the proposed system would provide sufficient control of actual operating costs, it is of the view that there must be a mechanism in place which would ensure that no operating expenses in excess of budgeted amounts would be included in the actual full cost of service until such amounts had been approved by the Board. Therefore, the Board would require that any operating expenses in excess of the approved budget not be included in IPL (NW)'s actual full cost of service until such amounts had been approved by the Board.

12.5 Management Agreement and Allocation of Common Costs Between IPL and IPL (NW)

12.5.1 Evidence of the Applicant. Under cross-examination, the Applicant stated that the management agreement between IPL and IPL (NW) had been developed in concept, but would not be finalized prior to the issuance of any certificate the Board might be prepared to grant. This agreement would include provisions relating to the allocation of common costs between IPL and IPL (NW).

The Applicant stated that the "Norman Wells Pipeline Agreement" provided Imperial with a right to review and comment on the terms of the management agreement prior to its execution. In addition, the Applicant stated that it would be agreeable to submitting the agreement to the Board for its approval.

12.5.2 Views of the Board. The Board would require the Applicant to submit the executed management agreement for Board approval.

12.6 Rules and Regulations Governing the Transportation of Petroleum

12.6.1 Evidence of the Applicant. The Applicant stated that the rules and regulations governing the transportation of petroleum in its pipeline were substantially the same as the rules and regulations which at present apply to the transportation of crude oil and natural gas liquids through the pipeline system of IPL.

12.6.2 Views of the Board. The Board finds these rules and regulations as they apply to IPL (NW) acceptable, but recognizes that minor revisions might be required should additional shippers wish to transport oil through the proposed pipeline.

12.7 Extended Outage

12.7.1 Evidence of the Applicant. Included in the tariff is a provision whereby a rebate of a shipper's proportionate share of the return on equity would be triggered by an interruption in service, provided that the interruption was caused by negligent acts of IPL (NW) or its employees and was of more than 60 days duration. The Applicant was questioned as to why this rebate did not also include the income taxes associated

with the reduced return on equity of the company. The Applicant's response was that the rebate of the associated income taxes would occur automatically as a result of proper accounting procedures.

12.7.2 Views of the Board. While the Board understands that income taxes would be reduced as a matter of course from a reduced return on equity, the Board does not accept the view that the rebate to the shippers would automatically reflect the reduced income taxes which would flow from a lower return. Therefore, the Board would require that the extended outage provision be amended to include associated income taxes when calculating the credit to a shipper's cost of service resulting from an extended outage.

CHAPTER 13
PUBLIC INTEREST, POLICY AND OTHER MATTERS

13.1 Evidence of the Applicant

The Applicant stated that the proposed pipeline project would bring a significant new source of domestic crude oil supply to Canadian domestic markets, resulting in substantial benefits to both the regional and national public interests. It was the Applicant's position that, although the throughput volumes were in the order of 3975 m³/d and represented only approximately one percent of the total Canadian requirement, they represent approximately seven percent of Canada's daily imported volumes when compared to the average daily imports of foreign crude oil into Canada. The net result would be to reduce the burden on all Canadian taxpayers as equivalent volumes of foreign crude oil imported at world prices were displaced. The Applicant stated that as soon as the project came onstream this reduction would equate to a saving of approximately \$1 million per day in foreign exchange payments. The Applicant also stated that the throughput volume of 3975 m³/d from the Norman Wells project represented 20 percent of the volume of synthetic crude oil produced in one tarsands plant with a 19 875 m³/d capacity.

The Applicant stated in its final argument that the project would also have a significant conservation component since it would increase the ultimate recovery of crude oil from the Norman Wells formations from 17 to 42 percent by using waterflood techniques, and would eliminate the flaring of refinery by-products and natural gas liquids. Esso Resources testified that with this project and the associated use of waterflooding there would be more supplies available for the territories than without it, inasmuch as the producibility of the field would be at a higher level for a longer period of time than it would be without it. Esso Resources further testified that, for economic reasons, it did not propose to increase the annual capacity of the existing refinery.

The Applicant testified that, because of the level of Canadian content in all capital expenditures, both for construction and operation of the project, substantial benefits would accrue to Canada. Foster Research, in conducting a cost-benefit analysis for the Applicant, estimated that there would be a net social benefit to Canada of \$1.4 billion in 1979 constant dollars discounted at 10 percent over the life of the project. This benefit, according to the Applicant, would include substantial savings in oil import compensation payments, direct and indirect employment generated by the combined projects, and tax revenues and royalties paid to the federal and provincial governments. It also included benefits resulting from the activity generated in various sections of the Canadian economy from the supply of equipment, materials and services that would be required by the combined projects.

The volumes of crude oil to be transported by the Applicant for ultimate delivery to domestic markets would make a positive contribution to the security of energy supply to those markets at a time when conventional crude oil production in western Canada was declining. Moreover, in final argument the Applicant stated that the volumes to be transported through the proposed pipeline would increase the utilization of existing connecting pipelines and therefore would increase the economic efficiency of operation of such pipelines to the benefit of Canadian consumers generally.

Regarding socio-economic benefits associated with the project, the Applicant submitted, as part of its application, a socio-economic policy statement and action plan together with major policies and commitments that would be implemented to maximize the anticipated benefits to Canadians. The Applicant stated that a number of programs would be instituted to maximize opportunities for northern residents, including a training and employment program. A northern business opportunities plan would also be developed to ensure that northern communities and northern businesses are afforded a preference when bidding on business opportunities associated

with the project. The net result was that through these business opportunities the project would make a substantial contribution to the economic self-sufficiency of the North. In addition, the Applicant stated that during the peak construction period season of 1981-82 approximately 1,200 workers would be employed on pipeline construction, construction of permanent facilities, and supporting services, with special emphasis being given to the employment of northern residents. The Applicant estimated that the average annual operating expenditures for the pipeline over the first five years would be \$14.3 million and that taxes to be paid to all levels of government would exceed \$175 million in the first ten years of operation.

As for regulatory requirements, the Applicant stated that it had complied with all of the Board's requirements, including the National Energy Board Act, the Oil Pipeline Regulations and environmental requirements contained in Part VI of the Schedule of the Rules of Practice and Procedure. Regarding the recommendations of the Berger Commission, the Applicant stated under cross-examination that these recommendations were made with respect to a major natural gas pipeline development originating in Alaska and crossing through Canada to serve markets in the United States. Compared with the Norman Wells project, the Applicant stated that its proposal was a completely different project, in a completely different time frame, of a completely different scale, and with different priorities. Because the line would be buried and would operate at ambient temperature, it would have less of an environmental impact than that associated with the northern gas pipeline project. It was the Applicant's opinion that the Berger report dealt mostly with the sensitive areas of the northern Yukon and Mackenzie Delta and only partly with the Mackenzie Valley. The Applicant stated that the Norman Wells project would cover only approximately 50 percent of the route of the Canadian Arctic Gas Pipe Line proposal and would be

located in the area of the MacKenzie Valley that has been the subject of previous development and therefore relatively well studied.

Under cross-examination by CARC, the Applicant stated that, should a commercial oil discovery be made along the proposed route, the Applicant would at the time make the necessary application to the Board for an expanded oil transportation system, since it would improve the economics of the overall project. When asked if it was the Applicant's intention to abandon the Norman Wells project, it responded in the negative. The Applicant stated that, after the amortization of the project in 20 to 25 years, IPL (NW) would not abandon the project if there were oil available.

CARC further asked whether the Applicant had given consideration to using the Norman Wells pipeline facilities to move natural gas liquids from the Beaufort Sea. The Applicant responded that these facilities could be used; however, no studies had been undertaken on this subject. Should threshold volumes be established in the delta, the Applicant stated that it would then consider this alternative.

With respect to the question of ownership of oil at Norman Wells and the possibility of conflict of interest because the Government of Canada was part owner of the oil, the Applicant in response to questions posed by CJL stated that no such situation existed. Imperial would be a shipper on this line and IPL (NW) had an agreement with Imperial and, as a public carrier, has had no direct dealings with the federal government.

13.2 Evidence of Intervenors

In the direct evidence filed with the Board by CJL, questions arose as to whether or not an essential element in the decision of the Board to issue a Certificate of Public Convenience and Necessity was to determine the kind of native claims settlement that would contribute to meeting the "public convenience and necessity" objective.

CJL further suggested that the Board's first priority in determining "public convenience and necessity" was to have a

clear idea of what constitutes such convenience and necessity. It was CJL's opinion that public convenience and necessity requires the Board to decide whether the project would contribute to the well-being and the quality of life of the people of the North most affected by the project and all Canadians.

CJL further stated in its evidence that, as a means to this end, a decision-making framework was needed weighing equally all of the impacts of the project, which would lead to the determination of whether, on balance, the project would produce net benefits.

CHAPTER 14
DISPOSITION

14.1 Introduction

Throughout the previous chapters of this report, the Board has set out a summary of the evidence, submissions and arguments of the Applicant and intervenors, and has expressed its own views and conclusions on a wide variety of issues that were raised at the public hearing of the application by Interprovincial Pipe Line (NW) Ltd. for a Certificate of Public Convenience and Necessity to construct and operate an oil pipeline extending from Norman Wells in the Northwest Territories to Zama, in the Province of Alberta, and for an order establishing the form and content of the rates, tolls and tariffs for the transportation service the company would perform.

The Board has carefully considered all of the evidence, submissions and arguments made before it concerning the application for a Certificate of Public Convenience and Necessity under Part III of the Act and for a Tariff Order under Part IV.

14.2 Application for a Certificate of Public Convenience and Necessity under Part III of the National Energy Board Act.

When considering an application for a Certificate of Public Convenience and Necessity, the Board is required to take into account all such matters as to it appear to be relevant, and without limiting the generality of the foregoing, the Board may have regard to the following:

- (a) the availability of oil to the pipeline;
- (b) the existence of markets, actual or potential;
- (c) the economic feasibility of the pipeline;
- (d) the financial responsibility and financial structure of the Applicant, the methods of financing the line and the extent to which Canadians will have an opportunity of participating in the financing, engineering and construction of the line; and

(e) any public interest that in the Board's opinion may be affected by the granting or the refusing of the application.

The Board has taken into account all matters that appeared to it to be relevant in considering the application for a certificate and in reaching its decision in this matter. The Board is satisfied that the pipeline facilities applied for by IPL (NW) are and will be required by the present and future public convenience and necessity.

As to the availability of crude oil for the proposed pipeline facilities, the Board finds that the Applicant has established that there will be an adequate supply through the Norman Wells oil field development project. While the Board's forecast of crude oil production is slightly lower than that forecast by the Applicant in the early years and slightly higher during the later stage, the Board finds that both forecasts are within the margin of error that could be assigned to either forecast methodology used and is satisfied that the development proposal is realistic and the production forecast reasonable.

With respect to markets to be served by the pipeline, because it is expected that the production of Canadian crude, both conventional and synthetic, will fall short of meeting Canada's long-term demand requirements, the Board finds it reasonable to assume that a ready market will be available in Canada for the light crude oil and for the NGL produced as a by-product of Norman Wells crude oil production. Moreover, the Board finds that under the prevailing circumstances the volumes of crude oil to be transported by the proposed pipeline for ultimate delivery to domestic markets will make a positive contribution to the security of energy supply.

Although it was argued that the relatively small volumes of oil to be produced at Norman Wells could be saved if efforts were directed at conservation, the Board finds that a

market is expected to be available regardless of steps which may be taken to conserve oil. The Board considers efforts towards conservation of oil necessary, and in this regard the Board sees advantages in the Norman Wells oil field development project, because of which there will be available sizeable additional volumes of NGL and heavy distillates which would otherwise be flared. Furthermore the reduction of the gas-oil ratios under the proposed expanded waterflood scheme should lead to a substantial increase in the ultimate recovery level and therefore in the production of crude oil.

The Board has examined the evidence adduced on right-of-way matters and is satisfied that IPL (NW)'s proposed facilities can be built with minimal interference with existing or potential land uses, including hunting and trapping, in light of the procedures proposed and to be undertaken in this regard. The Board is generally satisfied with the location of the route for the proposed pipeline facilities although it recognizes the possible need for relocation of pumping station sites during final design.

After a careful review of the evidence, the Board concludes that the project is feasible from an engineering point of view. The Board agrees with the selection of a conventional buried mode design for the pipeline and the Board finds satisfactory both the selection of a 323.9 mm. diameter pipeline and the proposed pumping station configurations. The Board recognizes that before completion of final design, further information would become available from additional geotechnical and other studies, which information should be used for final design purposes.

In Chapter 5 of this report, the Board has expressed its views with regard to the Applicant's geotechnical and geothermal assessments, thaw settlement and frost heave analyses, slope stability and river crossing designs. On the basis of the evidence, the Board is convinced that the project is feasible from a geotechnical and geothermal point of view.

However, the Board is of the view that a complete and comprehensive terrain investigation is fundamental to an accurate geotechnical and geothermal assessment of the proposed pipeline route. The Board recognizes the preliminary nature of the geotechnical and geothermal assessments performed by the Applicant but is satisfied with the analyses completed at this stage. The Board agrees with the Applicant that further geotechnical and geothermal assessments, through the analysis of site-specific subsurface investigations, should be an initial step in the formulation of final design.

Although the Board is generally satisfied with the treatment given by the Applicant to geotechnical and geothermal design at this stage, the Board has expressed, in Chapter 5 of this report, several concerns in areas where it feels that further investigations are required to ensure an optimum design of the system from a geotechnical and geothermal point of view. Accordingly, there should be conditions in the certificate requiring that appropriate steps be taken to provide the best information possible for purposes of final design of the pipeline system.

The Board has determined that the proposed construction procedures are within the limits of conventionally available pipeline construction techniques and is confident that the installation of the facilities is technically feasible.

The question of operation and maintenance of the proposed pipeline was examined at the hearing. The Board is of the view that detailed and well-documented operation and maintenance procedures are essential for the proper operation of a pipeline system. From the evidence, the Board is confident that IPL (NW) has available to it the experience and expertise to implement satisfactory operational procedures for the proposed pipeline system. Because experience related to the repair and maintenance of pipelines in the North is

limited, the Board accepts that IPL (NW) should use experience gained during the construction phase of the project to develop maintenance procedures, which shall be submitted for Board approval prior to leave to open being granted.

With respect to the total capital cost estimate of approximately \$360,000,000 submitted by IPL (NW) for the facilities for which certification is sought, the Board is satisfied with the analyses that IPL (NW) has conducted with respect to Canadian content and finds the estimated level of Canadian content to be reasonable.

On the basis of the evidence adduced on environmental matters, the Board is satisfied that the pipeline facilities can be constructed in an environmentally acceptable manner.

In Chapter 7 of this report, the Board has expressed its views on the environmental issues raised at the public hearing, including the questions of construction planning, terrain matters, use of cut lines, borrow resources, river crossings, reclamation plans, archaeological and historical resources, wildlife resources, aquatic habitat and fish resources, raptors, environmental orientation programs, construction inspection, environmental monitoring and surveillance, contingency plans, etc.

The Board has received numerous undertakings from the Applicant to provide additional detailed information based on additional studies and further design work. In Chapter 7, the Board has stated its concerns relating to environmental matters and has noted that a considerable number of additional site-specific studies are required in many areas to establish prevailing environmental conditions, develop mitigative measures and establish maintenance and rehabilitation procedures. Because the Board feels that intervenors of record can make a valuable contribution in assessing some of the information to be filed, the Board has decided to provide an opportunity to intervenors of record to review and comment on

the Applicant's study reports, programs, measures and procedures. In Chapter 7 of this report, the Board has explained the procedure it will follow in its approval process of the environmental studies; instead of repeating it here, reference is made to section 7.17.3.

The Board has given careful consideration to the evidence before it with respect to financing matters. Following a thorough examination of both the financial responsibility and financial structure of the Applicant, the Board finds the project financing plan as outlined by the Applicant to be acceptable. However, the Board, as a condition of the certificate, will require IPL (NW) to file prior to commencement of construction, information showing that appropriate arrangements have been made for financing the pipeline.

A major part of the hearing was devoted to the hearing of evidence on regional socio-economic matters. In light of the evidence presented by the Applicant and the views expressed by intervenors, the Board has assessed the potential facilities in terms of regional feasibility and regional desirability. The Board has determined that, provided that the policies, programs and commitments given in the course of hearing the application are implemented and provided that certain additional measures are taken, the proposed project is feasible and could be built without unduly taxing the infrastructure, services and facilities of the impact area. As to regional socio-economic desirability, the Board finds that the proposed pipeline project may not provide the region with a net positive benefit but rather that its modest potential benefits and modest potential liabilities would balance out, at least in the short-term. The Board has determined that conditions should be attached to the certificate to provide for certain measures to be taken by the Applicant with respect to

the regional socio-economic impacts of the pipeline construction and operation. As mentioned in Chapter 8, socio-economic plans and programs to be filed by the Applicant will be subject to an approval procedure similar to that discussed above with respect to environmental studies.

The Board has heard a considerable amount of evidence on the question of land claims negotiations between the native people and the federal government in relation to the proposed pipeline project. The Board recognizes the importance of the native claims but, on the basis of the evidence before it, it is not convinced that approval of the proposed pipeline project would in fact prejudice the settlement of native claims.

The issue of economic viability of the IPL (NW) proposed pipeline system focused on the ability of Esso Resources to provide sufficient volumes of crude oil to the Applicant's system. After conducting its own assessment of the economic viability of Esso Resources' proposed expansion of Norman Wells production, on the basis of the evidence adduced, the Board has concluded that the expansion of the Norman Wells producing capability is economically viable under any set of circumstances which could be reasonably anticipated.

The Board also assessed the net economic benefits to Canada from developing the Norman Wells oil reserves and marketing the products in eastern Canada. From the evidence presented and the views expressed on the Applicant's cost-benefit study, the Board has determined that there will be a net economic benefit to Canada from the IPL (NW) pipeline project, and this under as wide a range of scenarios as could reasonably be anticipated with respect to discount rates, oil price and production volumes.

Having regard to the foregoing considerations, findings, and conclusions, and having taken into account all

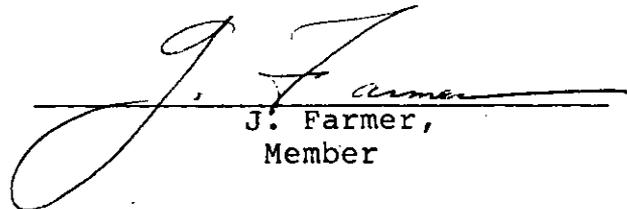
matters that appear to it to be relevant, the Board, being satisfied that the pipeline facilities applied for by Interprovincial Pipe Line (NW) Ltd. are and will be required by the present and future public convenience and necessity, is prepared to issue to IPL (NW) a Certificate of Public Convenience and Necessity in respect of the pipeline facilities which were the subject of this application, upon the terms and conditions set out in Appendix I, subject to the approval of the Governor in Council.

* * * * *

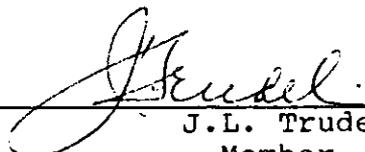
All of which is respectfully submitted.



R.F. Brooks,
Presiding Member



J. Farmer,
Member



J.L. Trudel,
Member

14.3 Application for an Order Respecting the Form and Content of the Tariff for the Transportation of Petroleum from Norman Wells to Zama under Part IV of the National Energy Board Act.

Throughout Chapter 12, the Board has recorded a number of decisions with respect to the application by IPL (NW) for approval of the form and content of the tariff for the transportation of petroleum from Norman Wells to Zama through the Applicant's proposed oil pipeline, which tariff is incorporated in the "Norman Wells Pipe Line Agreement."

Following from these decisions, the Board accepts

- (1) the Applicant's proposed method of regulation, and the form and content of the proposed "full cost of service" tariff as contained in the "Norman Wells Pipe Line Agreement," including the 16 percent return on equity referred to in Article 4.6 of Schedule A to the Agreement, and
- (2) the Applicant's proposed Rules and Regulations contained in Schedule B to the Norman Wells Pipe Line Agreement which would apply to the transportation of petroleum through the oil pipeline,

all subject to the following requirements and conditions:

- (a) Paragraph (c) of the definition of "Equity" in Article 1.1 of the "Norman Wells Pipe Line Agreement" shall be amended by inserting the words "the unamortized balance of" at the beginning of each of items (ii) and (iii) thereof;
- (b) IPL (NW) shall submit to the Board for review and approval, at least two months prior to the commencement of each operating year, its estimate of the full cost of service for the next operating year and the computed provisional toll to be in effect for the next operating year, arrived at in accordance with Article 5.0 of Schedule A to the "Norman Wells Pipe Line Agreement";

- (c) IPL (NW) shall submit to the Board for review and approval, at the latest within 30 days after the end of each operating year, the amounts of any operating expenses in excess of the estimate of the full cost of service approved by the Board pursuant to paragraph (b) hereof and IPL (NW) shall not include in its actual cost of service any such amounts until such time as they have been approved by the Board;
- (d) any "Management Agreement" entered into by Interprovincial Pipeline Limited and IPL (NW), pursuant to Article 18.3 of the "Norman Wells Pipe Line Agreement," including provisions for the allocation of common costs between Interprovincial Pipeline Limited and IPL (NW), shall be submitted to the Board for its approval upon execution of such agreement; and
- (e) the "Extended Outage" provision contained in Article 10.0 of Schedule A to the "Norman Wells Pipe Line Agreement" shall be amended to include the income taxes associated with the reduced return on equity of the company which would result if this provision were to apply.

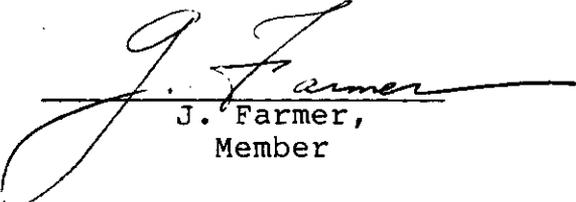
In indicating its acceptance of the method of regulation, the form and content of the "full cost of service" tariff, and the Rules and Regulations, the Board wishes to stress that

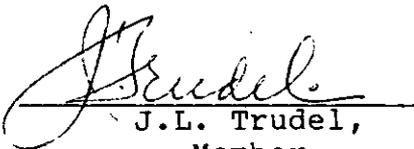
- (f) the method of regulation and the form and content of the tariff, including the provisions of the Norman Wells Pipe Line Agreement that have been written so as to accommodate more than one shipper, may be reviewed at any time that it becomes evident that shipper(s) other than Imperial intend to use the pipeline; and

(g) the Rules and Regulations contained in Schedule B to the "Norman Wells Pipe Line Agreement" may be reviewed should shipper(s) other than Imperial indicate a desire to use the pipeline.

The foregoing, together with Chapter 12 and Board Order No. TO-2-81, shown as Appendix II hereto, set forth our Reasons for Decision and our decision in the matter of an application by IPL (NW) for an order respecting the form and content of the tariff for the transportation of petroleum from Norman Wells to Zama under Part IV of the National Energy Board Act.


R.F. Brooks,
Member


J. Farmer,
Member


J.L. Trudel,
Member

TERMS AND CONDITIONS OF CERTIFICATE

1. The pipeline facilities to be constructed pursuant to this certificate shall be the property of and shall be operated by Interprovincial (NW).
2. Interprovincial (NW) shall, unless otherwise authorized or ordered by the Board, cause the facilities in respect of which this certificate is issued to be designed, manufactured, located, constructed and installed in accordance with specifications, plans, drawings and procedures approved pursuant to the terms and conditions contained herein, and the requirements of the National Energy Board Oil Pipeline Regulations (SOR/78-746).
3. Prior to construction, in these terms and conditions defined as prior to any site preparation, clearing, access road construction, or borrow pit development, Interprovincial (NW) shall not, unless otherwise authorized by the Board, cause any disturbance to the terrain along the pipeline route other than that which is necessary to carry out the field studies and surveys referred to in these terms and conditions.
4. Interprovincial (NW) shall, unless otherwise authorized or ordered by the Board, implement or cause to be implemented all the policies, practices and procedures for the protection of the environment included in its environmental reports and as otherwise adduced in its evidence before the Board, and those detailed in the further submissions referred to in conditions 5 and 13 herein.
5. Interprovincial (NW) shall, within two months of the issuance of this certificate, or on such later date as may be set by the Board, submit for the approval of the Board a schedule for the filing of those environmental and socio-economic studies, programs, practices, plans and procedures it undertook to carry out or develop, including those required by these terms and

conditions, and shall proceed to submit the material in accordance with the approved schedule, unless otherwise authorized by the Board.

6. Interprovincial (NW) shall, concurrently with the submission to the Board of the schedule referred to in condition 5, serve a copy of the said schedule upon every party of record in the hearing.
7. (1) Concurrently with the filing with the Board of each of the socio-economic submissions listed in the schedule referred to in condition 5 herein, Interprovincial (NW) shall serve notice on each of the parties of record in the hearing of the filing of the submission, and shall forthwith, on receipt of a request in writing from any of the said parties, serve a copy of the submission on that party. Interprovincial (NW) may apply to the Board for relief from the obligation of serving any of the said submissions on any or all parties, setting forth its reasons for making such application, but in such a case the notice required by this condition to be served on parties of record shall set out the reasons for the application.
(2) Parties upon whom a copy of any submission has been served pursuant to subcondition (1) may within 30 days of the receipt of the submission submit suggestions respecting the submission to Interprovincial (NW) and to the Board. Interprovincial (NW) shall, as soon as possible, submit to the Board and to the party from whom a suggestion was received, a response indicating which of that party's suggestions it is prepared to incorporate into the submission, and its reasons for not incorporating any other of that party's suggestions.
(3) Where applicable, Interprovincial (NW) shall file with the Board a revised submission incorporating those suggestions of parties of record which it has agreed to incorporate pursuant to subcondition (2).
(4) The Board may issue an order signifying its satisfaction with any submission or revised submission.

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8. (1) Concurrently with the filing with the Board of each of the environmental submissions listed in the schedule referred to in condition 5 herein, Interprovincial (NW) shall serve notice on each of the parties of record in the hearing of the filing of the submission, and shall forthwith, on receipt of a request in writing from any of the said parties, serve a copy of the submission on that party. Interprovincial (NW) may apply to the Board for relief from the obligation of serving any of the said submissions on any or all parties, setting forth its reasons for making such application, but in such a case the notice required by this condition to be served on parties of record shall set out the reasons for the application.
- (2) Parties upon whom a copy of any submission has been served in accordance with subcondition (1) may within 30 days of the receipt of the submission send suggestions respecting the submission to Interprovincial (NW), and to the Board.
- (3) Interprovincial (NW) shall, in the preparation of the programs, specifications and manuals referred to in conditions 14 and 15 herein, incorporate the suggestions received from parties of record that it accepts, and where Interprovincial (NW) is unwilling to incorporate any such suggestions, it shall provide an explanation in writing to the party from whom the suggestion was received, and to the Board.
- (4) Concurrent with the filing with the Board of each of the programs, specifications, and manuals required by conditions 14 and 15 herein, Interprovincial (NW) shall serve a copy of the program, specification, or manual on each of the parties from whom suggestions were received pursuant to subcondition (2). Interprovincial (NW) may apply to the Board for relief from the obligation of serving any of the said programs, specifications, or manuals on any or all parties, setting forth its reasons for making such application, but in such a case, Interprovincial (NW), shall serve a notice on each of the said parties setting forth the reasons for such application.
- (5) Parties upon whom a copy of any program, specification, or manual has been served in accordance with subcondition (4) may

submit comments to the Board respecting such program, specification, or manual within a time and in a manner to be directed by the Board at the time of the filing of such program, specification, or manual, and Interprovincial (NW) may reply to such comments within a time and in a manner to be directed by the Board.

(6) The Board may issue an order signifying its approval of any program, specification, or manual.

9. The plans, profiles and books of reference, to be filed pursuant to Section 29 of the Act, shall be based on field surveys of the entire route and shall indicate
 - a) all permanent and temporary rights-of-way,
 - b) the locations of pumping station sites, and
 - c) the locations of any mining claims.
10. Interprovincial (NW) shall, prior to approval by the Board of plans, profiles and books of reference, submit to the Board
 - a) copies of all signed easement agreements, and
 - b) terrain maps, satisfactory to the Board and similar to those filed as Exhibit 19A in the hearing, covering those parts of the pipeline route including related facilities and access roads for which such maps have not already been submitted.
11. Interprovincial (NW) shall, prior to construction, submit
 - a) information satisfactory to the Board setting out the findings of field tests, experiments and analyses in support of the final design of the pipeline system, and
 - b) for the approval of the Board, the final design for each portion of the pipeline system.
12. Interprovincial (NW) shall, prior to construction, submit to the Board
 - a) documents to demonstrate to the satisfaction of the Board that the Development Plan for the Norman Wells field has received the necessary regulatory approvals, and

- b) information showing to the satisfaction of the Board that appropriate arrangements have been made for financing the pipeline.
13. Interprovincial (NW) shall, prior to construction, submit reports satisfactory to the Board providing
- a) an environmental assessment of the development, operation, abandonment and rehabilitation of all borrow pits including the impact on terrain, wildlife and aquatic resources resulting from borrow pit activities, associated road construction and transport of borrow and associated materials,
 - b) mitigative measures based on studies of fish resources wintering in the vicinity of water crossings scheduled for winter construction,
 - c) results of studies which identify species of raptors occupying nest sites within 3.2 km (2 miles) of field construction activities, which report shall contain site-specific mitigative measures,
 - d) the identification and assessment of areas sensitive to terrain degradation, and
 - e) results and supporting data from field investigations for the evaluation of
 - i) slopes which may become unstable,
 - ii) water crossings and the approaches thereto, and
 - iii) interfaces of frozen and unfrozen soil where special designs may be required.
14. Interprovincial (NW) shall, prior to construction, develop and submit programs satisfactory to the Board for
- a) the environmental education of inspection and construction staff, and
 - b) construction and environmental inspection, including organization and reporting structure, and staff qualifications, training, authority, responsibilities and functions.

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15. Interprovincial (NW) shall, prior to construction, submit for the approval of the Board
 - a) construction contract specifications which shall include at least
 - i) the program for preserving the stability of slopes,
 - ii) the design and construction methods for water crossings,
 - iii) the appropriate timing and construction methods for the crossings of the Great Bear and Mackenzie Rivers, and
 - b) an environmental procedures manual which shall include at least
 - i) monitoring procedures during construction,
 - ii) measures for mitigating terrain damage,
 - iii) revegetation programs,
 - iv) procedures for handling and storage of fuels, lubricants and toxic chemicals, and the contingency plans in the event of spills,
 - v) all other measures developed as a result of recommendations in the environmental reports submitted during the hearing and pursuant to condition 5 and 13 herein, and
 - vi) an identification of those matters listed in part (b) of this condition which will form part of the construction contract specifications.

16. Interprovincial (NW) shall, prior to construction, develop and submit plans and procedures satisfactory to the Board for project cost control.

17. Interprovincial (NW) shall submit for the approval of the Board
 - a) three to six months prior to construction, a current construction schedule, and
 - b) during construction, any revisions to the construction schedule and, where necessary, corresponding changes to the applicable environmental mitigative measures.

18. Interprovincial (NW) shall, during the construction period, unless otherwise authorized by the Board, submit each month

construction reports satisfactory to the Board which detail the progress and current status of the project.

19. Interprovincial (NW) shall, unless otherwise authorized by the Board, within three months after the completion of the first winter of construction, submit
 - a) for the approval of the Board, a reclamation plan for the right-of-way, and
 - b) a reclamation plan satisfactory to the Board for access roads, borrow pits and construction sites.

20. Further to the requirements of Part VII of the Oil Pipeline Regulations (SOR/78-746), Interprovincial (NW) shall, prior to leave-to-open being granted, submit for the approval of the Board
 - a) a maintenance manual which shall include a section dealing with the special problems of operating and maintaining this northern pipeline system,
 - b) an emergency procedures manual, and
 - c) contingency plans for hydrocarbon loss from the pipeline and related facilities including procedures for the detection of and recovery of hydrocarbons from water bodies during periods of freeze-up and break-up.

21. Interprovincial (NW) shall, prior to leave-to-open being granted, submit for the approval of the Board a complete procedure and schedule for monitoring
 - a) the condition of the right-of-way with respect to thaw settlement, frost heave, and the adequacy of drainage and erosion control measures,
 - b) the radius of curvature of the pipe at sites of soil movement where critical pipe stresses may be exceeded,
 - c) the condition of the slopes along the right-of-way, and
 - d) the condition of river crossings.

22. Interprovincial (NW) shall, unless otherwise authorized by the Board, by 31 October of each year during the construction and

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operation of the pipeline, submit a report satisfactory to the Board describing the results of monitoring .

- a) the effects of pipeline construction and operation on the environment,
- b) the condition of the right-of-way and the pipeline, and
- c) the condition of river crossings and approaches, and slopes along the right-of-way.

23. Interprovincial (NW) shall, within twelve months after start-up of operations, or on such later date as may be set by the Board, submit for the approval of the Board a report detailing the actions taken or to be taken to mitigate long-term environmental effects of construction and operation of the pipeline system and evaluating the adequacy of the environmental policies, practices and procedures used during construction and operation.
24. Interprovincial (NW) shall, unless otherwise authorized by the Board, within six months following the end of the first year of operation of the pipeline system, submit a report satisfactory to the Board on the actual socio-economic impact of the project, including the development of the Norman Wells field, during the construction period and the first year of operation.
25. Interprovincial (NW) shall, unless otherwise authorized by the Board, at the end of the first and third years of operation of the pipeline system, submit to the Board aerial photographs of the entire route taken at a time and at a scale satisfactory to the Board, and an analysis of ground conditions on the right-of-way as shown in the photographs.

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NATIONAL ENERGY BOARD



OFFICE NATIONAL DE L'ÉNERGIE

ORDER NO. TO-2-81

IN THE MATTER OF the National Energy Board Act and the Regulations made thereunder; and

IN THE MATTER OF an application by Interprovincial Pipe Line (NW) Ltd. (hereinafter referred to as "Interprovincial (NW)") for an Order under Part IV of the National Energy Board Act respecting rates, tolls and tariffs, filed with the Board under File No. 1755-J1-42.

B E F O R E:

R.F. Brooks)	
Vice-Chairman	)	On
)	
J. Farmer	)	the 23rd day of
Associate Vice-Chairman)	)	March, 1981
)	
J.L. Trudel)	
Member)	

UPON an application by Interprovincial (NW) dated the 14th day of March, 1980, under Part III of the National Energy Board Act for a Certificate of Public Convenience and Necessity authorizing the construction and operation of an oil pipeline from Norman Wells in the Northwest Territories to Zama in the Province of Alberta, and under Part IV of the National Energy Board Act for an Order establishing the form and content of the rates, tolls and tariffs of the said oil pipeline;

AND UPON the Board having heard evidence and submissions relating to the said application at a public hearing which commenced on the 7th day of October, 1980;

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AND UPON the Board having considered the evidence and submissions relating to the application for an Order under Part IV of the National Energy Board Act;

THEREFORE IT IS DECLARED THAT:

1. Under sections 11 and 50 of the National Energy Board Act,

(1) the method of regulation, and the form and content of the "full cost of service" tariff contained in the Norman Wells Pipe Line Agreement between Imperial Oil Limited, Interprovincial Pipe Line (NW) Ltd. and Interprovincial Pipe Line Limited dated 1 January 1980 (the "Norman Wells Pipe Line Agreement"), including the 16 percent return on equity referred to in Article 4.6 of Schedule A thereto, and

(2) the Rules and Regulations contained in Schedule B to the Norman Wells Pipe Line Agreement to apply to the transportation of petroleum through the Interprovincial (NW) oil pipeline,

are hereby approved, all subject to the following requirements and conditions:

(a) Paragraph (c) of the definition of "Equity" in Article 1.1 of the Norman Wells Pipe Line Agreement shall be amended by inserting the words "the unamortized balance of" at the beginning of each of items (ii) and (iii) thereof;

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- (b) Interprovincial (NW) shall submit to the Board for review and approval, at least two months prior to the commencement of each operating year, its estimate of the full cost of service for the next operating year and the computed provisional toll to be in effect for the next operating year, arrived at in accordance with Article 5.0 of Schedule A to the Norman Wells Pipe Line Agreement;
- (c) Interprovincial (NW) shall submit to the Board for review and approval, at the latest within 30 days after the end of each operating year, the amounts of any operating expenses which exceed the amounts contained in the estimate of the full cost of service approved by the Board pursuant to paragraph (b) hereof and Interprovincial (NW) shall not include in its actual cost of service any such amounts until such time as they have been approved by the Board;
- (d) any management agreement entered into by Interprovincial Pipe Line Limited and Interprovincial (NW), pursuant to Article 18.3 of the Norman Wells Pipe Line Agreement, including provisions for the allocation of common costs between Interprovincial Pipe Line Limited and Interprovincial (NW), shall be submitted to the Board for its approval upon execution of such agreement; and

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- (e) the "Extended Outage" provision contained in Article 10.0 of Schedule A to the Norman Wells Pipe Line Agreement shall be amended to include the reduction in income taxes associated with the reduced return on equity of the company which would result if this provision were to apply.

IT IS FURTHER DECLARED THAT:

2. Notwithstanding the provisions contained in paragraph 1 of this Order,

- (a) the method of regulation and the form and content of the tariff, including the provisions of the Norman Wells Pipe Line Agreement that have been written so as to accommodate more than one shipper, may be reviewed at any time that it becomes evident that any shipper other than Imperial Oil Limited intends to use the pipeline; and
- (b) the Rules and Regulations contained in Schedule B to the Norman Wells Pipe Line Agreement may be reviewed should any shipper other than Imperial Oil Limited indicate a desire to use the pipeline.

AND IT IS ORDERED THAT:

3. The provisions contained in paragraphs 1 and 2 of this Order shall remain suspended and be of no effect until such time as a certificate is issued to Interprovincial (NW) under Part III of the National Energy Board Act, further to the application of Interprovincial (NW) dated the 14th day of March, 1980.

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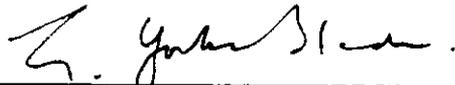
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DATED at the City of Ottawa, in the Province of Ontario,
this 23rd day of March, 1981.

NATIONAL ENERGY BOARD



G. Yorke Slader,
Secretary.

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GLOSSARY OF TECHNICAL TERMS

Active Layer. The top layer of the ground above the permafrost table which thaws annually. Active layer thickness may vary from a few centimeters to several meters.

Active Layer Detachment Slide. The mass movement of the material of the active layer along the active layer-permafrost interface.

Cut Line. A line approximately 10 m in width used for seismic surveys, winter roads etc. from which brush and trees have been removed.

Differential Settlement. The downward displacement of one point in a structure relative to another, resulting from a localized loss of soil support. Settlements of this nature are of particular concern because of the stresses which can be induced into a structure.

Five - Spot Production Pattern. The spacing and pattern of wells in a secondary recovery or pressure maintenance project. A common injection pattern includes a five-spot pattern where a production well is located in the centre of a square which is formed by four injection wells.

Frost Bulb. A bulb-shaped intrusion of the permafrost table into the active layer resulting from localized chilling caused by natural or man-made events. The bulb will grow until a new thermal equilibrium is reached.

Frost Heave. Certain types of soils, under certain conditions of moisture content and in-situ density exhibit an increase in volume of the soil mass when frozen. This volume increase phenomenon, which tends to impart upward displacements to surface features or structures, is referred to as frost heaving.

Gas-Oil Ratio. A measure of the volume of gas produced with oil, expressed in cubic feet per barrel or cubic metres per cubic metre.

Heavy Distillates. The range of refined petroleum products which include heavy fuel oil, lube oils and asphalt.

High Vapour Pressure Products. A class of petroleum products associated with the production of crude oil and natural gas which exist as vapours at standard atmosphere pressure and temperature conditions but are normally transported in a pipeline as liquids. These products are sometimes referred to as natural gas liquids. Common examples of natural gas liquids are butane and propane or mixtures thereof.

Injection Well. A well in which fluids have been injected into an underground stratum to increase reservoir pressure.

Middle Distillates. The range of refined petroleum products which include kerosene, stove oil, diesel fuel and light fuel oil.

Naphtha. A mixture of hydrocarbons mostly pentanes and heavier with a maximum final boiling point of about 480°C.

Natural Gas Liquids. Natural gas liquids are those hydrocarbon components recovered from raw natural gas as liquids by processing through extraction plants or recovered from field separators, scrubbers, or other gathering facilities. These liquids include the hydrocarbon components ethane, propane, butanes and pentane plus or a combination thereof.

Original Oil-in-Place. See "Recovery".

Permafrost. A thermal condition of earth materials when their temperatures remain continuously below 0°C for more than one year.

Permeability. The measure of the ease with which fluids may move through the interconnected pores of the rock.

Porosity. The pore space or void space of a rock expressed as a fraction or percentage of the total volume of the rock.

Raptor. Birds of prey; includes eagles, falcons, hawks.

Recovery.

Original Oil-in-Place. The total calculated volume, prior to any production of crude oil within a discovered petroleum reservoir, of which only a portion is recoverable.

Primary Recovery. Crude oil recovery from a petroleum reservoir as a result of the natural energy of the reservoir moving the crude oil toward producing wells.

Secondary Recovery. The additional crude oil recovery from a petroleum reservoir obtained by supplying energy to supplement or replace the energy of primary recovery. Generally, the term refers to already technically and economically proven methods such as waterflooding, gas injection, and steam injection.

Retrogressive Thaw Flow Slide. A slide consisting of ice or ice-rich sediments and having a steep headwall, which retreats in retrogressive fashion through melting. This results in a debris flow, formed from the mixture of thawed sediment and ice, which slides down the face of the headwall to its base.

Thaw Bulb. A body of perennially thawed ground caused by localized heat transfer from a warm object at or near the surface. The thaw bulb will grow in size until a new thermal equilibrium is established. If the bulb engulfs ice-rich soils a loss of bearing capacity and thaw settlement will occur.

Thaw Sensitive Soils. Soils which lose much of their bearing capacity on thawing. Silty soils are particularly thaw sensitive.

Thaw Settlement. A settlement of the ground surface in certain soil types which results from the melting of excess ice in the soil mass and the consolidation of the thawed soil strata. As a result, the terrain surface and man-made structures experience settlements.

Thermokarst. Subsidence of the ground surface in permafrost regions producing undulations and hollows caused by the melting of ground ice.

Vegetation Mat. The surface layer of both living and dead organic matter which covers mineral soil. This layer acts as an insulating layer preventing thaw and erosion of frozen soils.

Water Breakthrough. Water breakthrough occurs when the injected water first reaches the well bore of a production well.

Waterflooding. The process of injecting water into a reservoir for the purpose of displacing oil towards a production well.

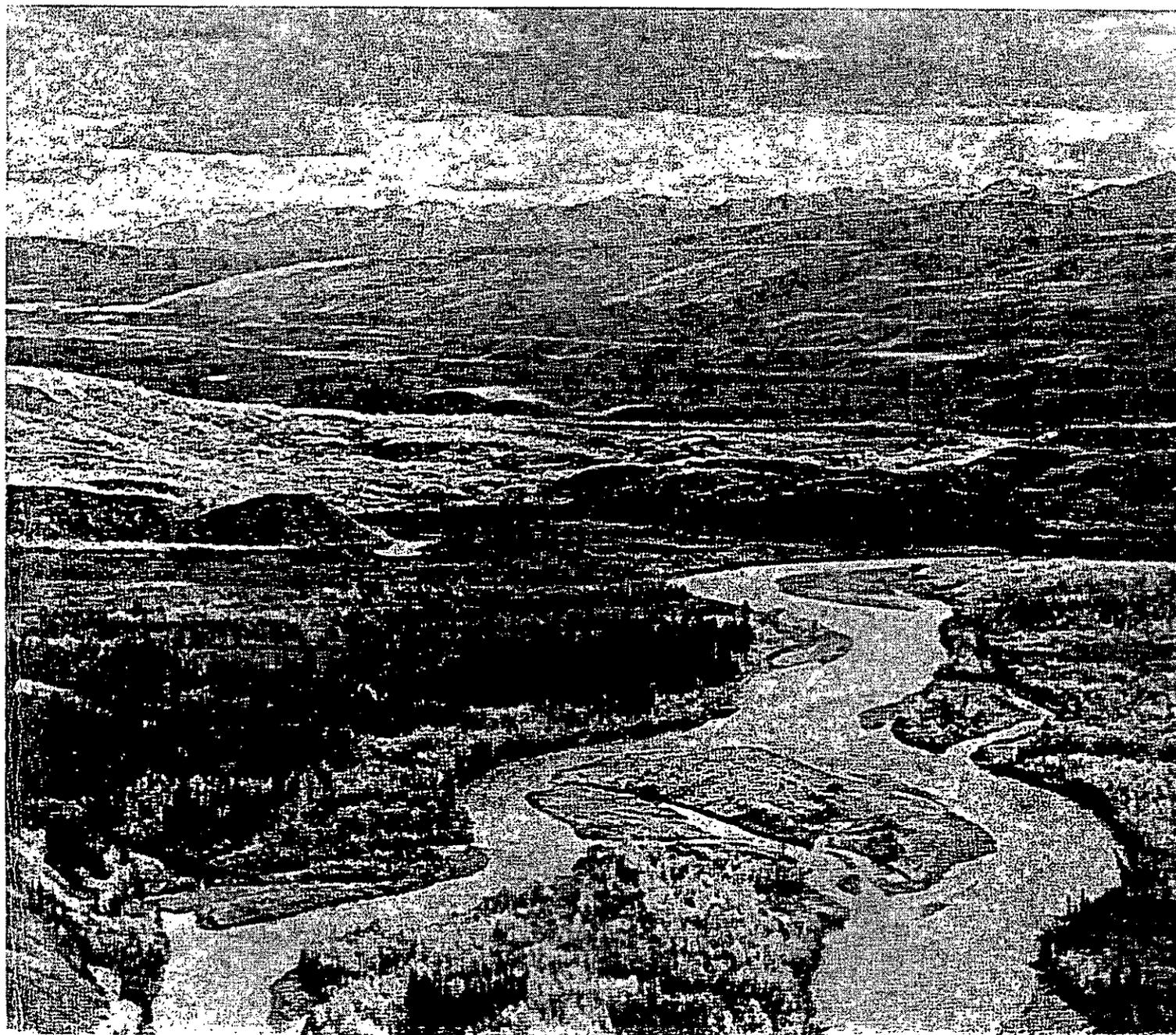
Water-Oil Ratio. A measure of the volume of water produced with oil expressed in barrels per barrel or cubic metres per cubic metre.

Workover. To perform one or more of a variety of remedial operations on a producing well to try to increase production.

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National Energy Board
REASONS FOR DECISION
NORTHERN PIPELINES

VOLUME 1



National Energy Board

**REASONS FOR DECISION
NORTHERN PIPELINES**

JUNE 1977

National Energy Board

REASONS FOR DECISION
NORTHERN PIPELINES

VOLUME 1

RECITAL

APPEARANCES

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CHAPTER 2 SUPPLY AND DEMAND

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**CHAPTER 3 ENGINEERING DESIGN AND
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**CHAPTER 5 REGIONAL SOCIO-ECONOMIC
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National Energy Board

REASONS FOR DECISION

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CHAPTER 1

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- Foothills Project
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NATIONAL ENERGY BOARD

IN THE MATTER OF the National Energy Board
Act;

AND IN THE MATTER OF an application by
Canadian Arctic Gas Pipeline Limited for a certificate
of public convenience and necessity for the
construction and operation of a natural gas pipeline,
under File No. 1555-C46-1;

AND IN THE MATTER OF applications by
Foothills Pipe Lines Ltd., Westcoast Transmission
Company Limited and The Alberta Gas Trunk Line
(Canada) Limited for certificates of public
convenience and necessity for the construction and
operation of certain natural gas pipelines, under File
Nos. 1555-F2-3, 1555-W5-49 and 1555-A34-1;

AND IN THE MATTER OF an application by
Alberta Natural Gas Company Ltd. for a certificate of
public convenience and necessity for the construction
and operation of certain extensions to its natural gas
pipeline, under File No. 1555-A2-10;

AND IN THE MATTER OF a submission by The
Alberta Gas Trunk Line Company Limited, under File No.
1555-A5-2;

AND IN THE MATTER OF applications by
Foothills Pipe Lines (Yukon) Ltd., Westcoast
Transmission Company Limited and The Alberta Gas Trunk
Line (Canada) Limited for certificates of public
convenience and necessity for the construction and
operation of certain natural gas pipelines, under File
Nos. 1555-F6-1, 1555-W5-55 and 1555-A34-2;

AND IN THE MATTER OF a submission by The
Alberta Gas Trunk Line Company Limited, under File No.
1555-A5-3.

HEARD at Ottawa, Ontario on 12, 13, 14, 15, 20, 21, 22, 23, 26, 27, 28, 29, 30 April 1976;

3, 4, 5, 6, 7, 10, 11, 12, 13, 14, 17, 18, 19, 20, 31 May 1976;

1, 2, 3, 4, 7, 8, 9, 10, 11, 14, 15, 16, 17, 18, 21, 22, 23, 24, 25 June 1976;

5, 6, 7, 8, 9, 12, 13, 14, 15, 16, 19, 20, 21, 22, 23, 26, 27, 28, 29, 30 July 1976;

16, 17, 18, 19, 20, 23, 24, 25, 26, 30, 31 August 1976;

1, 2, 3, 7, 8, 9, 10 September 1976; and

Inuvik, Northwest Territories on 20, 21, 22 September 1976; and

Whitehorse, Yukon on 27, 28 September 1976; and

Yellowknife, Northwest Territories on 4, 5, 6 October 1976; and

Ottawa, Ontario on 18, 19, 20, 21, 22, 25, 26, 27, 28, 29 October 1976;

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Whitehorse, Yukon on 1, 2, 3, 4 March 1977; and

Ottawa, Ontario on 8, 9, 10, 11, 14, 15, 16, 17, 18, 21, 22, 23, 24, 25, 28, 29, 30, 31 March 1977;

1, 4, 5, 6, 7, 12, 13, 14, 15, 18, 19, 20, 21, 22, 25, 26, 27, 28, 29 April 1977;

2, 3, 4, 5, 9, 10, 11, 12 May 1977.

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R.F. Brooks

Vice-Chairman
Associate Vice-Chairman
Member

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Northern Border Pipeline Company

R.J. Gibbs, Q.C.
A.R. O'Brien

Northwest Pipeline Corporation
and
Alcan Pipeline Company

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Columbia Gas Transmission
Corporation

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G.M. McGuire
C. Campbell
R.E. Stephenson

TransCanada PipeLines Limited

D.A. Hill

Panarctic Oils Ltd.

C.E. Crawford

Dome Petroleum Limited

J.B. Ballem, Q.C. G.A. Connell M.V. McDill	Gulf Oil Canada Limited
J.B. Ballem, Q.C. M.V. McDill	Imperial Oil Limited
J.B. Ballem, Q.C. T.B.O. McKeag, Q.C. M.V. McDill	Shell Canada Limited
P.D. Kennedy	Sun Oil Company Limited
E.H. Gaudet	Chevron Standard Limited
B.A. Crane E. Gilhooly	Canadian-Montana Pipe Line Company
M. Côté, Q.C. J-M. Fortier	Gaz Métropolitain, inc.
P.F. Scully B.K. Singer B. Davis	Northern and Central Gas Corporation Limited
J.H. Farrell	The Consumers' Gas Company and St. Lawrence Gas Company, Inc.
J.B. Jolley A.M. Butler	Union Gas Limited
L.A. Loo	British Columbia Hydro and Power Authority

D.W. Scott, Q.C.
A.W. Birnie
P.C. Thompson

Industrial Gas Users Association

B.A. Crane
M.D. Thompson

Abitibi Paper Company Ltd.

J.J. MacDonald

The Algoma Steel Corporation
Limited

D.W. Scott, Q.C.

Canadian Industries Limited

R.A. Smith, Q.C.

Canadian Pittsburgh Industries

S.A. Barker

Consumers Glass Company, Limited

J.J. Kinahan
E.B. MacDougall

Dow Chemical of Canada, Limited

A.R. O'Brien

DuPont of Canada Limited

D.J.M. Brown

Pilkington Brothers (Canada)
Limited

P. Dozois

SIDBEC et ses Filiales

D.W. Scott, Q.C.
G.D. Hunter

The Steel Company of Canada Limited

E.C. Tingey

Texasgulf Canada Ltd.

A.R. O'Brien

Midwestern Gas Transmission
Company

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R.S. Veale	The Council for Yukon Indians
J.G. Mercredi	Native Working Men of the Northwest Territories
J.H. Robertson J.M. Heath	Town of Inuvik
F.W. Henne	City of Yellowknife
G.L. Monuik	Settlement Council of Norman Wells
D.H. Searle, Q.C.	Legislative Assembly of the Northwest Territories
A.A. Wright A.M. Pearson	Government of the Yukon Territory
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G.D. Erion R.M. Hill	Northwest Territories Chamber of Commerce
T.A. Butters	Tom Butters, M.L.A.

M. Sigler	Northwest Territories Association of Municipalities
D. Morrison R. Campbell	Whitehorse Chamber of Commerce
J.M. Ryan P. Gerrard	The White Pass and Yukon Corporation
J.E. Kingsmill	Pacific Western Airlines
D.L.D. Bell	The Yukon Association of Municipalities
G. Romanczak	Yukon Teachers Association
G.D. Letcher H. MacKenzie	Yukon Conservation Society
R.G. McCandless	Robert G. McCandless
E. Van Alstine J.A. Howell	Canadian Arctic Resources Committee
F.G.G. Bregha I.A. McDougall	Canadian Wildlife Federation
G.F. Paschen G. Harrison	Canadians for Responsible Northern Development
N. McCool R.J.D. Page B.F. Willson	Committee for an Independent Canada
J.A. Olthuis G. Vandezande	The Committee for Justice and Liberty Foundation

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J.B. Robinson	Workgroup on Canadian Energy Policy
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A. Nadon	Attorney General for Quebec
W.N. Lawton	Attorney General for Saskatchewan
H. Soloway, Q.C. W.T. Houston	National Energy Board

GLOSSARY OF TERMS

ABBREVIATIONS OF NAMES

"Abitibi"	- Abitibi Paper Company Ltd.
"AERCB"	- Alberta Energy Resources Conservation Board
"Alaskan Arctic"	- Alaskan Arctic Gas Pipeline Company
"Alberta and Southern" or "A & S"	- Alberta and Southern Gas Co. Ltd.
"Alberta Natural" or "ANG"	- Alberta Natural Gas Company Ltd.
"Alcan"	- Alcan Pipeline Company
"Algoma Steel"	- The Algoma Steel Corporation, Limited
"API"	- American Petroleum Institute
"Arctic Canada" or "ACGTC"	- Arctic Canada Gas Transmission Company
"ASME"	- American Society of Mechanical Engineers
"Atlantic Richfield" or "ARCO"	- Atlantic Richfield Company
"Battelle"	- Battelle Memorial Institute of Columbus, Ohio
"B.C. Hydro"	- British Columbia Hydro and Power Authority
"Beaufort-Delta"	- Beaufort-Delta Oil Project Limited
"Berger Inquiry"	- Mackenzie Valley Pipeline Inquiry
"British Columbia"	- Minister of Transportation and Communications, British Columbia

"CAGPL"	- Canadian Arctic Gas Pipeline Limited
"CAGSL"	- Canadian Arctic Gas Study Limited
"Canadian Pittsburgh"	- Canadian Pittsburgh Industries
"Canadian Titanium"	- Canadian Titanium Pigments Limited
"Canadian-Montana"	- Canadian-Montana Pipe Line Company
"CARC"	- Canadian Arctic Resources Committee
"CGA"	- Canadian Gas Association
"Chevron"	- Chevron Standard Limited
"CIC"	- The Committee for an Independent Canada
"CICA"	- Canadian Institute of Chartered Accountants
"CIL"	- Canadian Industries Limited
"CJL"	- The Committee for Justice and Liberty Foundation
"CLC"	- Canadian Labour Congress
"CNT"	- Canadian National Telecommunications
"Columbia Gas"	- Columbia Gas Transmission Corporation
"Consolidated Natural"	- Consolidated Natural Gas Limited
"Consumers Glass"	- Consumers Glass Company, Limited

"Consumers' Association" or "CAC"	- Consumers' Association of Canada
"Consumers'"	- The Consumers' Gas Company
"COPE-ITC" or "COPE"	- Committee for Original Peoples Entitlement and Inuit Tapirisat of Canada
"CRND"	- Canadians for Responsible Northern Development
"CSA"	- Canadian Standards Association
"CWF"	- Canadian Wildlife Federation
"CYI" or "The Council"	- The Council for Yukon Indians
"DGGS"	- Division of Geological and Geophysical Surveys
"Dome"	- Dome Petroleum Limited
"Dominion Glass"	- Dominion Glass Company Limited
"Dominion Malting"	- Dominion Malting Limited
"Dow"	- Dow Chemical of Canada, Limited
"DuPont"	- DuPont of Canada Limited
"El Paso Alaska"	- El Paso Alaska Company
"Falconbridge"	- Falconbridge Nickel Mines Limited
"Foothills"	- Foothills Pipe Lines Ltd.
"Foothills (Yukon)"	- Foothills Pipe Lines (Yukon) Ltd.
"FPC"	- Federal Power Commission
"Gaz Métropolitain" or "Gaz Métro"	- Gaz Métropolitain, inc.

"GNWT"	- Government of the Northwest Territories
"Great Lakes"	- Great Lakes Gas Transmission Company
"Greater Winnipeg"	- Greater Winnipeg Gas Company
"Gulf"	- Gulf Oil Canada Limited
"GYT"	- Government of the Yukon Territory
"HUDAC"	- Housing and Urban Development Association of Canada
"Humble Oil"	- Humble Oil and Refining Company
"IGUA"	- Industrial Gas Users Association
"Imperial"	- Imperial Oil Limited
"Indian Brotherhood of the NWT" or "IBNWT"	- Indian Brotherhood of the Northwest Territories
"Inland"	- Inland Natural Gas Co. Ltd.
"Inland-Ocean Cement"	- Inland Cement Industries Limited and Ocean Cement Limited
"Inter-City"	- Inter-City Gas Limited
"Interprovincial Steel" or "IPSCO"	- Interprovincial Steel and Pipe Corporation Ltd.
"I-XL"	- I-XL Industries Ltd.
"Legislative Assembly of the NWT"	- The Legislative Assembly of the Northwest Territories
"Liquefaction"	- Liquefaction Limited

"Manitoba"	- Province of Manitoba
"Mannesmann"	- Mannesmann-Export AG
"Michigan Wisconsin"	- Michigan Wisconsin Pipe Line Company
"Midwestern"	- Midwestern Gas Transmission Company
"MVM Association"	- Motor Vehicle Manufacturers' Association
"MVPA"	- Mackenzie Valley Pipeline Authority
"Native Working Men"	- Native Working Men of the Northwest Territories
"Natural Gas of California" or "Natural Gas Corp."	- Natural Gas Corporation of California
"Natural Gas Pipe"	- Natural Gas Pipeline Company of America
"NEB" or "The Board"	- National Energy Board
"Niagara Gas"	- Niagara Gas Transmission Limited
"Noranda"	- Noranda Mines Limited
"Norcen"	- Norcen Energy Resources Limited
"Norman Wells" or "Settlement Council"	- Settlement Council of Norman Wells
"Northern and Central"	- Northern and Central Gas Corporation Limited
"Northern Border"	- Northern Border Pipeline Company
"Northern Natural"	- Northern Natural Gas Company
"Northwest"	- Northwest Pipeline Corporation

"Ontario"	- Ontario Minister of Energy for Ontario
"OPEC"	- Organization of Petroleum Exporting Countries
"Pacific Interstate"	- Pacific Interstate Transmission Company
"Pacific Lighting" or "PLGD"	- Pacific Lighting Gas Development Company
"Pacific Western" or "PWA"	- Pacific Western Airlines Ltd.
"Panarctic"	- Panarctic Oils Ltd.
"PG & E"	- Pacific Gas and Electric Company
"PGT"	- Pacific Gas Transmission Company
"Pilkington"	- Pilkington Brothers (Canada) Limited
"Polar Gas"	- Polar Gas Project
"Quebec"	- Attorney General for Quebec
"Saskatchewan"	- Attorney General for Saskatchewan
"Shell"	- Shell Canada Limited
"Shell Explorer"	- Shell Explorer Limited
"Shell Resources"	- Shell Canada Resources Limited
"SIDBEC"	- SIDBEC et ses Filiales
"So-Cal"	- Southern California Gas Company
"Sohio"	- Standard Oil Company of Ohio
"Soquip"	- Société Québécoise d'Initiatives Pétrolières
"St. Lawrence"	- St. Lawrence Gas Company, Inc.
"Steep Rock"	- Steep Rock Iron Mines Limited

"Stelco"	- The Steel Company of Canada Limited
"Sun Oil"	- Sun Oil Company Limited
"TAPS"	- Trans-Alaska Pipe Line
"Texas Eastern"	- Texas Eastern Transmission Corporation
"Texasgulf"	- Texasgulf Canada Ltd.
"The NWT Association of Municipalities"	- The Northwest Territories Association of Municipalities
"The NWT Chamber"	- The Northwest Territories Chamber of Commerce
"The Workgroup"	- Workgroup on Canadian Energy Policy
"TransCanada" or "TCPL"	- TransCanada PipeLines Limited
"Trunk Line (Canada)" or "AGTL (Canada)"	- The Alberta Gas Trunk Line (Canada) Limited
"Trunk Line" or "AGTL"	- The Alberta Gas Trunk Line Company Limited
"Union"	- Union Gas Limited
"United Association"	- United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada
"Westcoast"	- Westcoast Transmission Company Limited
"White Pass and Yukon" or "White Pass"	- The White Pass and Yukon Corporation Limited
"YASW"	- The Yukon Association of Social Workers
"YCS"	- Yukon Conservation Society

ABBREVIATIONS OF TERMS

AWG	- American wire gauge
°	- angular degree
bbls.	- barrels; 1 barrel is equal to 34.9723 Imperial gallons
Bcf	- billion cubic feet
Btu	- British thermal unit
cf	- cubic foot
CPI	- Consumer Price Index
cu. mi.	- cubic mile
C _V	- Charpy V-notch Test Absorbed Energy
C _V T	- Charpy V-notch Test Absorbed Energy at given temperature
C _V 100	- Charpy V-notch Test Absorbed Energy at 100 per cent Shear Area
°C	- degree Celsius
dBA	- sound pressure level in decibels weighted on the A-scale
DCF	- discounted cash flow
DWTT	- Drop Weight Tear Test
°F	- degree Fahrenheit
GNP	- Gross National Product
HP	- horsepower
kV	- kilovolt
kW	- kilowatt

L.F.	- load factor (average daily volume expressed as a percentage of maximum daily volume)
LNG	- Liquefied Natural Gas
Mb/d	- thousand barrels per day
Mcf	- thousand cubic feet
Mcf/d	- thousand cubic feet per day
MMcf	- million cubic feet
MMcf/d	- million cubic feet per day
MOP	- maximum operating pressure
M.P.	- milepost
O.D.	- outer diameter
ppm	- parts per million
psf lbs/ft ²)	- pounds per square foot
psi	- pounds per square inch
psia	- pounds per square inch absolute
psig	- pounds per square inch gauge
quad	- quadrillion Btu's (10^{15} Btu's)
RDP	- Real Domestic Product
sq. mi.	- square mile
SMYS	- specified minimum yield strength
Tcf	- trillion cubic feet
T-joint	- joint of spiral and plate joining welds
V	- volt
W	- watt

DEFINITIONS

Established Reserves

The Board defines established reserves as those reserves which, on the basis of identified economic considerations and within a specified time frame, are considered to be recoverable with a high degree of certainty from known reservoirs, through the application of currently accepted recovery techniques. The Board's established reserves consist of its "proved" reserves together with some portion, generally one half, of its "probable" reserves.

Proved Reserves

Proved reserves are those reserves considered to exist with a high degree of certainty. Volumes are mathematically calculated using dependable and well-defined basic reservoir data.

The classification "proved" may be applied to any of in-place, recoverable and marketable reserves. Thus, for example, proved recoverable reserves are those considered to be recoverable with a high degree of certainty, on the basis of well-defined reservoir data.

Probable Reserves

Probable reserves also are considered to exist with a high degree of certainty, but the basic reservoir data used in their calculation are less well-defined. What constitutes proved reserves in contrast to probable is, to a considerable extent, a matter of professional judgment.

Again, this classification may be applied to in-place, recoverable or marketable reserves, indicating that less definitive reservoir data entered into their determination than for reserves in the proved category.

Possible Reserves

Possible reserves are those to which a considerable degree of uncertainty is attached. The basic data used in their determination are not well-defined, hence substantial speculation is implied. The Board does not recognize possible reserves because of their speculative nature.

Initial Reserves

Initial reserves are those present in a reservoir before any production from that reservoir has been deducted. Certain agencies use the synonymous terms "ultimate" or "original" reserves.

Remaining Reserves

Remaining reserves are those currently available from a reservoir at a particular point in time, making allowance for any volumes produced (i.e. cumulative production) to that time. Thus, remaining reserves equal initial reserves less cumulative production.

In-Place Reserves

In-place reserves (commonly termed "gas in place") represent the total volume of gaseous substance occurring naturally in a reservoir without consideration of what portion may be recoverable.

Recoverable Reserves

Recoverable reserves represent that portion of the gas-in-place which is producible from a reservoir under anticipated technological and economic conditions, taking into consideration the geological and engineering characteristics of that reservoir. The adjective "raw" is often applied to recoverable reserves to eliminate ambiguity with marketable reserves. The ratio of recoverable reserves to in-place reserves, expressed as a fraction, is termed the "recovery factor".

Marketable Reserves

Marketable reserves are those volumes of natural gas available to the transmission line after removal, to the extent necessary or desirable, of certain hydrocarbon and non-hydrocarbon compounds present in the raw volumes produced from the reservoir, and after allowance has been made for field and plant fuel and losses.

The ratio of marketable gas reserves to recoverable gas reserves, expressed as a fraction, is termed the "shrinkage factor".

Marketable gas is also commonly referred to as pipeline, residue or sales gas. Unless otherwise specified, established reserves of natural gas reported by the Board are marketable reserves.

Beyond Economic Reach Reserves

Reserves beyond economic reach are included in established reserves. As a rule they are located in areas where, under current and anticipated economic conditions, the prospect of their being marketed is unlikely.

Deferred Reserves

Deferred reserves are those volumes of established reserves which for a specific reason, usually

because of involvement in a recycling or pressure maintenance project, are not now available for market.

Ultimate Potential

This is the volume of natural gas which it is anticipated will have been discovered in an area by the time all exploratory and development activity has ceased, having regard for the geological prospects of that area and future economic factors. A high degree of speculation and uncertainty is implicit in an estimate of ultimate potential, generally in inverse proportion to the geological knowledge of the area. Included in ultimate potential are volumes discovered and produced as well as those remaining to be found. Use of the term "potential reserves" as a synonym for ultimate potential is discouraged by the Board, since no justification exists for classifying undiscovered volumes as reserves.

Reserves Base Pressure and Temperature

The Board presently calculates reserves at a pressure base of 14.73 psia and temperature of 60°F. Provincial agencies in Western Canada and the Canadian Petroleum Association use a pressure base of 14.65 psia. Reserves at 14.73 psia equate to reserves at 14.65 psia

multiplied by a factor of 0.996. The standardization of reserves to a base of 1000 Btu/cf eliminates the need for reference to a specific pressure base and temperature and for this reason is preferred by the Board for reporting purposes.

Light Fuel Oil

In this report the term light fuel oil is used to include furnace fuel oil which is No. 2 fuel oil and stove oil which is No. 1 fuel oil. The major volume of light fuel oil used in Canada is furnace fuel oil.

Heavy Fuel Oil

In this report the term heavy fuel oil is used to include bunker fuel oils which are No. 5 and No. 6 fuel oils and also includes industrial fuel oil which is No. 4 fuel oil.

Rate of Take

The rate of take refers to the average daily rate of production of natural gas per unit volume of initial reserves. For example, 1:7,300 means one million standard cubic feet per day of production for each block of 7,300 million standard cubic feet of initial reserves.

In-Migration

In-migration is the term used to describe the process of individuals arriving from outside the impact area and taking up residence in the area, whether employed or not, but who stay in the area for the length or part of the construction period (or longer), generally requiring the same amenities as other northern residents. This, of course, excludes the pipeline workforce which is resident in camps.

Transients are persons arriving in the impact area from outside who only stay for a few days. They are not considered as in-migrants.

Finally, there are some policy actions which could be considered on the pricing of Delta gas to make it economically more attractive. The economics of the CAGPL project are based on all Delta gas being sold at a price equivalent to the price of gas in the Toronto market. However, the prices received by producers in the Western Provinces are based on both the netback from sales in Canada and the higher netback from export sales due to higher prices and lower transportation costs. While the differential between the netback from the exports and domestic shipments is likely to diminish, a case could be made for Delta producers sharing in the benefits which producers elsewhere receive from export sales.

1.4.5 Regional Socio-Economic Impact

It was evident that CAGPL had carried out thorough and extensive research on socio-economic, environmental design and engineering matters. However, the Board believes that a fundamental assessment of the underlying socio-economic and environmental factors inherent in the choice of route should be given more weight than simply the amount of research carried out so far on each project; provided of course that there is reasonable assurance that any deficiencies in research can be remedied before construction is permitted to begin and that the Board can be satisfied that socio-economic

and environmental impacts can be held to tolerable levels by means of effective mitigative measures, monitoring and controls.

No description of the potential socio-economic impact of a pipeline could begin without referring to the issue which now dominates the lives of Northerners - the settlement of land claims. The Board in its hearing did not consider the merits of the claims or their settlement since these are matters under direct negotiation between the native people and the federal government. But the Board is vitally concerned with the interrelation of the resolution of a land claims settlement with perceptions of Northerners on whether a pipeline should be built, and if so, where and when.

It is the Board's understanding that all native peoples' organizations with the possible exception of the Métis, desire a settlement of land claims before a pipeline is constructed. The Inuit of the Western Arctic live in the area where most of the hydrocarbons are likely to be found. The Inuit do not appear to vehemently oppose pipeline and related developments, provided that their land claims are settled, that the development of oil and gas is strictly controlled in terms of adverse environmental and socio-economic impacts and that they participate in such control, and that they share in the wealth generated, e.g., royalties. The

Dene, on the other hand, generally oppose the pipeline development - at least for ten years - and wish in that time to devote themselves to shaping Dene institutions and building a renewable resource based economy without being disturbed by the upheaval of pipeline construction. George Erasmus, their leader, claims that construction of a pipeline now could cause the cultural genocide of the Dene. The Métis Association favours construction of a pipeline because it sees business and job opportunities being created by it. The Council for Yukon Indians opposes in perpetuity the construction of a pipeline across the northern Yukon and wishes land claims to be settled and implemented before a pipeline is built in southern Yukon. Its position on a Dempster link was unclear at the time of the hearing but there is a motion of the Council indicating opposition to development activities in the vicinity of the Dempster Highway.

Undoubtedly the Board's socio-economic assessment will be compared with that made by the Berger Inquiry. It should thus be noted that the terms of reference are not identical. Justice Berger was specifically required to have regard to "any proposals to meet the specific environmental and social concerns set out in the Expanded Guidelines for Northern Pipelines as tabled in the House of Commons on June 28, 1972 by the Minister". These

guidelines envisaged an energy corridor including a future oil pipeline. The Board was not constrained by these guidelines, and five years later the expectation of large finds of oil and gas in the Delta and Beaufort Sea are much reduced, although major discoveries are still possible. However, at this time, the prospect of an oil pipeline and hence an energy corridor appears to be somewhat remote.

Finally, by way of introduction, the Board shares Justice Berger's view that statistics on the north are relatively sparse and somewhat unreliable, and that views of professional sociologists and economists often differ on solutions to the major problems which exist in the north today. The Board's assessment is, therefore, one of broad judgment.

The north at this time may be said to be a land in transition. The move of natives away from the traditional way of life, living in small groups and relying almost entirely on hunting and fishing, is a recognized fact. Many native northerners now live in communities where schools and social services are available. Hunting and trapping still take place, but more on a seasonal basis.

Little wage employment has been created and many of the people receive welfare payments. The problems of crime, alcoholism and health greatly exceed those of the south. For the individual native northerner, the situation

seems to be one of turmoil caused by fear of further white encroachment, a striving to retain the essentials of a life close to the land from a non-viable base in a community, a difficulty in adapting to modern technology but more and more exposed to it and, at the same time, a search for radical changes in political institutions to protect and safeguard native culture and ways of living. It is therefore not surprising that the added problems relating to the possible construction of a pipeline only confound an already confused situation.

The situation in the Yukon is similar in many respects to that in the Northwest Territories. However, the opening up of the Alaska Highway in 1942 and the fact that the Yukon economy and institutions are more developed, and that the land claim negotiations appear to be more advanced in the Yukon, offer more potential for the earlier resolution of difficult and complex problems associated with a land claims settlement.

The outlook of white residents of the north, particularly the entrepreneur and the small business man, is generally pro-development, although with some fear of being overwhelmed by the large companies from the south. Municipalities generally feel a need to grow and broaden their tax base if they are to provide the services their inhabitants are increasingly demanding, although they

recognized and expressed concern over the heavy burdens which might be imposed in the absence of sufficient lead time and financial support. Finally, a large component of the white population is comprised of territorial and federal public servants.

The territorial governments appear to look with favour upon developments such as those proposed by the Applicants. A major consideration for the territorial governments would seem to be that these developments would provide them with much needed increased revenues as well as contributing significantly to closing the wide gap between federal government expenditures required to maintain the north in a viable state and revenues originating in the territory.

Turning now to the CAGPL and Foothills applications, the socio-economic impact of these projects along the Mackenzie Valley would be broadly similar and will be considered together. The common features of the socio-economic impact and measures proposed by the Applicants to mitigate it include:

1. Willingness to train and hire Northerners for employment, but recognition that opportunities in the construction phase are limited and mainly related to unskilled and semi-skilled jobs.

2. The main job creation opportunity for Northerners arises from hydrocarbon exploration and development rather than the pipeline itself - but without a pipeline or the expectation of one these jobs would not be available.
3. Mitigative measures include the isolation of construction camps from communities, preference in hiring to be given to "Northerners", a term still lacking precise definition, the hiring of non-northern workers solely from union hiring halls south of the 60th parallel, provision of most of the pipeline company's own services such as transportation and barging, self-containment of camps, etc.
4. Assistance to municipalities and communities where the impact can be identified with the pipeline; e.g., employee housing.
5. Provision of gas to communities.

Construction south of the 60th parallel would follow the pattern traditionally associated with pipelines and no unusual problems were identified.

The undertakings made by CAGPL and Foothills on the socio-economic impact are contained in Appendices 5.1 and 5.2, as well as in evidence given in the hearing.

The Foothills (Yukon) project is basically similar to CAGPL and Foothills except that it would be carried out adjacent to an existing highway system. There can therefore be less containment of construction camps compared with that for camps in the Mackenzie Valley, and there would be more impact on some of the communities along the highway. On the other hand, it appears that a smaller number of inhabitants would be affected.

The Foothills (Yukon) undertakings are contained in Appendix 5.2.

The Board, in making its assessment of the socio-economic impact of the applications, assumed that if a pipeline were built the certificate would be conditioned with respect to the following requirements or that, where applicable, the requirements would be contained in agreements with the federal government.

1. Preferential hiring treatment for Northerners with the definition of a "Northerner" to be determined by and acceptable to the Government of Canada.
2. Southern hiring halls to be used for non-northerners working on the pipeline.

3. Union contracts would contain provisions responsive to the avoidance of work stoppages.
4. Applicants to abide by undertakings made on socio-economic matters.
5. Indirect costs north of the 60th parallel to be paid by the pipeline company.
6. An effective governmental monitoring system for socio-economic matters to be in place prior to the start of construction.

The Board's assessment of the socio-economic impacts which may flow from a pipeline project in the north follow. In the view of the Board, regional problems related to the possible large in-migration to the north, associated local inflation, and possible direct and indirect interference with the traditional sectors of the economy, are three of the main regional costs which may occur and which must be mitigated. Also, there would be territorial and federal government costs which have not been fully assessed. Short-run regional benefits will emerge from business opportunities, increased employment opportunities during the construction period and in the longer term, those associated with oil and gas exploration and development, and their consequent increases in real incomes to residents of the affected areas. Transportation and communication

systems would also be improved in the regions. The petroleum industry in the Delta area would be provided with substantial impetus. Perhaps the largest long-run impact upon the territories could be the possibility of their receiving income taxes and royalties associated with natural gas production and transmission. If Delta gas pipeline throughputs rise to levels estimated by the Applicants, these government income flows could go a long way towards providing an economic basis for territorial self-sufficiency.

The pipeline and related projects would do little to ameliorate the endemic social problems of the north. Job creation, particularly hydrocarbon exploration and development, should be beneficial but the transition to wage employment entails its own brand of social difficulties. Certainly, in the Board's view, the construction period would exacerbate social problems, particularly in the Mackenzie Valley. On balance, pipeline projects probably have a negative social impact.

However, the assessment of the net impacts on the pipeline corridors is greatly complicated by the diverse interests of the various residents and the quite different social and economic impacts on them.

The Inuit would tend to gain from the main job-creating activities being in the Delta and adjoining areas,

but they nevertheless fear the disruption to their traditional way of life and are concerned about the effectiveness of control measures.

The Métis would gain by their willingness to participate in pipeline development.

The Dene might participate in some of the unskilled and semi-skilled jobs during construction, but on balance the construction would have negative impacts since it would frustrate their attempt to develop their own institutions based on a renewable resource based economy and the operations phase would have little to offer the Dene. (It is assumed that all Northerners would directly or indirectly benefit through royalty and taxation income generated by hydrocarbon activities in the north).

Likewise, the Indian communities along the Alaska Highway would be adversely affected. However, they are fewer in number - about 3,000 inhabitants versus approximately 13,000 in the Mackenzie Valley corridor.

The white segments of society would, in the Board's view, gain from pipeline developments, particularly local businesses. Municipalities would welcome an opportunity to broaden their base and develop more services which economic development would make possible.

The territorial governments would benefit from the broadening of the economic base but with a concomitant requirement for increased and more diverse government services.

Comparing the Mackenzie Valley and Alaska Highway impact corridors, the Yukon has a more developed economic infrastructure, transportation network and business base which would enable it to handle the impact of a pipeline more easily; but the Yukon is more accessible and therefore more vulnerable to in-migration and the containment of construction would be more difficult. On the other hand, the native population which would be affected is smaller than in the Mackenzie Valley and has been in contact with modern society for a longer period commencing with the opening of the Alaska Highway. Furthermore, the Yukon Indians do not appear to be passing through the phase of a major restructuring of their society, as the Dene appear to be; the latter's transitional activities could be severely prejudiced by the construction of a pipeline. The Board concludes that the socio-economic impact on the pipeline corridors would on balance be more favourable along the Alaska Highway than in the Mackenzie Valley.

The major economic gain in the north would arise primarily from hydrocarbon development in the Mackenzie

Delta and related areas. This gain can only occur if the gas is connected to market and the Board has already indicated that it is desirable to do so if the socio-economic and environmental conditions of connecting it can be made acceptable. Since the adverse socio-economic impact of constructing a pipeline along the Mackenzie Valley at this time is of serious concern to the Board, it is necessary to examine in a preliminary way the socio-economic consequences of choosing instead a route through Dawson and a link from the Delta along the Dempster Highway to Dawson. Both the re-routing and the link would follow established highways. Only a small part of the land inhabited by the Dene would be involved, but there are important communities at Fort McPherson and Arctic Red River. In the Yukon, there are large native communities at Dawson, Stewart Crossing, Pelly Crossing and Carmacks. In total, the native population affected would be about 1,000 to 1,500 more than with the Alaska Highway route without a Dempster link. Nevertheless, the total native population impacted with a line through Dawson and a Dempster link would still be only about one-third that in the Mackenzie Valley. Also, the Dawson alternative has the potential for supplying natural gas to facilitate mining activities.

The Board finds that the potential adverse socio-economic impacts are less in the Yukon than in the Mackenzie Valley, and the economic benefits of the CAGPL and Foothills (Yukon) projects are probably about the same assuming a Dempster link were ultimately to become part of the latter.

The Board concludes that the social and economic impact of the Foothills (Yukon) project could be held to tolerable levels. It holds this view despite the fears expressed in the hearing that the problems of the socio-economic impact of Alyeska could be repeated in the Yukon, and despite the recognition that no conditioning of a certificate or monitoring system can be fully effective. The Board's assessment as indicated earlier is predicated on conditions to be incorporated into a certificate of public convenience and necessity, on undertakings given by the Applicant and its apparent willingness to translate socio-economic principles enunciated in the hearing into specific programs by the time of final design, on these programs being developed in co-operation with both the federal and territorial governments and local communities and organizations, and is influenced by the likely creation by the government of a new monitoring agency for socio-economic matters.

Turning first to the subject of payment of indirect costs by the Applicant, the Board believes that identifiable indirect costs of the project north

of the 60th parallel should be borne by the pipeline companies. These costs would be many and varied whether related to in-migration, to transportation services, to additional crime and alcoholism problems, to social and health services, to inflationary impacts on the poorer segments of the community, to strains on municipal services or to costs incurred in mitigating the adverse impacts in communities in the pipeline corridor. These costs are difficult to measure with precision even after the fact, but even more so at this stage. While the amount cannot now be estimated with any degree of accuracy, the Board recognizes that the Applicant would want to know the upper limit of the obligation it might incur before financing can be completed. The Board, therefore, recommends that the upper limit be set at \$200 million and recommends to the Governor in Council that before approval of a certificate is given, the Applicant enter into an agreement with the federal government to provide the funds to cover these costs. This fund would cover indirect costs for socio-economic impacts but would exclude costs of the monitoring authority.

In the hearing of a certificate application, the Board deals with and takes into account all relevant matters on a broad basis and these must be translated into specific programs for approval by the Board at the final design stage. Before these could be developed, it is clear that

the Applicant would need to carry out further research and studies and would need to hold extensive discussions with the federal and territorial governments, as well as with all segments of the communities. It is, therefore, unreasonable at this time to begin to appraise the minutiae of the Applicant's programs but this would be done before authorizing construction.

On the need for a government agency to monitor socio-economic matters, this is a new and vital feature of pipeline construction and the Board strongly recommends that the government create immediately effective machinery for this purpose.

In this regard, the Board shares the view of Interdisciplinary Systems Ltd., as set forth in its Initial Environmental Evaluation of the Proposed Alaska Highway Gas Pipeline, Yukon Territory, dated May 1977, and filed as a public document at the hearing.

"It was concluded from this preliminary review that much of the adverse social and economic impact which characterized construction of the Alyeska pipeline can be avoided in the Yukon with proper planning and controls. The pipeline project, while having considerable potential to adversely affect the Yukon, also presents a unique opportunity to improve the status quo."

"To introduce a project of this size into the Yukon could strain all existing governmental services and control mechanisms beyond their breaking points. This would be brought about partly because of the influx of construction workers but more particularly because of the free access to the Territory by the Alaska Highway and to a lesser degree, the airports and landing strips. Therefore, the control mechanisms that will limit the impact on the human and animal environments will be the key to limiting environmental change to an acceptable degree. The procedures for implementing and integrating these controls into a comprehensive planning framework for both government and the applicant have not yet been developed."

In the Board's view, it would be essential that the central role in socio-economic monitoring be carried out by an agency of the government since the effects would be widespread and a number of territorial and federal government departments would be involved; but the Applicant would also have to play a major constructive and co-operative

role. As stated previously, effective controls would have to be designed and installed before construction started so that the project could move smoothly on schedule to its completion. The Board is of the view that if this problem is tackled vigorously and immediately, there is adequate time to have in place an effective monitoring system within the time identified in the construction schedule. The Board assumes that this can be done and would be done. The monitoring authority would, in the Board's view, act in a complementary and co-operative manner with the Board in the exercise of the Board's statutory powers in all phases of construction.

Further views on the need for a monitoring authority are contained later in these Reasons for Decision, and the areas of concern which it is recommended be dealt with by the monitoring authority are contained in Chapter 5.



National Energy Board

Reasons for Decision

**Sable Offshore Energy
Project**

and

**Maritime & Northeast
Pipeline Project**

GH-6-96

December 1997

Facilities

National Energy Board

Reasons for Decision

In the Matter of

The Sable Offshore Energy Project

Application dated 11 June 1996, as amended,
for Facilities and Tolls

and

The Maritime & Northeast Pipeline Project

Application dated 7 October 1996, as
amended, for Facilities & Tolls

GH-6-96

December 1997

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Recital and Appearances

IN THE MATTER OF the *National Energy Board Act (NEB Act)*, and the Regulations made thereunder; and

IN THE MATTER OF an application dated 30 May 1996 by Mobil Oil Canada Properties and Shell Canada Limited., on behalf of the Sable Offshore Energy Project, for a Certificate under section 52 of the *NEB Act* and an Order under Part IV of the *NEB Act* to construct and operate facilities and to conduct activities that fall under the jurisdiction of the National Energy Board; and

IN THE MATTER OF an application dated 7 October 1996 by Maritimes & Northeast Pipeline Management Ltd., on behalf of Maritimes & Northeast Pipeline Limited Partnership, for a Certificate under section 52 of the *NEB Act* and an Order under Part IV of the *NEB Act* to construct and operate facilities and to conduct activities that fall under the jurisdiction of the National Energy Board; and

IN THE MATTER OF Hearing Order GH-6-96;

HEARD in Moncton, New Brunswick, April 4, 1997, in Antigonish, Nova Scotia, April 5, 1997, in Halifax, Nova Scotia on 7 to 11, 14 to 18, 21 to 24 April 1997, in Fredericton, New Brunswick on 28 to 30 April 1997, 1 and 2, 5 to 9, 12 to 16 May 1997, and in Halifax, Nova Scotia on 26 to 30 May 1997, 2 to 6, 9 to 13, and 23 June 1997, 2 to 4, 7 to 11 and 14 July 1997.

BEFORE:

K.W. Vollman	Presiding Member
R.O. Fournier	Member
A. Côté-Verhaaf	Member

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N. Miller	Corridor Resources Inc.
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C. MacKinnon	City of Saint John
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F. Leblanc, M.P.	On his own behalf
E. Lockerby	On his own behalf
G. Randall	On his own behalf
P. Noonan C. Beauchemin	Board Counsel

Foreword

The Proponents of the Sable Offshore Energy Project (SOEP) and of the Maritimes and Northeast Pipeline Project (M&NPP) submitted applications to the following regulatory agencies: the Canada-Nova Scotia Offshore Petroleum Board (CNSOPB); the National Energy Board (NEB or the Board); and the Nova Scotia Energy and Mineral Resource Conservation Board (NSEMRCB).

Given that each jurisdiction required a public review of both projects, an opportunity emerged to conduct a joint public review as a means of streamlining the regulatory process. The outcome was the Agreement for a Joint Public Review of the Proposed Sable Gas Projects (the Agreement) forged among the Ministers of Environment for Canada and Nova Scotia, the Ministers of Natural Resources for Canada and Nova Scotia, the Chairman of the National Energy Board and the Acting Chief Executive Officer of the Canada-Nova Scotia Offshore Petroleum Board (the Signatories). The purpose of the Agreement was to co-ordinate the environmental and socio-economic assessment requirements of the Signatories by providing a review of the environmental and socio-economic effects likely to result from the Projects.

A Joint Public Review Panel was struck by the Signatories comprising five members. The Chairman was appointed as a temporary member of the NEB, and two of the remaining members were full-time NEB Members.

The Terms of Reference contained in the Agreement stipulated that the review procedures set by the Joint Review Panel would include the *NEB Rules of Practice and Procedure* which contemplate testimony under oath or solemn affirmation, cross-examination and argument. The applications received from SOEP and M&NPP were simultaneously considered by the NEB during the Joint Public Review proceeding. The three NEB Members on the five member Joint Review Panel acted as the NEB panel for both the SOEP and the M&NPP facilities under Hearing Order GH-6-96.

The Joint Review Panel released its report on the environmental and socio-economic effects of the Projects on 27 October 1997. The Summary and Conclusions section from that report is included in this document as Chapter 2.

The Board has considered the Joint Public Review Panel Report Recommendations and the Government of Canada's response thereto, and is of the view that, taking into account the implementation of appropriate mitigation measures identified in the course of the Joint Panel Review proceedings, the Projects are not likely to cause significant adverse environmental effects. The Board accepts all the pertinent recommendations of the Joint Public Review Panel and, where appropriate, the recommendations have been incorporated as certificate conditions. The following chapters constitute the Board's decisions on those matters under its jurisdiction and the reader should refer to the Joint Review Panel Report for the reasons therefore.

Chapter 1

Introduction

The Sable Offshore Energy Project (SOEP), a consortium consisting of Mobil Oil Canada Properties Limited, Shell Canada Limited, Imperial Oil Resources Limited, and Nova Scotia Resources Limited, plans to develop six fields located on the Scotian Shelf: Venture; South Venture; Thebaud; North Triumph; Glenelg; and Alma. SOEP proposes the construction of offshore and onshore facilities for the drilling, production, transmission and processing of natural gas. Gas and associated natural gas liquids will be collected from offshore production platforms and brought ashore by means of a submarine pipeline to a gas plant to be located at Goldboro, in Guysborough County, Nova Scotia. Natural gas liquids will be transported from the gas plant by an onshore pipeline to Point Tupper, Nova Scotia for further handling and shipping.

Gas production is projected for late 1999, starting at Thebaud, Venture and North Triumph. Additional fields will be developed as required to maintain the sales gas rate of 13.0 million cubic metres per day (460 million cubic feet per day). Development of the South Venture, Glenelg and Alma fields is currently planned for 2004-2007. Project facilities will be designed so that, with proper inspection, maintenance and repairs, they can be used well beyond the current proposed project life of 25 years. This design approach will enable later development of additional satellite fields. Further exploratory discoveries will be incorporated into SOEP as warranted. Accordingly, SOEP is viewed as a seed project which should promote future development of offshore gas reserves on the Scotian Shelf.

The Maritimes and Northeast Pipeline Project (M&NPP) proposal will transport the processed natural gas via an onshore pipeline to Canadian and U.S. markets. The facilities will consist of 558 kilometres of 762 millimetre pipeline extending from the outlet point of the Goldboro gas plant, first in a northwesterly direction passing near New Glasgow and Tatamagouche, Nova Scotia, crossing the Nova Scotia-New Brunswick border near Tidnish. Approximately 234 kilometres of pipeline will be located in Nova Scotia. The pipeline will traverse New Brunswick in a westerly direction passing near Moncton and Chipman. From Chipman it will proceed in a southwesterly direction passing near Fredericton, crossing the Saint John River and proceeding to the international border near St. Stephen, New Brunswick. Approximately 324 kilometres of pipeline will be located in New Brunswick. At the border, the pipeline will connect with U.S. facilities that will deliver the gas to the northeastern states and ultimately tie into the existing North American natural gas pipeline grid.

The NEB formally referred the SOEP proposal to the federal Minister of the Environment in June 1996 for environmental assessment by a panel and the M&NPP proposal was added in October 1996.

The Agreement for a Joint Public Review of the Proposed Sable Gas Projects set out the process for conducting the Joint Public Review. It provided that the public review would allow for the collection and examination of environmental evidence and the hearing of argument on the environmental effects of the Projects for use in subsequent deliberations and decision making on the applications by regulatory authorities. It also provided a forum for one of the members acting as Commissioner to the CNSOPB to publicly distribute the Development Application as well as permit the collection of information in relation to the Development Plan Application for use in subsequent deliberations and recommendations to the CNSOPB.

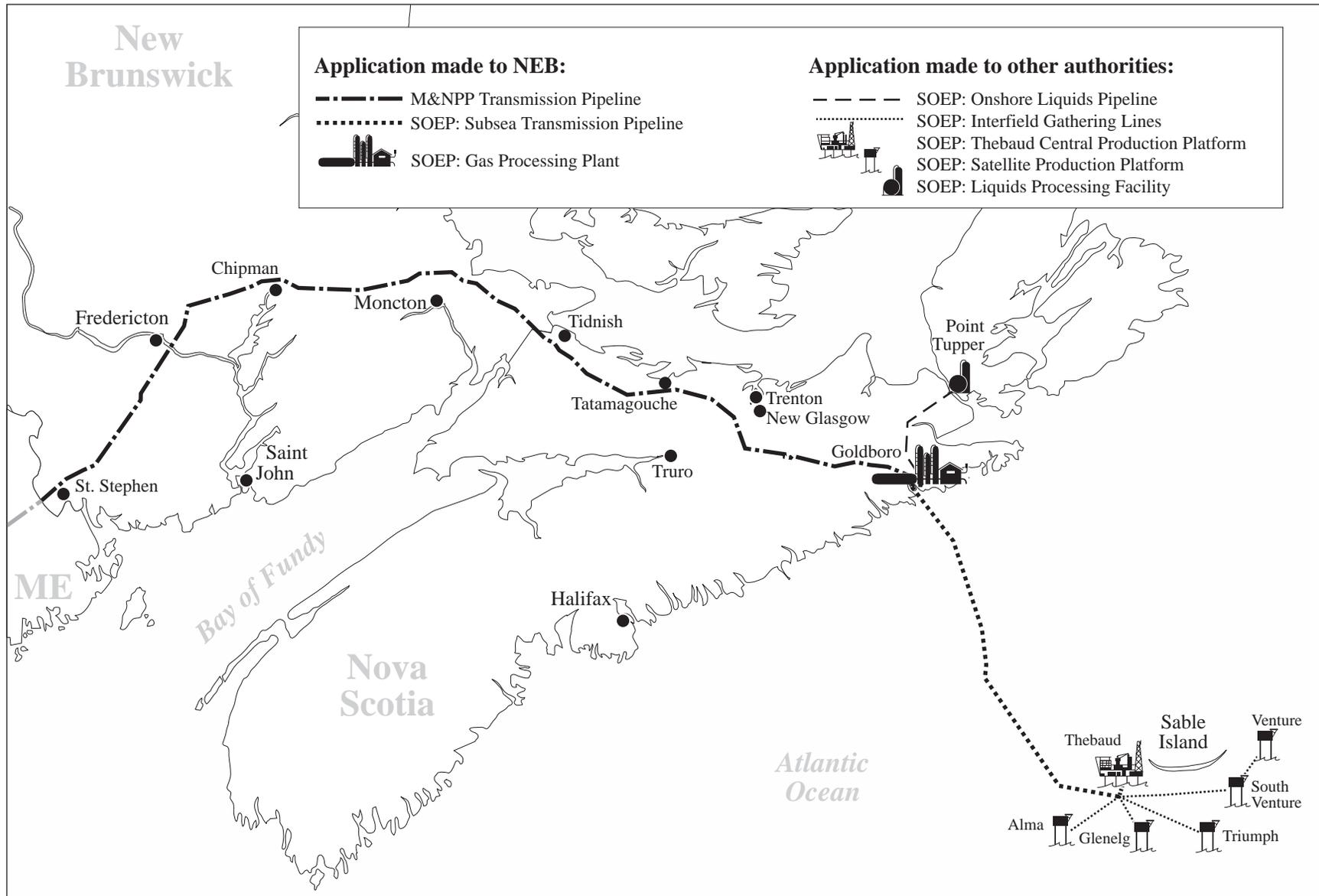
As previously mentioned in the foreword, the Terms of Reference, contained in the Agreement, stipulated that the Review procedures set by the Joint Review Panel would include the *NEB Rules of Practice and Procedure* which contemplate sworn testimony, cross-examination and argument. Many of the issues relating to SOEP and to M&NPP were the same or interdependent, as were many of the specific issues to be considered by the Joint Public Review Panel, the NEB panel and the Commissioner. The Joint Review Panel, the NEB panel and the Commissioner therefore decided to hear evidence and argument, relevant to their respective mandates, with respect to both SOEP and M&NPP in a single consolidated proceeding. The "Directions on Procedure", to that effect, were issued by the Joint Review Panel on 16 December 1996 as was the NEB Hearing Order, GH-6-96.

Applications by SOEP and M&NPP to the NEB were for Certificates of Public Convenience and Necessity under section 52 of the *NEB Act* for the facilities under NEB jurisdiction, which include: the offshore pipeline from the central processing facility at Thebaud to landfall; the onshore line from landfall to the gas plant at Goldboro, Nova Scotia; the slugcatcher and gas processing facilities at Goldboro; and, the 558 kilometres of 762 millimetre pipeline and associated facilities extending from the outlet point of the Goldboro gas plant to the international border near St. Stephen, New Brunswick. As well, application was made for an Order under Part IV of the *NEB Act* respecting pipeline tolls and tariffs.

The responsibility for the approval of the detailed design and matters related to the detailed design for the central processing facility at Thebaud, the unmanned satellite platforms at the remaining five gas fields, the interfield flowlines and the drilling activity required for the gas field development rests with the CNSOPB. Discussion and review of these matters will be part of their subsequent Decision Report on the Development Plan Application.

The responsibility for the approval of the detailed design and matters related to the detailed design for the natural gas liquids pipeline and the natural gas liquids facilities at Point Tupper, Nova Scotia rests with the province. Discussion and review of these matters will be part of their subsequent regulatory permitting and reporting.

Figure 1-1
The SOEP and M&NPP Projects



Chapter 2

The Joint Review Panel Report Summary and Conclusions

(This chapter is taken directly from the Joint Review Panel Report)

The Joint Review Panel (the Panel) after taking account of the evidence, cross-examination, argument and public comments during its examination of the Sable Offshore Energy Project (SOEP) and the Maritimes and Northeast Pipeline Project (M&NPP), concludes that SOEP and M&NPP are not likely to cause significant adverse environmental effects, provided that appropriate mitigation identified in the course of the review proceedings is applied to both Projects and that the Panel's recommendations are followed and implemented. As well, the Panel concludes that the socio-economic outcomes are favourable for the Maritimes and Canada. As a consequence, the Panel encourages the appropriate regulatory authorities to proceed with all necessary approvals for SOEP and M&NPP without further delay.

In reaching its conclusions, the Panel had for its review information gathered from twenty information and scoping sessions held throughout Nova Scotia and New Brunswick, 1270 exhibits representing either direct written evidence or responses to formal information requests, and a total of 12,266 pages of transcripts from the 56 hearing days in Halifax and Fredericton.

Alternatives

Prior to the start of the hearings, a motion was put forward by Trans Québec and Maritimes Pipeline Inc. (TQM) to request that the Panel consider their proposal as an alternative to M&NPP and allow for a full environmental assessment of the TQM Pipeline Project, and that the National Energy Board (NEB) panel delay any decision on M&NPP until TQM's proposal has been heard. In addition, the Panel heard arguments from Tatham Offshore Inc. and Seafloor Structures Consulting Ltd. requesting that their proposals be considered as alternatives.

The Panel considered whether procedural fairness required it to delay issuance of its Report in order to conduct a comparative environmental assessment of the alternatives to the Projects under review. The Panel believes that it has satisfied its obligations in this regard through the 56 day hearing convened to examine the SOEP and M&NPP Applications, which includes evidence submitted with respect to alternatives to the Project. In view of this, the Panel concludes that it would be inappropriate to delay its report in order to embark upon multiple environmental assessments of potential alternatives. In addition, the NEB panel has also decided to reject requests for delay.

Offshore Environment

In reaching its conclusion with regard to significant adverse effects, the Panel considered many issues, both environmental and socio-economic. A major concern was the Proponents' introduction of waste discharges into the marine environment, particularly drill cuttings with their attendant residues of oil base drilling muds.

Based on the evidence presented, the Panel believes that SOEP's proposed methodology for the treatment and discharge of drilling and production wastes will not result in significant adverse effects to the Scotian Shelf. The Panel notes that SOEP has stated that it will meet or fall well below the limits outlined in the "Offshore Waste Treatment Guidelines" for hydrocarbon content in liquid wastes and on drill solids. The Panel recognizes the importance of monitoring platform discharges.

Accordingly, it has provided recommendations to ensure that SOEP implement adequate monitoring and to encourage the incorporation of new drilling waste management technologies when they become available, if they are proven to be environmentally sound and economically feasible.

Another major concern was the possible impacts of the Project on the Gully, an area of special ecological significance on the Scotian Shelf. Concerns were raised regarding the impact of platform discharges and noise generated by Project-related activities potentially reaching the Gully. An additional concern that emerged was that future project expansion might lead to developments even closer to the Gully.

The Panel is concerned over the possibility of project expansion encroaching on the Gully. It has concluded that additional research must be conducted to obtain baseline data on water circulation, sediment transport and acoustic transmission effects on marine mammals. Accordingly, the Panel recommends that, prior to regulatory approval, SOEP submit its Code of Practice outlining protection measures for the Gully as part of their final Environmental Protection Plan. Included in the Code will be details on proposed monitoring programs and mitigative measures. The Panel further recommends that SOEP initiate or contribute to research activities that will provide the baseline data necessary for Environmental Effects Monitoring programs. Additional data are essential to permit effective decision-making with regard to further development of the resource, particularly at sites nearer to the Gully.

The impact of onshore and offshore construction activities on the aquaculture industry raised a number of issues, particularly in the area of Country Harbour, Nova Scotia. Blasting and trenching near the pipeline landfall raised concerns as to the potential for re-suspension of sediments. The siting of supply or service bases near Country Harbour was also raised. Increased vessel traffic associated with these bases could seriously impact on current aquaculture leases in the area. Of particular importance to the industry was the possibility of actual or perceived tainting, given that consumers view Country Harbour as a pristine marine environment.

The Panel was concerned here as well about the lack of baseline data regarding possible adverse effects on the aquaculture industry. Accordingly, it recommends that SOEP commit to a minimum of one full year of baseline water and sediment monitoring. As to the potential impact of supply or service bases on the aquaculture industry near Country Harbour, the Panel recommends that SOEP remove Country Harbour from consideration as a base site.

Onshore Environment

Onshore issues of particular importance to both the SOEP and M&NPP proposals included watercourse crossings, of which 260 are anticipated, and the potential impact of acid generating rock. Issues arising from watercrossing activities were focussed on potential adverse effects on fish and fish habitat. Blasting and excavation can expose acid generating rock, which can increase acid levels in the aquatic environment, thereby adversely affecting some organisms. Special emphasis was directed at the adverse impacts on salmon.

The Panel recommends that SOEP and M&NPP mitigate potential Project impacts by addressing: watercourse crossing methods; wet weather shut-down policy; construction techniques and mitigative measures; methods to deal with mitigation of acid generating rock; and finally, new environmental issues resulting from construction activities.

Route selection and land use conflicts were additional areas of concern. The Panel believes that the M&NPP route selection process was thorough and involved considerable public participation. The proposed general route for M&NPP is adequate, if proper mitigative measures are followed. Moreover a detailed 25 metre route will be identified and studied further. This should afford further opportunities for avoidance or mitigation of any sensitive environmental areas and address any new or remaining concerns which were raised by aboriginal and environmental interests. It will also permit persons who believe that their lands may be adversely affected to make their views known and ensure that their rights are protected.

The Panel recognizes that many rural residents fear that the presence of a pipeline will detract from the rural quality of life. It heard concerns during scoping and information sessions on matters such as pipeline safety, adverse effects on wildlife, property trespass and the aesthetics of right-of-ways. The Panel recognizes their validity but feels that the evidence before it indicates that these kinds of impacts can be avoided or mitigated to insignificance through proper planning, construction and maintenance practices. SOEP and M&NPP have committed to ensure that there will be no significant adverse impacts and the Panel has provided recommendations to ensure this happens.

Socio-Economic

Issues brought forth in the Hearing were not limited to environmental matters alone; they included many areas related to socio-economic effects and benefits. One issue of some importance was the adequacy of the public consultation program, which is required by the NEB and by the environmental assessment legislation of Nova Scotia and Canada. The Panel found SOEP and M&NPP's programs to be extensive, and it was satisfied with their overall effectiveness. One exception was the inadequate initial contact with the aboriginal community.

Jobs and business opportunities were a concern. The Panel found that direct construction benefits will be short-term and limited, especially when compared to overall economic activity in the Maritimes. The benefits will be real and welcome but they will not be an economic panacea.

The main economic benefits lie in the future. Attaining these benefits will depend on SOEP and M&NPP acting as a catalyst to further hydrocarbon exploration and development. Attainment of that goal will provide an energy alternative for existing industry as well as providing a stimulus for new industrial development, especially in the area of petrochemicals.

The Panel believes that more could be done to enhance opportunities in the Maritimes. In particular, there is no commitment to process gas liquids in Nova Scotia. They appear to be destined solely for export markets. The Panel sees industrial development opportunities arising from the availability of natural gas and its liquid by-products. The Panel was also struck by a lack of foresight in developing training programs in anticipation of the increased economic activity that a 'seed' project will generate. A similar concern was the absence of a long range research and development program. Such a program will be needed to provide a requisite environmental and socio-economic information base for

future regulatory decisions and to ensure that the Canada and Nova Scotia capture as many future benefits as possible.

Markets and Tolls

From the perspective of the Panel, a primary objective of SOEP and M&NPP is to provide access to natural gas for the Maritimes markets. At the same time, the Panel recognizes that markets in the U.S. northeast are a prerequisite to the success of the Projects.

Further, the Panel is of the view that the appropriate toll design is linked to several market development factors. First, SOEP and M&NPP are seed projects, which will provide the foundation for future activity. Second, the building of laterals will encourage access to and growth of natural gas markets in the Maritimes. Third, while preserving the overall economic viability of the pipeline, it is important to recognize the relative economic position of different groups of shippers.

Because of the importance the Panel places on use of Sable gas in the Maritimes, it is inclined to look at the toll design and laterals policy as a "package". The Panel was attracted to M&NPP's postage stamp toll design methodology and Lateral Policy on the basis that it would provide a solid economic foundation for the pipeline in its early years and the greatest potential for the development of the Maritimes market through M&NPP's Lateral Policy.

While the Panel recognizes that the Province of Nova Scotia withdrew their support for the "Joint Position" in reply argument, it is of the view that the Joint Position provides the best available package for promoting gas market development in the Maritimes and, through discounts, partially recognizes the Nova Scotia position that distance should be a factor in toll design.

Nova Scotia intervenors were also opposed to the commitment by SOEP to sell the entire gas production from the first six Sable fields exclusively to M&NPP shippers. They argued that because of their proximity to the Goldboro gas plant, they should not be required to become shippers on the M&NPP pipeline in order to have access to Sable gas. While recognizing that sufficient gas production must be available to M&NPP to make the pipeline economic, the Panel will not sanction tied sales by SOEP because it believes that access to natural gas for Canadians should not be conditional on buyers/shippers transporting their gas on designated facilities.

The Panel believes that the option of by-passing the M&NPP pipeline addresses Nova Scotia interests in arranging their own transportation, while preserving the prerequisite capacity to serve the U.S. northeast.

Monitoring

Natural gas production and transportation will bring new challenges to the Maritimes, but they are not dissimilar to those faced in the past 25 years of offshore petroleum exploration and production. Projects require detailed planning for the proposed operations prior to construction, and thereafter, effective inspection, monitoring and enforcement programs. Planning for SOEP and M&NPP is still evolving. The Panel in making its recommendations is aware that in some instances it has assessed principles rather than details. This is the nature of the offshore development process. Inspection, monitoring and enforcement are tools that guarantee that a project will be built and operated according to plan. The Panel has recommended a number of safeguards to ensure that any modifications to plans

result in greater safety, less environmental impact and more benefits. The Panel has, to the best of its ability, ensured that effective inspection and enforcement mechanisms are in place, consistent with the precautionary principle which ensures a conservative approach to environmental protection. It has also supported mechanisms by SOEP and M&NPP to encourage monitoring through continuing dialogue and input from the public, stakeholders, regulators and special interest groups. SOEP and M&NPP have initiated a range of consultative committees and the Panel has suggested how these committee mechanisms can be improved. Committees offer a meaningful opportunity to monitor work in progress and ensure that local and special concerns are addressed. The Panel recognizes the efforts that SOEP and M&NPP have taken to date and encourages them to build on these for the future.

Chapter 3

The Sable Offshore Energy Project

3.1 Description

The proposed two-phase production gathering pipeline from the Thebaud platform to the Goldboro gas plant will be approximately 208 kilometres in length. The pipe will be 660 millimetres in diameter, with a wall thickness of 17.48 millimetres, and has been designed with excess capacity in order to provide for future expansion of the offshore production facilities. The design pressure for the pipeline will be approximately 15,300 kPa, in accordance with the "CSA Z662-96, Oil and Gas Pipeline Systems, December 1996" specifications, and the maximum operating pressure will be approximately 11,700 kPa. The pipeline will be externally coated with a fusion bond enamel and cathodically protected against corrosion. The Proponents also considered coating the pipe with concrete to provide increased weight stability, but a final decision on this option has yet to be made.

The subsea pipeline corridor was selected on the basis of distance, slope, water depth and the avoidance of unsuitable substrate materials. The line will be routed, where possible, to avoid extreme water depths in order to simplify lay barge requirements and to avoid rock outcrops and severe slopes. The Proponents expect that the pipeline will be trenched in shallow water and, in many cases, that it will self bury. Design criteria for burial will be refined in forthcoming geotechnical studies.

The proposed onshore facilities will include a slugcatcher and a natural gas processing plant to be located in Goldboro, as well as a natural gas liquids processing facility to be located in the Point Tupper area. The gas plant will produce specification sales gas and unstabilized liquid products. These liquids will be shipped by pipeline to Point Tupper where production of specification liquefied petroleum gases and stabilized condensate will occur.

The Goldboro gas plant will have the capacity to process approximately 17.0 million cubic metres per day of raw inlet natural gas and to remove 3,849 cubic metres per day of natural gas liquids. The actual volumes of product shipped will vary according to production practices.

3.2 Environment and Socio-Economic Matters

Decision

The Board has considered the Joint Public Review Panel Report and the Government of Canada's response thereto, and is of the view that, taking into account the implementation of appropriate mitigation measures identified in the course of the Joint Panel Review proceedings, the portions of the Sable Offshore Energy Project under its jurisdiction are not likely to cause significant adverse environmental effects. Further, the socio-economic outcomes will be favourable to the Maritimes and Canada.

3.3 Facilities

Decision

Based on the information filed during these proceedings, the Board is satisfied with the design and configuration of the SOEP facilities. SOEP will be required to submit, for Board approval, information relevant to the final design of the offshore pipeline well in advance of actual construction. Further, SOEP will be required to seek approval pursuant to section 47 of the *NEB Act* for leave to open the offshore pipeline, the gas plant and associated facilities.

3.4 Economic Matters

Supply

A total of 121 test wells have been drilled on the Scotian Shelf since 1959. The CNSOPB has issued 22 Significant Discovery Licenses for fields considered to have potential commercial viability. These sites are estimated to contain a total of 163 billion cubic metres of recoverable gas.

The SOEP proponents submitted an application based on the proposed development of six fields on the Scotian Shelf: Alma, Glenelg, North Triumph, Venture, South Venture and Thebaud. These six fields have mean expected raw recoverable gas of 84.3 billion cubic metres and a 10 percent probability that the reserves will exceed 145.1 billion cubic metres. The proponents identified this six-field development as a "seed project" for future development. Additional information on supply can be found at pages 16 and 62-63 of the Joint Review Panel Report.

Markets

The ultimate markets for the SOEP-supplied gas are located in eastern Canada and the U.S. northeast where the gas would displace higher-priced fuels as well as serve incremental markets. A full discussion of both domestic and export markets can be found in Chapter 4 and on pages 64 and 65 of the Joint Review Panel Report.

Tolls & Method of Regulation

At the outset and for an indeterminate period, SOEP will be the sole user of the offshore transportation and onshore gas processing facilities. Since it will assume full ownership and operating costs of the facilities, SOEP will not charge a "toll" for transportation or processing service.

SOEP submitted that, because it would be the sole shipper on its line and no toll would be charged, there would be no need for the NEB to regulate its activities. Alternatively, it suggested that it be regulated as a Group 2 company on a complaints basis. Further, SOEP requested relief from the following accounting and financial reporting requirements: to keep its book of accounts pursuant to the code of accounts prescribed in the *Uniform Accounting Regulations*; to file audited financial statements; to file a tariff; to file detailed information to support a tariff specified in Part X of the NEB's "Guidelines for Filing Requirements"; and to comply with the *Toll Information Regulations*.

Financing

The companies participating in SOEP have substantial assets in Canada and around the world and will generate the funds necessary for the project internally or from third parties.

Decision

After taking into account the evidence filed with respect to supply, markets, economic feasibility and financial matters, the Board concludes that the SOEP facilities can be financed and will be used and useful over their economic life.

The SOEP operating entity will be designated as a Group 2 company for the purposes of regulation under the *NEB Act*. SOEP will be required to keep its book of accounts pursuant to the code of accounts prescribed in the *Uniform Accounting Regulations* and to file audited annual financial statements. Should a third party request service on SOEP's facilities, SOEP would be required to file a tariff and toll schedules pursuant to subsection 60(1) of the *NEB Act*. Further, this tariff would include the explanatory note set out in Schedule B of the "Memorandum of Guidance on the Regulation of Group 2 Companies" indicating that persons who cannot resolve traffic, toll, and tariff issues with the Company may file a complaint with the Board.

Chapter 4

Maritimes & Northeast Pipeline Project

4.1 Description

The proposed Maritimes & Northeast Pipeline Project (M&NPP) will consist of 558 kilometres of pipeline, 762 millimetres in diameter, extending from the outlet point of the Goldboro gas plant, first in a northwesterly direction passing near New Glasgow and Tatamagouche, and crossing the Nova Scotia-New Brunswick border near Tidnish.

The pipeline will traverse New Brunswick in a westerly direction passing near Moncton and Chipman. From Chipman, it will proceed in a southwesterly direction passing near Fredericton, crossing the Saint John River and proceeding to the international border near St. Stephen, New Brunswick. Approximately 234 kilometres of pipeline will be located in Nova Scotia and approximately 324 kilometres of pipeline will be located in New Brunswick.

The pipeline will be designed, installed and operated in accordance with the Board's *Onshore Pipeline Regulations*, which specify that the design, installation, testing and operation of a pipeline be in accordance with the applicable provisions of the "Canadian Standards Association Z662, Oil and Gas Pipeline Systems".

The proposed facilities include a custody transfer meter station located at the pipe inlet, three pig launchers and two pig receiver traps. Also included in the design are mainline valves, located at a nominal 40 kilometre spacing, and side valves for the future connection of laterals.

The pipeline will be designed to accommodate an initial forecast of 530,000 MMBtu (million British thermal units) of peak day capacity and, with additional compression, the peak day capacity could be increased to over of 800,000 MMBtu.

4.2 Environment and Socio-Economic Matters

Decision

The Board has considered the Joint Review Panel Report and the Government of Canada's response thereto, and is of the view that, taking into account the implementation of appropriate mitigation measures identified in the course of the Joint Panel Review proceedings, M&NPP is not likely to cause significant adverse environmental effects. Further, the socio-economic outcomes will be favourable to the Maritimes and Canada.

4.3 Facilities

Decision

Based on the information filed during these proceedings, the Board is satisfied with the design and configuration of the M&NPP facilities. Before initiating service, the company operating the pipeline will be required to seek approval pursuant to section 47 of the *NEB Act* for leave to open the pipeline.

4.4 Economic Matters

Supply

The supply for M&NPP will come from SOEP, as discussed in Chapter 3. More information on the supply available to M&NPP can be found at pages 16 and 62-63 of the Joint Review Panel Report.

Markets

Sable-sourced gas is expected to serve incremental and displacement industrial, Local Distribution Company (LDC), marketer, and power generation markets in Canada and in the U.S. The northeast U.S. market is considered to be the anchor market for SOEP and M&NPP.

Based on the NEB's "1994 Energy Supply and Demand Report", total energy demand in Nova Scotia and New Brunswick is forecast to grow at an average annual rate of approximately one percent between the years 1991 and 2010. M&NPP submitted that the construction of the SOEP and M&NPP facilities and downstream distribution systems will provide the necessary catalyst for the development and growth of these domestic markets.

To demonstrate the long-term nature of gas demand in the U.S. northeast market, M&NPP relied on a forecast, prepared by the Reed Consulting Group, entitled "Assessment of the Market for Natural Gas in the Northeast United States". This study concluded that total gas demand (i.e. firm throughput, interruptible, and electric power) in the U.S. northeast is forecast to increase from 2,700 TBtu (trillion British Thermal units) in 1997 to 3,325 TBtu in 2006, an annual average increase of 2.3 percent. Most of this gas demand is directly accessible off the U.S. portion of the M&NPP system.

M&NPP entered into Precedent Agreements with domestic and export shippers totalling 640,000 MMBtu/d. In addition executed Precedent Agreements for 7,600 MMBtu/d and 100,000 MMBtu/d of OP 275 and OP 214 (offpeak) services, respectively, have also been executed.

M&NPP has executed 20-year Backstop Precedent Agreements with Mobil Natural Gas Inc. and Imperial Oil Resources Limited for all of the throughput on the M&NPP pipeline up to 440,000 MMBtu/d that is not subject to firm transportation Service Agreements entered into by other shippers. These Backstop Precedent Agreements take effect from the date of commencement of service, and include all capacity that might become available in the future as a result of the termination of such PAs or firm transportation Service Agreements prior to the end of the 20 years.

Financial Regulation

Toll Design and Lateral Policy

The M&NPP proponents applied for a joint toll design and Lateral Policy which it argued were inseparable. The toll design is a single postage-stamp rate for each of the services offered. The Lateral Policy would see laterals tolled on a rolled-in basis if they generated sufficient revenue to cover the annual cost of service. Should additional costs be added because of a lateral, the pipeline company would seek a contribution from the shipper.

During the hearing, a Joint Position on Tolling and Laterals (Joint Position) was negotiated between representatives of SOEP and M&NPP and the provinces of Nova Scotia and New Brunswick. The Joint Position supports the postage stamp toll design but offers discounts for deliveries in Nova Scotia and New Brunswick in the initial years of the project. Any revenue deficiency associated with these discounts would be offset through adjustments to the depreciation policy of the pipeline. The Joint Position supported M&NPP's Lateral Policy and committed M&NPP's proponents to build laterals to Halifax, Nova Scotia, and Saint John, New Brunswick. Further, the Joint Position committed the SOEP proponents to put aside 10,000 MMBtu/d of production for sale to LDCs in each province for the initial three years of production.

Method of Regulation

The M&NPP proponents indicated a preference for regulation on a complaint basis as provided by Group 2 status. However, the M&NPP proponents suggested that it might be more appropriate to reserve judgement on the designation of the pipeline for Group 1 or Group 2 status until a hearing on its final toll application is held.

Financing

The M&NPP partners intend to finance the project with a combination of funded long-term debt and equity injections from the partners. The long-term debt will be arranged based on support provided by the long-term transportation contracts and financial arrangements with producing companies.

Decisions

After taking into account the information provided during this proceeding concerning supply, markets, economic feasibility and financial matters, the Board concludes that the M&NPP facilities can be financed, will be used and useful over their economic life, and that the associated tolls will be paid.

The Board approves the forward test year cost of service methodology as appropriate for M&NPP. Maritimes and Northeast Pipeline Management Ltd. (M&NPML) is directed to file tolls which are designed using this methodology and incorporate the provisions respecting toll design and laterals as contained in the "Joint Position on Tolling and Laterals" filed as Appendix V of the Joint Review Panel Report. M&NPML will be regulated as a Group 1 company.

Concerning the cost of equity capital, the Board agrees with the Joint Review Panel's statement, "...M&NPP can be viewed as having the same business risk as other Group 1 pipelines." However, the circumstances faced by M&NPP are substantially different from those faced by other pipelines regulated by the Board. It is a greenfield project, its only sources of gas are new and untested fields, it will be serving an untested market in Canada, and it is facing significant competition for its anchor market in the U.S. northeast. Consequently, the Board approves the combination of a 25 percent common equity portion coupled with a 13 percent rate of return on that equity as appropriate in the circumstances of this pipeline.

The Board notes that, should the circumstances change before the five years are up, any interested party may come before the Board to request a change in the financial structure and rate of return on equity for M&NPP.

Chapter 5

Disposition

The foregoing chapters constitute our Reasons for Decision in respect of the applications heard by the Board in the GH-6-96 proceedings. The Board has found that the Sable Offshore Energy Project facilities under its jurisdiction and the Maritimes & Northeast Pipeline Project will be required for the present and future public convenience and necessity, provided the conditions outlined in Appendices I and II are met. Therefore, the Board will seek approval from the Governor in Council for the issuance of certificates.

K. Vollman
Presiding Member

R. Fournier
Member

A. Côté-Verhaaf
Member

Calgary, Alberta
December 1997

Appendix I

Sable Offshore Energy Project Certificate Conditions

1. This Certificate of Public Convenience and Necessity shall be issued to and held by Mobil Oil Canada, Ltd. (the "Company") pending the establishment of the legal operating entity for the Sable Offshore Energy Project. Upon establishment of that legal entity, the Proponents will apply for permission to transfer this Certificate so that the pipeline facilities, in respect of which this Certificate is issued, shall be held and operated by that entity.
2. The Company shall implement or cause to be implemented all of the policies, practices, and procedures for the protection of the environment included in or referred to in its Application, in its undertakings made to relevant regulatory authorities, and as adduced in evidence before the Board in the GH-6-96 proceeding.
3. The Company shall, at least 60 working days prior to the commencement of construction of the nearshore pipeline in Betty's Cove, submit to the appropriate regulatory authorities for approval additional information regarding the proposed specific routes of the subsea pipeline and the specific installation method for the landfall point. The additional information shall set out:
 - (a) the results of the sediment sampling program along the specific route into Betty's Cove;
 - (b) an underwater habitat assessment along the specific route into Betty's Cove;
 - (c) an environmental issues list identifying all relevant effects of the selected route on marine biological Valued Environmental Components;
 - (d) the associated mitigation measures to render those environmental effects insignificant; and
 - (e) the details on the selected installation method for the landfall point.
4. The Company shall conduct a minimum of one full year of baseline water and sediment quality monitoring prior to any trenching activity in Country Harbour. Furthermore, the results of this program and those of the sediment modelling study for Country Harbour shall be submitted to the Board and shall be made available for review by both the Fisheries Liaison Committee and the Department of Fisheries and Oceans. Any issues raised shall be addressed prior to the commencement of any trenching activity.
5. The Company shall, to the extent possible, conduct pipeline laying activity at Country Harbour and Country Island outside the mid-May to mid-August nesting season, particularly until the appropriate baseline data has been collected and analyzed on the roseate tern population in this area. This data shall be submitted to the Board.

6. The Company shall prepare detailed Contingency Plans (as part of the Environmental Protection Plan) which focus on spill prevention and response, and strategies for cleaning up the marine and terrestrial environments. These plans shall be submitted to the Board prior to the commencement of any fabrication or construction activity related to the offshore pipeline.
7. The Company shall empower their Environmental Inspector with the authority to terminate any onshore pipeline construction activities which impact negatively on fish and fish habitat.
8. The Company shall revisit its use of the upper limit of the Nova Scotia Noise Guidelines as the design criteria for the Goldboro gas plant. The Company shall carry out regular noise monitoring at the natural gas plant and add plant noise to its Environmental Issues List.
9. The Company shall submit to the Board a written protocol or agreement spelling out Proponent-Aboriginal roles and responsibilities for cooperation in studies and monitoring.

Offshore Pipeline

Prior to the Commencement of Construction

10. The Company shall submit to the Board, for review, at least one hundred and eighty (180) days prior to the commencement of installation:
 - (a) the pipeline design data and the final pipeline design, including, but not limited to:
 - (i) the final Offshore Pipeline Design Basis Memorandum;
 - (ii) detailed materials specifications;
 - (iii) any relevant supporting design studies;
 - (iv) limits of unacceptable spans found during installation, testing and operation, and mitigation measures to be used if an unacceptable span was to develop; and
 - (v) construction schematics.
 - (b) a list of the regulations, standards, codes and specifications used in the design, construction and operation of the pipeline from the Thebaud Platform to the Goldboro gas plant, indicating the date of issue;
 - (c) reports providing results and supporting data from any geotechnical field investigations for the evaluation of:
 - (i) the potential for slope instability;
 - (ii) the geotechnical and geological hazards and geothermal regimes which may be encountered during installation and operation of the facilities; and
 - (iii) the special designs and measures required to safeguard the pipeline; and
 - (d) the pipeline route detailed on appropriate scale maps, indicating all seabed, geotechnical and other features to a sufficient depth and resolution.

11. The Company shall not start any pipeline installation activity until the final pipeline design has been submitted to the Board for review.
12. Unless the Board otherwise directs, the Company shall submit, at least thirty (30) days prior to the commencement of construction, a detailed construction schedule. The Proponents shall provide the Board and all other appropriate regulatory authorities with regular updates on the progress of construction activities and with any changes in the schedule as the construction progresses.
13. The Company shall submit to the Board, for review, at least thirty (30) days prior to the commencement of construction, all construction manuals, including:
 - (a) a pipe laying and pipe trenching manual (including, but not limited to, other pipeline construction activities such as pipeline stabilization or anchoring);
 - (b) a construction safety manual (containing appropriate procedures for the reporting of any incidents to the Board);
 - (c) a pipeline emergency response procedures manual; and
 - (d) all other manuals relevant to construction, installation and operation of the subsea gathering line from the Thebaud Platform to the Goldboro gas plant.

During Construction

14. Unless the Board otherwise directs, the Company shall, during construction, for audit purposes, maintain at each construction site a copy of the welding procedures and non-destructive testing procedures used on the project together with all supporting documentation.

Post Construction

15. The Company shall file with the Board, no later than one hundred and eighty (180) days after the completion of the pipe laying, an as-laid pipeline survey report and maps.
16. The Company shall submit to the Board, for review, at least thirty (30) days prior to "Leave to Open", an operation and maintenance manual including, but not limited to, inspection and remedial correction procedures for seabed movements causing spanning.
17. If the Board determines that the pipeline design assumptions, relative to pipeline burial, pipeline stability and seabed changes, cannot be confirmed, the Company shall submit to the Board, for review, at least one hundred and eighty (180) days prior to leave to open, a pipeline in-place monitoring program. This program shall include all the inspection procedures and schedules, and criteria that will initiate specific inspection and remedial action procedures (such as storm conditions and limiting span lengths). This program will also identify all equipment required on-site or near-site for remedial action procedures, as well as any such equipment that has to be brought from remote locations. The program shall include the procedures for reporting incidents to the Board.

Goldboro Gas Plant

18. Unless the Board otherwise directs, the Company shall:
- (a) cause the gas plant facilities to be designed, manufactured, located, constructed and installed in accordance with those specifications, drawings, and other information set forth in its application, or as otherwise adduced in evidence before the Board;
 - (b) within thirty (30) days of the issuance of this Certificate, submit to the Board for review an abbreviated design information package of the gas plant containing:
 - (i) process flows, with temperatures, pressures, mass balances, capacity and energy requirements of compressors, heaters, and turbo-expanders; and
 - (ii) codes, standards and material specifications, to be used (for major equipment and piping);
 - (c) make no variation to the specifications, drawings or other information or data referred to in subparagraphs 18(a) and 18(b) without the prior approval of the Board; and
 - (d) design, fabricate and install all of the components of the gas plant in accordance with the codes and standards of the Province of Nova Scotia which are adopted by reference in this Certificate.

Quality Assurance and Construction

19. Unless the Board otherwise directs, the Company shall file with the Board for its approval, at least ninety (90) days prior to the proposed date for the commencement of construction of the gas plant authorized by this Certificate:
- (a) a design information package of the gas plant containing:
 - (i) process flows, with temperatures, pressures, mass balances, and equipment energy requirements;
 - (ii) piping and instrumentation diagrams for all plant systems;
 - (iii) material specifications to be used.
 - (b) a description of any changes in the gas plant design from that indicated at the hearing or in the abbreviated design information package submitted pursuant to subparagraph 18(b);
 - (c) a list of the names and sections of the codes and standards to which the gas plant will be designed, fabricated and constructed;

- (d) the procedures for project quality assurance, quality control and cost control in the design, fabrication and construction of the gas plant, including audit and corrective action procedures; and
- (e) the pressure piping and pressure vessel, non-destructive and pressure testing program including audit and corrective action procedures.

Construction and Operational Safety

20. Unless the Board otherwise directs, the Company shall:
- (a) review with the appropriate regulators the results of all their Process Hazard Assessments within thirty (30) days of their completion. The Goldboro gas plant's Process Hazard Analysis shall be completed and reviewed with the appropriate regulators at least thirty (30) working days before final design freeze; and
 - (b) At least sixty (60) days prior to the commencement of construction of the approved facilities, file with the Board for review:
 - (i) a detailed construction schedule or schedules identifying major construction activities and shall notify the Board of any modifications to the schedule or schedules as they occur; and
 - (ii) a construction schedule safety addendum, detailing the management of safety for all employees on site, for each phase of the construction.

During Construction

21. Unless the Board otherwise directs, the Company shall, during construction of the gas plant, file with the Board monthly construction progress and cost reports, in a format to be determined through consultation with Board staff, providing a breakdown, by plant process system, location and facility, of costs incurred during that month, the percentage of each activity which has been completed and an update of costs to complete the project.
22. Unless the Board otherwise directs, the Company shall, during construction of the gas plant, maintain for audit purposes at each construction site, a copy of the welding procedures and non-destructive testing procedures used on the project together with all supporting documentation.

Prior to Leave to Open

23. Unless the Board otherwise directs, the Company shall, prior to applying for leave to open for any segment of the gas processing facilities authorized by this Certificate, file with the Board for its approval:
- (a) its specifications and procedures for the operation, maintenance, repair, and abandonment of the Goldboro gas plant as established pursuant to section 48 of the *Onshore Pipeline Regulations*. The existence of, and the detail of any

operation, maintenance or repair procedure shall be defensible in relation to the system or equipment Process Hazard Analysis;

- (b) a detailed explanation of the programs for monitoring the internal and external conditions of the pressure retaining equipment in the gas plant authorized by this Certificate, having particular regard to those parts of the gas plant with the potential to cause danger to the employees, the public and the environment; and
- (c) a detailed training program, based at least in part on the gas plant's Process Hazard Analysis, wherein audits can verify competency of the employee before the assignment of the task.

Prior to Commissioning and Start-Up

24. Unless the Board otherwise directs, the Company shall conduct a "Pre-Commissioning Safety Audit" of all gas plant facilities, and shall submit the results of the audit to the Board for review prior to undertaking the commissioning of the gas plant.

Prior to Equipment Custody Turn-Over or Commissioning

25. Unless the Board otherwise directs, the Company shall, at least sixty (60) days prior to turn-over or commissioning of any gas plant equipment, submit for review:
- (a) the turn-over, commissioning, and start-up procedures and schedules for all plant equipment. Include information regarding the estimated number and location of persons on site during each of the commissioning and start-up procedures; and
 - (b) the turn-over, or commissioning safety management policies and procedures, showing how the safety of all the employees and the public will be ensured during the commissioning phases of the gas plant.
26. Unless the Board otherwise directs, the Company shall submit for approval at least sixty (60) days prior to commencing plant operations:
- (a) an operations and maintenance manual pursuant to section 48 of Part VII of the *Onshore Pipeline Regulations* which shall include all the safe work procedures required to maintain, commission, start-up, operate, and shutdown all equipment in, and associated with, the gas plant;
 - (b) a gas plant specific emergency response procedures manual; and
 - (c) contingency plans for hydrocarbon releases to atmosphere within the gas plant and related facilities.

Post Construction

27. Unless the Board otherwise directs, the Company shall, within one-hundred and eighty (180) days of putting the additional gas plant facilities into service, file with the Board a report providing a breakdown of the costs incurred in the construction of the gas processing facilities, in a format similar to that used in Schedules 4 through 15 of subtab 9 under Tab "Facilities" of Exhibit B-1 of the GH-3-96 proceeding, setting forth actual versus estimated costs, including reasons for significant differences from estimates.

Gas Plant Operation

28. Unless the Board otherwise directs, the operators of the Goldboro gas plant shall ensure that the plant is operated in accordance with environmental protection codes, and standards approved or adopted by the Province of Nova Scotia which are adopted by reference in this document.
29. Unless the Board otherwise directs, the operators of the Goldboro gas plant will at least once per quarter allow, after at least 24 hours prior notice, representatives of the provincial environmental protection branch onto the gas plant site to inspect, audit or verify the installation or calibration of those metering, measuring and sample collection devices required to compile environmental compliance data that will be used by the Company to show compliance with applicable regulations.
30. Unless the Board otherwise directs, the operators of the Goldboro gas plant shall ensure that all modifications, repairs and expansions conform to the applicable codes or standards that are approved or adopted by the Province of Nova Scotia from time to time, which are adopted by reference in this document.

General Condition

31. Unless the Board otherwise directs prior to 31 December 2000, this Certificate shall expire on 31 December 2000, unless the construction and installation of the offshore pipeline facilities has commenced by that date.

Appendix II

Maritimes & Northeast Pipeline Project Certificate Conditions

1. Unless the Board otherwise directs, the pipeline facilities in respect of which this Certificate is issued shall be the property of and shall be operated by Maritimes & Northeast Pipeline Management Ltd. (the "Company") on behalf of Maritimes & Northeast Pipeline Limited Partnership.
2. The Company shall implement or cause to be implemented all of the policies, practices, and procedures for the protection of the environment included in or referred to in its Application, in its undertakings made to relevant regulatory authorities, and as adduced in evidence before the Board in the GH-6-96 proceeding.
3. Unless the Board otherwise directs, the Company shall:
 - (a) cause the approved facilities to be designed, manufactured, located, constructed and installed in accordance with those specifications, drawings and other information or data set forth in its application, or as otherwise adduced in evidence before the Board, except as varied in accordance with subsection (b) hereof; and
 - (b) cause no variation to be made to the specifications, drawings or other information or data referred to in subsection (a) without the prior approval of the Board.
4. Unless the Board otherwise directs, at least ninety (90) days prior to applying for leave to open for any segment of the pipeline facilities authorized by this Certificate, the Company shall file with the Board, for its approval, operations and maintenance manuals and emergency response plans in accordance with sections 48 and 49 of the *Onshore Pipeline Regulations*.

Prior to the Commencement of Construction

5. Unless the Board otherwise directs, at least ten (10) days prior to the commencement of construction of the approved facilities, the Company shall file with the Board a detailed construction schedule or schedules identifying major construction activities and shall notify the Board of any modifications to the schedule or schedules as they occur.
6. Unless the Board otherwise directs, at least ninety (90) days prior to the commencement of construction, the Company shall submit reports satisfactory to the Board providing results and supporting data from any geotechnical and hydrological field investigations for the evaluation of:
 - (a) the potential for slope instability;
 - (b) water crossings and the approaches thereto;

- (c) the presence of acid generating rock; and
 - (d) the presence of, or the potential for, the formation of, sink holes.
7. Unless the Board otherwise directs, at least ninety (90) days prior to the commencement of construction of the pipeline authorized by this Certificate, the Company shall file with the Board for approval:
- (a) the final design for the pipeline, including a description of any changes in the pipeline design from that submitted at the hearing set down by Order GH-6-96; and
 - (b) the procedures for project cost control in the construction of the pipeline authorized by this Certificate.
8. The Company shall, at least sixty (60) days prior to construction, submit to the Board construction plans for each watercourse crossing site. The construction plans shall:
- (a) be prepared in consultation with the appropriate regulatory agencies;
 - (b) include a consideration of all salmon rivers which will be crossed by the pipeline;
 - (c) as a minimum, include consideration of erosion and sedimentation control, blasting requirements, habitat restoration and site restoration as required, but may refer to standard drawings or specifications as appropriate; and
 - (d) be provided to interested parties for comment.
9. The Company shall, at least sixty (60) days prior to construction, prepare a report on the scheduling of water crossings in cooperation with appropriate regulatory authorities. The report shall discuss back-up measures to resolve potential problems. The report shall be made available to all interested parties who request a copy. Furthermore, the Company shall, at least 30 working days prior to the commencement of construction of the pipeline, submit to the Board for approval, additional information regarding the stream crossings. The additional information shall set out:
- (a) the construction designs of the crossings;
 - (b) the proposed duration of the crossings;
 - (c) in-stream timing restrictions identified by regulatory agencies;
 - (d) an erosion and sediment control plan;
 - (e) the site-specific mitigative and restorative measures to be employed as a result of consultations with regulatory agencies;

- (f) if a directional drilling method is used, the detailed drilling fluid plan addressing the methods of drilling fluid containment and storage, and specific methods for disposing of and/or recycling of the drilling fluids;
 - (g) if blasting is required, the blasting plan, including comments from the Department of Fisheries and Oceans;
 - (h) the evidence to demonstrate that all issues raised by regulatory agencies have been adequately addressed, including all necessary updates to the environmental assessments where deficiencies have been identified;
 - (i) the evidence to demonstrate that the proposed construction method and site-specific mitigative and restorative measures are in compliance with federal and provincial legislation; and
 - (j) the status of approvals, including environmental conditions.
10. The Company shall, at least thirty (30) days prior to the commencement of construction, file with the Board the results of the acid generating rock studies, including any locations which would be affected by construction, the proposed mitigation measures, monitoring requirements and the results of consultation with provincial authorities.
11. The Company shall, at least thirty (30) working days prior to the commencement of construction of the pipeline, submit to the Board for approval additional information regarding the treatment method to deal with acid drainage and specific mitigative measures to be implemented at stream crossings. The additional information shall set out for each stream crossing to be affected:
- (a) the name and location of the stream;
 - (b) the selected treatment method of the runoff water;
 - (c) the proposed Canadian Water Quality Guideline values to be adhered to;
 - (d) the site-specific mitigative and restorative measures to be employed as a result of consultation with regulatory agencies;
 - (e) the evidence to demonstrate that all issues raised by regulatory agencies and other interested parties have been adequately addressed, including all necessary updates to the environmental assessments where deficiencies have been identified; and
 - (f) the status of approvals, including environmental conditions.
12. The Company shall, at least one hundred and eighty (180) days prior to the commencement of any construction activity requiring regulatory approval, submit to the Board for approval the final Environmental Protection Plan. Details of the proposed specific route for the pipeline shall also be filed at that time, and shall include:

- (a) the results of all pre-construction surveys to identify special status species/habitat along the proposed corridor, including specific measures to be implemented;
- (b) an environmental issues list identifying all relevant effects of the selected route; and
- (c) the associated mitigation measures to render those environmental effects insignificant.

During Construction

- 13. Unless the Board otherwise directs, the Company shall, during construction, maintain for audit purposes at each construction site, a copy of the welding procedures and non-destructive testing procedures used on the project together with all supporting documentation.
- 14. Unless the Board otherwise directs, during the construction period, each month the Company shall submit construction reports that are satisfactory to the Board which detail the progress and current status of the project.

Post Construction

- 15. Unless the Board otherwise directs, within one-hundred and eighty (180) days of putting the facilities into service, the Company shall file with the Board a report providing a breakdown of the costs incurred in the construction of the facilities, in a format that is satisfactory to the Board, setting forth actual versus estimated costs, including reasons for significant differences from estimates.
- 16. The Company shall file with the Board a post-construction environmental report within one hundred and eighty (180) days of the in-service date for the Project. The post-construction environmental report shall set out the environmental issues that have arisen and shall:
 - (a) indicate the issues resolved as well as unresolved; and
 - (b) describe the measures the Company proposes to take in respect of the unresolved issues.
- 17. The Company shall develop the Environmental Protection Plan in consultation with government agencies, stakeholder groups, interested parties and landowners.
- 18. The Company shall implement an environmental compliance and monitoring program which would include the filing of post-construction environmental reports to address Project-related environmental issues.
- 19. The Company shall develop the operations, emergency response and environmental protection manuals in consultation with relevant agencies, stakeholders and the public. The manuals shall be filed with the Board.

20. The Company shall take all reasonable steps to avoid fragmenting natural and forested areas. The fragmentation of natural and forested areas shall be included in the Company's Issues List. This shall require consideration and follow-up on steps to be taken at the detailed route design and construction stages.
21. The Company shall, at least one hundred and eighty (180) days prior to construction, submit a traffic study for the Goldboro area to the Board.
22. The Company shall submit to the Board a written protocol or agreement spelling out Proponent-Aboriginal roles and responsibilities for cooperation in studies and monitoring.
23. The Company shall file with the Board, prior to the commencement of construction, the executed Backstop Precedent Agreements.
24. The Company shall file with the Board, prior to the commencement of service, all firm transportation Service Agreements.
25. Unless the Board otherwise directs, this Certificate shall expire on 31 December 2000 unless the construction and installation of the facilities authorized by this Certificate has commenced by that date.



National Energy
Board

Office national
de l'énergie

Reasons for Decision

**TransCanada Keystone
Pipeline GP Ltd.**

OH-1-2007

September 2007

**Application for Construction and
Operation of the Keystone Pipeline**

Canada

National Energy Board

Reasons for Decision

In the Matter of

TransCanada Keystone Pipeline GP Ltd.

Section 52 Application dated 12 December
2006 for the Keystone Pipeline Project

OH-1-2007

September 2007

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Glossary of Terms and Abbreviations

AB	Alberta
AFL	Alberta Federation of Labour
bbl(s)	barrel(s)
b/d	barrels per day
Board or NEB	National Energy Board
CAPP	Canadian Association of Petroleum Producers
CEA Act	<i>Canadian Environmental Assessment Act</i>
CEP	Communications, Energy & Paperworkers Union of Canada
CPPL	ConocoPhillips Pipe Line Company
CSA	Canadian Standards Association
cSt	centistoke
Carry the Kettle	Carry the Kettle First Nation
ConocoPhillips	ConocoPhillips Canada Limited
DFO	Fisheries and Oceans Canada
Dakota Nations of Manitoba	Birdtail Sioux First Nation, Canupawakpa Dakota First Nation, Dakota Plains First Nation, Dakota Tipi First Nation, Sioux Valley Dakota Nation
EA	environmental assessment
EPP	environmental protection plan
ESR	environmental screening report
Enbridge	Enbridge Pipelines Inc.
FA(s)	Federal Authority(ies)
Federal Coordination Regulations	<i>Regulations Respecting the Coordination by Federal Authorities of Environmental Assessment Procedures and Requirements</i>
GHG	greenhouse gas
HDD	horizontal directional drill

ILI	in-line inspection
kg/m ³	kilograms per cubic metre
KLG	Kessler Landowners Group
km	kilometre(s)
kp	kilometre post
KSG	Keystone Shippers Group (ConocoPhillips Canada Limited & Suncor Energy Marketing Inc.)
kW	kilowatt
Keystone	TransCanada Keystone Pipeline GP Ltd.
Line 100-1	One of the TransCanada PipeLines Limited lines between Burstall, Saskatchewan and Carman, Manitoba
m ³	cubic metre(s)
m ³ /d	cubic metres per day
MB	Manitoba
mm	millimetre(s)
MOG	<i>Memorandum of Guidance on the Regulation of Group 2 Companies</i>
MOP	maximum operating pressure
MOU	Memorandum of Understanding
NAFTA	<i>North American Free Trade Agreement</i>
NEB Act or the Act	<i>National Energy Board Act</i>
NPS	nominal pipe size (in inches)
nominal capacity	The long-term sustainable capacity of the pipeline. For the Keystone pipeline, this is expected to be 90 percent of the design capacity
OCC	Operations Control Centre
OPR-99	<i>Onshore Pipeline Regulations, 1999</i>
OPUAR	<i>Oil Pipeline Uniform Accounting Regulations</i>
PADD	Petroleum Administration for Defense District. Regions defined by the Energy Information Administration, U.S.

	Department of Energy that describes a market area for crude oil in the U.S.
PADD II	Region also known as the U.S. Midwest and includes the following states: Illinois, Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Missouri, Nebraska, North Dakota, South Dakota, Ohio, Oklahoma, Tennessee and Wisconsin
PIP	Preliminary Information Package
psi	pounds per square inch
Project	Keystone Pipeline Project
Purvin & Gertz	Purvin & Gertz, Inc.
RA or RAs	Responsible Authorities
RoW	right-of-way
RPP	refined petroleum products
SCADA	Supervisory Control and Data Acquisition
SCO	synthetic crude oil
SEMI	Suncor Energy Marketing Inc.
SK	Saskatchewan
Standing Buffalo	Standing Buffalo Dakota First Nation
Suncor	Suncor Energy Inc.
synbit	a heavy blend in which synthetic crude oil is mixed with bitumen to reduce its viscosity for pipeline transportation purposes
TOP or TOPs	TransCanada Operating Procedure(s)
TSA or TSAs	Transportation Service Agreement(s)
TMPL	Trans Mountain Pipeline system
TransCanada	TransCanada PipeLines Limited
Treaty 4	Treaty 4 First Nations
U.S.	United States of America
WCSB	Western Canada Sedimentary Basin
\$Cdn	Canadian dollars

Recital and Appearances

IN THE MATTER OF the *National Energy Board Act* (NEB Act or the Act) and the Regulations made thereunder; and

IN THE MATTER OF an application dated 12 December 2006 by TransCanada Keystone Pipeline GP Ltd. (Keystone) for an authorization to construct and operate the Canadian portion of a crude oil pipeline extending from Hardisty, Alberta to a point near Haskett, Manitoba; and

IN THE MATTER OF Hearing Order OH-1-2007;

HEARD in Calgary, Alberta on 4, 5, 6, 7, 8, 20 and 21 June 2007; and in Regina, Saskatchewan on 13 and 14 June 2007.

BEFORE:

G. Caron	Presiding Member
G. Habib	Member
S. Crowfoot	Member

Appearances

C. K. Yates, Q.C.
W.M. Moreland
J. Herbert

Participants

TransCanada Keystone Pipeline GP Ltd.

Witnesses

J.A.M. Hunt
R.E. Jones
R. Kendel
D. King
P. Kocis
A.T. Lees
P.E. Miller
A. Purves
M.J. Schmaltz
G.R. Simmonds
B. Thomas
T.H. Wise

N.J. Schultz Canadian Association of Petroleum Producers

B. Troicuk BP Canada Energy Company

E.W. Dixon Enbridge Pipelines Inc.

G. Nettleton Keystone Shippers Group (ConocoPhillips
R. Rodier Canada Limited & Suncor Energy Marketing Inc.)

R. Kolber Petro-Canada

L. Chahley Alberta Federation of Labour

G. McGowan
T. Pearson

S. Shrybman	Communications, Energy & Paperworkers Union of Canada	D.H. Coles M.C. McCracken
P. Ryzuk	Kessler Landowners Group	
D. Gibson	The Parkland Institute	D. Gibson
M.C. Phillips Z. Charowsky	Standing Buffalo Dakota First Nation	Chief R. Redman Elder W. Goodwill Elder C. Tawiyala Elder D. Thorne
L. C. Bell J. A. Fisk	Board Counsel	

Arguments

Alberta Federation of Labour

Canadian Association of Petroleum Producers

Communications, Energy & Paperworkers Union of Canada

Dakota Nations of Manitoba (Birdtail Sioux First Nation, Canupawakpa Dakota First Nation, Dakota Plains First Nation, Dakota Tipi First Nation, Sioux Valley Dakota Nation)

Kessler Landowners Group

Keystone Shippers Group

Standing Buffalo Dakota First Nation

TransCanada Keystone Pipeline GP Ltd.

Chapter 1

Introduction

1.1 Background

On 12 December 2006, TransCanada Keystone Pipeline GP Ltd. (Keystone) applied to the National Energy Board (the Board or NEB) for approvals related to the proposed Keystone Pipeline Project (the Project). Specifically, Keystone requested:

- (a) a Certificate of Public Convenience and Necessity under section 52 of the *National Energy Board Act* (the Act) authorizing Keystone to construct and operate the Keystone Pipeline;
- (b) approval for a change in service of Line 100-1 from natural gas to crude oil service, pursuant to section 43 of the *Onshore Pipeline Regulations, 1999*; and
- (c) an Order under Part IV of the Act for approval of the proposed toll methodology and tariff for the Keystone Pipeline.

The Project consists of a 1,235 km pipeline which would extend from Hardisty, Alberta to a location near Haskett, Manitoba at the border between Canada and the U.S. (Figure 1-1). The Project involves the construction of two new pipeline segments and the conversion of one segment of the TransCanada PipeLines Limited (TransCanada) Mainline Line 100-1 from Burstall, Saskatchewan to Carman, Manitoba.

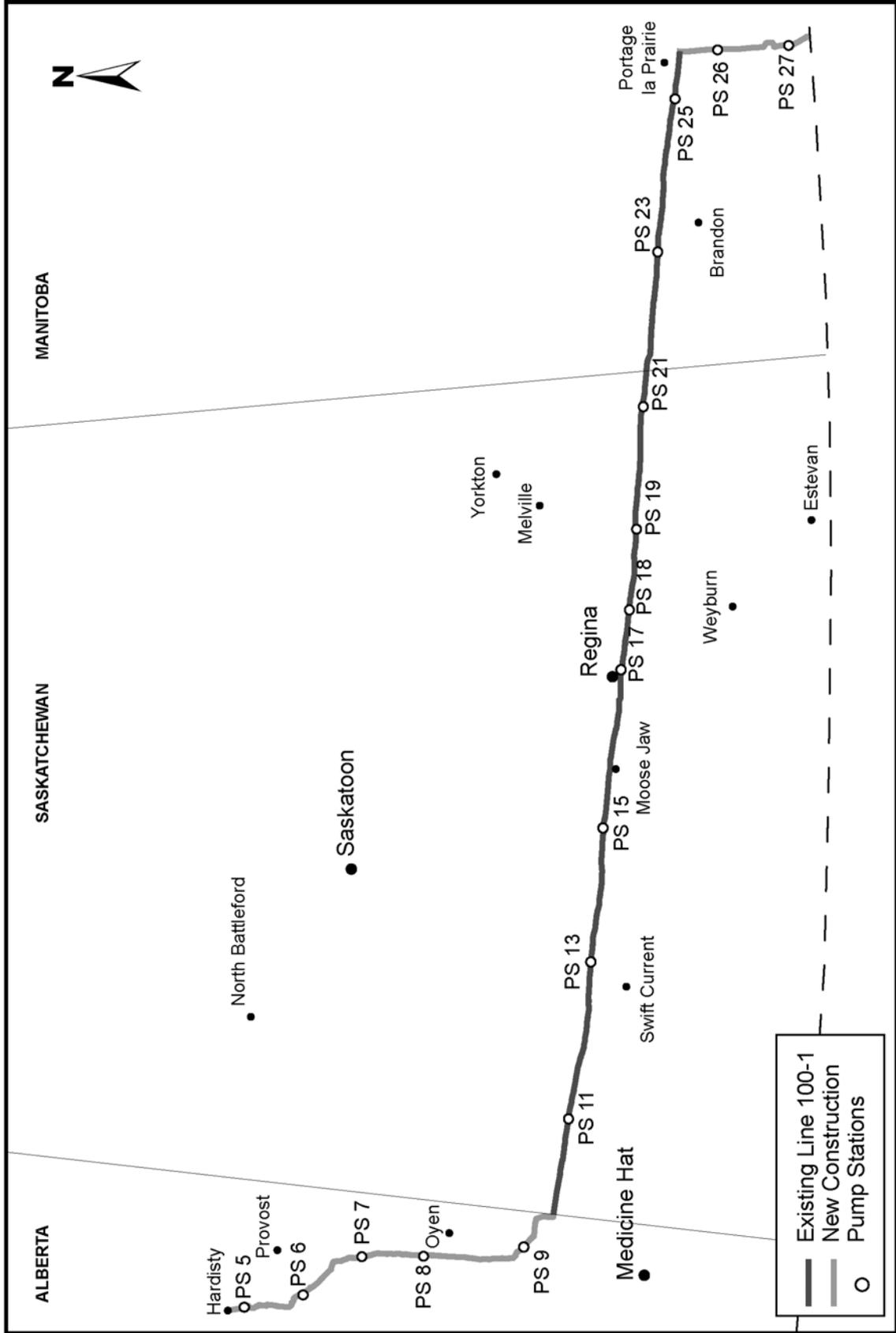
Keystone submitted that the Project would have an initial nominal capacity of approximately 69 200 m³/d (435,000 b/d). The nominal capacity could be expanded to 94 000 m³/d (591,000 b/d) with the addition of pumping facilities.

Since the Project requires a Certificate of Public Convenience and Necessity under section 52 of the NEB Act, it triggers the requirement for an environmental assessment under the *Canadian Environmental Assessment Act* (CEA Act). Based on a project description filed by Keystone on 10 July 2006, the Board and other Responsible Authorities (RAs) each determined that the Project would be subject to a screening level assessment under the CEA Act. Since the Project does not require more than 75 km of new right-of-way (RoW), a comprehensive study under the CEA Act was not required.

1.2 Regulatory Context

Keystone filed a Preliminary Information Package (PIP) respecting the proposed Project on 10 July 2006. The purpose of the PIP was to initiate and facilitate an efficient regulatory review of the Project and enable the Board and other federal departments to determine their environmental assessment responsibilities and the scope of the assessment under the CEA Act.

**Figure 1-1
Keystone Pipeline Project - Canadian Section**



On 12 December 2006, Keystone filed an application with the Board for approvals to construct and operate the Canadian portion of the Keystone pipeline. Keystone intended to commence construction in early 2008 to ensure the Project would be in service by late 2009.

The Board issued a letter on 29 January 2007 announcing it had decided to convene an oral public hearing beginning Monday 4 June 2007. The Hearing Order, setting out the procedures to be followed in the hearing, was included. The Board invited any person wanting to intervene in the proceedings to apply by 23 February 2007. The Board received and approved 33 applications for intervenor status.

In its 29 January 2007 letter, the Board invited parties to suggest any amendments or additions to the List of Issues by 23 February 2007. The Board received comments from the Alberta Federation of Labour (AFL), the Communications, Energy & Paperworkers Union of Canada (CEP), The Parkland Institute (Parkland), Dr. Gordon Laxer, and Birdtail Sioux First Nation, Canupawakpa Dakota First Nation, Dakota Plains First Nation, Dakota Tipi First Nation and Sioux Valley Dakota Nation (collectively known as the Dakota Nations of Manitoba). On 27 February 2007, the Board received reply comments from Keystone. The concerns raised by parties related to greenhouse gas (GHG) emissions, value-added processing, energy security and issues related to the Dakota traditional territory.

The Board responded to parties on 2 March 2007. The Board concluded that no amendments or additions to the List of Issues were required as the List of Issues covered all matters raised by parties to the extent they were relevant to the determination the Board had to make.

On 19 April 2007, the Board announced the location of the hearing. In that letter, the Board noted that it considered a number of factors when determining the location of the oral public hearing, including the location of the Project and the interest of intervenors located in Alberta, Saskatchewan and Manitoba. Based on these factors, the Board decided to hold the hearing in Calgary, Alberta and Regina, Saskatchewan.

The Board offered to host an information session for the Dakota Nations of Manitoba and other parties to the proceeding on 2 March and 13 March 2007, respectively. The purpose of the information sessions was to offer parties unfamiliar with Board processes information about how the Board examines applications for pipelines and associated facilities and how parties can participate in these processes. The information sessions would also provide an opportunity for parties to ask questions of Board staff. No party expressed an interest in such an information session.

On 1 June 2007, the Board announced it had decided to hold a Technical Conference on Engineering matters. The Technical Conference was held in Calgary on 18 June 2007. All parties were invited to attend and the Board Panel was in attendance. The purpose of the Technical Conference was to obtain further information about engineering matters in a more informal setting in order to gain an improved understanding of complex matters and use hearing time more effectively. At the Technical Conference, the Board questioned Keystone primarily on engineering construction, change of service, pipeline operations and integrity management systems.

The Board used a life cycle approach in considering the Keystone Project. This means that all issues and concerns before the Board were considered in the context of the entire Keystone Project life cycle (i.e., design, planning, construction, operation, decommissioning and abandonment), if approved. The Board also considered its various regulatory roles, such as application assessment and post-decision condition compliance, at each stage in the project life cycle to determine where it could best provide oversight.

The Board considered all the information in the application and subsequent submissions and ensured there was adequate information on the public record to make its decision as to whether to approve the Project. The Board focused its assessment effort on those issues and concerns that were considered critical to the Board's decision rather than on implementation details. For example, when the company provided a commitment to achieve reasonable goals or objectives, or implement standard mitigation, the Board determined this was sufficient for the application assessment. However, where the Board was in doubt, where non-standard mitigation was proposed or where there was perceived risk, the Board did explore in more detail the specific design, construction and operational aspects during the assessment stage of the life cycle approach.

If the Project is approved, the specific implementation details would be considered by the Board following the issuance of a certificate of public convenience and necessity. Some of the post-decision regulatory tools the Board would use include: post-decision meetings with Keystone to review commitments and to discuss specific construction and operational methods; on-site inspections during construction and operation to verify compliance to certificate conditions and relevant legislation and standards; and audits to evaluate Keystone's management systems.

The life cycle approach supports the NEB's goal-oriented direction, allows for more focused Board decisions, and places the regulatory focus on the appropriate stage of the regulatory process. The anticipated outcome is a more efficient and effective regulatory process for all stakeholders.

As a responsible authority under the CEA Act, the Board completed an environmental screening report pursuant to the CEA Act and the Board's regulatory process. The report is provided as an appendix to these Reasons. Further discussion of environmental matters can be found in Chapter 8 Environment and Socio-Economic Matters.

1.3 Motions

On 15 May 2007, the CEP, Parkland, the AFL and Dr. Laxer filed a Notice of Motion for orders to adjourn the hearing to allow for the assembly of information relating to the impact of the Project on the development or viability of Canadian refining and petrochemical industries and to authorize one or more Board Members, under section 15 of the NEB Act, to make a report to the Board on certain matters. The Motion submitted that it was unreasonable to expect intervenors to provide further evidence on these matters given the limited access to proprietary information, including information in Keystone's possession, and in light of the fact that they lack the necessary resources and expertise. The Board denied the request to adjourn the hearing noting that the Board will make its decision based on the evidentiary record before it and determined

that the proceeding pursuant to the Hearing Order was the most appropriate, efficient and effective forum to hear the relevant evidence. See full ruling in Appendix II.

The AFL and the CEP filed a Notice of Motion on 28 May 2007 requesting subpoenas to be issued to representatives of the Keystone Shippers Group (KSG) and for an order requiring Keystone to disclose the identity of the committed shippers and the nature and quantities of the oil goods to which the contracts pertain. In its 1 June 2007 letter, the Board advised it would hear from parties orally on this motion as a preliminary matter on the first day of the hearing. On 4 June 2007, parties provided their views and the Board communicated its decision orally on 5 June 2007. The Board denied the subpoena request of the AFL and the CEP. The Board stated that there was already information on the public record with respect to supply, markets and products to be transported by the Keystone pipeline. To the extent that the information requested had not already been provided or was not as detailed as requested, the Board found that it was unnecessary in order for the Board to satisfy its mandate. The Board also denied the request of the AFL and the CEP for Keystone to provide information related to committed shipments. For the reasons provided earlier, the Board was of the view that this evidence would not assist it with the determination it was being called upon to make. See full ruling in Appendix III.

After the conclusion of the hearing and the filing of Keystone's Reply Argument, the CEP filed a motion dated 29 June 2007 to file sur-reply and included the sur-reply. The CEP's motion alleged that Keystone's reply argument misrepresented the CEP's evidence and submissions, introduced errors to the record and claimed the CEP fabricated evidence in its argument. The CEP submitted that sur-reply should be permitted to allow it to address these errors. The Board also received a letter dated 3 July 2007 from the AFL supporting the CEP's motion. In its letter of decision dated 5 July 2007, the Board explained that leave to file sur-reply should be granted rarely and only in circumstances where an applicant has raised a new issue in reply which an intervenor has not had an opportunity to address. The Board was not persuaded that Keystone's reply argument raised any new issue to which the CEP must, as a matter of fairness, be permitted to respond. Further, the Board noted that it would draw its own conclusion as to whether the submissions and evidence had been properly characterized by counsel. Therefore, the Board denied the CEP motion and did not consider the sur-reply in its deliberations. See full ruling in Appendix IV.

Chapter 2

Economic Feasibility

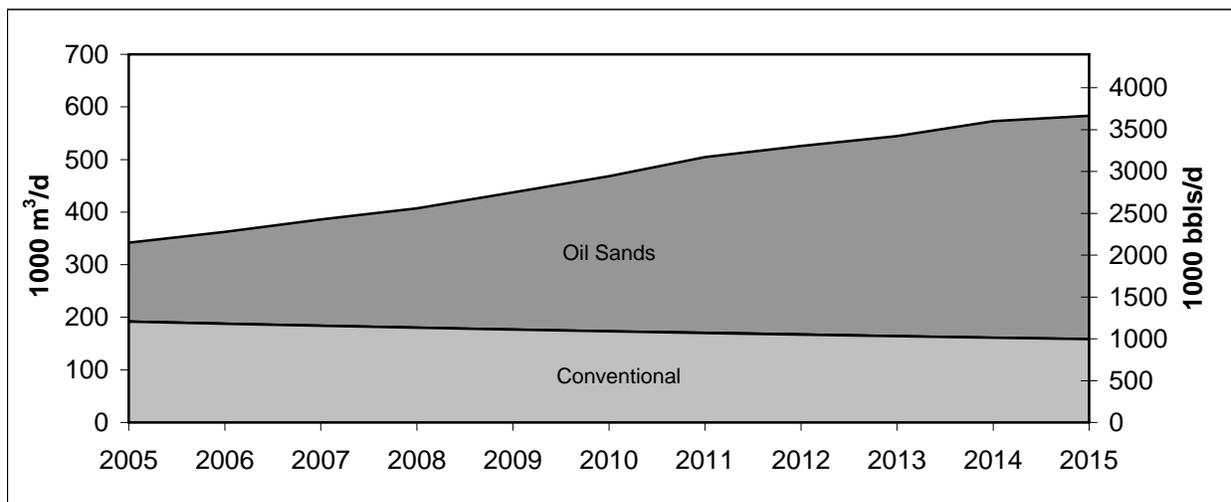
In making its determination on the justification for and economic feasibility of a proposed pipeline project, the Board assesses whether the facilities are needed and would be used at a reasonable level over their expected economic life. In order to make this determination, the Board considers the evidence submitted on the supply of commodities that will be available to be shipped on the pipeline, the availability of adequate markets to receive products delivered by the pipeline and the adequacy of existing pipeline capacity. As well, the Board considers evidence related to financing the construction and ongoing operations of the proposed pipeline.

2.1 Crude Oil Supply

In support of its application, Keystone submitted evidence on crude oil supply in western Canada in the form of a report prepared by Purvin & Gertz, Inc. (Purvin & Gertz) entitled "Supply and Markets Outlook for the Keystone Pipeline Project". The report also discussed the facilities available in Hardisty, Alberta that would enable this supply to access the Keystone pipeline.

The Purvin & Gertz report forecast that total crude oil production in the Western Canada Sedimentary Basin (WCSB) will increase from 342 000 m³/d (2,152,000 b/d) in 2005 to 468 000 m³/d (2,944,000 b/d) by 2010 and to 583 200 m³/d (3,699,000 b/d) by 2015 (Figure 2-1). It stated that this increase is the result of growth in Alberta oil sands production which will more than offset the decline in conventional oil production. The report noted that forecasts by others showed similar trends in both conventional and oil sands production.

Figure 2-1
Western Canada Crude Oil Production



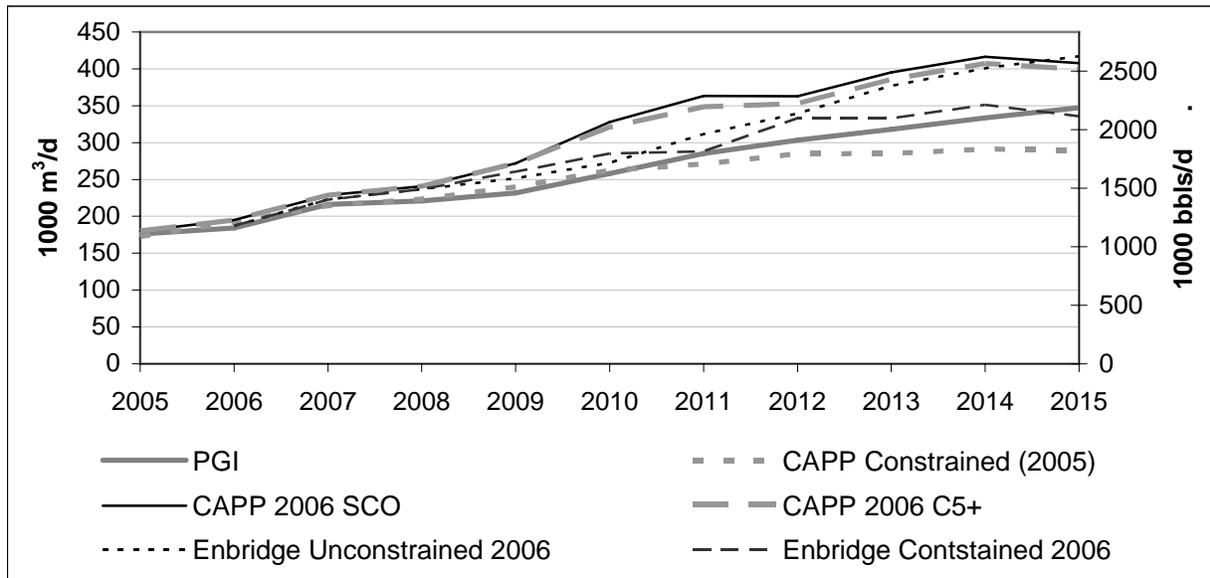
ConocoPhillips Canada Limited (ConocoPhillips) and Suncor Energy Marketing Inc. (SEMI), the two disclosed committed shippers on the Keystone pipeline, have each made significant investments aimed at expanding their oil sands production.

Purvin & Gertz noted that crude oil supply available for transportation by pipeline to the market differs from crude oil production due to yield losses when heavy crude oil and bitumen are upgraded and due to increases when imported diluent is purchased to facilitate pipeline transportation of heavy crude oil and bitumen. Taking these adjustments into consideration, it estimated that total crude oil supply in western Canada available to the market will increase by 36 percent in 2010 and 74 percent in 2015 compared to 2005 supply levels.

Purvin & Gertz submitted that there are different views on the types of crude oil blends that will be available to ship by pipeline to the markets depending on the assumptions made about diluent source. It compared its own heavy and light crude oil supply forecasts to forecasts prepared by the Canadian Association of Petroleum Producers (CAPP) and Enbridge Pipelines Inc. (Enbridge).

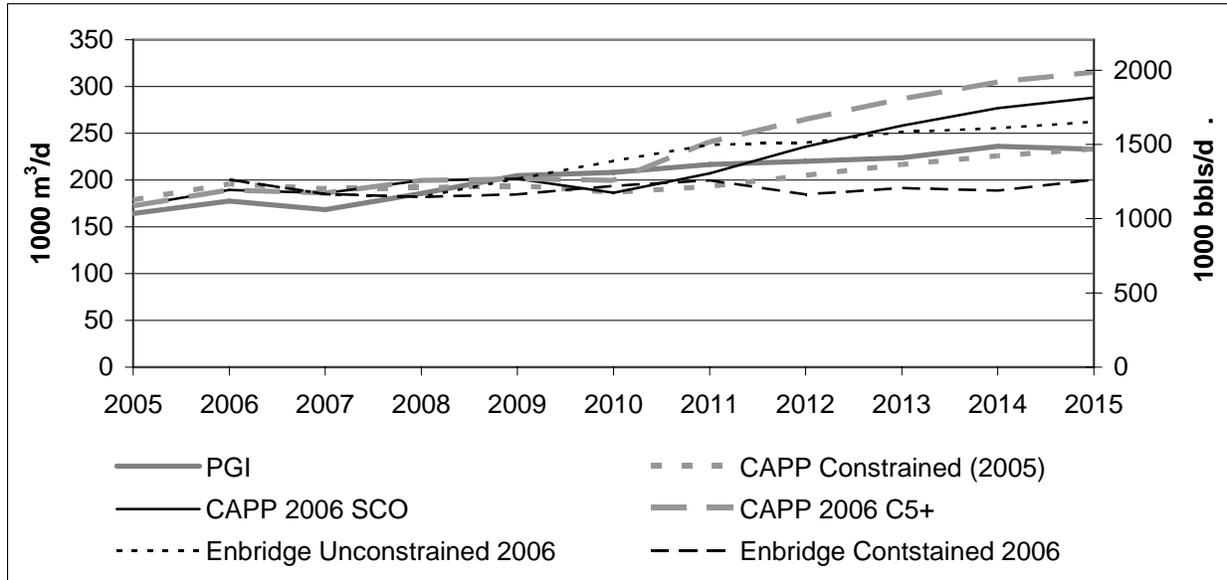
With regard to heavy crude oil supply the report noted that, while there was some variability, all the forecasts projected steady increases to 2015 (Figure 2-2).

**Figure 2-2
Comparison of Western Canada Heavy Crude Oil Supply Forecasts**



Light crude oil supply forecasts in the Purvin & Gertz report varied from remaining relatively flat near 2005 levels to the end of the forecast period to rising during the same timeframe. Purvin & Gertz submitted that the differences in the forecasts were largely related to assumptions regarding whether synthetic oil or imported condensate would be used for diluent to transport heavy crude. In comparing its forecast with others, Purvin & Gertz noted that its outlook was on the high end of the range compared to those completed in 2005, but was less than CAPP's 2006 forecast, especially after 2013 (Figure 2-3).

**Figure 2-3
Comparison of Western Canada Light Crude Oil Supply Forecasts**



The Purvin & Gertz oil supply forecast submitted by Keystone was not contested by parties.

In addition to discussing projected increased supplies of crude oil, Keystone provided evidence regarding the access to upstream supplies. Keystone noted there is over 1 500 000 m³ (9,500,000 bbls) of storage available at Hardisty, Alberta which is connected to pipelines from Edmonton, Cold Lake, Lloydminster and Fort McMurray, Alberta. It submitted that inbound pipeline capacity, which totals approximately 441 500 m³/d (2,777,000 b/d), is further supplemented by rail and truck transport. Figure 2-4 illustrates the hub nature of the Hardisty area, which is the receipt point for crude oil supply delivered into the Keystone pipeline.

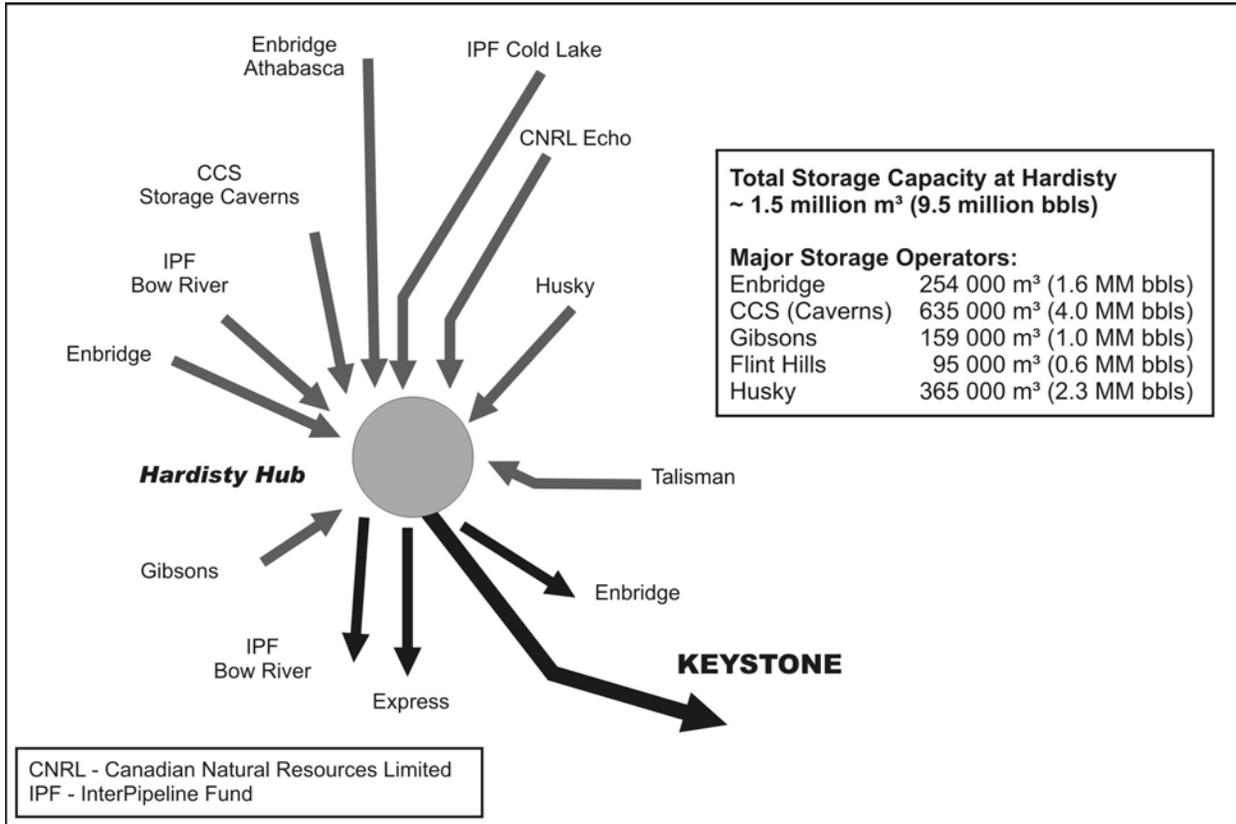
Keystone submitted that parties who have executed Keystone’s long-term transportation service agreements, as well as other potential WCSB crude oil producers, have access to the Hardisty hub, thus facilitating the Keystone pipeline’s ability to access diversified supplies. Based on these commitments and the Purvin & Gertz analysis, Keystone concluded that there is ample and uncontroverted evidence as to the availability of crude oil to the proposed Keystone pipeline.

2.2 Transportation

WCSB Export Pipeline Capacity

The Purvin & Gertz report described seven pipeline systems that currently export crude oil from western Canada: TransMountain Pipeline (TMPL), Enbridge, Express, Rangeland, Bow River, Wascana and Enbridge’s Westspur Pipeline system. Table 2-1 shows existing pipeline capacity to transport crude oil as per the Purvin & Gertz report.

**Figure 2-4
Hardisty Infrastructure**



Despite some expansions to current capacity, Purvin & Gertz forecast that these existing systems will not have sufficient capacity to support the forecast production and subsequent exports beyond 2009. Without additional pipeline capacity to export crude oil from western Canada, the transportation shortfall could reach 53 000 m³/d (339,000 b/d) by 2011 and 136 000 m³/d (860,000 b/d) by 2016. Purvin & Gertz further noted that the expected impact of insufficient pipeline capacity for Canadian crude would be price discounting, shipping crude oil to less desirable markets, shut-in of crude oil and possibly delaying investments in announced but uncommitted oil sands projects.

While none of the parties directly questioned the need for additional pipeline capacity out of the WCSB, the CEP noted that there are other pipeline applications before the Board that are related to common sources of supply or common markets that are pending. It argued that considering the Project in isolation from other related proposals did not accord with the Board's public interest mandate. Accordingly, and in support of its submission that the Board should undertake a more comprehensive review of the Project before it, the CEP encouraged the Board to consider other related proposals that are imminent or already in the regulatory process in order to determine which pipeline proposals would best align with Canadian policy objectives.

**Table 2-1
Existing Crude Oil Export Pipeline Capacity as Calculated by Purvin & Gertz**

Pipeline system	Crude Oil Capacity		Estimated Breakdown of TOTAL Pipeline Capacity by Product Type
	m ³ /d	b/d	
TMPL	20 700 ⁽ⁱ⁾	130,000 ⁽ⁱ⁾	Light (38%), heavy (31%), RPP (31%)
Enbridge	281 700	1,772,300	Light (32%), heavy (60%), RPP (8%)
Express/Platte	45 000 ⁽ⁱⁱ⁾	283,000 ⁽ⁱⁱ⁾	Light (33% by 2010) and heavy (67% by 2010)
Rangeland	10 300	65,000	Light (77%) and heavy (23%)
Milk River	18 800	118,000	Light (4%) and heavy (96%)
Wascana	n/a ⁽ⁱⁱⁱ⁾	n/a ⁽ⁱⁱⁱ⁾	Light (100%)
Enbridge Westspur	1 000 ^(iv)	6,000 ^(iv)	Light (12%), heavy (0%)
Total	377 500	2,374,300	

(i) The crude oil capacity on TMPL includes the 5 600 m³/d (35,000 b/d) expansion in early 2007. This was derived by taking the total capacity of the pipeline of 41 300 m³/d (260,000 b/d), which is the capacity of the pipeline assuming that 31 percent of the total capacity transports heavy crude oil, and then subtracting 7 900 m³/d (50,000 b/d) to account for the capacity used for Canadian domestic crude oil deliveries. An additional 12 700 m³/d (80,000 b/d) is subtracted to account for the portion of the pipeline's capacity used for the delivery of refined petroleum products (RPP). Note that a subsequent expansion of 6 400 m³/d (40,000 b/d) to the pipeline is estimated to be available by mid 2008.

(ii) The 45 000 m³/d (283,000 b/d) capacity on the Express pipeline is currently not fully utilized because it is limited by the capacity available on the connecting Platte Pipeline. Purvin & Gertz assumed that due to indigenous crude oil production declines in the U.S. Rockies and rising refinery demand, Express and/or other pipelines to the U.S. Rockies will be able to increase their use of their combined export capacity by 3 200 m³/d (20,000 b/d) each year from 2007 to 2009.

(iii) The Wascana pipeline has a capacity of 6 400 m³/d (40,000 b/d) but has not been operating in recent years hence, its capacity to export light crude is not included in the analysis.

(iv) Enbridge's Westspur pipeline system connects at the U.S. border to the Enbridge North Dakota line, with an export capacity of around 7 900 m³/d (50,000 b/d). However, due to portion of capacity used to transport U.S. domestic crude oil volumes, only 12 percent of the capacity or 1 000 m³/d (6,000 b/d) was estimated to be available for transporting Canadian crude oil.

In response to the CEP's argument, Keystone submitted that information about other pipelines is not required or relevant in assessing the merits of the Keystone pipeline. Further, it indicated that the Keystone application is not deficient as it supplied all the information stipulated in the Board's Filing Manual and scoping decision.

Keystone Pipeline Capacity

Keystone stated the Project could increase the available transportation capacity for western Canadian oil producers by 69 200 m³/d (435,000 b/d), the nominal capacity of the pipeline, by 2009. Keystone also noted that this capacity could be expandable to 94 000 m³/d (591,000 b/d) through the addition of pumping facilities.

Keystone noted that, as set out in its Keystone Pipeline System Petroleum Tariff (Tariff), the pipeline would be able to transport crude oil ranging from blended heavy to light synthetic crude oil. The range of crude oil types that could be transported by the pipeline are shown in Table 2-2.

**Table 2-2
Properties of Crude Oil Transported by the Keystone Pipeline**

Product	Standard Density	Reference Temperature		Viscosity	
				13.5°C	18.5°C
	kg/m ³	°C	°F	cSt	cSt
Heavy Blend	940	7.5	45.5	227	164
		18.5	65.3	523	350
Synthetic Crude	865	not available	not available	8	12

In addition to increasing export capacity for a wide range of crude oil products, Keystone submitted that the pipeline’s “bullet” design from Hardisty, Alberta to Wood River, Illinois would better protect batch integrity and thus provide better delivered product quality compared to competitor pipelines. The bullet design would also eliminate the need for break-out tankage and reduce transit times.

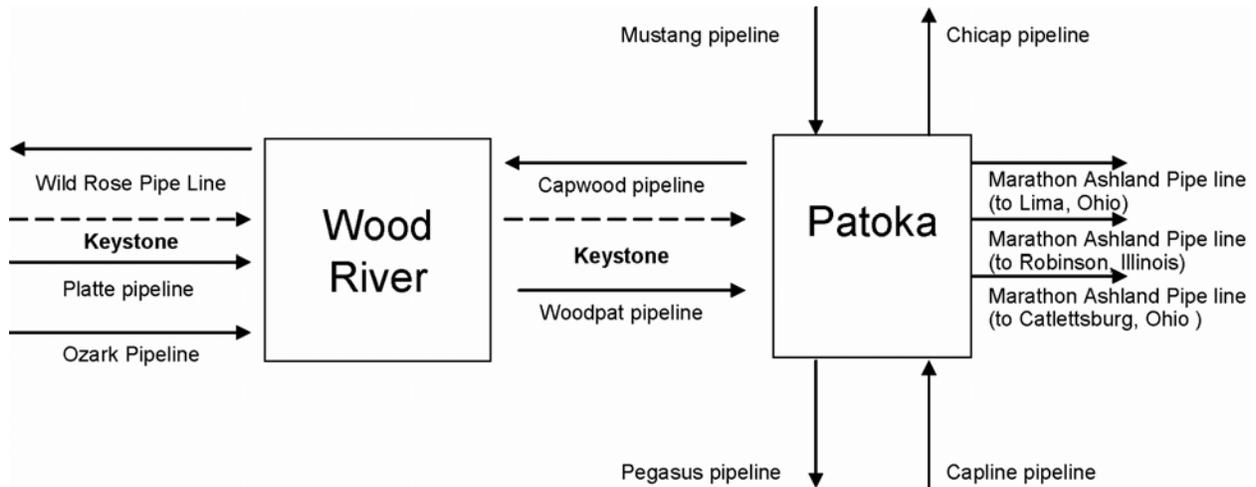
2.3 Market for Western Canadian Crude Oil

According to the Purvin & Gertz report, in 2005, the eight refineries in Western Canada used approximately 92 800 m³/d (584,000 b/d) of crude oil, which represents almost 97 percent of their total estimated capacity of 96 100 m³/d (605,000 b/d). Since 2000, annual crude oil demand growth from these refineries has been 1.4 percent per year. Purvin & Gertz forecast that demand would increase by 1.5 percent per year and therefore it expects demand to rise by only 7 100 m³/d (45,000 b/d) by 2010. Purvin & Gertz also noted that heavy crude oil use at the Western Canadian refineries was not expected to grow significantly; therefore, heavy crude oil exports are forecast to rise.

Keystone Target Market

Keystone stated in its application that the target markets for the Project are refineries in southern PADD II. PADD II refineries have access to crude oil from Illinois, either at Wood River or Patoka. These points form a market hub as illustrated in Figure 2-5. Of particular note was that both the ConocoPhillips refinery at Wood River, with a capacity of 48 600 m³/d (306,000 b/d) and Marathon Ashland Petroleum LLC’s refinery at Robinson, Illinois, with a capacity of 30 500 m³/d (192,000 b/d), could receive crude oil from the Keystone pipeline.

**Figure 2-5
Wood River and Patoka Infrastructure**



In addition, Keystone stated that both refineries were planning expansions or modifications to enable processing of additional Canadian crude oil. ConocoPhillips plans to add coking capacity to process about 30 200 m³/d (190,000 b/d) of heavy crude oil and expand its refinery by between 4 800 to 7 300 m³/d (30,000 to 46,000 b/d), while Marathon is examining a 23 800 m³/d (150,000 b/d) modification to enable processing of heavy crude oil.

Keystone submitted that the region potentially served by the Keystone pipeline via the Patoka hub includes three other refineries in Ohio and Kentucky that have a combined refining capacity of 71 400 m³/d (449,000 b/d).

Purvin & Gertz forecast that demand in PADD II would grow and that increasing supplies of Canadian crude oil could handle this growth in addition to offsetting declining U.S. domestic production.

Keystone stated that it had obtained binding transportation contracts that underpinned the Project. The contracts total 54 100 m³/d (340,000 b/d), which represents 78 percent of the pipeline's nominal capacity and have an average term of 18 years. However, it noted that specific contract details could not be disclosed as the information would be commercially sensitive to the shipper, Keystone, or both. Keystone submitted that the existence of firm transportation contracts is evidence that there is market support for the Project and that the terms of the negotiated commercial arrangements are reasonable and competitive.

The CEP and the AFL expressed concerns regarding the lack of information provided on the products that would be transported by the pipeline. The CEP submitted that without details on the specific products and proposed volumes that would be transported, it would be impossible for the Board to assess the adequacy of the markets for the oil products exported though the Keystone pipeline because the Board could not determine whether the specifications of the exported oil matched the type of oil that the refineries in the target market were equipped to process. The CEP also submitted that Keystone's analysis of markets concentrated on developments in the U.S. and did not include an equivalent analysis of planned and expanded

facilities for processing bitumen or heavy blends in Canada. The CEP argued that there was insufficient evidence for the Board to assess the adequacy of the markets served by the Keystone pipeline to absorb the type of oil products that are likely to be produced in Alberta for export markets.

The Keystone Shippers Group (KSG) supported the proposed transportation arrangements on the Keystone pipeline. It noted that it is presently not known what shippers on the Keystone pipeline will ship and that the pipeline has the ability to move a range of products, including up to 100 percent upgraded product if that was what the shippers and market desired. It argued that such flexibility is key to be able to respond effectively to market demand and price signals.

2.4 Ability to Finance

In its application Keystone submitted that it will obtain the funds required for the construction of the Project from its parent company, TransCanada. By using a combination of internally-generated cash flow and funds obtained from Canadian and U.S. capital markets, TransCanada will be able to fully finance the capital expenditures required to construct and place the Project in service. Keystone further advised that it has signed contracts with negotiated tolls for 78 percent of the capacity of the pipeline for an average of 18 years. Keystone also stated that the negotiated tolls were comprised of a combination of fixed and variable tolls. The fixed component of the toll is to recover capital invested and the variable portion of the toll is a flow-through of actual operating costs, adjusted on an annual basis.

No concerns were raised and no parties sought to examine Keystone on either the proposed financing or the Company's ability to recover the capital, operating expenses or financing costs of the applied-for facilities.

Views of the Board

The Board finds the assessment of crude oil production and supply, transportation infrastructure and markets for western Canada crude oil submitted by Keystone, to be reasonable. Having reviewed the evidence, the Board is satisfied that there will be sufficient crude oil supply and markets to support the construction and long-term operation of the Keystone pipeline. The Board is of the view that there is a need for additional crude oil transportation capacity out of the WCSB to ship the growing oil sands production to the markets in the U.S. identified by Keystone.

The Board accepts that Keystone's parent company, TransCanada, has the ability to finance the construction of the Project and place it into operation. Furthermore, the Board recognizes that Keystone has signed contracts for 78 percent of the pipeline's capacity for an average term of 18 years, with the negotiated tolls designed to recover both capital and operating costs. The volumes likely to be transported for uncommitted shippers, to be tolled at a maximum of 120 percent of the five year negotiated toll, will also contribute to the recovery of costs. Overall, the

Board is satisfied that adequate provisions exist for the recovery of capital, operating expenses and financing costs for the applied-for facilities.

In assessing these matters, the Board has also considered the concerns expressed by some intervenors regarding the unspecified composition of the product that will be transported by the Keystone pipeline. In the Board's view, this information is unnecessary to assess whether the Keystone pipeline will be used at a reasonable level over its economic life. Furthermore, the Board is of the view that oil markets will continue to be in constant evolution. These markets would be better served by a pipeline capable of effectively handling a range of products, which Keystone is designed to be. The Board notes there is demonstrated strong shipper support for the Project in the form of long-term contracts for a significant proportion of the pipeline's capacity and that no intervenor challenged Keystone's evidence on supply, transportation and markets. The Board is satisfied that if approved, the applied-for facilities will be used at a reasonable level and that the associated tolls, will be paid.

It was suggested by the CEP in final argument that the Board should consider the public interest broadly enough to review this application in comparison or conjunction with other proposed projects. The Board does not however have a practice of hearing facilities applications on a comparative basis and has, in the case of *Sable*¹, determined that it is not under a statutory obligation to hold comparative hearings. In the Board's view, it has an obligation to hear all views in order to determine whether the Project is in the "present and future public convenience and necessity". The Board finds that the circumstances of this case do not warrant a comparative hearing. The Board is therefore of the view that it would be inappropriate to delay its decision on this application.

1 Joint Public Review Panel Report, Sable Gas Projects, October 1997, Appendix VI, National Energy Board Decision on TQM motion for Delay – Ruling on Comparative Hearings and Deferral of Decision Making, at pp.131-2.

Chapter 3

Tolls and Tariffs

Keystone requested approval of its proposed toll methodology and tariff for the Project pursuant to Part IV of the NEB Act. Keystone also sought to be regulated on a complaint basis for toll and tariff purposes.

3.1 Tolls

Keystone proposes to charge tolls for two types of service: Committed Service which is supported by a long-term Transportation Service Agreement (TSA) and for which Committed Tolls would be charged; and Uncommitted Service which is not supported by a TSA and for which Uncommitted Tolls would be charged.

Committed Tolls

Keystone submitted that its Committed Tolls are not based on a traditional cost of service methodology and that Keystone has accepted certain financial risks. Committed Tolls were negotiated and designed to recover a combination of fixed and variable costs.

The fixed portion of the Committed Toll is designed to recover invested capital and would not change over the term of the TSA. It is also levelized to provide toll predictability and stability. The fixed component of the toll decreases as the length of contact (5, 10, 15 and 20 years) increases, recognizing the additional financial commitment provided by shippers that subscribed to longer-term TSAs. The fixed component of the Committed Toll is required to be paid whether crude oil is shipped or not.

Within two months of regulatory approval, the capital expenditures for the construction of the Project would be re-estimated. The fixed portion of the Committed Toll would change at the percentage rate equal to the percentage change between the re-estimated Project costs and the original estimated Project costs. Not more than two years following the start up of the Project, a final determination of capital costs would be made and the fixed portion of the Committed Toll would either increase or decrease at a percentage rate equal to one-half of the percentage change between the final Project costs and the re-estimated Project costs. To offer additional toll certainty and to align with shippers in a desire to minimize construction costs, Keystone would assume the remaining 50 percent change in construction costs.

Keystone submitted that the variable portion of the Committed Toll is a flow-through of actual operating costs adjusted annually, which reflects the cost differences between the types of crude oil transported. Keystone also advised that after the third anniversary of commencement of operations, it would seek to negotiate an incentive arrangement for Operations Maintenance and Administration expenses.

Illustrative tolls provided by Keystone are shown in Table 3-1.

**Table 3-1
Illustrative Committed Tolls from Hardisty, Alberta to the International
Border (\$Cdn)**

Line	Term of Contract: Units:	5 Years		10 Years		15 Years		20 Years	
		\$/m ³	\$/bbl	$/m^{3}	$/bbl	$/m^{3}	$/bbl	$/m^{3}	$/bbl
1	Fixed Toll	3.124	0.497	3.118	0.496	3.066	0.488	2.994	0.476
2	Variable Toll - Light	1.862	0.296	1.862	0.296	1.862	0.296	1.862	0.296
3	Total Light (1 + 2)	4.986	0.793	4.980	0.792	4.928	0.784	4.856	0.772
4	Variable Toll - Heavy	2.645	0.421	2.645	0.421	2.645	0.421	2.645	0.421
5	Total Heavy (1 + 4)	5.769	0.918	5.763	0.917	5.711	0.909	5.639	0.897

Uncommitted Tolls

Keystone submitted that the maximum Uncommitted Toll would be equivalent to the five year Committed toll (both fixed and variable components) including any adjustments, plus a 20 percent premium. In addition to sending the correct economic signals in respect of the appropriate toll (in the absence of long-term shipping commitments), Uncommitted Tolls were designed to be competitive with alternative methods of transportation. Comparisons of the Uncommitted Tolls to the Five Year Committed Tolls are provided in Table 3-2.

**Table 3-2
Comparison of Uncommitted and Committed Tolls from Hardisty, Alberta to
the International Border (\$Cdn)**

Units	Uncommitted		Five Year Committed	
	\$/m ³	\$/bbl	\$/m ³	\$/bbl
Light Crude	5.983	0.952	4.986	0.793
Heavy Crude	6.924	1.101	5.769	0.918

Should market conditions warrant, Keystone indicated that it may be required to offer uncommitted capacity at less than the maximum Uncommitted Toll. In the event that market conditions indicate the Uncommitted Toll is not competitive, Keystone would make the appropriate toll filing with the Board to reduce the level of the toll or to seek approval for a mechanism which allows discounting.

No concerns were raised and no parties sought to examine Keystone on the proposed methodology for the Committed and Uncommitted Tolls or the proposed discounting of Uncommitted Tolls.

3.2 Appropriateness of Contracted Capacity on Common Carrier Pipeline

Subsection 71(1) of the NEB Act requires that an oil pipeline company offer service to any party wishing to ship oil on its pipeline. Where capacity on an oil pipeline is contracted, the Board examines the open season process and the capacity to be made available for spot shipments in considering whether the pipeline is acting in a manner consistent with its common carrier obligations.

3.2.1 Open Season

In April 2005, non-binding expressions of interest from potential shippers on the proposed Keystone oil pipeline were solicited by TransCanada and interest in 79 500 m³/d (500,000 b/d) of capacity was received. Between 1 November 2005 and 4 December 2005, TransCanada conducted an open season to seek binding expressions of interest from shippers.

Concurrent with the open season, TransCanada solicited two non-binding expressions of interest related to potential extensions to the Keystone Project, specifically an additional originating point in the Fort Saskatchewan, Alberta area and an extension to Cushing, Oklahoma.

Through the open season, potential shippers had the opportunity to sign TSAs to commit to shipping a minimum volume of 800 m³/d (5,000 b/d) for a term of 5, 10, 15 or 20 years. Under the TSA, the shipper would have a one-time option to extend the contract by an additional five year period if the initial term was less than 20 years. Where the initial term is 20 years, the shipper would have a one-time option to extend the contract by a period of up to 10 years.

The TSA also provided committed shippers that contracted to ship a minimum of 4 000 m³/d (25,000 b/d) for 10, 15 or 20 years with a 60-day option to commit to transport up to their proportionate share in the event of an extension of the pipeline or an increase in the physical capacity of the pipeline to no more than 95 400 m³/d (600,000 b/d). On 30 January 2007, Keystone commenced a binding open season to expand the nominal capacity to 93 800 m³/d (590,000 b/d) and to construct an extension of the U.S. portion of the pipeline to Cushing, Oklahoma. No eligible shipper took advantage of this option prior to the open season for expanding the pipeline and Keystone expects the option to have no future effect.

3.2.2 Available Capacity

Keystone stated that after the initial open season, long-term contracts totaling 54 100 m³/d (340,000 b/d) were signed with an average contract duration of 18 years. Uncommitted capacity of 15 100 m³/d (95,000 b/d), would therefore be available to all shippers. Under the Tariff, in an apportionment situation, committed shippers would have unapportioned priority access for their ship-or-pay commitments. Any remaining available capacity would be allocated on a pro rata basis among all remaining nominations.

In the event that shipper demand for additional contracted capacity materializes, Keystone stated that it may seek to market a portion of the presently unsubscribed capacity through a future open season process. However, Keystone indicated that it would reserve 4 000 m³/d (25,000 b/d) to

be offered as uncommitted capacity. Keystone further noted that incremental capacity, measured as the difference between nominal and design capacities, would also typically be available up to an additional 7 600 m³/d (48,000 b/d) for spot shipments.

No party expressed views regarding the adequacy of the open season or the resulting capacity allocation.

3.3 Method of Regulation

For the purpose of toll and tariff regulation, Keystone requested to be regulated as a Group 2 company on a complaint basis.

In the event that the Board was not inclined to approve this method of regulation, Keystone requested that it be permitted to make toll filings pursuant to paragraph 60(1)(a) of the *National Energy Board Act* and be relieved from filing Quarterly Surveillance Reports and Performance Measures and from keeping its books in accordance with the provisions of the *Oil Pipeline Uniform Accounting Regulations (OPUAR)*.

In its application, Keystone cited the Alliance Pipeline Ltd. Reasons for Decision GH-3-97, for the factors that have been found relevant when the Board makes its determination. These factors include: the size of the facilities; whether the pipeline transports commodities for third parties; and, whether the pipeline is regulated under traditional cost of service methodology.

Keystone submitted that while the size of the Project is not insignificant, both the shipper base and the negotiated tolls support complaint-based toll and tariff regulation. Keystone's services are underpinned by TSAs signed by sophisticated shippers for an average of 18 years and for 78 percent of the pipeline's nominal capacity. The fixed component of the Committed Toll is not based on a traditional cost of service recovery methodology. Rather, Keystone is accepting risks not undertaken in a traditional cost of service model. Such risks include: system underutilization; the competitiveness of the Uncommitted Toll; contract non-renewals; and a level of construction cost overruns.

Keystone further submitted that the TSAs contain audit rights respecting calculation of the re-estimated Project costs (a key determinant of the fixed toll) and once the pipeline is operational, Keystone would undertake an incentive arrangement for the variable portion of the tolls. Further, shippers would have the on-going right to annually audit the derivation of the variable toll.

If disputes arise respecting the tolls charged or the terms of access to or transportation on the pipeline, all shippers, whether having signed long-term TSAs or not, would have the right to complain to the Board. It is for these reasons that Keystone requested regulation as a Group 2 company on a complaint basis.

No concerns were raised and no parties sought to examine Keystone on the requested method of regulation.

Views of the Board

Tolls and Tariff

Pursuant to sections 62 and 67 of the NEB Act, tolls must be just and reasonable and not unjustly discriminatory. The Board notes that no party to the proceeding expressed concerns with respect to Keystone's proposed toll methodology. The Board finds the proposed Committed Toll methodology would produce tolls that are just and reasonable given that they are the result of negotiations between sophisticated parties. The Board further finds the proposed methodology for calculating Uncommitted Tolls, applying a 20 percent premium to the five year committed toll, to be just and reasonable. The Board also accepts Keystone's proposal to file with the Board discounted uncommitted tolls in the event that market conditions render such tolls uncompetitive.

The application of different tolls among committed shippers and between committed and uncommitted shippers is reflective of the differing levels of support and risk undertaken in connection with the Keystone Project. Accordingly, the Board is of the view that the proposed differential tolling is not unjustly discriminatory. Further, the Board finds that the renewal rights and unapportioned access accorded to committed shippers do not result in unjust discrimination.

Contracted Capacity

In previous decisions, the Board has found that an oil pipeline acts in a manner consistent with its common carrier obligations when an open season is properly conducted and where the facilities are either readily expandable or capacity is left available for monthly nominations. In this case, the Board is satisfied that the open season conducted by TransCanada granted all potential shippers a fair and equal opportunity to participate. The Board notes that the pipeline is expandable to 94 000 m³/d (591,000 b/d) and that Keystone currently has 15 100 m³/d (95,000 b/d) or approximately 22 percent of nominal capacity available for spot shipments. Further, Keystone has committed to reserve 4 000 m³/d (25,000 b/d), or approximately 6 percent of the pipeline's nominal capacity, to be offered as uncommitted capacity in addition to any incremental capacity available.

The Board notes that during the hearing no potential shipper came forward to indicate a firm intention to ship on an ongoing basis, nor was any view expressed disputing the fairness of the open season or the resulting capacity allocation. Accordingly, the Board finds that Keystone's common carrier status is maintained.

Open Access

In addition to a pipeline having adequate physical capacity, open access to transportation capacity is an important prerequisite to enable the effective and efficient operation of the market. The principle that shippers are to know the terms and conditions of access to a pipeline in advance of negotiations provides a more equal footing in the negotiation of a business arrangement by providing transparency and preventing the potential for an abuse of market power, either in terms of substance or perception.

The Board notes the market for oil transportation has evolved and will continue to evolve to embrace commercial arrangements better suited to meet the needs of market participants. This evolution has included the acceptance, under certain conditions and circumstances, of firm contractual commitments to capacity on oil pipelines operating under the common carrier obligations of the NEB Act. In most instances this has resulted in the majority of capacity being contractually committed to firm transportation services with a residual amount of capacity being left available to meet the requirements of uncontracted shippers.

The Board is of the view that the principles of open and transparent access apply equally to contracted and uncontracted transportation capacity. The Board is also of the view that the market would benefit from knowing the general terms and conditions of access to contracted capacity in advance of a pipeline company initiating an open season process. In the GH-2-87 Reasons for Decision², the Board expressed its views on the matters as follows:

The Board, however, considers it essential that all terms and conditions of access to a pipeline be clearly reflected in the tariff in order to ensure that there are no undue service restrictions imposed by pipeline companies involved in the marketing or producing sectors of the natural gas sector. In the Board's view, prospective shippers are entitled to know the conditions of access to a pipeline system in advance of contract negotiations, as this knowledge will allow market participants to make informed supply and market decisions thereby contributing to the efficient functioning of the natural gas market.

While the GH-2-87 Reasons for Decision were written in the context of access to natural gas transportation, the regulatory principles of open access to transportation, and terms and conditions of access clearly reflected within a tariff are equally applicable to oil transportation services, particularly to oil pipeline systems with contracted capacity. Accordingly, the Board directs Keystone to amend its Tariff to include

² GH-2-87, TransCanada PipeLines Limited, Applications for Facilities and Approval of Toll Methodology and Related Tariff Matters, July 1988.

terms and conditions of access to contracted transportation capacity on the Keystone pipeline prior to the commencement of operations.

Method of Regulation

The *Memorandum of Guidance on Regulation of Group 2 Companies, December 1995* divides pipeline companies into two groups. Group 1 companies are generally subject to a greater degree of financial regulation and monitoring than Group 2 companies.

In the past, when determining whether a company should be designated as Group 1 or Group 2, the Board has considered the size of the facilities, whether the pipeline transports commodities for third parties and whether the pipeline is regulated under traditional cost of service methodology.

Given that both Committed and Uncommitted Tolls are determined with reference to negotiated agreements rather than on a traditional cost of service basis, the Board has concluded that Keystone should be designated as a Group 2 company. Keystone is therefore required to comply with the requirements of subsection 5(2) of the OPUAR.

Keystone is further required to comply with the following:

1. All toll filings pursuant to paragraph 60(1)(a) of the NEB Act shall be accompanied with supporting documentation for the tolls;
2. In the event that Keystone determines the Uncommitted Toll to be uncompetitive and files with the Board to reduce the level of the toll, Keystone is required to provide supporting documentation including an explanation of the discounting mechanism; and
3. When an application is filed with the Board, at that same time Keystone shall provide its shippers and interested parties with a notice of its application and advise that comments and concerns with respect to the application are to be provided in writing directly to the Board within 10 days of receipt of notification of the subject filing from Keystone.

Chapter 4

Engineering

In its examination of pipeline and facility applications, the Board considers relevant safety issues to ensure companies design, construct and operate their facilities in a safe manner. The Board determines whether the proposed project meets regulatory requirements concerning the safety of employees and the public and may examine issues such as the suitability of the proposed design, construction techniques, materials and control systems, pipeline security as well as potential risks to pipeline integrity.

4.1 Project Design

The Keystone Project consists of the following pipeline and related facilities:

- construction of 271 km of 762 mm (NPS 30) pipeline; 268 km in Alberta and 3 km in Saskatchewan;
- modifications to convert 864 km of Line 100-1 from gas to oil service;
- construction of 10 km of 864 mm (NPS 34) pipeline from Carman to Elm Creek, Manitoba;
- construction of 90 km of 762 mm (NPS 30) pipeline from Elm Creek, Manitoba to the U.S. border;
- installation of pigging facilities on the new and existing pipeline segments;
- construction of 16 pump stations; and
- construction of three operational tanks with a nominal capacity of 55 600 m³ (350,000 bbl), associated manifold piping and metering facilities at Hardisty, Alberta.

A map of the Project is shown in Figure 1-1. Pipeline specifications for both the new construction and Line 100-1 replacement sections are summarized in Table 4-1.

**Table 4-1
New Construction and Line 100-1 Replacement Pipeline Specifications**

	Alberta/Saskatchewan Segment	Saskatchewan/ Manitoba Existing Segment	Manitoba Segment	
Outside Diameter	762 mm (NPS 30)	864 mm (NPS 34)	864 mm (NPS 34) (10 km)	762 mm (NPS 30) (90 km)
Wall Thickness	8.6 mm (Grade 550) or 9.8 mm (Grade 483)	Minimum of 9.5 mm (Grade 550) or 9.5 mm (Grade 483 or Grade 414)	9.7 mm (Grade 550) or 11.1 mm (Grade 483)	8.6 mm (Grade 550) or 9.8 mm (Grade 483)
Material Grade	550 MPa or 483 MPa	550 MPa, 483 MPa or 414 MPa	550 MPa or 483 MPa	
Material Category	Category 1	Category 1	Category 1	
Maximum Operating Pressure	9930 kPa (1440 psi)	6070 kPa (880 psi)	9930 kPa (1440 psi)	

The locations of the pump stations and pumping equipment are provided in Table 4-2.

**Table 4-2
Pump Station Location and Equipment**

Pump Station Number	Pump Station Name	Province	Chainage (KP)	Number of Pumping Units	Motor Size (kW)
PS 5	Hardisty	AB	0.0	4	3000
PS 6	Lakesend	AB	48.6	2	3000
PS 7	Monitor	AB	104.4	3	3000
PS 8	Oyen	AB	162.3	3	3000
PS 9	Bindloss	AB	230.8	3	3000
PS 11	Cabri	SK	361.0	2	3000
PS 13	Herbert	SK	461.0	2	3000
PS 15	Caron	SK	564.4	3	3000
PS 17	Regina	SK	669.2	2	3000
PS 18	Kendal	SK	720.6	2	3000
PS 19	Grenfell	SK	774.6	2	3000
PS 21	Moosomin	SK	879.7	2	3000
PS 23	Rapid City	MB	987.7	2	3000
PS 25	Portage la Prairie	MB	1096.6	2	3000
PS 26	Carman	MB	1159.6	3	3000
PS 27	Haskett	MB	1223.6	2	3000

Keystone submitted that the proposed new pipeline segments and facilities of the Project would be designed, constructed and operated in accordance with the Board's *Onshore Pipeline Regulations, 1999* (OPR-99), Canadian Standards Association (CSA) Z662-03 and all other applicable standards, specifications and codes referenced in Keystone's application. Specific design standards, material specifications and construction procedures for liquid pipelines would be developed as part of the detailed engineering phase and would also comply with the requirements of OPR-99 and CSA Z662-03. Where required, Keystone stated it involved

independent engineering consultants in the design and review of the Project, to ensure the Keystone pipeline would be suitable for crude oil service.

4.2 Project Construction

Keystone indicated it is planning to construct three major watercourse crossings using the horizontal directionally drilled (HDD) crossing technique. The water crossings are:

- Red Deer River, Alberta;
- South Saskatchewan River, Alberta; and
- Boyne River, Manitoba.

A preliminary report on the geotechnical evaluation of the three major crossings, which was prepared for Keystone, concluded that it is feasible to directionally drill all three crossings. Given the relative size of the watercourse crossings, Keystone also had an HDD feasibility report prepared for the proposed Red Deer and South Saskatchewan river crossings. The report concluded that the crossings do not pose a significant difficulty to an HDD methodology.

Keystone stated that welding and testing would be completed in accordance with CSA Z662-03. The specific welding procedure would be produced to match the material properties of both new and existing pipe. Non-destructive testing of all welds using either radiographic or ultrasonic inspection would be employed to ensure the field weld quality.

4.3 Line 100-1 Change in Service and Integrity

As part of its application, Keystone sought approval to convert approximately 864 km of 864 mm (NPS 34) pipeline of TransCanada's Mainline between Burstall, Saskatchewan and Carman, Manitoba (Line 100-1) from natural gas to oil transmission service. In order to determine the pipeline's suitability for liquid service, Keystone stated it conducted an engineering assessment on Line 100-1 in accordance with CSA Z662-03 Clause 10.11.3. The engineering assessment consisted of a due diligence review of Line 100-1 and a pipeline risk assessment of new and existing pipeline segments.

Keystone indicated that the due diligence review it conducted included a review of TransCanada's design, operations and maintenance records of Line 100-1 as well as discussions with TransCanada's subject matter experts. Keystone then had a pipeline risk assessment prepared by consultants which used information from the due diligence review. Keystone submitted that the pipeline risk assessment consisted of a failure threat assessment defining the probability of a failure and an analysis defining the consequences of failure.

Keystone submitted that the engineering assessment determined that Line 100-1 is suitable for liquid service upon the implementation of several actions and modifications prior to and during the operation of Line 100-1 in liquid service. Keystone committed to submit to the Board an updated engineering assessment incorporating the results of the corrective actions and modifications.

In order to provide the required level of assurance of pipeline integrity on Line 100-1, Keystone determined that it would be necessary to complete a crack detection in-line inspection (ILI) before the end of gas service and complete subsequent investigations and repairs prior to liquid service. Keystone stated that this approach would provide better certainty that Line 100-1 would perform properly in oil service than the results of a hydrostatic test to 1.25 times the maximum operating pressure (MOP).

Keystone indicated that Line 100-1 contains corrosion fatigue sensitive features which in oil service would be subjected to large pressure cycles. Under these circumstances, Keystone was of the view that hydrostatic testing is an ineffective integrity management tool as it would not verify the pipeline's integrity when put into liquid service. It would merely establish the minimum static strength of a pipeline at the time of testing. Keystone indicated that failure could potentially occur during the filling of the line. Furthermore, a hydrotest is a binary test that provides no information on potential flaws that remain, other than the flaws that do not exceed the envelope of dimensions that would have failed at test pressure.

Keystone also stated that hydrostatically pressure testing Line 100-1 would have two significant impacts. The first impact would be a delay to the Project schedule of one quarter of one year. The second impact would be increased costs from hydrostatic testing and the need to accelerate construction activities.

Keystone submitted that conducting ILI on Line 100-1 would allow Keystone to better manage the integrity of the pipeline as it provides more complete information on the inherent defects in the line. Keystone indicated that crack detection ILI tools have been used extensively and successfully to manage cracking in many pipelines and that the detection capability of such tools is excellent and is improving over time. The benefit of ILI, as submitted by Keystone, is that it would allow Keystone to implement a defect management approach where it can predict how cracks would grow and remove them at the right time. Keystone committed to repair all flaws that would not meet a rupture pressure ratio of 1.25, would leak, or otherwise fail by corrosion fatigue within two years of operation based upon the design pressure spectrum. Keystone also committed to conducting a ground-based leak detection survey while the pipeline is in gas service, to ensure that the pipeline does not leak.

During the oral portion of the hearing, Keystone agreed to complete a second ILI of Line 100-1 within one year of liquid operation. With a second ILI run after one year, Keystone stated that it would be able to perform more analysis and compare the results from the two tool runs to validate the methods being used to manage the integrity of the pipeline. Keystone expected there would be sufficient pressure cycling of the line in the first year of operation to allow it to assess actual defect growth rates.

Keystone stated that it would adopt TransCanada's Integrity Management Program and modify the methodology for liquid service. Keystone submitted that the overall objective of TransCanada's Integrity Management Program is to establish and maintain acceptable levels of integrity by reducing environmental impacts, ensuring safety of the public and company employees, protecting the installed pipelines and facilities, and maintaining reliability. Keystone indicated that a risk assessment approach to identifying potential integrity threats would be used to initiate appropriate inspection and mitigation activities. Keystone stated it would perform an

economic assessment and weigh both the economic impacts of conducting additional integrity management activities against the consequences of a failure. Keystone stated that the goal of its integrity program is to achieve zero ruptures and leaks. However, Keystone stated there would be considerable financial costs to ensure a zero rupture condition and these costs would far outweigh the benefit given the low probability of a rupture occurring.

4.4 Project Operations and Safety

Keystone stated it would operate the pipeline and associated facilities in accordance with all governing regulatory requirements, permit conditions and other approvals, including the OPR-99 and CSA Z662-03. To address both routine and non-routine pipeline system maintenance, Keystone submitted that it would use the existing registry of TransCanada Operating Procedures (TOPs). Keystone indicated that in areas where oil-related processes and procedures do not exist, they would be created by Keystone with the input of consultants as required. Keystone further stated that operating procedures would be reviewed by professional engineers knowledgeable and experienced in liquids pipeline operation. Keystone also indicated that the development of oil-related TOPs would be completed in advance of the pipeline being placed in-service and would also be used for training its pipeline operators prior to the start of operations.

Keystone indicated that it would have an emergency response plan that would meet all regulatory requirements. The plan would ensure emergency response equipment, consisting of containment and recovery equipment for both land and water, is available at strategic locations along the pipeline system. Keystone would coordinate with emergency response agencies in the areas in which it operates to ensure appropriate communications, understanding and cooperation. Keystone submitted that emergency procedures and other necessary work instructions would be developed using TransCanada's existing policies and procedures and enhanced, where necessary, to incorporate Keystone pipeline operations.

Keystone stated that it would utilize a comprehensive Supervisory Control and Data Acquisition (SCADA) system situated within the Operations Control Centre (OCC) to remotely monitor and control the pipeline and tankage facilities. The OCC would be staffed by operators on a 24-hour per day, 7-day per week basis. A redundant, fully functional Backup Control Centre would be available should the OCC become interrupted for any reason. Keystone indicated that other features would be designed and installed as integral components of the SCADA system to protect the pipeline from over pressure conditions and to ensure operation within licensed pressure limits. Pump station discharge pressure would be controlled using an electro-hydraulic pressure control valve. In the event of a failure of the pressure control system, backup pressure devices (pressure switches and transmitters) would automatically respond to shut down a pump or pumps to protect downstream piping. In addition, an on-site system would be installed to provide pipeline pressure protection in the event communications with the SCADA host are interrupted.

During the detailed engineering stages of the Project, Keystone stated that a pipeline transient hydraulic system model would be developed. A comprehensive review of the entire pipeline system would be performed to identify any potential issues. Furthermore, Keystone indicated that the model would be enhanced to provide a pipeline simulator with the capability of replicating operation of the Keystone pipeline on a real time basis. Specific OCC procedures would then be developed, tested and refined through the use of this system. Keystone indicated

that the pipeline simulator would also be used to provide real time training of the OCC operators under a variety of conditions, including leaks and other upset conditions, in order to familiarize personnel and ensure appropriate responses.

Keystone submitted that it plans to invest in a state-of-the-art SCADA and leak detection system. Keystone stated the pipeline would have a computer-based leak detection system that would report through the SCADA system to the OCC and would provide the operator with enhanced capabilities related to the early detection and location of leaks. The leak detection system hardware would be comprised of both a main and fully-redundant hot standby system. Where required, inline flow meter, suction pressure, discharge pressure and temperature transmitters to facilitate leak detection would be installed. Keystone indicated that the leak detection system would be designed and installed in accordance with CSA Z662-03 and OPR-99 to monitor flow, pressure and temperature imbalances characteristic of line leaks. Keystone also confirmed that it intends to employ a leak detection system in compliance with Annex E of CSA Z662-03, Recommended Practice for Liquid Hydrocarbon Pipeline System Leak Detection. Keystone stated that a preliminary investigation into the level of attainable performance of the leak detection system indicates the following detection times for various sizes of leaks:

Leak Relative to Pipeline Flow	Approximate Detection Time (minutes)
2%	102
5%	45
15%	18
50%	9

With respect to the actual operation of the Project, Keystone stated that it intends to enter into an Operating Services Agreement with TransCanada for the provision of operating services. Keystone indicated that a formalized relationship would exist and the scope and details of the agreement would be finalized in advance of the pipeline in-service date.

Views of the Board

The Board notes that the proposed new pipeline segments and facilities would be designed, constructed and operated in accordance with the OPR-99, CSA Z662-03 and all other applicable standards, specifications and codes. The Board is of the view that the general design of the Project is appropriate for its intended use. However, the Board is mindful of Keystone’s plan to use TransCanada’s existing registry of operating procedures, which deal exclusively with gas service, and that specific design standards, material specifications and construction procedures for liquid pipelines have yet to be developed. The Board expects Keystone to uphold its commitment to ensure that those involved in the detailed design of the facilities and the development of liquid operating procedures are competent and have the appropriate experience in designing and operating oil facilities. The Board notes that the 2007 edition of CSA Z662 has been released and reminds Keystone that it must comply with CSA Z662-07 on a go forward basis. The Board also expects that Keystone would ensure operators have received sufficient training prior to the start of liquid

operations to ensure the safe operation of the pipeline and related facilities.

Accordingly, in order to verify that appropriate training and procedures are in place, Keystone shall file, prior to the submission of its first leave to open application, confirmation from an officer of the Company that all the liquid related operating procedures are completed and implemented and that operators have been trained in these procedures.

To help ensure the safe construction and operation of the proposed facilities, the Board also conditions Keystone to submit its field joining program, a drill execution plan for each HDD crossing, a Construction Safety Manual, its pressure testing program and an emergency response plan for pressure testing activities. To facilitate potential Board inspections, the Board further conditions Keystone to submit its final pipeline construction specifications along with a detailed construction schedule and to maintain at each construction site a copy of the welding and non-destructive testing procedures.

With respect to the change in service of Line 100-1, the Board accepts Keystone's approach, in this instance, for managing the integrity of the pipeline. While the Board values hydrostatic pressure testing as a means of ensuring fitness for purpose, the Board recognizes the binary nature of the test results. Although the detection capability of defects in ILI tools is not 100 percent, the Board notes that ILI has been used extensively as an integrity management tool in pipelines. Given Keystone's commitment to conducting two ILI tool runs in addition to a leak detection survey, the Board is prepared to approve Keystone's proposed method to ensure Line 100-1 would be fit for liquid service. Dual ILI tool runs would provide a more insightful examination of the condition of Line 100-1 and would allow Keystone the opportunity to determine actual defect growth rates caused by the cyclic loading of liquid service operations.

To help ensure the safe operation of Line 100-1, the Board expects Keystone to use the best available technology when selecting the ILI tools. The Board also expects increased vigilance in the operation and maintenance of Line 100-1 during the first year of operation, given that Keystone will only have the results of the first ILI. Accordingly, Keystone will be expected to meet the following conditions, as detailed in the Certificate Conditions found in Appendix V:

- Keystone shall file, prior to the submission of its first leave to open application, its integrity management program and emergency procedures manual with the Board. In conjunction with the emergency procedures manual, Keystone shall file its liaison program and continuing education program for the Project. The Board expects the emergency procedures manual

to identify the high consequence areas, including municipal or residential water sources, along or near the pipeline route and specific plans to ensure these areas are protected.

- Keystone shall engage an independent third party to qualify the in-line inspection of Line 100-1 in gas service. The scope of the third party activities and deliverables shall be determined by the Board and provided to Keystone. Keystone shall select the third party from a list provided by the Board. The final report of the third party reviewer shall be submitted to the Board.
- Keystone shall also engage an independent third party to perform an independent verification of an updated engineering assessment of Line 100-1. The scope of the third party activities and deliverables shall be determined by the Board and provided to Keystone. Keystone shall select the third party from a list provided by the Board. The final report of the third party reviewer shall be submitted to the Board. In addition, Keystone shall be required to file with the Board for approval a final engineering assessment that determines Line 100-1 is suitable for liquid service. The Board expects the engineering assessment to consider, in addition to CSA Z662-07 requirements, the line fill plan, the third party final report and the findings of performance testing conducted to ascertain the dynamic response of the pipe materials to fatigue loading representative of the pressure spectrum anticipated in liquid service.
- To ensure all modifications necessary to make Line 100-1 fit for oil service are completed prior to the line going into liquid service, Keystone shall file a commitments tracking table indicating the status of all commitments made prior to and during the hearing. Monthly updates of the table shall be filed with the Board until final leave to open is granted.
- Keystone shall conduct line patrolling of Line 100-1 once a week during the first year of operation.
- Keystone shall conduct boom deployment and ice cutting drill exercises prior to its first leave to open application.
- Keystone shall report to the Board all reportable accidents and incidents on Line 100-1, as defined by the Transportation Safety Board Regulations, during the first year of operation.

In keeping with the life-cycle approach used in this hearing, the Board will dedicate resources to monitoring the post-approval actions to be taken by Keystone in implementing this decision. The Board expects Keystone to dedicate the necessary resources to meet its commitments and to support the Board in its monitoring.

Chapter 5

Land Matters

The Board expects companies to provide a description and rationale for both permanent and temporary lands that will be required for a project in order to assess the extent of new lands to be affected by the project. In addition, companies are required to advise the Board if they are using any existing land rights or if there are areas where no new land rights are required.

The Board also requires a description of the land acquisition process as well as the status of acquisition activities. This allows the Board to assess the appropriateness of the acquisition process and to be aware of the timing of acquisition. Companies must provide the Board with a copy of the sample notices provided to landowners pursuant to subsection 87(1) of the NEB Act as well as all forms of the acquisition agreements. This information enables the Board to verify that the agreements and notices comply with the requirements of the NEB Act and that the rights of landowners are protected.

5.1 Land and Land Rights

The Project traverses lands in Alberta, Saskatchewan and Manitoba. Land and land rights required by Keystone for construction, operation and maintenance of the Project are needed for the new pipeline segments, pump stations, and cathodic protection facilities. In addition, Keystone will require the existing land rights from TransCanada on Line 100-1.

New Pipeline Segments (Easement and Temporary Workspace)

The Project includes two new sections of pipeline, the first being in NW 29-42-9-W4M near Hardisty, Alberta to a point near Burstall, Saskatchewan in SW 9-20-29-W3M. The second section commences in SE 24-10-5-WPM near Carman, Manitoba and terminates at the Canada/U.S. border within SE 5-1-4-WPM near Haskett, Manitoba. For the new construction areas in Alberta and Manitoba, Keystone stated it would require a new permanent easement of 20 metres and approximately 10 metres of temporary work space.

Keystone stated that approximately 38 percent of the affected lands in Alberta are provincial Crown lands and the remainder is privately owned parcels. For the new construction segments in Manitoba, Keystone stated that the lands are privately owned.

Existing Line 100-1 (Easement & Temporary Workspace)

The new segments of pipeline would be connected to the existing TransCanada Mainline Line 100-1 starting at a point east of TransCanada's Burstall Compressor Station No. 2 in SW 9-20-29-W3M and ending at its Carman Sales Meter Station in SE 24-10-5-WPM. Keystone's acquisition of Line 100-1 will include the assignment of a 9.906 metre RoW from TransCanada. This represents a partial assignment of TransCanada's existing 19.812 metre easement.

Keystone stated that properties on the existing Line 100-1 section are primarily private lands with a small number of Crown-owned properties.

New Pump Stations

The Project includes the installation of 16 new pump stations along the route in Alberta, Saskatchewan and Manitoba. Keystone stated that eight pump stations would be located on private lands. The remaining pump stations would be located on existing compressor station lands owned by TransCanada. The total land area required for each pump station is approximately 2.0 hectares.

Cathodic Protection Facilities

Keystone stated that it would be installing and maintaining a cathodic protection system along the entire length of the Project. The approximate easement area for each cathodic protection facility is 20 metres by 100 metres in size with an additional area of approximately 5 metres by 100 metres to facilitate a cable. Keystone stated that the specific location of these facilities would be determined during the detailed design phase.

5.2 Land Acquisition Process

Keystone indicated that most land acquisition activities would occur from January/February 2007 to 30 April 2008.

Keystone would precede land acquisition negotiations by serving a notice to landowners under section 87(1) of the NEB Act. Keystone further indicated that, when landowners are served their section 87(1) Notice, they would also be provided with a copy of the NEB publication, *Pipeline Regulation in Canada: A Guide for Landowners and the Public*.

Land Acquisition Agreements

As part of its application, Keystone submitted copies of its land acquisition agreements as well as its form of section 87(1) Notice. Keystone did not provide copies of the form of agreement for temporary workspace since those agreements are not required for the subsequent operation of the pipeline.

Views of the Board

The Board finds that Keystone's anticipated requirements for permanent and temporary land rights are reasonable. The land rights documentation and acquisition process proposed by Keystone are also acceptable to the Board.

Chapter 6

Public Consultation

The Board promotes the undertaking by regulated companies of an appropriate level of public involvement commensurate with the setting, as well as the nature and magnitude of each project.

This chapter addresses Keystone's public consultation program. Keystone's consultation with potential shippers is discussed in Chapter 3 and Aboriginal engagement matters are discussed in Chapter 7.

6.1 Keystone's Consultation Program

Keystone adopted TransCanada's consultation practice, which is to develop and adapt consultation programs according to the nature, location and effects of a project. Keystone considered that the Project impacts would vary according to the different segments of the Project. Therefore, the consultation program for the Keystone Project was adapted for the different segments of the Project: new pipeline and pump stations; change of service activities along the existing pipeline and new pump stations along the existing pipeline. The consultation program also considered the baseline knowledge which stakeholders in different regions of the Project were expected to have about pipeline construction and the oil and gas industry.

Keystone initiated its consultation program in February 2005 when the Project was publicly announced. The program involved a variety of activities including direct contact with landowners, meetings with interest groups and government officials, public notices, open houses and newsletters. Keystone developed and refined the proposed route based upon feedback from stakeholders and stated in its application that all concerns raised by stakeholders have been addressed or are expected to be resolved to the satisfaction of the stakeholder.

Keystone stated that consultation will continue through the construction phase and into operations when stakeholder engagement will transition from the Keystone project team into TransCanada's ongoing community relations program, including the Integrated Public Awareness Program.

Views of Parties

Both the Kessler Landowners Group (KLG) and the Alberta Association of Pipeline Landowners indicated they had some outstanding concerns and required further information about how the Project would impact their ranching and agricultural operations. For further information regarding these concerns, refer to Chapter 8.3.2 Impacts to Agricultural Operations.

Views of Keystone

Keystone stated that it is committed to working with landowners to resolve concerns as it is Keystone's experience that meaningful consultation builds better projects. Keystone also committed to meet with all landowners to provide additional information on the Keystone Project and to mutually develop mitigation plans that will be implemented prior to and throughout construction activities. Keystone committed to resolving outstanding concerns prior to construction but noted that some issues regarding appropriate compensation remain and would require further discussion.

Keystone stated it had requested an opportunity to meet with the KLG as a group, but to date the KLG has not accommodated this request. However, Keystone noted it had spoken with Mr. Butt, a representative of the KLG, on several occasions to discuss the KLG concerns.

Views of the Board

The Board notes that Keystone took into consideration the impacts which the different segments of the Project would have on stakeholders as well as the level of stakeholder familiarity with pipeline projects, and modified its consultation program accordingly. Additionally, the company identified potentially affected landowners and other stakeholders, used appropriate methods to disseminate Project information and engage the public in consultation activities, and was responsive in addressing concerns raised by stakeholders.

The Board notes that Keystone has committed to seek to address all outstanding landowner concerns prior to construction and to ongoing consultation through TransCanada's community relations program. The Board expects that stakeholder concerns will be addressed as they arise through the lifecycle of the Project. The Board encourages the KLG and Keystone to meet and share information about Project impacts, discuss all outstanding concerns, and seek mutually agreeable solutions.

The Board is satisfied that Keystone's public consultation program was commensurate with the nature, magnitude and setting of the Project.

Chapter 7

Aboriginal Matters

7.1 Participation of Aboriginal Groups in the Regulatory Process

Two Aboriginal groups actively participated in the regulatory process for the Keystone Project: Standing Buffalo Dakota First Nation, located near Fort Qu'Appelle, Saskatchewan and five First Nations in southern Manitoba known collectively as the Dakota Nations of Manitoba.

Standing Buffalo Dakota First Nation

Standing Buffalo Dakota First Nation (Standing Buffalo) filed an application for intervenor status on 22 February 2007, stating its interest in the proceeding was related to unextinguished Aboriginal title, self governance rights and historic allyship status. On 16 April 2007, Standing Buffalo made a late filing of its written evidence and requested that the Board allow their Elders to provide oral traditional evidence in their own language during the oral portion of the hearing.

On 19 April 2007, the Board accepted the late filing of Standing Buffalo's evidence and announced that the majority of the oral hearing would be held in Calgary, Alberta, but that it would also schedule two days of hearing in Regina, Saskatchewan to accommodate the participation of Standing Buffalo.

The hearing in Regina opened with a pipe ceremony conducted by the Standing Buffalo Elders. The applicant presented an overview of the Project and made a witness panel available for cross-examination by counsel for Standing Buffalo. Elder Goodwill, Elder Thorne and Elder Tawiyala provided their oral traditional evidence and Chief Redman provided oral testimony. Parties were also given the opportunity to question these witnesses. Counsel for Standing Buffalo provided oral argument and also filed written argument.

During the proceeding, the Board asked an Information Request of Standing Buffalo about how the Project would impact its current use of lands and resources for traditional purposes as well as other environmental or socio-economic factors. In addition, at the hearing Board counsel and Members of the Board Panel asked the Elders questions to understand better how the Project would impact Standing Buffalo.

Dakota Nations of Manitoba

The Birdtail Sioux, Canupawakpa, Dakota Plains, Dakota Tipi and Sioux Valley Dakota First Nations filed applications for intervenor status and noted that their interests would be pursued collectively as the Dakota Nations of Manitoba. The Dakota Nations of Manitoba indicated that their interest in the proceeding was related to the fact that the Project would pass through and impact their traditional territory in southern Manitoba. They stated they are not signatories to a treaty and Canada has not undertaken actions to discharge its legal obligation and fiduciary duty to consult with the Dakota in respect of the Project. In addition, they stated that the applicant has

not met its legal obligations to consult or enter into formal agreements. They indicated that they would support in principle the approval and construction of the Project if and when their issues have been comprehensively dealt with to their satisfaction.

In their intervention, the Dakota Nations of Manitoba requested that the Board add the following to its List of Issues set out in Appendix 1 of the Board's Hearing Order:

Outstanding matters flowing from unresolved issues concerning Dakota traditional territories within what is now the Province of Manitoba and in particular the claim of the Dakota Nations of Manitoba based on unextinguished Aboriginal title and Governance rights.

After considering this request, the Board sent a letter on 2 March 2007 directly to the Dakota Nations of Manitoba outlining its decision that no addition to the List of Issues was required. The Board indicated that in all cases it considers the potential effects of a project on Aboriginals within the project area. Specifically, under Issue #5 in the List of Issues, the Board will examine the potential impacts of the Project on the current use of lands and resources for traditional purposes and will thoroughly examine the socio-economic impacts of the Project.

When the Board announced the location of the oral public hearing on 19 April 2007, it noted that the five Dakota Nations of Manitoba had not filed written evidence or requested the opportunity to make an oral statement at the hearing. Accordingly, the Board did not schedule hearing time in Manitoba to facilitate the participation of the Dakota Nations of Manitoba. The Board did however indicate that should this situation change through the filing of written evidence, it would consider making arrangements for additional hearing time in Winnipeg, Manitoba.

On 1 June 2007, the Dakota Nations of Manitoba informed the Board they would not be filing written evidence or formally participating in the oral hearing but would be filing written argument. The Dakota Nations of Manitoba indicated that preliminary discussions with both Canada and Keystone had been initiated. As a measure of good faith, the Dakota Nations of Manitoba wanted to allow time to explore the potential with Canada and Keystone to achieve agreements which would assure them that their issues would be addressed. On 20 June 2007, the Board received the written argument of the Dakota Nations of Manitoba.

7.2 Aboriginal Engagement

Keystone initiated its consultation activities with Aboriginal groups, as well as the general public, when the Project was publicly announced in February 2005. Keystone employed TransCanada staff to undertake the consultation with Aboriginal groups as TransCanada has existing relationships with Aboriginal people in the Project area. Keystone stated it was guided by TransCanada's Aboriginal Relations Policy when identifying and engaging communities that may be affected by the Project. Keystone also stated that federal and provincial Aboriginal consultation guidelines and the results of the Keystone Environmental and Socio-Economic Assessment provided direction in its consultation activities with Aboriginal peoples. Based on TransCanada's Aboriginal Relations Policy, Keystone contacted those Aboriginal communities located within approximately 50 km of the Project.

In Alberta, Keystone determined that no Aboriginal communities, including Métis settlement lands, were located within 50 km of the Project facilities. However, Keystone contacted the Siksika Nation (Siksika), as members of the Blackfoot Confederacy since TransCanada had an existing relationship with them. Keystone noted that a work plan had been developed with the Siksika to assist the Project team in identifying any traditional land use sites that may be important for determining the final route for the Project.

In Saskatchewan, Keystone initially determined that two Aboriginal groups may be impacted by the Project and initiated consultation with them. These two Aboriginal groups are Carry the Kettle First Nation (Carry the Kettle) and Treaty 4 First Nations (Treaty 4).

Approximately 15 km of TransCanada RoW presently passes through Carry the Kettle reserve lands. Keystone determined that the existing easement agreement with this First Nation would require an amendment due to the change in product being transported. Keystone consulted with Carry the Kettle and Indian and Northern Affairs Canada. Keystone reached a new easement agreement in April 2006 which granted permission for crude oil transportation across Carry the Kettle reserve lands. A memorandum of understanding was also signed by TransCanada and Carry the Kettle in June 2006. Keystone submitted that TransCanada will continue communications with Carry the Kettle and make efforts to extend employment and business opportunities to them in accordance with TransCanada's Aboriginal Policy, the memorandum of understanding and TransCanada's business practices.

The Project route is located within the lands traditionally used by the signatories to Treaty 4. Keystone consulted with Treaty 4 as per the TransCanada and Treaty 4 Protocol Agreement which has been in place since July 2000. The Agreement specifies that Treaty 4 will be the lead agency responsible for consultation with Treaty 4 communities that may be affected by a project. Keystone submitted that Treaty 4 representatives did not indicate any issues or concerns with the Project and their only interest was related to potential economic opportunities. Keystone committed to continue communication with Treaty 4 as the Project progresses.

Keystone initially determined that Long Plain First Nation, Birdtail Sioux First Nation and the Manitoba Métis Federation were the only Aboriginal groups in Manitoba with interests within 50 km of the Project area and initiated consultation with them. As consultation activities proceeded, Keystone also consulted with the Dakota Ojibway Tribal Council, Roseau River First Nation and Sioux Valley Dakota Nation. Keystone stated in the Application that no concerns or issues were identified by these groups although there was an interest in potential employment opportunities from the Project. Based on a request by the Dakota Nations of Manitoba, on 26 March 2007 Keystone wrote a letter to the Minister of Indian and Northern Affairs Canada. The letter indicated that due to the lack of progress on discussions between the Crown and the Dakota Nations of Manitoba regarding land claims, there is the potential to delay discussions on Project-specific issues which are of concern to Keystone. Keystone urged the Minister to take immediate and appropriate action to address and resolve these matters.

In the application, Keystone stated that should other Aboriginal communities or organizations come forward with a bona fide interest in the Project, those interests would be addressed in a timely manner.

Keystone's application stated that no Aboriginal land claims had been identified along the route. However, Keystone became aware of the outstanding land claim of the Dakota Nations of Manitoba during consultation activities. Also, after the intervention of Standing Buffalo, Keystone became aware of this group and their outstanding land claim. Keystone then initiated consultation with Standing Buffalo.

Views of Standing Buffalo

Standing Buffalo initially stated it had not been consulted by Keystone about the Project. However, a meeting between Keystone and Standing Buffalo did take place on a 'without prejudice' basis on 5 June 2007. As this meeting was conducted on a without prejudice basis, no evidence was provided about the results of the meeting. Standing Buffalo stated it would continue to meet with Keystone to discuss how traditional sites and its lands can be respected.

Standing Buffalo submitted it holds unextinguished Aboriginal title, does not have a treaty with Canada and has not been able to negotiate a treaty despite over 70 meetings with the Saskatchewan Office of the Treaty Commissioner. Standing Buffalo noted that its negotiations with the Treaty Commissioner were winding down and it had to do something to advance its interests so it decided to intervene in both the OH-2-2007 Alida to Cromer Capacity Expansion and the Keystone proceedings. Through a series of letters to the Minister of Indian and Northern Affairs Canada, Standing Buffalo informed the federal government of the relationship between its decision to intervene in these proceedings and the ongoing lack of progress concerning its unextinguished Aboriginal title and its desire to enter into a treaty. To date, the letters have received no response and Canada has not met with Standing Buffalo about the Project or any issues related to its Aboriginal title.

Standing Buffalo claims that although it does not have a treaty with Canada, it has not given up its traditional lands and has an existing alliance with the British, now the Canadian Crown, that creates duties for the Crown similar to those accruing from a treaty. Standing Buffalo stated that the duties of the Crown include the duty to consult regarding the traditional lands which Standing Buffalo may select related to a flood settlement agreement. The Standing Buffalo Chief indicated that Standing Buffalo would meet with Keystone to resolve issues and reach an agreement with respect to the Project. However, in its view the federal government must also be at these meetings.

Standing Buffalo counsel argued that the Board should not issue a Certificate for the Project due to the failure of Canada to consult with Standing Buffalo concerning Dakota claims to Crown land to be affected by the Project. He also argued that if the Project is allowed to proceed before meaningful consultation occurs, the NEB will be in violation of section 35 of the *Constitution Act, 1982*.

Views of The Dakota Nations of Manitoba

The Dakota Nations of Manitoba stated that the Government of Canada has the primary duty to consult and accommodate respecting the Keystone Project. Although Keystone and the NEB have their own accommodation and consultation duties, neither Keystone's nor the NEB's work can be substituted for the primary duty held by the Crown. The Dakota Nations of Manitoba

stated they are prepared to recommend to their members that they support the Project provided their consultation needs are met.

As discussed previously, on 1 June 2007 the Dakota Nations of Manitoba indicated that discussions with both Canada and Keystone had been initiated and they would allow those to proceed.

In their final argument, the Dakota Nations of Manitoba requested that the Board consider the addition of the following condition to any approval that may be granted;

TransCanada (Keystone) shall

- (i) continue consultation with the Dakota Nations of Manitoba with a view to assuring the requirements relating to Consultation and Accommodation in law and in the Board's Letter of Guidance dated 3 August 2007 (*sic*) are met; and
- (ii) shall provide updated reporting to the Board at the time that it files the detailed schedule provided for in [condition number to be specified]

They argued that imposing such a condition would reflect the Dakota Nations' conclusions respecting the Project.

Views of Keystone

Keystone stated it did not initially consult Standing Buffalo as it understood the Standing Buffalo community to be located just outside the 50 km zone. Also Keystone was not aware that Standing Buffalo was not a member of Treaty 4 and therefore not covered under the Treaty 4 Protocol Agreement with TransCanada. In addition, Keystone stated it did not receive instruction from Treaty 4 that Standing Buffalo was not a member of its organization. Once Standing Buffalo filed its intervention, Keystone made numerous unsuccessful attempts to engage Standing Buffalo until the 5 June 2007 meeting occurred on a 'without prejudice' basis.

TransCanada's representative indicated at the hearing they will continue to engage Standing Buffalo for the purpose of seeking common interests and determining how they can work together. In addition, Keystone stated it would like to have further dialogue with Standing Buffalo to determine if any of the 2.5 km of the land for new pipeline construction in Saskatchewan is used for traditional purposes or if any sites of concern might be on those lands. Additionally, it would like to better understand what Standing Buffalo's interests may be and how Standing Buffalo would be impacted by the Keystone Project or other TransCanada projects.

Keystone argued that according to the *Haida Nation v. British Columbia (Minister of Forests)*³ decision, the requirement to consult is minimal if infringement is minimal. It went on to cite part of this decision and quoted; '...the only duty on the Crown may be to give notice, disclosure of information, and discuss any issues in response to the notice.' Keystone argued that this much has happened between Standing Buffalo and Keystone, albeit, not the Crown. Therefore,

3 [2004] 3 S.C.R. 511, at para. 25 and 53.

Keystone submitted it has met its onus and so the arguments of the Standing Buffalo should be dismissed.

Keystone stated it met with the Dakota Nations of Manitoba after their intervention was filed and it would continue to meet with them.

7.3 Impacts of the Project on Aboriginal Peoples

In its application, Keystone submitted that the Project is expected to have minimal impact on Aboriginal peoples along the proposed route due to the distance of the Project facilities from Aboriginal communities and the types of lands traversed. Specifically, Keystone determined that only 5 Aboriginal groups were located within 50 km of the Project. Additionally, only 60 km of the total Project RoW would be new, lands traversed are primarily privately-owned and used for agricultural and livestock raising purposes and, there are no records of active trapping in the Project area. With respect to Crown lands, Keystone calculated that 38 percent of RoW in Alberta is on Crown lands and the remainder is on privately owned lands. There are no Crown lands in Saskatchewan where new construction would take place and of the 612 km of the existing 100-1 line RoW, 30 km is on Crown lands subject to grazing leases and 2 km is on unoccupied Crown lands. In Manitoba the proposed new construction is on privately-owned lands and of the 258 km of existing line RoW, 4 km is on leased Crown lands and 2 km is on unoccupied Crown land.

Views of Standing Buffalo Dakota First Nation

In the Dakota view, all land is sacred and the Dakota people have stewardship obligations towards their lands. Any kind of construction project is an interference with the land and therefore an impact according to the traditional belief system of Standing Buffalo.

During the oral portion of the hearing, Standing Buffalo Elders explained that although their reserve land is in Saskatchewan, their traditional territory is vast and extends beyond Saskatchewan and into Alberta, Manitoba and the U.S. They stated there is evidence to support the extent of their traditional territory from the archaeological, historical and traditional oral history records. They also explained that their territory is shared with the Cree and the Blackfoot and they all have a responsibility to protect sacred sites.

The Elders submitted that the Dakota people have built many sacred monuments and their traditional practice is to leave them undisturbed once completed as a sign of respect. Therefore, they may not currently use Dakota sites for traditional purposes but they are still sacred and must be protected. The Elders were concerned that the Project has the potential to disrupt these sites particularly if there was a leak or rupture of the pipeline. They were especially concerned because, in their view, TransCanada was responsible for desecrating some sites when the existing RoW was built. They indicated there are sacred sites along both the existing and proposed RoW but the Elders would require some time to identify their location in relation to the pipeline. They added that their concern is not limited to the destruction of sites in Saskatchewan, as they have a responsibility for their whole territory which extends into the other provinces where the Project is located.

In response to the Board's information request which asked Standing Buffalo to indicate how the Project would impact its current use of lands and resources for traditional purposes or other environmental or socio-economic factors, Standing Buffalo indicated that the Project cuts through its traditional territory and any building project is an interference with the land requiring, at least, a duty to consult. It stated this is particularly true when construction and operation of the project may disrupt wildlife, harm the land or waters by, for example, spills of noxious substances or disturb traditional sites and Crown lands claimed by the First Nation.

Standing Buffalo also expressed concern that the Project would limit even further the Crown lands that will be available for selection once its Treaty claim has been resolved and that would be available to meet the terms of its flood compensation agreement.

The Standing Buffalo Elders stated that Elders of the local First Nations should be involved in identifying where these sacred sites are and ensuring that protocols are respected when working around these sites.

Views of Dakota Nations of Manitoba

The Dakota Nations of Manitoba state that the Project would impact their traditional lands and explained that impacts cannot be limited to the pipeline corridor because pipelines have impacts on past uses and future land uses which would be open to the Manitoba Dakota First Nations once their claims are resolved. Neither the pipeline corridor nor the question of effects on current traditional use is relevant because the Dakota Nations of Manitoba have unextinguished title over a larger traditional territory.

Views of Keystone

At the hearing, Keystone re-iterated that it has not identified any Project impacts to the current use of lands for traditional purposes. However, it is willing to continue to meet with Aboriginal groups to discuss concerns now and throughout the life of the Project. Should traditional sites be identified during further consultation with Aboriginal groups, Keystone committed to make modifications to the Project design. Keystone indicated it had been meeting with the Dakota Nations of Manitoba and more work would be done with them to determine if there are any Project impacts. Keystone asserted that since there would be only 2.5 km of new pipeline construction in Saskatchewan and the remainder of the project in Saskatchewan would be the existing pipeline conversion, Keystone did not expect there to be any significant Project impacts to Standing Buffalo. However, Keystone is willing to establish an agreement and work plan with Standing Buffalo so they can assess what the next steps will be.

Views of the Board

Although discussions with Standing Buffalo and the Dakota Nations of Manitoba began somewhat later than they could have, overall, the Board is satisfied that Keystone meaningfully engaged Aboriginal groups potentially impacted by the Project. Aboriginal groups were provided with details of the Project as well as an opportunity to express their concerns to Keystone regarding Project impacts. Keystone considered the

concerns and made Project modifications where appropriate. Keystone also worked within established agreements which TransCanada had with Aboriginal groups in the area of the Project and persisted in its attempts to engage certain Aboriginal groups. The Board is also satisfied that Keystone has committed to ongoing consultation through TransCanada.

The evidence before the Board is that TransCanada, on behalf of Keystone, was not aware that Standing Buffalo and the Dakota Nations of Manitoba had asserted claims to land in the Project area. The Board is of the view that, since TransCanada has a long history of working in the area of the Keystone Project, it should have known or could have done more due diligence to determine claims that may exist in the area of the Keystone Project. The Board acknowledges that as soon as Keystone became aware that Standing Buffalo and the Dakota Nations of Manitoba had an interest in the Project area, it did take action and initiated consultation activities. The Board further notes that consultation with Carry the Kettle and Treaty 4 was based upon TransCanada's established protocol agreements and that Keystone is willing to establish similar agreements and work plans with other Aboriginal groups, including Standing Buffalo and the Dakota Nations of Manitoba.

Once an application is filed, all interested parties, including Aboriginal persons, have the opportunity to participate in the Board's processes to make their views known so they can be factored into the decision-making. With respect to the Keystone Project, the Board notes that Standing Buffalo and the Dakota Nations of Manitoba took the opportunity to participate in the proceeding and the Board undertook efforts to facilitate their participation. The Board agreed to late filings by Standing Buffalo and the Elders had an opportunity to provide oral testimony in their own language at the hearing. In addition, the Board held two hearing days in Regina to facilitate the participation of Standing Buffalo and was prepared to consider hearing time in Winnipeg for the benefit of the Dakota Nations of Manitoba. The Board notes it undertook to ensure it understood the concerns of Standing Buffalo by hearing the testimony of the Elders, making an Information Request and asking questions at the hearing.

The Board is satisfied that Standing Buffalo and the Dakota Nations of Manitoba were provided with an opportunity to participate fully in its process and to bring to the Board's attention all their concerns. The hearing process provided all parties with a forum in which they could receive further information, were able to question and challenge the evidence put forward by the parties, and present their own views and concerns with respect to the Keystone Project. Standing Buffalo and the Dakota Nations of Manitoba had the opportunity to present evidence, including any evidence of potential infringement the Project could have on their rights and interests. The Dakota Nations of Manitoba did not provide evidence at the hearing.

Standing Buffalo filed affidavit evidence and gave oral evidence at the hearing, which was carefully considered by the Board in the decision-making process. Standing Buffalo also suggested that the Project would further limit the Crown lands that would be available to meet the terms of its flood compensation agreement and any Treaty claim. In the Board's view, the evidence on this point is too speculative to warrant the Board's consideration of it as an impact given there are Crown lands available for selection and private lands available for purchase within the traditional territory claimed by Standing Buffalo.

It is not within the jurisdiction of the Board to deal with land claim matters. Accordingly, to the extent that the evidence provided by Standing Buffalo relates to its asserted land claim rather than the effects of this particular Project on its interests, it is of limited probative value to the consideration of the application before the Board.

Standing Buffalo presented evidence of a general nature as to the existence of sacred sites along the existing and proposed RoW. The Board notes Keystone's commitment to discuss with Standing Buffalo the potential for the Project to impact sacred sites, develop a work plan and incorporate mitigation to address specific impacts to sacred sites into its Environmental Protection Plan. The Board would encourage Standing Buffalo to bring to the attention of TransCanada its concerns with respect to impacts to sacred sites from existing projects and to involve their Elders in these discussions.

The Board notes that almost all the lands required for the Project are previously disturbed, are generally privately owned and are used primarily for ranching and agricultural purposes. Project impacts are therefore expected to be minimal and the Board is satisfied that potential impacts identified by Standing Buffalo which can be considered in respect of this application will be appropriately mitigated.

With respect to the request by the Dakota Nations of Manitoba for additional conditions, the Board notes that Keystone and the Dakota Nations of Manitoba have initiated consultations and that both parties have committed to continue these discussions. In addition, the Board notes Keystone's commitment to address concerns that are raised through all its ongoing consultation activities and its interest in developing agreements and work plans with Aboriginal groups in the area of the Project. The Board strongly supports the development of such arrangements and encourages project proponents to build relationships with Aboriginal groups with interests in the area of their projects. Given the commitments both parties have made to ongoing dialogue, the Board does not see a need to impose the conditions as outlined.

Chapter 8

Environment and Socio-Economic Matters

The Board considers environmental and socio-economic matters under both the CEA Act and the NEB Act. The Board expects applicants to identify and consider the effects a project may have on biophysical and socio-economic elements, the mitigation to reduce those effects, the significance of any residual effects once the mitigation has been applied and enhancements of project benefits.

8.1 Environmental and Socio-Economic Assessment Process

Keystone filed an Environment and Socio-Economic Assessment (ESA) for the Project and concluded that the Project will not have a significant adverse effect on any environmental or socio-economic resources provided the mitigation measures identified in the ESA are implemented during construction, operation, decommissioning and abandonment.

The proposed Project requires a Certificate of Public Convenience and Necessity under section 52 of the NEB Act, and thus triggers the requirement for an environmental screening under the CEA Act. In addition, pursuant to the CEA Act *Regulations Respecting the Coordination by Federal Authorities of Environmental Assessment Procedures and Requirements* (Federal Coordination Regulations), the NEB coordinated Responsible Authority (RA) and Federal Authority (FA) involvement in the CEA Act process. To reduce potential duplication, the Board and other RAs worked together to create an efficient screening process that would meet the needs of each in carrying out its environmental assessment responsibilities.

Under the Federal Coordination Regulations, the RAs are required to jointly determine the scope of the Environmental Assessment. After consulting with the other RAs and the CEA Agency, the Board circulated a draft Scope of the Environmental Assessment for comment to the FAs, relevant provincial agencies and Keystone. The Scope was then finalized and released on 15 March 2007. See Appendix VI for the Scope of the Environmental Assessment.

Following the oral portion of the hearing, on 25 July 2007, the Board issued a draft Environmental Screening Report (ESR) for public review and comment. The Board received comments from Environment Canada, Transport Canada, Indian and Northern Affairs Canada, and Standing Buffalo Dakota First Nation. Keystone subsequently filed comments.

The final ESR reflects parties' comments and the Board's assessment of the biophysical and socio-economic effects of the Project and mitigation measures based on the Project description, factors to be considered and the scope of those factors. Since the full report, including an executive summary, is included as Appendix VII, no portion of it has been reproduced in this Chapter.

Fisheries and Oceans Canada (DFO), in its role as RA, will conduct an environmental assessment specifically for watercourse crossings where an authorization under the *Fisheries Act* is required, and a CEA Act determination is triggered for DFO.

Views of the Board

Pursuant to the CEA Act, the Board has determined that taking into account the implementation of Keystone's proposed mitigation measures, compliance with the Board's regulatory requirements and the recommended conditions attached to the ESR, the construction and operation of the pipeline and associated facilities is not likely to cause significant adverse environmental effects.

With respect to its regulatory decision under the NEB Act, the Board has adopted the ESR and its recommendations. The Board has also considered additional socio-economic matters related to impacts of the Project on agricultural operations and employment. These are discussed in detail later in this Chapter. The Board is satisfied that all biophysical and socio-economic matters have been considered adequately in accordance with the requirements as specified in the Board's Filing Manual.

8.2 Scope of Assessment

Keystone stated that the scope of the ESA filed with its application was determined with reference to sections 15 and 16 of the CEA Act and the NEB Filing Manual. The ESA included in its scope of the Project, the physical works set out in Keystone's application as well as activities and undertakings considered to be in relation to these physical works. The ESA further defined the biophysical and socio-economic elements to be assessed and the spatial and temporal (i.e. distance and time) boundaries for the assessment of each element evaluated. The Keystone ESA did not assess upstream facilities that would provide supply to, or downstream facilities that would be served by, the Keystone pipeline except as applicable to its cumulative effects assessment.

Views of Parties

In final argument, the CEP submitted that there is evidence of a close connection between the proposed Project and the ConocoPhillips production facilities in Alberta, and the ConocoPhillips processing facilities in the U.S. The CEP stated that it would be an error for the Board to approve the Keystone pipeline without assessing the environmental impacts of both upstream and downstream facilities that may be directly connected to the pipeline and that might not proceed if the pipeline is not approved. The CEP further argued that by denying motions intended to obtain further information with respect to the relationship between upstream and downstream facilities and the Project, the Board had effectively denied the CEP the opportunity to appropriately assess the nature of Keystone's case and to persuade the Board of the need for a more comprehensive review of the Project.

KSG submitted that the Keystone pipeline originates in Hardisty, a crude oil market hub, and terminates at the international boundary in Manitoba. KSG argued that this situation was not analogous to the Sumas decision, which was dependent upon a finding of direct connection. With reference to the CEP's argument concerning the Board's denial of its motions, KSG argued that the scope of assessment was not before the Board when the decisions on those motions were made.

Keystone argued that there is no direct nexus between the Keystone pipeline and any particular upstream or downstream facility. In reply argument, Keystone noted that the proposed pipeline would connect an existing hub at Hardisty, Alberta to extra-jurisdictional markets in the U.S. Keystone submitted that no information about upstream and downstream facilities is required to adjudicate the application.

Views of the Board

The Scope of the Environmental Assessment pursuant to the CEA Act was released on 15 March 2007. The scoping document provides that the Project has two distinct components: the construction of new pipeline and other related facilities; and, the utilization and conversion of existing pipeline facilities. It goes on to state:

The scope of the Project includes construction, operation, maintenance and foreseeable changes, and where relevant, the abandonment, decommissioning and rehabilitation of sites relating to the entire project and specifically, the following physical works and activities...

Subsection 15(3) of the CEA Act reads as follows:

Where a project is in relation to a physical work, an environmental assessment shall be conducted in respect of every construction, operation, modification, decommissioning, abandonment or other undertaking in relation to that physical work that is proposed by the proponent or that is, in the opinion of

- (a) the responsible authority, or
- (b) where the project is referred to a mediator or a review panel, the Minister, after consulting with the responsible authority,

likely to be carried out in relation to that physical work.

The Board is of the view that upstream facilities that would provide supply to the Keystone pipeline are not directly related to the Keystone Project, nor are they ancillary or subsidiary undertakings. Accordingly, they do not fall within the scope of the Project defined above. With respect to downstream facilities that would be served by the Keystone pipeline, the

Board remains of the view expressed in the Sumas Energy 2 Ruling on the Environmental Effects Motion⁴, that the CEA Act does not contemplate that facilities located outside of Canada are to be included within the scope of a project located in Canada.⁵ However, the cumulative effects assessment within Keystone's ESA and the Board's ESR, consider the effects of upstream facilities to the extent that they act in combination with the effects of the Project.

Under the NEB Act, the Board considers the environmental and socio-economic effects in Canada of upstream or downstream facilities where the necessary connection exists between those facilities and the application before the Board. As discussed in Chapter 2 of these Reasons, the Keystone pipeline commences at Hardisty, Alberta, a crude oil supply hub (See Figure 2-4) and delivers crude oil to markets at Wood River and Patoka, Illinois, points that form a major market hub for incoming and outgoing crude oil pipelines (See Figure 2-5). Given that the Keystone pipeline may be supplied by numerous sources and may serve a number of refineries located in PADD II, the Board finds that the upstream and downstream facilities are not sufficiently connected to the Keystone pipeline so as to make the effects of those facilities relevant to the Board's NEB Act decision.

The Board further considers it appropriate that the ESA does not consider the effects of upstream and downstream facilities except as applicable to the cumulative effects assessment, in conducting its environmental and socio-economic assessment of the Project.

8.3 Socio-Economic Matters

The Board expects companies to identify and consider the impacts a project may have on socio-economic conditions including the mitigation of negative impacts and enhancement of project benefits. Keystone filed an ESA for the Project and concluded that the Project will not have a significant adverse affect on any socio-economic resources provided the mitigation measures identified in the ESA are implemented during construction, operations, decommissioning and abandonment. The potential socio-economic effects covered by the CEA Act are discussed in the ESR in Appendix VII and potential socio-economic effects covered by the NEB Act are discussed in this section.

8.3.1 Impacts to Employment

Keystone submitted that the total direct and indirect jobs created during construction of the facilities would be approximately 646 person-years. It estimated there would be 17 full-time

4 EH-1-2000, Sumas Energy 2 Inc., Facilities, March 2004, Appendix III, Ruling on the Environmental Effects Motion, 9 December 2002, p. 125.

5 *Ibid.*, page 130.

positions created during operation of the Project. Keystone also noted that the population in the Project area is almost fully employed.

No party to the proceeding raised concern with respect to the jobs that would be created by the Project however parties were concerned about the missed opportunities for job creation due to the lack of value-added processing of oil products to be shipped on the Keystone pipeline. This issue is discussed in Chapter 9.

8.3.2 Impacts to Agricultural Operations

In the application, Keystone stated that the Project would be constructed in areas that are primarily rural with small towns and villages and the majority of the pipeline traverses lands used primarily for farm and ranch cattle operations as well as agricultural operations.

The Kessler Landowners Group (KLG) intervened in the Keystone proceeding. The KLG is an association of 5 landowners located near Hardisty, Alberta. They carry out ranching and agricultural operations on lands which the proposed Project traverses. In their intervention they noted concerns related to the impact the Project would have on their operations.

Views of the Parties

The KLG stated that the Project will have a significant adverse economic and commercial impact on both the ranching and agricultural operations carried out by members of the KLG during construction, operations and abandonment of the Project. They submitted that any negative impacts on ranching and agricultural operations will be increased by the restrictive nature of the safety zone and if the pipeline is not buried to a sufficient depth. The KLG were also seeking assurances that Keystone will assume liability for all environmental contingencies, including liability for the abandonment of the pipeline. In addition, they were seeking further information from Keystone about the design and construction of the pipeline and how their ranching and agricultural operations will be impacted by the Project. Specifically, KLG sought information related to how their use of the RoW may be restricted.

The KLG stated in its final argument that although it maintained its position as articulated in its written evidence, the KLG focused its attention at the hearing primarily on the issue of abandonment of the pipeline. It argued that Keystone had not adequately demonstrated that the proposed Project will be properly abandoned in the future. KLG was concerned that the financial responsibility associated with environmental impacts from future abandonment activities would fall on members of the KLG or other similarly affected landowners. The KLG requested the Board include a condition on any Certificate issued for the Project requiring Keystone to take out a performance bond guaranteeing future reclamation of the proposed pipeline or make annual payments to an established reserve fund set up by Keystone for the purposes of ensuring that future abandonment is fiscally possible.

The Alberta Association of Pipeline Landowners filed a Letter of Comment stating they were not opposed to the Project if their concerns were addressed and further information was provided. The concerns related to pipeline depth of cover and adequacy of compensation. The information

requested included integrity data of the 'old line', detailed abandonment plans, emergency response plans and the composition of the product to be shipped in the pipeline.

Views of Keystone

Keystone stated that the Project is expected to operate for a minimum of 30 years and that decommissioning and abandonment activities will comply with all applicable federal and provincial regulatory requirements in force at the time. Keystone stated that once a decision is made to abandon the pipeline, a detailed plan would be prepared and an application would be made for the necessary approvals. The plan would take into consideration and address a number of factors including: consideration of legislative requirements at the time, public health and safety; pipeline salvage opportunities or alternative uses; current and future land uses; input from landowners; regulatory authorities, and other affected stakeholders; the comparative environmental effects of either abandoning the pipeline in place, or excavating and removing the pipeline; and water, road, railway, and utility crossing issues. Keystone stated it was not planning to establish a reserve fund or post a bond to address any environmental remediation.

Keystone also noted that it will indemnify landowners for any and all liabilities arising out of the construction and operation of the pipeline, with the exception of willful misconduct or gross negligence by the landowner.

Keystone stated it is committed to working with landowners, including the KLG, to reach mutually-agreeable resolutions to concerns and to develop and maintain positive relationships. Keystone also committed to meet with all landowners, including the directly-affected members of the KLG, to provide additional information on the Keystone Project and to mutually develop mitigation plans that will be implemented prior to and throughout construction activities.

Keystone submitted that its current financial wherewithal is strong and is evidenced by its ability to finance the Project through its parent company, TransCanada. Keystone stated it would bear the responsibility for any liability arising throughout the operational life of the facilities and ultimately it will be required to satisfy the Board of the propriety of the eventual abandonment plan.

Views of the Board

The Board is satisfied that Keystone has identified and considered all the socio-economic aspects of the Project and proposed suitable mitigation to minimize the negative impacts and enhance its benefits. The Board notes that although the KLG did not pursue their concerns of Project-related impacts to ranching and agricultural operations during the hearing, the KLG have stated that these concerns still exist. The Board notes Keystone's commitment to work with landowners, including the KLG, to reach mutually agreeable resolutions to such concerns and to develop mitigation plans. The Board encourages Keystone to follow through on this commitment and to provide any further information which landowner groups may require about the Project and its potential impacts.

With respect to issues associated with pipeline abandonment, the Board recognizes that abandonment is a real and valid concern of landowners. Currently companies are required to apply to the Board at the time of abandonment and at such time, an abandonment plan must be in place and approved by the Board. Abandonment plans must include evidence that all landowners and other persons potentially affected are sufficiently notified and have their rights protected. Further, should the Board approve the plan, an Order would be issued that may have conditions attached that would be monitored by the Board for compliance.

At present, there is no legislative or other requirement that companies assume abandonment related costs at the certification stage of a project. The Board notes that abandonment issues, such as the concerns raised by the KLG, have been and will remain under discussion at a broad level within industry. The Board will engage in the further developments expected in this area and in so doing will consult with interested and affected persons.

In light of Keystone's strong financial position and its commitment to address liability issues which may arise during the life of the Project, the Board will not impose a condition requiring Keystone to post a bond or establish a reserve fund. The Board however encourages Keystone to financially prepare itself for the eventual abandonment of its facilities.

Concerns respecting the loss of potential jobs to Canadians, particularly Albertans due to the lack of oil processing in Canada, are discussed in Chapter 9 of these Reasons.

Chapter 9

Impacts of the Project on Domestic Interests

Certain intervenors at the hearing expressed concern that if the Project were approved, there would be missed opportunities or negative consequences for domestic industries, employment and security of supply. Keystone and parties supporting the application took the position that there would be negative economic consequences if the Project were not approved on a timely basis.

Views of the Communications, Energy & Paperworkers Union of Canada (CEP)

The CEP took the position that without information about the nature, sources and end-uses of the oil products that would be transported by the pipeline, the Board does not have sufficient information to assess the likely economic, commercial, supply and market impacts of the removal of unprocessed heavy crude oil from Canada and whether the Project is in the public interest.

Assuming that the pipeline would be predominantly used to export heavy oil, the CEP argued that Project approval would mean foregoing the substantial economic development and job creation that would result had the bitumen been upgraded in Canada prior to export. The CEP submitted that exports must not occur unless they are surplus to Canadian needs, including those of the oil and gas industry.

In support of its position, the CEP tendered a report by Informetrica Limited (Informetrica Report). The Informetrica Report identified three different development scenarios that reflected the extent to which Canadian oil and gas resources may be transported by the Keystone pipeline.

The first scenario focused on the extraction of Canadian heavy oil for export to markets in the U.S. for further processing. The Informetrica Report claimed that the Canadian public interest would not be served if supplies of energy goods to Canadian refineries and petrochemical industries were truncated and the development of a diversified oil and gas industry in Canada was frustrated by a lack of supply.

The second scenario would see increased value-added for Canada whereby pipeline facilities would be built to transport heavy oil to Canadian upgraders. From there the light crude oil would be transported to refineries and other end-users, including petrochemical producers, in Canada. Under this scenario the pace of oil sands development would proceed in line with Canadian priorities rather than those of the U.S. The export of natural gas liquids as diluent would only occur where it was not needed as a feedstock for Canadian petrochemical industries. The Informetrica Report estimated that the expansion of the Canadian refining industry, as a source of demand for 63 600 m³/d (400,000 b/d) of heavy oil, would add approximately 18,000 jobs per year to the Canadian economy and approximately 0.2 percent to Canada's Gross Domestic Product. The Informetrica Report claimed that the public interest would be served by

this scenario due to enhanced growth opportunities for many different firms in a number of industries.

The third scenario envisioned the expansion of oil and gas supply in Canada proceeding rapidly enough to fully satisfy the goals of the two previous scenarios. Under this scenario, increases in oil sands production would be sufficient to support the Canadian, and particularly Albertan petrochemical industries, and provide for future expansion. Upgrading would occur to approximately 66 percent of oil sands production and supplies would be sufficient to provide feedstock for the refining industry and higher value-added exports.

In final argument, the CEP indicated that it does not have concerns with current government policy and that the Board should in fact have regards to it in rendering its decision. The Union explained that it was not seeking a change to government policy since its views were closely aligned with the policy statement of the Alberta government. It reiterated the importance of the Board considering the advantages and burdens that may follow from approving or denying a project. In particular, it relied on comments made by the Board in the Alliance Pipeline case in support of its position that the Board should consider the potential for the Keystone Project to adversely affect the environment of Alberta communities or the commercial interests of persons other than the owners and users of the pipeline.

The CEP further urged the Board to take into account the proportional sharing provisions of the North American Free Trade Agreement (NAFTA), Article 605. The CEP viewed Article 605 as imposing constraints on future regulatory options and the authority of the Board to serve the public interest. Its view was that once exports commenced, Canada would be “locked-in” to maintaining a proportional share. The CEP also expressed the view that the domestic energy security safeguards outlined in section 118 of the NEB Act would be circumvented if a shipper applied for a short-term export order instead of a long-term licence. The overarching concern expressed by the CEP was that the Board might not have an opportunity in the future to consider whether the products the Project might export would be surplus to reasonably foreseeable Canadian needs.

Views of the Alberta Federation of Labour (AFL)

The AFL expressed the view that the potential economic and social impacts of the Project are significant and so the Board must consider the broader, long-term impacts of the Project. This would include an examination of the Project’s implications for jobs, communities and economic development in Canada as well as for upgrading, refining, petrochemical and secondary industries. To do so, the AFL argued that the Board would need evidence on who the shippers are, the quantities and commodities that would be transported and the end-uses of the products shipped.

The AFL was concerned that if the Keystone Project was approved, North American energy companies would make investment and development decisions that would serve interests outside of Alberta and Canada. In contrast, if the pipeline was not approved, the AFL claimed that energy companies would be encouraged to invest in Canadian refineries. The AFL contended that every barrel of bitumen shipped to the U.S. would be a barrel of bitumen that was not available for value-added production and job creation in Alberta. On this point, the AFL relied

on the Informetrica Report which estimated that 18,000 jobs could be created in Canada if bitumen destined to be shipped to the U.S. via the Keystone pipeline was instead refined in Canada.

If the Keystone pipeline were approved, the AFL also expressed concern that the bitumen would no longer be a shut-in resource resulting in increased bitumen pricing. In its view, harmonized bitumen prices would undermine the Canadian downstream petroleum industry by rendering upgrading and refining facilities in Alberta economically unviable. The AFL noted that Canadian oil sands producers currently have proposals to build 14 new bitumen upgraders or to expand existing capacity in Alberta and that many, or possibly all, of these proposals may be jeopardized if the Keystone pipeline is allowed to proceed.

The AFL submitted that, if the NEB were to focus on the greater public interest, it could force industry, government, labour and other stakeholders to work together to develop a comprehensive plan for the development of Canadian energy resources.

The AFL suggested that the scope of the project assessment, as submitted by the Applicant, was too narrow. It asked the Board to construe the public interest broadly to include considerations of the impact that the Keystone pipeline will have on domestic interests. To achieve this, the AFL recommended the Board choose one of three options.

The first option, which was preferred by the AFL, was for the Board to deny the application based on a lack of evidence on whether the Project was in the public interest. The AFL submitted that the Board does not have facts about what the impacts of the Project will be on existing and proposed upgraders in Canada. In addition, the Board does not have facts about how the demand over time for oil will impact the current Canadian industry, or what impact denying the Keystone pipeline the ability to ship unprocessed bitumen to the U.S. would have on Canada. The AFL argued that these missing facts will ultimately impact what is at the core of its submissions: namely, employment opportunities.

The second option was for the Board to issue an interim order and then establish another process to address the issue of the public interest.

As a third alternative, the AFL suggested the Board delay its decision and seek guidance from government on energy policy, although it later clarified that this was not required since the Board has a wide latitude to consider all relevant factors in its decision making. The AFL indicated that while it did not agree with government energy policy, it was not asking the Board to change it.

Views of the Parkland Institute (Parkland)

Parkland claimed that by expanding the capacity to export bitumen, the Keystone pipeline would increase the pace of investment in the extraction and export of bitumen. In its view, adequate debate had not occurred on whether the expansion of the oil sands was in the interests of Albertans and Canadians.

Parkland noted that if the pipeline was approved, it would have the effect of reducing the heavy to light oil price differential caused by an oversupply of heavy oil. It claimed that narrowing the

differential would negatively impact the viability of upgrading and refining in Canada and would risk a loss of investment and jobs.

Parkland also expressed the view that the effects of proportional sharing and the NAFTA would have the irreversible effect of deepening the nation's reliance on raw exports.

Views of Dr. Laxer

Dr. Laxer provided a letter of comment suggesting that approval of the Keystone pipeline would undermine the long-term security of supply of oil to Canadians, which in his view is the paramount public interest. Since Canada does not have a strategic petroleum reserve, Eastern Canadians would be unduly exposed to the risk of politically-directed oil shortages. Dr. Laxer concluded that the Project should be denied as it would be in the public interest to reduce foreign imports to Eastern Canada and ensure Canada's security of supply.

Views of Keystone

Keystone took the position that the evidence of the CEP, the AFL, Parkland and Dr. Laxer related to the effects of exporting non-upgraded oil on domestic industries, employment and security of supply were irrelevant to the matters to be determined by the Board. In Keystone's view such evidence was not only inconsistent with, but contrary to, public policy that is properly under the purview of the federal and provincial governments. Keystone's position was that existing government economic and energy policy disposed of the issues raised by these intervenors. Keystone further argued that these parties were in the wrong forum; they should address their concerns to governments rather than the Board.

In determining the public interest, Keystone expressed the view that the Board should weigh the benefits and burdens of a project and that the Board must take into account the current economic and energy policies of the government in coming to its decision on the public interest.

With respect to the Informetrica Report, Keystone argued that 18,000 jobs is insignificant compared to the economic loss that would occur if the Project was not approved, or if it was delayed pending the construction of refining capacity in Canada. Keystone noted there would be insufficient pipeline capacity by 2009 and that even if a refinery was planned for at this time, it could not be on-stream until 2012 at the earliest. Keystone also suggested that if the application was denied, capacity apportionment would result in loss in value in Canada such that producers would stop developing extraction projects, upgraders would not get constructed, jobs would be lost and this would result in significant losses in royalty and tax revenues to governments.

Keystone claimed that one of the most attractive features of the Keystone pipeline was its ability to transport a range of products from heavy oil to synthetic crude oil, including the possibility of 100 percent upgraded products.

In response to claims by the CEP that a number of upgrading facilities currently planned for Canada would be abandoned if the Project were approved, Keystone argued there would be no growth in the upgrading industry without additional pipeline capacity. Also, since the pipeline could carry both segregated synthetic crude oil (SCO) and synbit, Keystone concluded that approval of the Project would have a positive impact on investment in upgrading facilities.

Keystone submitted it was significant that while the regulatory process provided interested parties with the opportunity to express their views, no opposition to the Project had been expressed by petroleum producers, potential shippers, representatives of the refining and upgrading industries, end-users of energy, or by governments of producing or consuming provinces.

Keystone argued that the benefits of the Project going ahead far outweigh any perceived benefits associated with its delay or denial. Keystone stated that the negative impacts of a delay would be tremendous since billions of dollars are being invested in upgrading facilities and upgraded product requires access to markets. Keystone also argued that the expected impact on Canadian crude oil due to insufficient pipeline capacity would be price discounting, shipping crude oil to less desirable markets, shutting-in of crude oil production or the slowing down of uncommitted oil sands projects.

Views of the Keystone Shippers Group (KSG)

The KSG supported Keystone's position in arguing that the Board should not attribute any probative value to the evidence filed by the CEP, the AFL and Parkland. If the Board was inclined to accord probative value to these intervenors' submissions, the KSG suggested that the probative value of Keystone's evidence so greatly outweighed that of these intervenors' that the Board should not even take it into account in its deliberations. The KSG's position was that these intervenors had done nothing more than raise questions and pose different views without providing any credible evidentiary support.

The KSG stressed the importance of the Project as it would provide incremental access for WCSB crude oil to reach markets in PADD II in a timeframe that would eliminate or minimize forecasted pipeline capacity constraints. The KSG indicated that its members, and others, have made significant investments that will require transportation capacity by 2009.

Similar to Keystone, the KSG argued that the consequence of insufficient access to markets for all WCSB crude oil would be pricing discounts, which would have significant negative impacts on the Canadian oil industry and the economy in general to the point where producers may stop developing projects or building upgraders. This would result in Canadian job loss in both the production and refining sectors as well as the loss of royalties and taxation benefits.

The KSG noted that a 69 200 m³/d (435,000 b/d) increase in refining capacity would double the amount of oil currently refined in Alberta. The KSG indicated there was no evidence to support the assumption that the supply to western Canadian refining or petrochemical plants would be truncated as a result of the Keystone pipeline. It argued that this was demonstrated by the fact that no representatives of the refining or upgrading industries were present at the hearing to oppose the Keystone application.

The KSG argued that many of the underlying assumptions of the Informetrica Report were unrealistic. The Report did not consider what types of oil products are needed by the markets in Canada and the U.S. nor whether adequate markets exist in the U.S. for Canadian refined oil products. The KSG further noted that the Informetrica analysis was not evidence for the proposition that denial of the Project would create 18,000 jobs in Alberta.

The KSG also expressed the view that there was no evidence on the record to suggest that Canada's security of supply was at risk; in fact, the record was rife with evidence showing the opposite.

Views of the Canadian Association of Petroleum Producers (CAPP)

CAPP argued there was a need for the Keystone Project as there was tremendous growth in supply and that trapped supply is not in the public interest. It claimed there was a clear market need for the Project, as demonstrated by strong contractual support.

CAPP suggested that investment decisions concerning the Project were taking place within the framework of market-oriented government policies. Upgrading and refining capacity was increasing as expected in light of growing supply and in response to market forces. CAPP noted that it was unreasonable to expect all supply to be refined or upgraded in Canada. The Association also submitted that the types of protectionist arguments raised by the CEP and AFL regarding free trade had already been debated and decided by the signing of the NAFTA. It argued that Canada has already had painful experiences with restrictive energy policies and that it now affirms its commitment to market-oriented policies. In CAPP's view the market is working as expected and a decision to approve the Keystone pipeline would be in the public interest.

Views of the Board

The Board's decisions are governed by the NEB Act. Section 52 requires the Board to have regard to all considerations that appear relevant to it. In particular, subsection 52(e) provides that the Board may have regard to any public interest that in the Board's opinion may be affected by granting or refusing an application.

The Board has a very wide discretion in determining what to consider in coming to a decision under section 52 of the NEB Act. As the Board indicated in its discussion of the public interest in the MH-1-2006⁶ Reasons for Decision, there is no precise definition of the concept. Rather, it may vary with the application, the location, the commodity involved, the various segments of the public affected by the decision and the purpose of the applicable section of the Act.

Therefore, the Board does not accept that the totality of the evidence presented by the CEP, the AFL and Parkland is irrelevant to the public interest determination it must make. The Board is of the view that the concerns expressed by the CEP, the AFL, Parkland and Dr. Laxer regarding potential impacts related to the export of non-upgraded oil on domestic industries, employment and security of supply are public interest considerations relevant to the disposition of this application.

6 MH-1-2006, TransCanada PipeLines Limited and TransCanada Keystone Pipeline GP Ltd., Transfer Application, February 2007.

The Board's determination of the constituent elements of the public interest must necessarily vary based on the application before it. The Board found in the context of the MH-1-2006 proceeding that the types of issues raised by the CEP and AFL were not relevant as they were "matters of broad public policy that were properly within the purview of Federal and Provincial governments". However, that case specific determination does not limit the Board's determination of the scope of the public interest in this proceeding.

The Board is of the view that its consideration of the overall public interest must transcend the positions of individual parties as well as government expressions of current economic and energy policy. While the Board is informed by them, it is of the view that its decision on the public interest must balance overall competing political, economic and social interests.

As part of its regulatory framework, one of the Board's goals is that Canadians benefit from efficient energy infrastructure and markets. In order for markets to function properly, there must be adequate transportation capacity to connect supply to markets. The Board is of the view that well-functioning markets tend to produce outcomes that are in the public interest.

It was suggested by some intervenors that an opportunity to create Canadian jobs would be lost if the Keystone pipeline exported unrefined product. The Informetrica Report provided an estimate of the number of jobs that could be created if the Canadian refining industry was expanded to process an additional 63 600 m³/d (400,000 b/d) of crude oil. The Board notes that the evidence does not, however, support the proposition that an expansion of the Canadian refining industry would necessarily result from a denial of this application. This is a decision that is normally made by the market.

The Board also finds the argument that approval of the Keystone pipeline may frustrate the development and growth of the domestic upgrading and refining industry by causing a lack of available oil and gas supply to be unpersuasive. The western Canadian crude oil production forecasts presented in this hearing was estimated at 468 000 m³/d (2,944,000 b/d) by 2010. These forecasts were not challenged. In contrast, the capacity of the Keystone pipeline would be 69 200 m³/d (435,000 b/d). The evidence demonstrates that projected supply will far exceed takeaway capacity offered by the Project. The Board accepts the evidence that the Keystone pipeline would provide producers in western Canada with takeaway capacity to accommodate projected growth in oil sands production in a timeframe that would eliminate or reduce the forecasted capacity constraints. The Board recognizes the adverse economic impacts that could be expected to arise from inadequate pipeline takeaway capacity. Given the capacity of the proposed pipeline in relation to the expected

production, the Board concludes that Canadian requirements for crude oil would continue to be met if the Keystone pipeline were built and carried the range of oil throughputs indicated in the application.

The Board finds it significant that current feedstock users did not participate in the hearing. Furthermore, the Board notes that shippers who signed long-term firm transportation contracts on the Keystone pipeline accepted a significant level of business risk. This is further evidence that market participants have confidence that the market is working and could be expected to continue to work to meet long-term requirements for Canadian crude oil.

Some intervenors suggested that the operation of the NAFTA and the existence of export orders may have negative consequences for security of supply that warrant a finding by the Board that the Project is not in the public interest. The Board is not persuaded by arguments that the Project should be denied because of the effect NAFTA may have or because shippers are not required to apply for long-term oil export licences. The Board is bound by legislation. Part VI of the NEB Act sets out the framework for export approvals and requires the Board to give effect to NAFTA. The Board is of the view that the approval of the pipeline and the consequent exports it will facilitate will not put Canadian security of supply at risk.

The Board notes that certain intervenors sought more detailed information on the products to be shipped and the specific end-uses of market demand. The Board is of the view that this detailed information is not necessary for its decision making. The Board is satisfied that the Keystone pipeline is flexible enough to meet a range of market requirements, including the possibility of transporting upgraded products. This flexibility should contribute to efficiency of the market and improved economic outcomes for Canadians.

Based on the evidence in this proceeding, the Board does not accept that approval of the application will have an adverse impact on Canadians. The existence of adequate pipeline capacity would enable the operation of the market and could stimulate investment, including investment by participants seeking to develop domestic upgrading and refining facilities. In the circumstances of this case, the Board does not believe that denying the Project strictly for the purpose of restricting bitumen exports to make them available as feedstock for potential domestic upgrading projects, that may or may not be realized, would serve the Canadian public interest. Such regulatory intervention would likely introduce uncertainty in the market that could negatively impact investment decisions and the availability of bitumen for both domestic and export markets. The Board concludes that there is no compelling reason in this case to interfere in what the Board believes to be a well functioning market by denying or delaying the Keystone application.

Chapter 10

Conclusion and Disposition

In making its decision, the Board must weigh the various benefits of the project against its various burdens and come to a conclusion about whether there is an overall benefit, detriment or lack of effect on the public interest.

The Board has weighed the evidence projecting benefits of the Project against the evidence projecting detriments and finds that the advantages of approving the Project outweigh its potential burdens. The Board therefore concludes that approval of the Project is in the public interest and that the applied for facilities will be required for the present and future public convenience and necessity.

The Board has also evaluated the Applicant's proposed toll methodology and tariff in accordance with the statutory standard described in Part IV of the NEB Act and finds it to be just and reasonable and not unjustly discriminatory. In addition, the Board finds that Keystone's common carrier status has been maintained and has designated Keystone as a Group 2 company. As set out in Chapter 3, Keystone is subject to certain requirements with respect to tolls filings and is required to file an amended tariff to include terms and conditions of access.

In February 2007, the Board released its Reasons for Decision pertaining to the MH-1-2006 hearing and Order MO-02-2007. The Order authorized TransCanada Pipelines Limited and Keystone, to respectively sell pursuant to paragraph 74(1)(a) of the NEB Act and purchase pursuant to paragraph 74(1)(b), the facilities described in Schedule A of the Order (Transferred Facilities). The Order also authorized, pursuant to section 59 of the NEB Act, TransCanada to reduce its Mainline rate base by the net book value of the Transferred Facilities on the date of the transfer and for Keystone to include the net book value in the rate base of the Oil Plant in Service if the Keystone pipeline is placed in service.

The Board noted in its MH-1-2006 Reasons for Decision that the approval had no effect unless further regulatory approvals, including approvals under section 52 and section 21, were later granted. This was the result of the Applicants' choice to apply for authorizations in a stepwise process, the merits of which were discussed extensively in the context of that hearing.

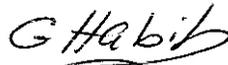
While Order MO-02-2007 was not issued conditionally, the Keystone project could not proceed until further Board authorizations were granted and sanctioned by the Governor in Council, as necessary. With these Reasons for Decision the Board has determined, subject to the approval of the Governor in Council, to issue a certificate in respect of the applied-for pipeline granting approvals under section 52 of the NEB Act and under section 43 of the *Onshore Pipeline Regulations, 1999*.

Following the granting of these approvals, the Board expects that TransCanada will file with it forthwith, upon completion of the transfer of the facilities authorized by MO-02-2007, an application pursuant to subsection 21(2) of the NEB Act for an Order to vary Board Certificate of Public Convenience and Necessity No. GC-1, issued to TransCanada on 11 April 1960.

The foregoing constitutes our Reasons for Decision in respect of the application considered by the Board in the OH-1-2007 proceeding.



G. Caron
Presiding Member



G. Habib
Member



S. Crowfoot
Member

Calgary, Alberta
September 2007

Appendix I

List of Issues

1. The need for the proposed project.
2. The economic feasibility of the proposed project.
3. The potential commercial impacts of the proposed project.
4. The reasonableness of the open season process and the appropriateness of contracted capacity on the oil pipeline.
5. The potential environmental and socio-economic effects of the proposed new, modified and converted facilities, including those factors outlined in subsection 16(1) of the *Canadian Environmental Assessment Act*.
6. The appropriateness of the general route of the pipeline.
7. The appropriateness of the proposed tolling methodology and the method of toll and tariff regulation, including the proposal that the Keystone Pipeline be regulated on a complaint basis.
8. The suitability of the design, construction and operation of the proposed new, modified and converted facilities.
9. The terms and conditions to be included in any approval the Board may issue.

Appendix II

NEB Ruling on the Motion by the CEP, Parkland, the AFL and Dr. Laxer

National Energy
Board



Office national
de l'énergie

File OF-Fac-Oil-T241-2006-01 02
17 May 2007

Mr. Steven Shrybman
Sack Goldblatt Mitchell
Suite 500, 30 Metcalfe Street
Ottawa, ON K1P 5L4
Facsimile 613-235-3041

Dear Mr. Shrybman:

**TransCanada Keystone Pipeline GP Ltd. (Keystone)
Application for Construction and Operation of Keystone Pipeline
Hearing Order OH-1-2007
Ruling on Notice of Motion by Communications, Energy and Paperworkers Union
of Canada, The Parkland Institute, The Alberta Federation of Labour and Dr.
Gordon Laxer (Moving Parties)**

On 15 May 2007, the Moving Parties filed a Notice of Motion pursuant to section 35 of the Board's Rules of Practice and Procedure and subsections 12(1), 15(1) and (3) of the *National Energy Board Act* (Act) for orders:

- adjourning the present hearings until an adequate evidentiary record is assembled that assesses the extent to which the Keystone Pipeline Project may inhibit the development or viability of Canadian refining and chemical industries;
- authorizing, pursuant to s. 15 of the Act, one or more Members to make a report to the Board on certain matters which have arisen in this hearing; and
- such other order as the Board may consider just or appropriate.

The Moving Parties submit that the issues they raise in connection with environmental, economic and social impacts of exporting raw bitumen for value-added processing in the United States and concerns relating to security of supply for Eastern Canada are central to the public interest determination that the Board is being called upon to make. They submit that it is unreasonable to expect them to provide further evidence on these matters as they have limited access to proprietary information, including information in the Applicant's possession, and in light of the fact that they lack the necessary resources and expertise.

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Facsimile/Télécopieur : 1-877-288-8803

Views of the Board

Although the motion refers to substantive issues the Board may consider in arriving at its ultimate decision in this proceeding, it is in fact a request for procedural relief.

Parties to Board proceedings are responsible for filing for the record information they deem material. The Board notes that parties to this proceeding have been afforded and exercised opportunities to file evidence and to test the evidence of others through information requests. Parties will also have a further option at the Hearing to cross-examine witnesses tendered by intervenors with contrary views.

The Board will make a decision in this matter, based on the record that will be before it. This being said, it will be open to parties to take the position in argument at the end of the hearing that the Board does not have sufficient evidence to be able to make a determination on any or all aspects of the application. Accordingly, the Board denies the request to adjourn the hearing for the purpose of augmenting the evidentiary record.

The Board also declines the Moving Parties' request to authorize one of its Members to take evidence to assess the potential adverse impacts of the Keystone Project. The Board is of the view that the proceeding it has initiated pursuant to Hearing Order OH-1-2007 is the most appropriate, efficient and effective forum to hear the relevant evidence.

Having denied the Motion, no changes to the procedural schedule are required.

Yours truly,



David Young
Acting Secretary



cc: All Parties to Hearing Order OH-1-2007

Appendix III

NEB Ruling on the Motion by the CEP and the AFL

Decision on Motion Chairman

--- Upon commencing at 8:29 a.m./L'audience débute à 8h29

620. **THE CHAIRMAN:** Good morning everyone. Bonjour à tous.

621. The Board would like to first communicate its decision on the motion.

622. On the 28th of May 2007, the CEP and AFL filed a written motion with the Board seeking two orders pursuant to section 11 of the *National Energy Board Act* and section 40 of the Rules of Practice and Procedure.

623. The first requested order was for a subpoena to be issued for representatives of the Keystone Shippers Group to attend and answer questions described in paragraph 20 of the motion materials. The second was for an order that the Applicant disclosed the identity of the companies who have entered into term contracts for use of the Keystone Pipeline and the nature and quantities of products that would be shipped.

624. In addition to the moving parties, on 4th of June 2007, the Board heard from the Keystone Shippers Group, CAPP and the Applicant orally on the motion.

625. Without reiterating the moving parties' submissions, at the heart of the motion was the assertion that the information sought was needed to allow CEP and AFL an opportunity to present their case to the Board and to allow the Board to determine whether the Keystone project is in the public interest.

626. Section 11 of the *National Energy Board Act* and section 40 of the Rules of Practice and Procedure empower the Board to issue subpoenas. The Board takes the view that this is a discretionary power which must be exercised carefully and accordingly that the subpoena should be issued only where the information sought is relevant and necessary to the Board satisfying its mandate.

627. In this case, the Board is not persuaded that the evidence the moving parties seek to obtain by subpoena is necessary in order for the Board to fulfill its mandate. There is already information on the public record with respect to the supply, markets and products to be transported by the Keystone Pipeline.

628. For example, section 3 of the Keystone Pipeline application and Purvin & Gertz Inc.'s supply and market outlook for the Keystone Pipeline project in Appendix 3-1 provide the origin and the intended markets of the products to be transported by the proposed pipeline. Furthermore, the pro forma transportation services agreement and tariff in section 5 of the application provide evidence regarding the range of products that might be transported by the Keystone Pipeline.

Preliminary Matters

Ms. L. Chahley

629. The Board recognizes that some of the information requested by the moving parties in paragraph 20 is not on the record. To the extent that this information has not already been provided or is not as detailed as requested, it is unnecessary for the Board to satisfy its mandate.
630. While the Board is sensitive to the requirements of natural justice and the need to allow parties an opportunity to present their case, the Board is of the view that there is sufficient information on the record to allow the moving parties to conduct their cross-examination and make their arguments without the degree of detail they are seeking.
631. In addition, it would remain open to parties to take the position that Keystone has not discharged its burden of proof and that the application should ultimately be denied. For these reasons, the Board is satisfied that the hearing will be fair for all parties.
632. The Board also denies the moving parties' second request for an order requiring Keystone to disclose the identity of the committed shippers and the nature and quantities of the oil goods to which the contracts pertain. For the reasons noted above with respect to the subpoena request, the Board is of the view that this evidence would not assist it with the determination it is being called upon to make.
633. Having concluded that the Board will not order Keystone to disclose the requested information, the matter of confidentiality under section 16.1 of the *National Energy Board Act* does not arise. Accordingly, the CEP's and AFL's requests pursuant to the *National Energy Board Act* and the Rules of Practice and Procedure are denied.
634. This is the Board's ruling on the motion.
635. Are there any preliminary matters this morning?
636. Ms. Chahley ...?
637. **MS. CHAHLEY:** Mr. Chairman, Members of the Panel, I have for you to file the Opening Statement that we will be presenting on behalf of the Federation of Labour, Mr. McGowan.. I provided copies to your staff and to the clerk and we will be filing it online this morning from my office in Edmonton. If I might file that and have an exhibit number, please?
638. **THE REGULATORY OFFICER:** That will be Exhibit C-23-7;
Pièce C-23-7.

Appendix IV

NEB Ruling on the Motion by the CEP

National Energy
Board



Office national
de l'énergie

File OF-Fac-Oil-T241-2006-01 02
5 July 2007

Mr. Steven Shrybman
Sack, Goldblatt, Mitchell LLP
30 Metcalfe Street
Suite 500
Ottawa, ON K1P 5L4
Facsimile 613-230-5801

Dear Mr. Shrybman:

**TransCanada Keystone Pipeline GP Ltd. (Keystone)
Keystone Pipeline Application
Hearing Order OH-1-2007
Sur-Reply Submissions of the Communications, Energy and Paperworkers
Union of Canada (CEP)**

The Board is in receipt of the motion to file sur-reply argument of the CEP dated 29 June 2007. The motion alleges that Keystone's reply argument misrepresented CEP evidence and submissions, introduced errors to the record and claimed CEP fabricated evidence in its argument. CEP submits that sur-reply should be permitted to address these matters. The Board has also received a letter dated 3 July 2007, in support of the CEP motion, from the Alberta Federation of Labour.

The Board is of the view that leave to file sur-reply should be granted rarely and only in circumstances where an applicant raises a new issue in reply which an intervenor has not had an opportunity to address. In this case, the Board is not persuaded that Keystone's reply argument raised any new issue to which CEP must, as a matter of fairness, be permitted to respond.

Further, the Board has heard the submissions and evidence of all parties and will draw its own conclusion as to whether the submissions and evidence have been properly characterized by counsel. Additional argument on these points is of no assistance.

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Accordingly, the Board has decided to deny the CEP motion and will not consider the sur-reply in its deliberations. The Board will allow the covering letter and notice of motion, paragraphs one through five, to form part of the record for this proceeding.

Yours truly,

A handwritten signature in cursive script, appearing to read "David Young".

David Young
Acting Secretary

cc: Mr. Kemm Yates, Q.C., Stikeman Elliott LLP, facsimile 403-266-9034
Ms. Leanne Chahley, Blair Chahley Severy, facsimile 780-425-6448

Appendix V

Certificate Conditions

In these conditions, the expression ‘commencement of construction’ means: clearing of vegetation, ground-breaking and other forms of right-of-way preparation that may have an impact on the environment, but does not include activities associated with normal surveying operations.

General

1. Keystone shall cause the approved Project to be designed, located, constructed, installed, and operated in accordance with the specifications, standards and other information referred to in its application or as otherwise agreed to during questioning in the OH-1-2007 proceeding or in its related submissions.
2. Keystone shall implement or cause to be implemented all of the policies, practices, programs, mitigation measures, recommendations and procedures for the protection of the environment included in or referred to in its application or as otherwise agreed to during questioning in the OH-1-2007 proceeding or in its related submissions.
3. Keystone shall file with the Board, at least 30 days prior to any actions or modifications related to Line 100-1, a table which tracks all commitments related to the Line 100-1 Change of Service resulting from the:
 - (a) application and subsequent filings;
 - (b) undertakings made during the OH-1-2007 proceeding; and
 - (c) approval conditions.

Keystone shall also file monthly status updates of the table until the final leave to open is granted by the Board.

4.
 - (a) Keystone shall engage an independent third party to qualify the in-line inspection of Line 100-1 in gas service. The qualification process shall be analogous to the requirements set forth in American Petroleum Institute Standard 1163.
 - (b) The scope of the third party activities and deliverables shall be determined by the Board. Keystone shall advise the Board, at least 30 days in advance, when it requires the scope of the third party activities and deliverables.
 - (c) Keystone shall select the third party from the following list, or provide an alternative party to the Board for approval:
 - i) Det Norske Veritas
 - ii) Lloyd’s Register

- iii) ABS Consulting
 - iv) Germanischer Lloyd
- (d) Keystone shall file with the Board, at least 90 days prior to submission of its first leave to open application, the final report of the third party reviewer.
- 5. (a) Keystone shall engage an independent third party to perform an independent verification of an updated engineering assessment of Line 100-1.
- (b) The scope of the third party activities and deliverables shall be determined by the Board. Keystone shall advise the Board, at least 30 days in advance, when it requires the scope of the third party activities and deliverables.
- (c) Keystone shall select the third party from the following list, or provide an alternative party to the Board for approval:
 - i) Det Norske Veritas
 - ii) Lloyd's Register
 - iii) ABS Consulting
 - iv) Germanischer Lloyd
- (d) Keystone shall file with the Board for approval, at least 60 days prior to commencing line fill, the final engineering assessment that determines Line 100-1 is suitable for liquid service.
- (e) Keystone shall file with the Board, at least 60 days prior to commencing line fill, the final report of the third party reviewer on the engineering assessment.
- (f) In addition to CSA Z662-07 requirements, the engineering assessment shall consider:
 - i) the findings of performance testing conducted to ascertain the dynamic response of the pipe materials to fatigue loading representative of the pressure spectrum anticipated in liquid service. Testing shall incorporate the materials of all manufacturers present on Line 100-1;
 - ii) the line fill plan; and
 - iii) the third party final report.
- 6. Keystone shall maintain at its construction office(s):
 - (a) an updated Environmental Tracking Commitments Table listing all regulatory commitments, including but not limited to all commitments resulting from:
 - i) the NEB application and subsequent filings;
 - ii) undertakings made during the OH-1-2007 proceeding; and
 - iii) conditions from permits authorizations and approvals.

- (b) copies of any permits approvals or authorizations for the applied-for facilities issued by federal, provincial or other permitting agencies, which include environmental conditions or site-specific mitigative or monitoring measures; and
 - (c) any subsequent variances to any permits, approvals or authorizations.
7. The facility to be constructed and operated pursuant to this Certificate shall be owned by TransCanada Keystone Pipeline GP Ltd., as the general partner acting on behalf of the TransCanada Keystone Pipeline Limited Partnership, and operated by TransCanada PipeLines Limited.

Prior to the Commencement of Construction

8. Keystone shall file with the Board for approval, at least 60 days prior to the commencement of construction, an updated, Project-specific Environmental Protection Plan (EPP). The EPP shall be a comprehensive compilation of all environmental protection procedures, mitigation measures, fish and wildlife restricted activity periods and monitoring commitments, as set out in Keystone's application for the Project, subsequent filings or as otherwise agreed to during questioning in the OH-1-2007 proceeding or in its related submissions. The EPP shall also include the results of additional studies conducted in 2007, updated Environmental Alignment Sheets and Watercourse Data Sheets. Construction shall not commence until Keystone has received approval of its EPP.
9. Keystone shall file with the Board for approval, at least 45 days prior to commencement of construction, a Native Range Management Plan that includes a Follow-up Program for the protection and reclamation of native range. It shall include:
- (a) on a map or Environmental Alignment Sheets, the locations where native range management and follow-up would be applied;
 - (b) the measures to be applied, and an assessment of the anticipated effectiveness of the proposed mitigation and reclamation strategy;
 - (c) the schedule for implementing the measures as set out in the above;
 - (d) evidence demonstrating that Environment Canada, Canadian Wildlife Service, and Alberta Sustainable Resource Development have reviewed and commented on the Program;
 - (e) the results, evaluation and recommendations for managing native range;
 - (f) the schedule Keystone shall implement to address any unresolved concerns; and
 - (g) a schedule for filing follow-up reports for native range management reports with the Board.

10. Keystone shall file with the Board, at least 30 days prior to the commencement of construction of the approved facilities, a Construction Safety Manual.
11. Keystone shall file with the Board at least 14 days prior to the commencement of construction of the approved facilities, Keystone's final Pipeline Construction Specifications.
12. Keystone shall file with the Board, at least 14 days prior to the commencement of construction of the approved facilities, a detailed construction schedule or schedules identifying major construction activities and shall notify the Board of any modifications to the schedule or schedules as they occur. Keystone shall file construction progress reports on a monthly basis until completion. The report shall include an updated construction schedule identifying major construction activities, information on activities carried out during the reporting period, any environmental and safety issues and non-compliances, and measures undertaken for the resolution of each issue and non-compliance.
13. Keystone shall file with the Board, at least 14 days prior to joining, its field joining program.
14. Keystone shall file with the Board, at least 30 days prior to pressure testing, a pressure testing program for each of the following:
 - (a) New pipeline segments;
 - (b) Pump stations; and
 - (c) Tanks.
15. Keystone shall file with the Board, at least 30 days prior to pressure testing, an emergency response plan for pressure testing activities, including response to a pressure test failure, for each of the following:
 - (a) New pipeline segments;
 - (b) Pump stations; and
 - (c) Tanks.
16. Keystone shall file with the Board, at least 30 days prior to commencement of construction:
 - (a) the comments and recommendations received from the provincial authorities in Saskatchewan and Manitoba regarding the Heritage Resources Impact Assessment; and
 - (b) for approval, the mitigation measures Keystone proposes to address the comments and recommendations in (a).

17. Keystone shall file any watercourse compensation plan required by Fisheries and Oceans Canada for the Project with the Board, at least 14 days prior to the planned start of excavation at watercourses identified in the plan.
18. Keystone shall file with the Board prior to commencement of construction, evidence to confirm that Environment Canada, Canadian Wildlife Service and Alberta Sustainable Resource Development have reviewed and commented on the proposed methods for mitigating the effects of construction and operation of the pipeline on *Species at Risk Act* listed amphibian species.
19. Keystone shall file with the Board prior to commencement of construction, confirmation that Environment Canada, Canadian Wildlife Service (for federal lands), and Alberta Sustainable Resource Development (for Crown lands crossed in Alberta), have reviewed and accepted the proposed seed mixes to be used for the reclamation of the Project, and confirmation that these seed mixes have been obtained.

During Construction

20. In the event of clearing within restricted activity periods for migratory birds, Keystone shall retain a qualified avian biologist to carry out a survey to identify any migratory birds and nests. The spatial boundaries of the survey for the Project will include at least 30 m beyond the disturbance footprint for migratory birds and 100 m beyond the disturbance footprint for raptors. Keystone shall file with the Board:
 - (a) evidence to confirm that Environment Canada and Canadian Wildlife Service have reviewed and commented on the proposed methods for the survey;
 - (b) the results of the survey;
 - (c) mitigation strategies, including monitoring, developed in consultation with Environment Canada and Canadian Wildlife Service to protect any identified migratory birds or their nests; and
 - (d) mitigation, including monitoring, developed in consultation with Environment Canada and Canadian Wildlife Service to protect any identified migratory *Species at Risk Act* birds or their nests.
21. Keystone shall:
 - (a) notify the Board in writing of any change from the proposed HDD watercourse crossing methods including those undertaken to comply with CSA Z662-07, and the reasons for that change prior to implementation;
 - (b) provide copies of all correspondence from regulatory authorities relating to the changed crossing method; and

- (c) file for approval, within 30 days of implementing the changed watercourse crossing method, a description of amended reclamation and re-vegetation measures for the affected watercourse crossings.
22. Keystone shall, during construction, maintain for audit purposes at each construction site:
- (a) a copy of the welding procedures;
 - (b) the non-destructive testing procedures used on the Project; and
 - (c) all supporting documentation related to non-destructive testing.
23. Keystone shall notify the Board 14 days prior to the commencement of excavation of any watercourse crossing that has been assessed for fish and fish habitat.
24. Keystone shall preserve the riparian vegetation during construction and operation of the pipeline for each of the watercourses listed by KP and name: Boyne River 1174.25, 1174.35, 1174.39; Shannon Creek 1201.25; Deadhorse Creek 1205.1; Unnamed 1217.4; Unnamed 1219.73; and Buffalo Creek 1232.86.
25. Keystone shall file with the Board, at least 14 days prior to HDD activities at the Red Deer River, South Saskatchewan River and Boyne River and any additional locations where HDD may take place, a drill execution plan specific to each crossing. Guidance for execution plans can be found in CAPP Publication 2004-0022, "Planning Horizontal Directional Drilling for Pipeline Construction". The execution plans shall consider the following:
- (a) use of drill bit detecting and tracking equipment to confirm the drill path;
 - (b) workspace requirements for equipment at entry and exit points;
 - (c) workspace requirements to construct and layout the pipe drag section;
 - (d) drilling mud and water requirements;
 - (e) environmental protection and monitoring plan;
 - (f) drilling fluid management plans;
 - (g) spill or fluid loss contingency, response, cleanup and mitigation plans;
 - (h) equipment specifications, condition, and integrity; and
 - (i) mitigation of potential detrimental effects of geological formations.

Prior to Submission of First Application for Leave to Open

26. Keystone shall file with the Board, at least 120 days prior to submission of its first leave to open application, an Emergency Procedures Manual for the Project facilities which will include a table with: valve chainage and GPS locations; leak and rupture information; and environmental features. Keystone shall notify the Board of any modifications to the manual as they occur. In preparing its Emergency Procedures Manual, Keystone shall refer to the Board's *Onshore Pipeline Regulations, 1999* and the corresponding Guidance Notes.
27. Keystone shall file with the Board, at least 120 days prior to submission of its first leave to open application, in conjunction with Keystone's Emergency Procedures Manual, the liaison program for the Project facilities. In preparing the liaison program, Keystone shall refer to sections 33 and 34 of the Board's *Onshore Pipeline Regulations, 1999* and the corresponding Guidance Notes.
28. Keystone shall file with the Board, at least 120 days prior to submission of its first leave to open application, in conjunction with Keystone's Emergency Procedures Manual, the continuing education program for the Project facilities. In preparing the continuing education program, Keystone shall refer to section 35 of the Board's *Onshore Pipeline Regulations, 1999* and the corresponding Guidance Notes.
29. Keystone shall conduct, at least 60 days prior to submission of its first leave to open application and in the appropriate season, boom deployment and ice cutting drill exercises. Keystone shall notify the Board 30 days prior to the drill exercises, of the date and location of the drill.
30. Keystone shall file with the Board, at least 60 days prior to submission of its first leave to open application, a copy of the integrity management program for the facilities of the Project. In preparing the integrity management program, Keystone shall refer to section 40 of the Board's *Onshore Pipeline Regulations, 1999* and the corresponding Guidance Notes.
31. Keystone shall file with the Board, at least 14 days prior to submission of its first leave to open application, a confirmation letter signed by an officer of the Company that lists all liquid related operating procedures, including emergency procedures, that have been developed and confirms that affected personnel have been trained in these operating procedures. The filing required by this condition shall include a statement confirming that the signatory to the filing is an officer of the Company.

Post Construction

32. Keystone shall file with the Board, 6 months after the commencement of operation, and on or before the 31st January for each of the subsequent 5 years, a post-construction environmental monitoring report that:
 - (a) provides a summary of the effectiveness of the environmental mitigation measures applied during construction;

- (b) identifies deviations from plans and alternate mitigation applied as approved by the Board;
 - (c) identifies locations on a map or diagram where corrective action was taken during construction and the current status of corrective actions;
 - (d) provides proposed measures and the schedule Keystone shall implement to address any unresolved concerns; and
 - (e) evaluates the success of:
 - i) re-vegetation as measured against a 85 percent survival rate of recommended plantings;
 - ii) non-native plant vegetation management.
33. Keystone shall file with the Board for approval, at least 30 days prior to the planned start of operation, a project specific Environmental Protection Program for the operation and maintenance of the pipeline pursuant to section 48 of the *Onshore Pipeline Regulations, 1999*. The Program shall include practices and procedures for:
- (a) ongoing environmental training for employees;
 - (b) the handling and disposal of all wastes associated with the operation and maintenance of the pipeline;
 - (c) vegetation management;
 - (d) erosion control on the right-of-way;
 - (e) the management of air and noise emissions;
 - (f) soil conservation;
 - (g) travel on the right-of-way; and
 - (h) environmental monitoring and surveillance of the right-of-way.
34. Keystone shall file with the Board, at least 30 days prior to the commencement of operations, Keystone's Project-specific internal standards and practices for the protection of the environment referenced in its application and related submissions in the OH-1-2007 proceeding.
35. Keystone shall file with the Board, within 30 days following issuance of the Order for leave to open, a confirmation by an officer of the Company, that the approved Project was completed and constructed in compliance with all applicable conditions in this Certificate. If compliance with any of these conditions cannot be confirmed, the officer of the Company shall file with the Board details as to why compliance cannot be

confirmed. The filing required by this condition shall include a statement confirming that the signatory to the filing is an officer of the Company.

36. Keystone shall conduct line patrolling (aerial or ground) of Line 100-1 once a week during the first year of operation.
37. Keystone shall report to the Board all reportable commodity pipeline accidents and incidents on Line 100-1, as defined by section 2 of the *Transportation Safety Board Regulations*, during the first year of operation.

Expiration of Certificate

38. Unless the Board otherwise directs prior to 31 December 2008, this Certificate shall expire on 31 December 2008 unless construction in respect of the facilities has commenced by that date.

Appendix VI

Scope of the Environmental Assessment

TransCanada Keystone Pipeline GP Ltd. (Keystone)
Proposed Keystone Pipeline Project
Scope of the Environmental Assessment Pursuant to the
Canadian Environmental Assessment Act

1.0 INTRODUCTION

The Canadian portion of the Keystone Pipeline Project (the Project) is a proposed crude oil pipeline extending from Hardisty, Alberta to a point near Haskett, Manitoba. The Project involves the conversion to oil transmission service of 864 km of existing natural gas pipeline and the construction of 371 km of new oil pipeline. The Project also includes the construction and operation of pipeline operational tanks, pump stations and other related physical works and activities.

The Project would be constructed, owned, and operated by TransCanada Keystone Pipeline GP Ltd. (Keystone). Keystone is a wholly-owned subsidiary of TransCanada PipeLines Limited (TransCanada).

Keystone filed an application with the National Energy Board on 12 December 2006 for permission to construct and operate the Canadian portion of the Project. The Board released a Hearing Order regarding the application on 29 January 2007. A Certificate of Public Convenience and Necessity to construct and operate the project pursuant to section 52 of the *NEB Act* would be required and the project is subject to an environmental screening under the *Canadian Environmental Assessment Act* (CEA Act).

On 10 July 2006, Keystone filed a Preliminary Information Package with the National Energy Board. The intent of the PIP was to initiate the environmental assessment (EA) process pursuant to the CEA Act. The following departments subsequently identified themselves as having responsibilities or an interest under the CEA Act in the environmental assessment of the proposed Keystone project:

- National Energy Board – Responsible Authority (approval role under section 5 of the CEA Act (RA))
- Department of Fisheries and Oceans – RA and Federal Authority (in possession of specialist or expert information or knowledge (FA)). See cover letter attached to this scope.
- Transport Canada, Navigable Waters – RA
- Indian and Northern Affairs Canada – RA
- Environment Canada - FA
- Health Canada – FA
- Natural Resources Canada - FA
- Canadian Transportation Agency - FA

The Provinces of Alberta, Manitoba, and Saskatchewan also expressed an interest in monitoring and participating in the EA coordination process although Provincial EA legislation is not triggered.

The scope of the EA was established in accordance with the CEA Act and the *CEA Act Regulations Respecting the Coordination by Federal Authorities of Environmental Assessment Procedures and Requirements* which state that the RAs shall establish the scope of the EA after consulting with FAs. The Provinces of Alberta, Manitoba, and Saskatchewan also reviewed the draft scope.

2.0 SCOPE OF THE ASSESSMENT

2.1 Scope of the Project

The scope of the Project as determined for the purposes of the environmental assessment includes the various components of the Project as described by Keystone in its 12 December 2006 application, submitted to the National Energy Board.

The Project has two distinct components:

- construction of new pipeline and other related facilities; and
- utilization and conversion of existing pipeline facilities.

The scope of the Project includes construction, operation, maintenance and foreseeable changes, and where relevant, the abandonment, decommissioning and rehabilitation of sites relating to the entire Project, and specifically, the following physical works and activities:

New Facilities

- 3 pipeline operational tanks, each having a capacity of approximately 55 600 m³ (350,000 bbl) and associated piping at Hardisty, Alberta.
- 268 km of 760 mm (NPS 30) pipeline from Hardisty, Alberta to near Burstall, Saskatchewan and 3 km of 760 mm (NPS 30) pipeline near Burstall, Saskatchewan.
- 10 km of 864 mm (NPS 34) pipeline from TransCanada's existing Mainline Carman Sales Tap to a point near Elm Creek, Manitoba.
- 90 km of 762 mm (NPS 30) pipeline from north of Elm Creek, Manitoba to the U.S. border.
- an initiating pump station located at Hardisty, Alberta and four additional pump stations at kilometer post (KP) 49, 104, 162, and 231 in Alberta.
- 2 pump stations at KP 1165 and 1228 in Manitoba.
- mainline valves, block valves, and meter stations spaced at intervals along the pipeline.
- a pipeline internal inspection launcher located at Hardisty and a receiver located near the TransCanada Mainline Burstall compressor station.
- a pipeline internal inspection launcher and receiver facility located at the junction of the NPS 34 and NPS 30 pipeline segments in Manitoba.
- a cathodic protection system, including the construction of anode beds, installed for the pipeline, operational tanks and pump stations.
- a pressure control station located at the end of the new pipeline to provide overpressure protection for the allowable operating pressure of the existing pipeline.
- Supervisory Control and Data Acquisition (SCADA) system linking facilities to control centers.
- communications system and power supply to service pump stations, meter stations, valve sites, and other pipeline facilities.
- various temporary construction workspace, access roads, work camps, if required, and equipment laydown areas.

Utilization and Conversion of Existing Facilities

- 864 km of TransCanada's existing Mainline Line 100-1 natural gas pipeline located in Saskatchewan and Manitoba, 612 km and 252 km in each province respectively, modified to transport crude oil.

- the removal or modification of existing natural gas pipeline facilities not required for the Project (e.g. mainline drips, tie-over piping, sales, receipt and metering facilities).
- mainline valves spaced at intervals along the pipeline to facilitate operational activities.
- 9 new pump stations on the converted pipeline facilities for oil transmission service located at KP 361, 461, 564, 669, 721, 775, and 880 in Saskatchewan and KP 988 and 1097 in Manitoba.
- communications system and power supply to service pump stations, meter stations, valve sites and other pipeline facilities.
- various temporary construction workspace, access roads, work camps, if required, and equipment laydown areas.

It should be noted that any additional modifications or decommissioning/abandonment activities would be subject to future examination under the NEB Act and consequently, under the CEA Act, as appropriate. Therefore, at this time, these activities will be examined in a broad context only.

2.2 Factors to be Considered

The environmental assessment will include a consideration of the following factors listed in paragraphs 16(1)(a) to (d) of the CEA Act:

1. the environmental effects of the Project, including the environmental effects of malfunctions or accidents that may occur in connection with the Project and any cumulative environmental effects that are likely to result from the Project in combination with other projects or activities that have been or will be carried out;
2. the significance of the effects referred to in paragraph 1;
3. comments from the public that are received during the environmental assessment process; and
4. measures that are technically and economically feasible and that would mitigate any significant adverse environmental effects of the Project.

In addition, pursuant to paragraph 16(1)(e), the environmental assessment will consider alternative means of carrying out the project that are technically and economically feasible and the environmental effects of any such alternative means.

For further clarity, subsection 2(1) of the CEA Act defines ‘environmental effect’ as:

- “environmental effect” means , in respect of a project,
- a) any change that the project may cause in the environment, including any change that the project may cause to a listed wildlife species, its critical habitat or the residences of individuals of that species as defined in the *Species at Risk Act*,
 - b) any effect of any change referred to in paragraph (a) on
 - i. health and socio-economic conditions,
 - ii. physical and cultural heritage,
 - iii. the current use of lands and resources for traditional purposes by aboriginal persons,
 - iv. any structure, site or thing that is of historical, paleontological, or architectural significance; or
 - c) any change to the project that may be caused by the environment,
- whether any such change or effect occurs within or outside Canada.

2.3 Scope of Factors to be Considered

The environmental assessment will consider the potential effects of the proposed Project within spatial and temporal boundaries within which the Project may potentially interact with, and have an effect on components of the environment. These boundaries will vary with the issues and factors considered, and will include:

- construction, operation, decommissioning, site rehabilitation and abandonment or other undertakings that are proposed by the Proponent or that are likely to be carried out in relation to the physical works proposed by the Proponent, including mitigation and habitat replacement measures.
- the natural variation of a population or ecological component.
- the timing of sensitive life cycle phases of wildlife species in relation to the scheduling of the Project.
- the time required for an effect to become evident.
- the time required for a population or ecological component to recover from an effect and return to a pre-effect condition, including the estimated degree of recovery.
- the area affected by the Project.
- the area within which a population or ecological component functions and within which a Project effect may be felt.

For the purpose of the assessment of the cumulative environmental effects, the consideration of other projects or activities that have been or will be carried out will include those for which formal plans or applications have been made.

Appendix VII

Environmental Screening Report

National Energy Board

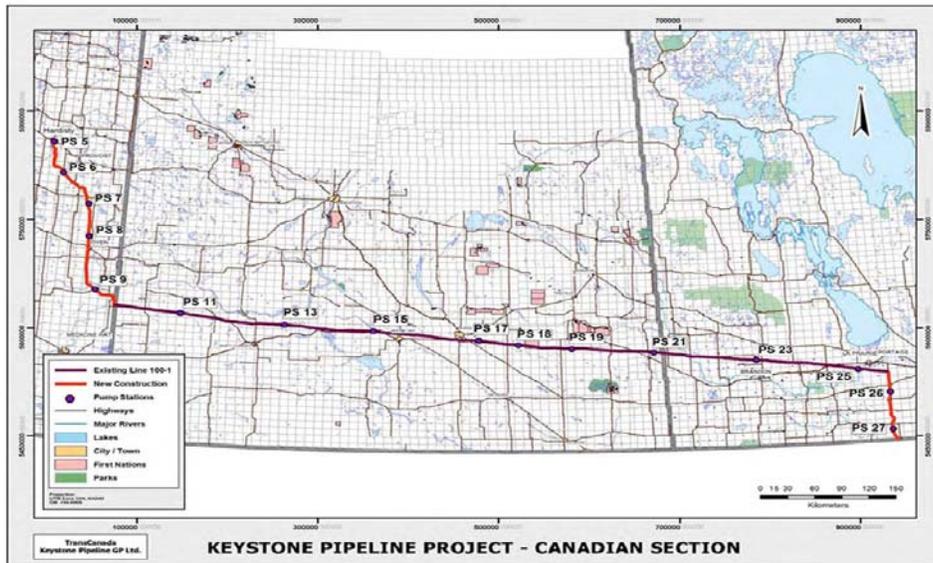


Office national de l'énergie

ENVIRONMENTAL SCREENING REPORT Pursuant to the *Canadian Environmental Assessment Act (CEA Act)*

Keystone Pipeline Project

Applicant Name:	TransCanada Keystone Pipeline GP Ltd.		
Application Date:	12 December 2006	CEA Act Registration Date:	27 July 2006
National Energy Board (NEB or Board) File Number:	OF-Fac-Oil-T241-200601 02	CEA Registry Number:	06-01-21045
CEA Act Law List Trigger:	NEB Act section 52	CEA Act Determination Date:	6 September 2007



SCREENING SUMMARY

This Report represents an Environmental Screening Report (ESR) for the Canadian portion of the TransCanada Keystone Pipeline GP Ltd. (Keystone) Keystone Pipeline Project (Project). The Project extends from Hardisty, Alberta, through Saskatchewan, to a point near Haskett, Manitoba. It involves acquisition and conversion to oil transmission service of 864 km of existing natural gas pipeline and the construction of 371 km of new oil pipeline. The Project also includes the construction and operation of pipeline operational tanks, pump stations (16), and other related physical works and activities. Approximately 60 km of new right of way (RoW), not contiguous with or alongside existing RoW, would be required for the new pipeline facilities. A number of watercourse crossings would be required for the construction of new pipeline facilities in Alberta and Manitoba, including crossings of the Red Deer and South Saskatchewan rivers in Alberta and the Boyne River in Manitoba.

The analysis in this ESR is based on Keystone's Application, Keystone's Environmental Protection Plan (EPP), the Environmental Alignment Sheets, and on evidence filed pursuant to Hearing Order OH-1-2007, including: Application Supplements dated 5 March 2007; Keystone's responses to NEB Information Requests (IRs) dated 2 and 9 April 2007 and 11 May 2007; evidence given at the oral hearing dated 4 June to 28 June 2007; Undertaking U-1 dated 19 June 2007; Undertaking U-4 dated 14 June, Public comments on the draft ESR dated 8 August 2007, and Keystone's comments on the ESR dated 15 August 2007.

This Report has been prepared for the purposes of assisting other Responsible Authorities (RAs) in preparing to make their own determination under the *Canadian Environmental Assessment Act* (CEA Act) to minimize potential duplication of effort in the assessment of the Project. The draft ESR was made available to the public for comment 25 July 2007, prior to the NEB determination. The final ESR includes comments by the public as well as RAs, and Federal Government Authorities (FAs) and Keystone.

The Board noted that the proposed Project has the potential to adversely affect several components of the environment, as detailed in the ESR. The Board has determined, pursuant to the CEA Act, that, taking into account the implementation of Keystone's proposed mitigation measures, compliance with the Board's regulatory requirements and the recommended conditions attached to the Board's environmental screening report, the construction and operation of the pipeline and associated facilities is not likely to cause significant adverse environmental effects.

To view Keystone's Application and the Environmental and Socio-Economic Assessment, please refer to the NEB website at: www.neb-one.gc.ca, click on "Regulatory Documents", and go to "Browse Regulatory Document Index", then go to "Looking for filing? Enter its Id here" and type in filing identification numbers A14322 to A14325 and click on "Go!" Filings related to the Application, refer to the following web address: <https://www.neb-one.gc.ca/ll-eng/livelink.exe?func=ll&objId=446079&objAction=browse&sort=name>

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1.0 ENVIRONMENTAL ASSESSMENT PROCESS

The application requested an authorization pursuant to section 52 of the *National Energy Board Act* (NEB Act), to construct and operate the Project. This triggers the CEA Act *Law List Regulations*, which in turn, require the preparation of this Environmental Screening Report (ESR).

Pursuant to the CEA Act *Regulations Respecting the Coordination by Federal Authorities of Environmental Assessment Procedures and Requirements*, the NEB coordinated RA and FA involvement in the CEA Act process by sending out a letter of notification. The Table below identifies the RAs and FAs that responded to the NEB's letter of notification and summarizes their involvement with respect to the Project. Other government participants are Saskatchewan Environment and Manitoba Conservation. Refer to Section 4.1 for a summary of public and government comments.

Table 1: Federal Government Participants in the CEA Act Process

Federal Government Agency	Involvement	
	Responsible Authority (RA) with a CEA Act Trigger	Federal Authority (FA) in possession of specialist advice
National Energy Board	NEB Act section 52	
Fisheries and Oceans Canada	<i>Fisheries Act</i> subsections 22(1), 22(2), 22(3), 35(2), 37(2) and section 32	X
Transport Canada	<i>Navigable Waters Protection Act</i> : paragraph 5(1)(a), subsection 6(4) and sections 16 and 20 NEB Act: section 108 Approval	
Canada Transportation Agency	<i>Canada Transportation Act</i> : section 32, where the review, rescission, variation or rehearing relates to a decision, order or application made under subsections 98(2), 99(3), 101(3), 116(4), 127(2) or 138(2)	
Indian and Northern Affairs Canada	<i>Indian Act</i> subsections 35(1) and 35(3)	
Environment Canada		X
Health Canada		X

NEB Hearing Order OH-1-2007 was released 29 January 2007, describing the process and requirements of the oral public hearing for the Project. As part of the process, a finalized scope of the environmental factors was released 15 March 2007. The oral public hearing began 4 June 2007 and concluded on 28 June 2007. The draft ESR was released for public comment on 25 July and the ESR with the NEB determination was released on 20 September 2007 to be used by other RAs in making their respective CEA Act determinations.

2.0 DESCRIPTION FOR THE PROJECT

The Keystone pipeline is a proposed crude oil line that would extend from Alberta, Canada to markets in Illinois, United States. The Canadian portion of the Keystone pipeline would extend

from Hardisty, Alberta, to a point near Haskett, Manitoba at the border between Canada and the United States. The Project proposes the conversion to oil service of 864 km of existing gas pipeline currently owned and operated by TransCanada PipeLines Limited and the construction of 371 km of new pipeline.

The purpose of the Project is to transport crude oil by underground pipeline from the Hardisty area of Alberta to markets in the United States. The Project would transport crude oil supply from the Western Canada Sedimentary Basin, which Keystone forecasts will grow by approximately 220 000 m³/d (1.4 million bbl/d) between 2006 and 2015. In support of the Project, Keystone has secured long-term transportation contracts totaling 54 000 m³/d (340 000 bbl/d) with an average duration of 18 years.

Table 2: Details of the Project

Physical Work and Activities <i>(see Keystone Application section 12.0 and the ESR section 4.0 for additional detail)</i>
<i>Construction Phase:</i>
<ul style="list-style-type: none"> ▪ Keystone's planned in service date for 1 November 2009 for the oil pipeline. ▪ Alberta Segment – construction of 271 km of 762 mm (NPS 30) pipeline during the summer and fall/winter of 2008 (July to early December); restoration and reclamation in October, November and early December, 2008 with additional restoration activities in summer 2009. ▪ Manitoba Segment – construction of 10 km of 864 mm (NPS 34) and 90 km of 762 mm (NPS 30) during summer and fall of 2008 (late June/early July to late November); restoration and reclamation would occur in October and November 2008, with additional restoration activities in summer 2009. ▪ Horizontal Directional Drill (HDD) Segments – April 2008. ▪ Conversion Segment – conversion of 864 km of 864 mm (NPS 34) of existing pipeline, Line 100-1, from natural gas to oil service from spring 2008 through to late June 2009. ▪ New valves and cathodic protection beds to be constructed for each of the new pipeline segments, and for the converted segment, the existing valves would be used and the existing cathodic protection beds extended. ▪ Pump Stations – construction of eight new pump stations would require 2.0 ha of new land, access roads and power lines, while the remainder would be co-located at existing compressor stations. Work at Hardisty (PS 5), Cabri (PS 11), Regina (PS 17) and Carmen (PS 26) would start in February 2008 and be completed by June 2009. Construction at the remaining twelve pump stations would start May 2008 and be completed by November 2009. ▪ Tankage Terminal – construction of the Hardisty tanks and associated piping would start March 2008 and be completed by June 2009. ▪ Fit for Service Testing - prior to operation <ul style="list-style-type: none"> ▪ Keystone has proposed that the new pipeline would be hydrostatically tested with water; ▪ the converted section would be tested by running both crack detection and magnetic flux leakage (MFL) tools prior to operation; and ▪ the tank facilities at the tankage terminal will be pressure tested using either water or oil.
<i>Operation Phase:</i>
<ul style="list-style-type: none"> ▪ The Project facilities would have an in-service period in excess of 30 years. ▪ Vegetation control for non-native and noxious plant species. ▪ Periodic monitoring and follow-up for reclamation at wetlands, watercourses and native range. ▪ Monitoring and reclamation for subsidence and erosion. ▪ Pipeline integrity maintenance, monitoring and emergency response for oil leaks and ruptures.
<i>Abandonment Phase:</i>
<ul style="list-style-type: none"> ▪ Any environmental effects associated with the abandonment phase are likely to be similar to those caused by the construction phase. Pursuant to the NEB Act, an application would be required to abandon the facility, at which time the environmental effects would be assessed by the Board.

3.0 DESCRIPTION OF THE ENVIRONMENT

Two routing alternatives have been considered for the Project. Each of these routing alternatives consisted of several options, which were evaluated from an engineering, land, human and environmental perspective. For the Alberta segment, each of the routes that were considered crossed provincially designated Environmentally Significant Areas (ESAs). Keystone selected a route that minimized potential fragmentation of native range, reduced the footprint of the Project by paralleling existing linear disturbances and in general, sited pump stations outside of ESAs except in the case of the Bindloss Pump Station – PS 9 located in the Remount ESA. Keystone’s preferred pipeline route would cross agricultural lands, native range, rare ecological communities, wetlands and watercourses. The following environmental elements have been described in detail in the ESA for the proposed Keystone Project:

Atmospheric and Acoustic Environment

- Air contaminants (e.g. hydrogen sulphide, sulphur dioxide, nitrogen oxides, particulate matter etc.) and hazardous air pollutants (e.g. benzene, toluene, ethylbenzene, xylenes, and mercaptans) that could be potentially released due to the Project were assessed. All predicted ground-level concentrations of air contaminants associated with emissions from the proposed operational tank facilities and construction activities are within the reference regulatory limits for ambient air quality. For construction, Keystone assessed the effects of air contaminants as insubstantial.
- Generally, ambient sound levels would not be affected by the construction and operation of the pipeline and pump stations. This infrastructure would be constructed and operated in largely rural areas, and noise associated with it would not significantly change background ambient sound levels.

Soils

- The primary land use traversed by the Project is agricultural, consisting of annual cropland, hayland, improved pasture and native range. The ESA assesses the Project effects on soil resources with respect to changes in the physical, chemical and biological properties of soil. Soil units were used as the basis for determining construction mitigation procedures in the local study area (LSA). Soil units were defined based on soil series and soil phases.

Vegetation

- Rare plants and rare ecological communities were identified along the Project route in Alberta. In Manitoba, rare plants were found in riparian areas associated with watercourses crossed by the Project.

Wildlife

- Two amphibian species listed on Schedule 1 of the *Species at Risk Act* (SARA) were found along the Project route. The Great Plains Toad was identified in wetlands along the Project route in Alberta, and the Northern Leopard Frog was identified as occurring in riparian areas in Manitoba. Both of these species are listed as of Special Concern on Schedule 1 of SARA.

Three bird species listed as “Threatened” on Schedule 1 of SARA were observed in the wildlife LSA along the Project route in Alberta.

- 6 watercourses have been identified to have high ecological value specific to wildlife and vegetation and are proposed to be crossed using a trenchless method. The sites are the Boyne River, Shannon Creek, Deadhorse Creek, two Unnamed Creeks, and Buffalo Creek.

Fisheries and Hydrology

- The Project would cross 16 watercourses in Alberta, and 40 watercourses in Manitoba.
- 3 major watercourses are proposed to be crossed using horizontal directional drill (HDD), the Red Deer and South Saskatchewan Rivers in Alberta and the Boyne River in Manitoba.

Socio-Economic Environment

- The Project traverses lands that are primarily privately owned and are used extensively for agricultural production. Other land uses include oil and gas resources and recreational activities.
- Any Crown lands to be disturbed for new construction are located in Alberta. Specifically there are 49 tracks of Crown lands of which 43 are within provincially designated Special Areas.
- The Alberta/Saskatchewan section of the proposed Project is largely rural: it includes small towns and villages and traverses farm and ranch cattle country in grassland areas.
- The converted section of the proposed Project in Saskatchewan and Manitoba is located in an existing corridor utilized for a number of pipelines and generally along a relatively highly urbanized strip near the Trans Canada highway.
- In Manitoba the new pipeline would traverse low lying agricultural lands with varied agricultural production including specialty crops.
- The labour force in all areas is almost fully employed.

Heritage and Palaeontological Resources

- In Alberta, 59 historical or heritage sites would be affected, either partially or completely by the current configuration of the Project, and would require avoidance or mitigation. 44 of these have moderate to high heritage value.
- In Saskatchewan, there would be no sites in close proximity to the areas of new disturbance.
- In Manitoba, 3 historical or heritage sites would be affected, either partially or completely by the current configuration of the Project, and would require avoidance or mitigation.
- Palaeontological resources would be encountered in Alberta and Manitoba. In Alberta, there would be 3 sites with high potential to impact significant palaeontological resources.

Use of Lands and Resources for Traditional Purposes

- In Alberta there would be no Aboriginal communities within a 50 km radius of the proposed Project. The Project would be within the traditional territory of the Blackfoot Confederacy.

- In Saskatchewan, the existing pipeline traverses the Carry the Kettle First Nation reserve. The proposed Project would fall within the traditional territory used by the Treaty 4 First Nations and that claimed by Standing Buffalo Dakota First Nation (Standing Buffalo).
- In Manitoba, the Long Plain First Nation and Birdtail Sioux First Nation are located within 50 km of the proposed new pipeline. The proposed Project would be within the traditional territory claimed by the five Dakota Nations of Manitoba. The Birdtail Sioux, Canupawakpa, Dakota Plains, Dakota Tipi and Sioux Valley Dakota Nations are collectively known as the Dakota Nations of Manitoba. The Manitoba Métis Federation has an interest in lands of the new construction portion of the Project.

4.0 COMMENTS FROM THE PUBLIC

4.1 Project-Related Issues Raised in Comments Received by the NEB

To view the following submitted documents, please refer to the NEB website at: www.neb-one.gc.ca, click on “Regulatory Documents”, go to “Browse the Regulatory Document Index”, then “Looking for filing? Enter its Id here” and type in the filing ID numbers that appear in the table below and click on “Go!”

Table 3: Submissions to the NEB

Name	Comments	Date of Submission	Filing ID
Donald Harron	<ul style="list-style-type: none"> ▪ Determination of significance ▪ Manitoba buffer guidance ▪ <i>Manitoba Endangered Species Act</i> ▪ Professional Judgment 	2 April 2007	A15179
Manitoba Conservation and Manitoba Water Stewardship	<ul style="list-style-type: none"> ▪ Habitat alteration and loss ▪ Location of wetlands and springs ▪ Endangered species habitat ▪ Migratory birds ▪ HDD of watercourses ▪ Live fish handling ▪ Precautions for drinking water ▪ Hydrostatic testing 	10 April 2007	A15127
Environment Canada	<ul style="list-style-type: none"> ▪ Atmospheric Environment ▪ Emergency Response Procedures ▪ Wildlife ▪ Request to comment on the draft Screening Report 	11 April 2007	A15226
Transport Canada	<ul style="list-style-type: none"> ▪ Interest and involvement in the Project 	12 April 2007	A15253
Kessler Landowners Group	<ul style="list-style-type: none"> ▪ Impacts to farming and ranching operations ▪ Abandonment of the pipeline ▪ Assumption of liability ▪ Conservation of topsoil ▪ Potential adverse impacts to water table 	13 April 2007	A15262
Jon W. Kruse	<ul style="list-style-type: none"> ▪ U.S. Department of State Scoping Summary 	23 April 2007	A15398

4.2 Project-Related Issues Raised through Consultation Conducted by Keystone

Keystone initiated its stakeholder consultation program, including its consultation with Aboriginal groups on 9 February 2005 when the Project was announced. A range of consultation activities were carried out including personal contacts, mailing of Project information, open houses, a toll-free number and news releases. Stakeholder groups included landowners, community leaders, elected representatives, Aboriginal groups, regulatory agencies, emergency service organizations, special interest groups and co-located RoW owners.

Concerns raised by the public included routing and pump station locations, depth of cover on drainage ditches, integrity/safety/leaks, construction methods, weeds, exporting of resources, traffic and increased road use, compensation processes, impacts to agricultural lands, reclamation and land access requirements and tax revenue for municipalities.

Keystone contacted Aboriginal groups where Keystone was aware the Project crossed their reserve or claimed traditional territory. Keystone submitted that the Project is expected to have minimal impact on Aboriginal communities due to the distance of the proposed Project from communities and the type of lands traversed. Most communities indicated they had no concerns with the Project and some identified interest in the potential economic opportunities. When Standing Buffalo intervened in the regulatory process, Keystone became aware that the Project crossed their claimed traditional territory and Keystone initiated consultation with them. Keystone was not aware that Standing Buffalo was not a member of Treaty 4 and therefore not covered under the Treaty 4 Protocol Agreement with TransCanada respecting consultation. Keystone also became aware of the outstanding land claim of the Dakota Nations of Manitoba when they filed their intervention. Both groups raised concerns about the lack of consultation by the Crown and had concerns about the impact the Project could have on traditional sites and activities and unextinguished Aboriginal title. Standing Buffalo also raised concerns about lack of consultation by the proponent. Keystone negotiated an agreement with the Carry the Kettle First Nation granting permission for crude oil transmission across the reserve.

In the Application, Keystone submitted that all issues raised by stakeholders have been resolved or are expected to be resolved to the satisfaction of affected stakeholders. Where issues have not been resolved with Standing Buffalo and the Dakota Nations of Manitoba, Keystone committed to on-going consultation. Keystone also committed to on-going consultation with all potentially impacted parties and noted that its consultation would be guided by TransCanada's consultation practices and Aboriginal Relations Policy.

The Board has given due consideration to all comments raised throughout this proceeding. The comments that relate to the Board's *CEA Act* mandate have been considered in the preparation of this ESR. A broader discussion of consultation matters is included in the Board's Reasons for Decision.

4.3 Comments Received by the NEB on the Draft Environmental Screening Report

To view the following submitted documents, please refer to the NEB website at: www.neb-one.gc.ca, click on "Regulatory Documents", and go to "Browse Regulatory Document Index", then go to "Looking for filing? Enter its Id here" and type in the filing ID numbers that appear in the table below and click on "Go!"

Table 4: Comments on the draft Screening Report

Name	Topics	Filing ID
Environment Canada	<ul style="list-style-type: none"> ▪ Inclusion of SARA listed bird species ▪ Agreement to review the Native Range Management Plan ▪ Contact Pauline Erickson – Edmonton Office for review ▪ ASRD to review seed mixes in province 	A16170
Transport Canada	<ul style="list-style-type: none"> ▪ NEB Act section 108 approval may be required for navigable waters ▪ Clarification regarding recommended NEB conditions 	A16187
Standing Buffalo	<ul style="list-style-type: none"> ▪ Impacts to Dakota/Lakota traditional use sites 	A16188
Indian and Northern Affairs	<ul style="list-style-type: none"> ▪ The document meets its requirements; items considered when reviewing the draft screening document were limited to items pertaining to the First Nations Treaty rights and on-reserve concerns 	A16244

5.0 METHODOLOGY OF THE NEB'S ENVIRONMENTAL ASSESSMENT

In conducting the environmental screening, the NEB considered the factors set out in paragraphs 16(1)(a) through (d) of the CEA Act. The Board also considered the scope of the factors as described in Regulatory Document A15048. Further, in addition to assessing the need for the Project and alternatives to the Project, the NEB deems the following to be relevant matters pursuant to paragraph 16(1)(e) of the CEA Act and considered:

- Construction, operation, decommissioning, site rehabilitation and abandonment or other undertakings that are proposed by the Proponent or that are likely to be carried out in relation to the physical works proposed by the Proponent, including mitigation and habitat replacement measures.
- The natural variation of a population or ecological component.
- The timing of sensitive life cycle phases of wildlife species in relation to the scheduling of the Project.
- The time required for an effect to become evident.
- The time required for a population or ecological component to recover from an effect and return to a pre-effect condition, including the estimated degree of recovery.
- The area affected by the Project.
- The area within which a population or ecological component functions and within which a Project effect may be felt.

Baseline information and sources:

The analysis for this ESR is based on Keystone's application and responses to information requests, the EPP, letters of comment, and evidence submitted at the public hearing. For details on how to obtain documents, please contact the Secretary of the Board at the address specified in Section 8.0 of this Report.

Methodology of the analysis:

In assessing the environmental effects of the Project, the NEB used an issue-based, life-cycle approach. The design, planning, construction and operation were considered during the application assessment. Decommissioning and abandonment will be considered during a separate application process.

In its analysis within Section 6.1, the NEB identified interactions expected to occur between the proposed Project activities and the surrounding environmental elements. Also included were the consideration of potential accidents and malfunctions that may occur due to the Project and any change to the Project that may be caused by the environment. If there were no expected element/Project interactions then no further examination was deemed necessary. Similarly, no further examination was deemed necessary for interactions that would result in neutral potential effects. In circumstances where the potential effect was unknown, it was categorized as a potential adverse environmental effect.

Section 6.2.1 provides an analysis for all potential adverse environmental effects that are normally resolved through the use of standard design or routine mitigation measures. Section 6.2.2 provides a detailed analysis for each potential adverse environmental effect which is of public concern, involves non-standard mitigation measures, follow-up programs, or requires the implementation of an issue-specific recommendation. The analysis specifies mitigation measures, ratings for criteria used in evaluating significance as defined in Table 5, monitoring and/or follow-up programs, views of the NEB and any issue-specific recommendations.

Section 6.3 addresses cumulative effects, Section 6.4 addresses follow-up programs and Section 6.5 lists recommendations for the possible regulatory approval of the Project.

Table 5: Evaluation of Significance Criteria

Criteria	Definition
Frequency	<ul style="list-style-type: none"> ▪ Low: at sporadic intervals during one phase of the Project lifecycle ▪ Medium: continuous during one phase of the Project lifecycle ▪ High: continuous throughout all phases of the Project lifecycle
Duration	<ul style="list-style-type: none"> ▪ Short term: only during one phase of the Project ▪ Medium term: starts in construction and persists through operation ▪ Long term: beyond the lifecycle of the Project
Reversibility	<ul style="list-style-type: none"> ▪ Reversible: adverse environmental effect would return to baseline conditions within the life of the Project ▪ Irreversible: adverse environmental effect would be permanent, or only reversible beyond the lifecycle of the Project
Biophysical and Socio-Economic Geographic Extent	<ul style="list-style-type: none"> ▪ Project Development Area (PDA): the 30 m RoW and footprints associated with the construction of the pipeline, access roads, and associated facilities such as pump stations. ▪ Local Study Area (LSA): includes the PDA as well as a 500 m buffer on either side of the RoW. In some cases, the LSA is only the 30 m RoW. ▪ Regional Study Area (RSA): varies with each discipline, and can include such things as natural subregions, the home ranges of wildlife species, or an airshed.
Magnitude	<ul style="list-style-type: none"> ▪ Low: adverse environmental effect would have a negligible influence on physical (e.g. soils and terrain), biophysical (e.g. vegetation, wildlife, fisheries, air quality), or social elements (e.g. human health, traditional land use, heritage resources, ambient noise levels) ▪ Medium: adverse environmental effect would have a local influence on physical, biophysical, or social elements ▪ High: adverse environmental effect would have a regional influence on physical, biophysical, or social elements
Evaluation of Significance	<ul style="list-style-type: none"> ▪ “Likely to be significant” would typically involve effects that are: high frequency, irreversible, long term in duration, regional in extent or of high magnitude

6.0 ENVIRONMENTAL EFFECTS ANALYSIS

6.1 Project - Environment Interactions

Environmental Element	Project Interaction? Y/N/U	Description of Interaction (How, When, Where)	Potential Adverse Environmental Effect	Standard Mitigation to be Implemented
Biophysical	Y	<ul style="list-style-type: none"> Burning woody debris on soil Topsoil stripping and restoration during construction activity Machinery operations Open trench wall slumping during construction Subsidence of the trench during operation 	<ul style="list-style-type: none"> Topsoil loss, compaction or mixing during handling 	<ul style="list-style-type: none"> Y
			<ul style="list-style-type: none"> Topsoil loss from surface water erosion and wind erosion 	<ul style="list-style-type: none"> Y
			<ul style="list-style-type: none"> Topsoil loss through trench instability 	<ul style="list-style-type: none"> Y
			<ul style="list-style-type: none"> Increased stoniness of surface horizons 	<ul style="list-style-type: none"> Y
			<ul style="list-style-type: none"> Trench subsidence and roach/crowning 	<ul style="list-style-type: none"> Y
	Y	<ul style="list-style-type: none"> Vegetation disturbance prior to and during construction, and during the operation of the pipeline 	<ul style="list-style-type: none"> Disturbance of grasses, forbs, shrubs and trees 	<ul style="list-style-type: none"> Y
			<ul style="list-style-type: none"> Disturbance of native range, rare ecological communities and rare plants 	<ul style="list-style-type: none"> N
			<ul style="list-style-type: none"> Non-native or invasive weed introduction 	<ul style="list-style-type: none"> N
	Y	<ul style="list-style-type: none"> Ground water and wetland disturbance prior to and during clearing and construction During the excavation of the trench in fine texture clay soils in Manitoba During the excavation of the trench where unconfined groundwater is found in sandy sediments overlying clay sediments in the Lower Assiniboine Delta Failure of watercourse isolation measures during excavation of a watercourse Failure of a temporary vehicle crossing over a watercourse 	<ul style="list-style-type: none"> Disruption of surface water hydrologic flow 	<ul style="list-style-type: none"> Y
			<ul style="list-style-type: none"> Disruption of subsurface hydrologic flow and reduction of groundwater quality and quantity 	<ul style="list-style-type: none"> Y
			<ul style="list-style-type: none"> Disruption of aquifer quality and quantity 	<ul style="list-style-type: none"> Y
			<ul style="list-style-type: none"> Reduced groundwater flow leading to increased saturation and increased salination 	<ul style="list-style-type: none"> Y
			<ul style="list-style-type: none"> Disruption to water wells 	<ul style="list-style-type: none"> Y
			<ul style="list-style-type: none"> Introduction of sediments 	<ul style="list-style-type: none"> Y
			<ul style="list-style-type: none"> Introduction of contaminants, including any other deleterious substances 	<ul style="list-style-type: none"> Y

Legend: Y (Yes, see section 6.2.1); N (No, see section 6.2.2); U (Uncertain)

Environmental Element	Project Interaction? Y/N/U	Description of Interaction (How, When, Where)	Potential Adverse Environmental Effect	Standard Mitigation to be Implemented
Fish and Fish Habitat	Y	<ul style="list-style-type: none"> ▪ Excavation of trench through watercourse ▪ Installation of vehicle access over watercourses ▪ Failure of HDD 	<ul style="list-style-type: none"> ▪ Sediment entering watercourses and erosion of disturbed areas adjacent to waterbodies ▪ Deterioration of aquatic ecological integrity (fish-bearing and non-fish bearing) and loss of fish habitat, including blockage of fish passage during migration periods ▪ Fish and aquatic organism mortality, including: destruction of fish eggs; temporary or permanent alterations in water flow; and loss of potential food supply ▪ Harmful alteration, disruption or destruction of fish habitat (including riparian vegetation) from the pipeline installation and access 	<ul style="list-style-type: none"> ▪ Y ▪ Y ▪ Y ▪ N
Wetlands	Y	<ul style="list-style-type: none"> ▪ Clearing vegetation, stripping organic layer, excavating trench, and backfilling during construction 	<ul style="list-style-type: none"> ▪ Loss of wetland function, terrestrial and aquatic habitat in wetlands ▪ Disturbance to surface water and subsurface hydrologic flow 	<ul style="list-style-type: none"> ▪ N ▪ Y
Wildlife and Wildlife Habitat	Y	<ul style="list-style-type: none"> ▪ Removal of shrubs and trees during RoW and temporary workspace clearing ▪ Increase of noise level during construction ▪ Worker interaction with wildlife ▪ Waste generated by construction activity ▪ Construction activity in wetlands ▪ Excavation on the right-of-way 	<ul style="list-style-type: none"> ▪ Disturbance of wildlife habitat ▪ Disturbance to nesting birds ▪ Disturbance to wildlife ▪ Sensory disturbance to wildlife ▪ Wildlife conflicts and mortality ▪ Habituation of wildlife to construction waste ▪ Increased and long term vegetation management on the RoW 	<ul style="list-style-type: none"> ▪ Y ▪ N ▪ Y ▪ Y ▪ Y ▪ Y ▪ Y
Species at Risk (federal), COSEWIC and SARA – Table 9-4 of ESA	U	<ul style="list-style-type: none"> ▪ Disturbance of listed species during clearing, site preparation and equipment operation 	<ul style="list-style-type: none"> ▪ Disturbance to SARA listed amphibians and habitat (<i>Northern Leopard Frog</i>, <i>Great Plains Toad</i>) 	<ul style="list-style-type: none"> ▪ N

Legend: Y (Yes, see section 6.2.1); N (No, see section 6.2.2); U (Uncertain)

Environmental Element	Project Inter-action? Y/N/U	Description of Interaction (How, When, Where)	Potential Adverse Environmental Effect	Standard Mitigation to be Implemented
			<ul style="list-style-type: none"> Disturbance to SARA listed birds (Peregrine Falcon, Burrowing Owl, Piping Plover, Whooping Crane, Ferruginous Hawk, Short-eared Owl, Loggerhead Shrike, Sprague's Pipit, Long-Billed Curlew, McCown's Longspur, Yellow Rail) Disturbance to a SARA listed mammal (<i>Ord's Kangaroo Rat</i>) 	<ul style="list-style-type: none"> Y U
Species of Special Status (provincial, territorial, local) – Table 9-4 of ESA	N	Disturbance of listed species during clearing, site preparation and equipment operation	<ul style="list-style-type: none"> Disturbance to special status herptiles (Prairie Rattlesnake, Plains Hognose Snake) Disturbance to special status birds (Baird's Sparrow, Great Blue Heron, Prairie Falcon) Disturbance to special status mammals (<i>American Badger, Mule Deer</i>) 	<ul style="list-style-type: none"> U U Y
Air Quality	Y	<ul style="list-style-type: none"> Vehicles and equipment operation during construction Dust generated by vehicles and equipment on gravel roads and the RoW Emissions generated by the tankage terminal 	<ul style="list-style-type: none"> Decreased local air quality during construction, operation and maintenance 	<ul style="list-style-type: none"> Y
Human Occupancy/ Resource Use	Y	Cleaning and construction activities on the RoW	Disturbance to agricultural operations	Y
Heritage Resources	Y	Cleaning and construction activities on the RoW	Loss or alteration of previously identified and unidentified heritage or palaeontological resources	Y
Traditional Land and Resource Use	U	Cleaning and construction activities on the RoW	<ul style="list-style-type: none"> Loss or alteration of traditional use site Disruption or inability to carry out traditional activities 	U
Socio and Cultural Well-being	N	-	-	
Human Health/ Aesthetics	U	Refer to Air Quality and Water Quality and Quantity sections above	Health effects from decreased air quality during construction and impacts to water wells	Y

Legend: Y (Yes, see section 6.2.1); N (No, see section 6.2.2); U (Uncertain)

	Environmental Element	Project Inter-action? Y/N/U	Description of Interaction (How, When, Where)	Potential Adverse Environmental Effect	Standard Mitigation to be Implemented
Other	Accidents/Malfuctions	Y	<ul style="list-style-type: none"> ▪ Operation and fuelling of machinery on the RoW and temporary work space ▪ During the discharge of hydrostatic test water ▪ Wildfire initiated by construction activities ▪ Leak or rupture of the existing pipeline during construction ▪ Leak or rupture of the pipeline during operation 	<ul style="list-style-type: none"> ▪ Introduction of contaminants to soil, water and wetlands from vehicles and equipment ▪ Introduction of crude oil to soil, water and wetlands from a leak or rupture of the pipeline 	<ul style="list-style-type: none"> ▪ Y ▪ N
	Effects of the Environment on the Project	Y	<ul style="list-style-type: none"> ▪ Flooding at watercourses due to weather events during construction and operation 	<ul style="list-style-type: none"> ▪ Erosion of in-stream substrate and banks of watercourses ▪ Soil erosion, subsidence, slope failure 	<ul style="list-style-type: none"> ▪ Y ▪ Y

Legend: Y (Yes, see section 6.2.1); N (No, see section 6.2.2); U (Uncertain)

6.2 Potential Adverse Environmental Effects

To mitigate environmental effects, Keystone committed to reasonable goals and objectives for construction, reclamation and operation of the pipeline as outlined in its ESA, EPP and Environmental Alignment Sheets.

Several mitigation strategies have been proposed to avoid or minimize the effects of the Project, including avoidance through route selection; scheduling of activities to avoid sensitive periods; developing mitigation measures to address site-specific and general issues; inspection during construction to ensure mitigation is implemented and effective; and maintenance activities during the operation of the pipeline system.

In addition, if the Project is approved, the NEB would work with Keystone through technical meetings to ensure that best practices would be recorded in the final EPP, Environmental Alignment Sheets and in the Keystone Environmental Commitments Tracking List (ECTL).

6.2.1 Analysis of Potential Adverse Environmental Effects to be Mitigated through Standard Measures

Keystone has provided standard design and mitigation measures both in the ESA, the EPP and the Environmental Alignment Sheets. These measures have been assessed by the NEB and meet the objective of mitigating potential adverse environmental effects.

A standard mitigative measure is a specification or practice that has been developed by industry, or prescribed by a government agency, that has been previously employed successfully, and meets the expectations of the NEB.

The NEB is of the view that for this Project, if Keystone follows the standard design and mitigative measures proposed in the application, commitments made during the oral public hearing and adherence to the recommendations found section 6.5 of the ESR, the potential adverse environmental effects are not likely to be significant.

6.2.2 Detailed Analysis of Potential Adverse Environmental Effects

A detailed analysis is provided for each potential adverse environmental effect which is of either public concern, involves non-standard mitigation measures, follow-up programs, or requires the implementation of an issue-specific recommendation.

The analysis specifies those mitigation measures, ratings for criteria used in evaluating significance, monitoring and/or follow-up programs, views of the NEB and any issue-specific recommendations.

6.2.2.1 Native Range, Rare Ecological Communities and Rare Plants and Wildlife in Alberta

From Section 6.1	▪ Disturbance of native range, rare ecological communities and rare plants
Background/Issues	The selected route would cross approximately 75.5 km of ESAs including seven provincial and four nationally significant ESAs (Silver Heights, Grassy Island Native

	<p>Prairie, Remount and the South Saskatchewan Canyon) including crossing approximately 190 km of native prairie and 2.5 km of greenfield RoW.</p> <p>Fescue prairie is extremely vulnerable to disturbance and invasion by non-native species and is difficult to reclaim, particularly if it is subject to heavy or spring grazing. In addition, shifts in vegetation types are likely to occur in plains rough fescue communities. The Northern Fescue Grasslands are among the most threatened biogeographic regions on the Canadian plains "...only five percent or less of its original area remains".</p> <p>Environment Canada (EC), in a letter dated 3 April 2007 has recommended a revision to Keystone's proposed seed mixes to include additional forb species to provide a better balance, and the use of local native ecological varieties especially where crossing large tracts of native prairie. EC notes that acquiring these seed mixes in advance of reclamation activities may be essential to ensure availability. Further, EC recommends that Alberta Sustainable Resources Development (ASRD) be consulted for seeding in native range areas that are the responsibility of that department.</p> <p>The Bindloss Pump Station - PS9 is to be located in the Remount ESA on native rangeland. This area is one of the largest continuous blocks of native grassland in Canada. In the vicinity of the proposed station, SARA listed bird species are known to occur. Hydraulic analysis conducted by Keystone has determined that PS9 has the potential to be moved in the order of approximately 5.0 kilometres upstream or downstream of the proposed location. Keystone submitted in a letter dated 1 June 2007, that "Keystone has revisited the proposed PS9 location and still finds it to be in the optimal location based on the pump station site location criteria".</p> <p>In Information Request Response (IRR) 3.1, Keystone stated "[i]n selecting the final location of PS9, it was necessary to balance the site selection criteria, system hydraulics and potential wildlife impacts and the related wildlife mitigation measures". Keystone went on to state "[t]he only wildlife potentially affected by the construction and operation of this pump station are birds, and the potential for effect is only expected to occur during the nesting and breeding period".</p> <p>At the oral public hearing, the Board requested the following in Undertaking - 1.</p> <p><i>Provide a discussion of all considerations, including the cost analysis, design limitations and a comparison of the ecological trade-offs for re-locating the PS9 – Bindloss Pump Station outside the Remount ESA to a location that would reduce environmental effects.</i></p> <p>Keystone's assessment of the optimum location for PS9 is further described in its response to Undertaking – 1, dated 19 June 2007. Keystone provided justification for the selected location of PS9-Bindloss Pump Station considering the environmental effects trade-offs of the alternate locations. For example, the need for additional access road and powerline land requirements in native rangeland and the possibility of requiring an additional pump station to support the hydraulic requirements of the pipeline.</p>
Mitigation Measures	<p>Keystone's general mitigation measures are described in the ESA, EPP and the Environmental Alignment Sheets.</p> <ul style="list-style-type: none"> ▪ no more than 5% of provincially rare communities and no more than 1% of the occurrence of globally rare communities would be disturbed ▪ specific mitigation measures for native range would be incorporated into the EPP ▪ consult with ASRD and EC to refine mitigation plans and appropriate seed mixes for inclusion in the EPP ▪ specific mitigation to minimize the effects of invasive non-native species and weeds where rare plants exist, consult with ASRD and EC for confirmation of appropriateness and incorporate into the EPP and the Operations Vegetation Management Plan ▪ where rare ecological communities and riparian vegetation exists, only conduct vegetation management where there is a need to control restricted or noxious weeds,

	<p>or for safety reasons where woody vegetation has encroached across the ditchline.</p> <ul style="list-style-type: none"> ▪ for the Bindloss Pump Station - PS9 (PS9), schedule construction to avoid the sensitive nesting and rearing period (approximately April 15 to July 31) ▪ where practicable, maintenance activities will be timed to avoid nesting periods ▪ if construction occurs in the vicinity of any active nest sites: pre-construction nesting surveys; monitoring of nests; speed limits; limiting vehicle numbers and trips would be implemented ▪ At PS9: bore under the abandoned railway RoW and secondary highway to avoid any impacts to SARA listed bird species ▪ construction would be timed to avoid the bird nesting and rearing period to prevent any disturbances from noise emissions ▪ the ECTL would include requirements to protect rare wildlife species found in the vicinity of PS9, and these requirements would be extended to include operation of the station ▪ during the operation of the PS9, conduct regular orientations for pump station staff to ensure requirements for the protection of rare wildlife species is understood ▪ Keystone has proposed that for two years post-construction, it would conduct follow-up and monitoring to confirm the effectiveness of mitigation measures in reducing environmental effects caused by construction and operation of PS9 																				
Monitoring	<ul style="list-style-type: none"> ▪ Monitoring as required by the NEB <i>Onshore Pipeline Regulations, 1999</i> 																				
Follow-up Program	<p>The NEB recommends a Native Range Management and Follow-up Program in order to ensure clarity of the mitigation to be applied during construction, and the specifics of a follow-up program for post-construction.</p>																				
Views of the NEB	<p>The NEB recognizes that native range is a rare and declining ecosystem and that mitigation strategies may have limited effectiveness. Therefore, there maybe a requirement for adaptive approaches as a result of a scientifically based follow-up program. In addition, the pipeline route Keystone has proposed, along with PS9, would be located in ecologically sensitive areas. The following conditions are recommended:</p> <p>Condition E – file for approval a Native Range Management and Follow-up Program</p> <p>Condition J – file confirmation of EC, CWS and ASRD acceptance of seed mixes</p> <p>The desired end result of these conditions is to evaluate the Native Range Management Plan and Follow-up Program to ensure commitments made in the application and any post approval Technical Meetings as described below are captured for construction and operation of the pipeline located in native prairie. It is also the intent of these conditions to ensure that other responsible government agencies are satisfied with the programs and commitments prior to construction.</p> <p>If the Project is approved, a Technical Meeting with Keystone would be conducted to finalize the details of the Native Range Management and Follow-up Program prior to filing for NEB approval and the commencement of construction.</p> <p>The NEB is of the view that the route selected would have the least environmental effects of the alternatives and options presented by Keystone.</p>																				
Evaluation of Significance	<table border="1"> <thead> <tr> <th>Frequency</th> <th>Duration</th> <th>Reversibility</th> <th>Geographical Extent</th> <th>Magnitude</th> </tr> </thead> <tbody> <tr> <td>High</td> <td>Medium term</td> <td>Reversible</td> <td>PDA</td> <td>Medium</td> </tr> <tr> <td colspan="5">Adverse Effect</td> </tr> <tr> <td colspan="5">Not likely to cause significant adverse environmental effects.</td> </tr> </tbody> </table>	Frequency	Duration	Reversibility	Geographical Extent	Magnitude	High	Medium term	Reversible	PDA	Medium	Adverse Effect					Not likely to cause significant adverse environmental effects.				
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Refer to Table 5 for definitions of the Evaluation of Significance Criteria

6.2.2.2 Accidents and Malfunctions

From Section 6.1	<ul style="list-style-type: none"> ▪ Introduction of contaminants, including any other deleterious substances ▪ Introduction of crude oil to soil, water and wetlands from a leak or rupture of the pipeline
Background/Issues	<p>Keystone proposes to construct 361 km of new 762 mm (30 inch) and 10 km of new 864 mm (34 inch) pipeline in Alberta and Manitoba and convert 864 km of 864 mm (34 inch) pipeline from natural gas to oil service in Saskatchewan and Manitoba. Keystone is proposing three HDD watercourse crossings and five trenchless watercourse crossings for the Project, resulting in a total of eight trenchless watercourse crossings.</p> <p>The following are Project-related accidents and malfunctions that could occur during the construction, operation, decommissioning and abandonment phases of the Project:</p> <ul style="list-style-type: none"> ▪ Equipment failure and accidental spill of hazardous materials, e.g. fuel, lubricants, coolants, etc. ▪ Inadvertent mud release during HDD watercrossings; and ▪ Pipeline failure during operations resulting in an accidental release of crude oil. <p>Keystone is required by DFO to develop monitoring and emergency response plans for HDD crossings to address any potential inadvertent mud release during trenchless crossings, as well as contingency plans should the crossing prove unsuccessful. In addition, Keystone would conduct a geotechnical investigation for each crossing as part of the HDD design to minimize the risk of inadvertent mud releases.</p> <p>The operational failure of a pipeline has the potential to release crude oil into the environment. Keystone would develop programs to manage the risk of pipeline failure to ensure that all potential effects on the environment from a release of crude oil are prevented or minimized for all biophysical components.</p> <ul style="list-style-type: none"> ▪ Keystone IRR 3.5 indicates the preliminary design has located valves based on a review of the following environmental features: <ul style="list-style-type: none"> ▪ wetlands and native range ▪ watercourses ▪ drinking water ▪ shallow aquifers <p>In IRR 5.6, Keystone provided Table 1 – Valve Assemblies and the Environmental Features for the Keystone Project. This table identifies the location, the valve type, and the predicted volumes of a leak or rupture based on a variety of variables at or near sensitive environmental features. The outflow modeling for the Project indicates that if there was a leak or a rupture on the converted portion of the Project, versus the new pipeline portions, 1.6 to 1.8 times more product would be released depending on the commodity type (synthetic crude or heavy blend).</p> <p>In IRR 3.5, “Keystone’s design of the pipeline and proposed management systems, considered the following requirements to enhance environmental protection:</p> <ul style="list-style-type: none"> ▪ installation of a computational model-based leak detection system and Supervisory Control and Data Acquisition system (SCADA) which would be continuously monitored from Keystone’s operations control center; ▪ implementation of a risk-based integrity management program to monitor and ensure the integrity of all pipeline related facilities....; ▪ development and implementation of control center and field operating procedures; and ▪ training of emergency response personnel.” ▪ In the unlikely event of a leak or rupture of the pipeline, Keystone would refer to the Emergency Response Plan and Integrity Management Program for direction on public safety and remediation measures to be implemented.
Mitigation Measures	<p>In addition to the standard mitigation measures in the ESA and EPP for equipment failure and accidental spill of hazardous materials, the following Plans have been developed to</p>

	<p>respond to potential environmental effects: Waste Management Plan, Contaminated Soils Contingency Plan , HDD Contingency Plan, and the Spill Contingency Plan.</p> <p>For inadvertent mud releases during HDD, Keystone would develop contingency and response plans that would include a protocol to monitor construction, to stop work in the event of a release, to contain and clean-up drilling fluids and mitigation measures.</p> <p>The following general mitigation has been proposed by Keystone for minimizing the effects of a leak or rupture:</p> <ul style="list-style-type: none"> ▪ installation of remotely controlled block valves at a nominal distance of 30 km, including the mainline valves at pump stations; ▪ installation of additional valves as determined by the consequence analysis; and ▪ retention of the original valve assemblies on 100-1 if they operate for liquid service. <p>Measures to be taken by Keystone to prevent, detect and mitigate potential leaks and ruptures, including those at drinking water locations as provided in IRR 5.6:</p> <p><u>Prevention</u></p> <p>Design and construction practices for the new pipeline would include:</p> <ul style="list-style-type: none"> ▪ quality control of the pipe manufacturing and coating process; ▪ hydrostatic testing of pipe joints at mill; ▪ construction management and inspection of the pipeline installation contractor; ▪ 100% non-destructive testing of the circumferential girth welds at each pipe joint; ▪ complete field coating of welded joints to ensure coating is continuous along 100% of pipeline; ▪ hydrostatic testing of completed pipeline as per CSA Z662 guidelines; ▪ installation of cathodic protection systems; and ▪ installation of automated control systems, both centrally and locally, to ensure the pipeline operates within design parameters and prescribed pressure limits. <p>The Integrity Management Program would include as stated in IRR 5.6:</p> <ul style="list-style-type: none"> ▪ in-line inspection to ensure defects could be identified and proactively repaired; ▪ periodic monitoring of the pipeline cathodic protection system; ▪ continuous monitoring of product quality; ▪ periodic aerial patrols by helicopter or fixed wing aircraft; ▪ landowner/stakeholder awareness program, including periodic contacts; and ▪ pipeline markers and warning signs to indicate the presence of the pipeline. <p><u>Detection</u></p> <ul style="list-style-type: none"> ▪ automated pipeline leak detection system; ▪ pipeline system control, including 24 hours monitoring of the system operation; and ▪ an operator training program for responding to leaks and ruptures in a timely manner. <p><u>Mitigation</u></p> <ul style="list-style-type: none"> ▪ install and automate isolation valves at strategic locations to limit spill outflow volume to levels that can be adequately addressed through the execution of the Emergency Response Plan (ERP); and ▪ implement a ERP that includes <ul style="list-style-type: none"> ▪ pre-determined resources strategically situated along the route to respond to a leak or rupture identified in the outflow analysis; ▪ implement enhanced site specific plans to minimize the impact to major environmental features under various weather conditions; ▪ provide timely notification reporting to stakeholders including: landowners, local emergency responders, and government authorities; ▪ provide training and periodic exercises in the execution of the ERP.
Monitoring	<ul style="list-style-type: none"> ▪ Monitoring as required by the NEB <i>Onshore Pipeline Regulations, 1999</i>
Views of the NEB	<p>The NEB notes the various mitigation proposed by Keystone to reduce potential impacts in the event of an accident or malfunction. Given the higher consequences associated with a spill or failure in ecologically sensitive areas, including watercourses, it is</p>

	<p>recommended that any approval granted to Keystone by the NEB be conditioned such that the Board could verify that the mitigation would be specified appropriately on a site-specific basis.</p> <p>Condition D – file Emergency Response Plan (ERP) that includes the locations of environmentally sensitive areas and valve locations</p> <p>Condition P – file an ERP for pressure testing</p> <p>Condition N – file a drill execution plan for HDD</p> <p>The purpose of these conditions would be to facilitate the Board in assessing and verifying Keystone’s emergency procedures in order to consider the safety of people and the protection of property and the environment in the event of an incident or a failure.</p> <p>The NEB is of the view that Keystone’s proposed mitigation in combination with fulfillment of the above noted conditions is sufficient to minimize environmental effects due to accidents and malfunctions related to the construction and operation of the Project.</p>																				
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Refer to Table 5 for definitions of the Evaluation of Significance Criteria

6.2.2.3 Preservation and Reclamation of Native Vegetation

From Section 6.1	<ul style="list-style-type: none"> ▪ Disturbance of native range, rare ecological communities and rare plants ▪ Non-native or invasive weed introduction
Background/Issues	<p>Keystone submitted the following information in the ESA.</p> <p>Native vegetation in the Manitoba Plains has been heavily impacted by agriculture, and native grassland has been almost completely removed from the region. Riparian areas cover only 1-2% of the total land base on the prairies, and only very small areas of native vegetation remain, primarily as riparian areas along creeks and rivers. For the Keystone Project, there are 40 proposed water crossings in Manitoba and at some of those crossings native vegetation remains, i.e. trees, shrubs, grasses and rare plants.</p> <p>For Manitoba, the remaining patches of native vegetation are highly vulnerable to further fragmentation. Losing even small numbers of rare plants may affect the viability of provincial or national populations. While most of the pipeline in Manitoba is adjacent to existing pipelines, there would be 20 km of new pipeline not contiguous with existing pipelines.</p> <p>Areas adjacent to watercourses are susceptible to fragmentation, as they act as corridors for vegetation propagules, as well as for insects, birds and mammals. Each one is essential for pollination, seed dispersal and herbivory, and provide critical habitat for fish and amphibian species. In addition, species diversity may be potentially altered from the introduction and spread of non-native and invasive plant species during operation of the pipeline.</p> <p>As a result of Keystone’s operational practices in Manitoba, the ESA states that there would be effects to shrubby and wooded communities with high ecological value and rare ecological communities may be affected, as any native trees or shrubs that re-establish would be controlled to some extent. In addition, the ESA states that in riparian areas in Manitoba, vegetation maintenance during operation has the potential to reduce habitat availability throughout the lifetime of the Project.</p> <p>As stated in IRR 3.7, “All watercourse crossings with high ecological value for wildlife</p>

	<p>have been proposed as trenchless crossings due to the presence of SARA-listed species”. In IRR 3.7, Keystone has identified six water crossings with high ecological value and has provided an effects analysis for each. Keystone proposes to cross six of the watercourses using a trench-less method as confirmed in the oral public hearing, 7 June 2007, including:</p> <ul style="list-style-type: none"> ▪ Boyne River (Kp 1174.25, 1175.35, 1174.39); ▪ Shannon Creek (Kop 1201.25); ▪ Deadhorse Creek (Kp 1205.1); ▪ Unnamed Creek (Kp 1217.4); ▪ Unnamed Creek (Kp 1219.73); and ▪ Buffalo Creek (Kp 1232.86) <p>Keystone has submitted that a decrease of common native vegetation may occur as a result of Right-of-Way preparation activities such as topsoil stripping and grading, and to a limited extent clearing of woody vegetation at selected sites in Alberta. A decrease of communities of high ecological value or communities that are considered rare ecological communities may result in a reduction or loss of diversity.</p> <p>During the operation of the pipeline, Keystone indicates in the ESA that mechanical vegetation management may occur over the hotline to a total width of 10 m. The ESA further states that “[v]egetation control potentially alters the habitat of rare species observed that are currently present as understory species (i.e., all rare plant occurrences occurred as an understory)”. In addition, “...effects to shrubby and wooded communities with high ecological value and rare ecological communities may be affected as any native trees or shrubs that re-establish may be controlled to some extent during pipeline operation.”</p> <p>Keystone has submitted that vegetation management would only be undertaken where there is a need to control restricted or noxious weeds, or for safety reasons where woody vegetation has encroached across the ditchline.</p>
Mitigation Measures	<p>In addition to the standard mitigation measures in the ESA and EPP, Keystone provided additional mitigation in IRR 3.7, for the watercourses in Manitoba with high ecological value these were aimed to:</p> <ul style="list-style-type: none"> ▪ prevent the loss of individual species of rare plants and Northern Leopard Frogs; and ▪ develop site specific construction and mitigation plans for salvaging plants, reducing clearing and grading, narrowing the width of the RoW, reduced vehicle access and a proactive reclamation plan. <p>For the conservation of rare plant species occurring on the new pipeline RoW, Keystone provided the following measures in IRR 5.4:</p> <ul style="list-style-type: none"> ▪ clearly flag all rare plant sites ▪ ditchline stripping at flagged areas ▪ clean all construction equipment of vegetative materials ▪ reduce extra temporary work space ▪ reduce grading ▪ ensure there are no weed seeds in seed mixes ▪ conduct reclamation as soon after final clean-up as weather and environmental conditions permit ▪ restrict vehicle/equipment travel post reclamation ▪ install exclusion fencing to prevent grazing ▪ post construction monitoring to assess success and identify remedial areas ▪ develop vegetation management plan in consultation with ASRD and EC.
Monitoring	<ul style="list-style-type: none"> ▪ Monitoring as required by the NEB <i>Onshore Pipeline Regulations, 1999</i>
Views of the NEB	<p>The NEB is concerned with the preservation of riparian vegetation and native range along with the potential for invasive plant species to replace native vegetation as a result of the Project. The following recommended conditions would mitigate these concerns:</p>

	<p>Condition B – file the Environmental Tracking Commitments List</p> <p>Condition C – file an updated EPP that includes all commitments</p> <p>Condition M – preserve riparian vegetation at select watercourses</p> <p>The desired end result of these conditions is to: ensure all commitments and requirements are documented, tracked and available to construction staff; to ensure all mitigation measures are in the final version of the EPP; and to ensure areas with high ecological value at select watercourses are preserved.</p>																				
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6.2.2.4 Fish and Fish Habitat

From Section 6.1	<ul style="list-style-type: none"> Harmful alteration, disruption or destruction of fish habitat (including riparian vegetation) from the pipeline installation and access
Background/Issues	<p>Watercourse crossing method selection was based on an assessment of a number of factors as indicated in IRR 3.7, including:</p> <ul style="list-style-type: none"> the potential for adverse impact of fish and fish habitat; scheduling of construction to avoid instream restricted activity periods; the amount of available space to complete the crossing; the ability to reclaim the crossing and associated riparian area; and geotechnical factors.
Mitigation Measures	<p>Standard mitigation measures were provided in the Keystone ESA, the detailed watercourse data sheets and the EPP.</p>
Monitoring	<ul style="list-style-type: none"> Monitoring as required by the NEB <i>Onshore Pipeline Regulations, 1999</i>
Views of the NEB	<p>Keystone has made an adequate commitment to achieve the goal for the protection of fish and fish habitat during the construction and operation of the Project. However, Keystone has not filed the final design details for the major watercourses, nor the details for reclamation at the more sensitive watercourses. In the ESA, Appendix 11-2, Table 5.0, it is indicated that DFO requires detailed contingency plans for HDD locations. These details are also required to ensure that the design, implementation, contingency plans and reclamation at watercourses meet the expectations of the NEB.</p> <p>Keystone has committed to providing the details for the proposed HDD crossing procedures, timing, contingencies, alternative crossing methods, timelines and contingency measures with a “pending” due date.</p> <p>In order to ensure that the design, implementation, contingency plans, and reclamation at watercourses meets the expectations of the NEB, detailed information for the major watercourse crossings and HDD crossings, updates to the watercourse data sheets, and all commitments made to DFO regarding the details of watercourse crossings are required by the NEB:</p> <p>Condition H – file DFO Watercourse Compensation Plan</p> <p>Condition L – notify in advance timing for excavation of watercourse crossings</p> <p>Condition N – file HDD Drill Execution Plan</p> <p>Condition O – file change from HDD crossing to another method</p>

	If the Project is approved, a Technical Meeting with Keystone and DFO would be organized by the NEB to finalize the details of the mitigation and reclamation measures prior to the filing of the final EPP for approval by the NEB and the commencement of construction.				
Evaluation of Significance	Frequency	Duration	Reversibility	Geographical Extent	Magnitude
	Medium	Medium term	Reversible	LSA	Medium
	Adverse Effect				
	Not likely to cause significant adverse environmental effects.				

Refer to Table 5 for definitions of the Evaluation of Significance Criteria

6.2.2.5 Wildlife and Wildlife Habitat

From Section 6.1	<ul style="list-style-type: none"> ▪ Loss of wetland function, terrestrial and aquatic habitat in wetlands ▪ Disturbance to nesting birds ▪ Disturbance to SARA listed amphibians and habitat ▪ Disturbance to SARA listed and special status birds ▪ Disturbance to a SARA listed and special status mammals ▪ Disturbance to special status herptiles
Background/Issues	<p>The Keystone ESA describes the broad effects to wetlands from pipeline construction. The assessment states that wetlands provide a significant source of vegetation, bird and animal diversity and that for this Project, a high proportion of wetlands surveyed contained rare plants, life stage habitat for migratory birds, and critical habitat for SARA listed amphibian species.</p> <p>Keystone stated that due to the size of the RoW and the resulting vegetation clearing, there may be effects on local hydrology and significant effects on ephemeral, temporary and other wetlands. The ESA also stated that for toads and frogs, pipeline construction through existing ephemeral or temporary wetlands may result in a potential irreversible loss of habitat for these species if pipeline as construction negatively alters local surface and/or groundwater flow thus, impacting the hydrologic regime of the particular wetland.</p> <p>It is recommended in the ESA that when riparian areas or wetlands are encountered and re-routing (re-alignment) is not possible, that trench-less construction be used to reduce potential mortalities and to avoid destroying any amphibian habitat.</p> <p>In IRR 3.6, Keystone stated that “additional field work is planned for April 2007 to delineate the pipeline right-of-way boundary relative to wetlands where SARA-listed amphibian species have been observed or are likely to occur.” Further, Keystone commits to consult with Alberta Sustainable Resource Development and Canadian Wildlife Service “...to determine the need for further mitigation, including avoidance of wetland habitat”.</p> <p>IRR 5.7 states ...” Keystone recognizes the importance of the Policy (Federal Policy on Wetland Conservation) and its associated goals and strategies, and has accommodated the objective of no net loss of wetland function by avoiding wetlands altogether or, where avoidance is not feasible, through mitigation strategies of soils conservation and natural recovery”.</p> <p>At this time, not all of the mitigation recommendations in the ESA have been captured in the EPP and Alignment Sheets.</p>
Mitigation Measures	Keystone has submitted in IRR 3.6 that “[a]dditional Field work is planned for April 2007 to delineate the pipeline RoW boundary relative to wetlands where SARA-listed amphibian species have been observed or are likely to occur. The results of the field work, in consultation with ASRD and CWS, would be used to determine the need for further mitigation, including avoidance of wetland habitat”.

	Keystone has committed to include all mitigation measures for each of the selected sites in the EPP and on the environmental alignment sheets.																				
Monitoring	<ul style="list-style-type: none"> Monitoring as required by the NEB <i>Onshore Pipeline Regulations, 1999</i> 																				
Views of the NEB	<p>The NEB recognizes that there is potential for the Project to disturb SARA listed species, species of special status and birds protected by the <i>Migratory Bird Convention Act</i>. In addition, Keystone has further field work to complete prior to finalizing mitigation. Keystone did not clearly commit to avoiding wetlands and watercourses with SARA listed amphibian species as recommended by the ESA and the other government agencies.</p> <p>In order to verify appropriate protection of species at risk and to confirm that sufficient consultation has taken place with EC, CWS and ASRD regarding mitigation, conditions would be recommended for inclusion in any approval granted to Keystone:</p> <p>Condition I – file mitigation for amphibian species at risk</p> <p>Condition K – conduct a nesting bird survey if construction is to occur within the restricted activity period (RAP)</p> <p>If the Project is approved, a Technical Meeting with Keystone would be organized by the NEB to finalize the details of the mitigation measures prior to the filing of the final EPP and the commencement of construction.</p>																				
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6.2.2.6 Environmental Training and Qualifications

From Section 6.1	<ul style="list-style-type: none"> Implementation of mitigative measures for potential adverse environmental effects listed in Section 6.1
Background/Issues	<p>Keystone has provided general qualifications, responsibilities and training in the EPP for ensuring environmental compliance. The ESA indicated that the Environmental Inspector would provide advice on major decisions or courses of action to deal with major unexpected environmental conditions.</p> <p>In IRR 3.9 Keystone provided the following qualifications for Environmental Inspectors:</p> <ul style="list-style-type: none"> a university degree in the natural sciences a college diploma or technical certificate will be considered if the applicant has excellent credentials in the other three categories; an equivalent combination of education and experience; and Lead Environmental Inspectors would have a minimum of five years direct experience. <p>In IRR 3.9 Keystone indicated that a “comprehensive in-house training program will be conducted for all Environmental Inspection staff and any additional environmental Resource Specialists...”</p> <p>IRR 3.9 does not indicate the environmental training for construction contractor personnel, nor how competency would be measured to ensure compliance to the commitments made by Keystone to protect the environment.</p> <p>Keystone has provided general qualifications, responsibilities and training in the EPP for ensuring environmental compliance. It is noted in the EPP that the Environmental Inspector would provide <u>advice</u> on major decisions or courses of action to deal with major</p>

	<p>unexpected environmental conditions.</p> <p>In IRR 3.9 the Board asked Keystone to “[d]escribe the authority that would be given to Environmental Inspectors and related field staff to ensure implementation of environmental commitments and their respective reporting relationships”. Keystone responded that “[t]he Environmental Inspector will have overall responsibility to ensure that all environmental commitments, undertakings and conditions of authorizations are met and that work is completed in compliance with all applicable environmental regulations and Keystone policies, procedures and specifications”.</p> <p>IRR 3.9 also stated “any non-compliance, including alterations or variances to approved measures, is the responsibility of the Environmental Inspector to report to the Construction Manager”.</p> <p>During the oral public hearing, Keystone committed to providing: the environmental training syllabus for construction personnel; the authority of Environmental Inspectors for the Project; and the process for resolving disagreements regarding implementation of environmental mitigation measures.</p>																				
Views of the NEB	<p>The NEB is concerned that the Environmental Inspector has sufficient authority to initiate the appropriate action to ensure environmental compliance and that construction personnel have sufficient training to implement environmental mitigation measures.</p> <p>The NEB expects that Keystone will fulfill its commitments prior to commencement of construction. The desired end result is to confirm that Keystone has an adequate plan to communicate the EPP, commitments and approval conditions to field construction staff.</p> <p>The NEB is of the view that, should Keystone provide an adequate training and communication plan, the company would be able to ensure appropriate environmental protection.</p>																				
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6.2.2.7 Heritage and Palaeontological Resources

Background/Issues	<p>Keystone conducted an assessment of heritage and palaeontological resources as it was identified that artifacts, cultural remains and contexts would be modified or lost as a result of the proposed Project.</p> <p>A baseline review of the local and regional databases was completed in each province. This information was then supplemented by doing a Project specific Heritage Resources Impact Assessment (HRIA) for the Alberta and Manitoba portions of the Project and the proposed new development locations in Saskatchewan.</p> <p>As required, reports were forwarded to the appropriate provincial authority responsible for Heritage and Palaeontological resources for clearance to proceed with the Project.</p>
Mitigation Measures	<p>If historical or paleontological features not previously identified are found on the RoW or facility site during construction, activity in the area would be halted until the Environmental Inspector and cultural/paleontological specialists have been notified. Work would not resume until the appropriate provincial cultural and historical resources divisions has been informed and appropriate actions were taken.</p> <p>Where required by provincial authorities, further field studies to determine detailed</p>

	<p>mitigation requirements will be completed in spring 2007.</p> <p>Clearance to proceed from provincial authorities in Saskatchewan and Manitoba would be required prior to construction.</p> <p>Regarding heritage resources in Alberta, clearance for the Project to proceed was received under the Alberta <i>Historical Resources Act</i> under the following conditions:</p> <ul style="list-style-type: none"> ▪ avoidance or further study for the potentially impacted historic resources sites ▪ deep testing program in areas of high archaeological potential to contain deeply buried cultural material ▪ construction monitoring program during pipeline trenching in areas that contain significant sedimentation and potentially deeply buried cultural material and at entry and exit holes at directional drill locations ▪ restriction of construction activities to the RoW ▪ changes to development footprint would require further clearance ▪ reporting of any additional archaeological resources palaeontological resource or historic sites which may be encountered during construction and/reclamation activities <p>Regarding palaeontological resources in Alberta, clearance for the Project to proceed was received under the Alberta <i>Historical Resources Act</i> on condition that a construction monitoring program is in place and a pre-construction inspection is undertaken in three locales: South Saskatchewan River valley crossing, Red Deer River valley crossing, and Sounding Creek where glacial gravels and/or Bearpaw Formation are found. Also, if any bedrock and/or palaeontological resources are encountered during construction, provincial authorities must be contacted.</p>																				
Monitoring	<ul style="list-style-type: none"> ▪ Keystone committed to monitoring construction activities by a qualified archeologist at sites where subsurface materials may be found. ▪ Specific monitoring may be required by provincial authorities. 																				
Views of the NEB	<p>The Board notes that Keystone has forwarded reports to the provincial authorities responsible for heritage resources in Saskatchewan and Manitoba but that clearance letters have not yet been received. To ensure that any mitigation recommended by these authorities is addressed prior to construction, the NEB recommends the following condition:</p> <p>Condition G – File heritage resources clearance letters from the provincial authorities in Saskatchewan and Manitoba and implement mitigation.</p>																				
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6.2.2.8 Lands and Resources for Traditional Purposes

Background/Issues	<p>Based on consultation with Aboriginal groups and considering the location of the Project and nature of the lands impacted, Keystone determined that traditional use studies would be limited in scope. To date, no traditional use activities have been identified that would be impacted by the Project.</p> <p>The Siksika Nation has stated that given the location of the Project, there will be little, if any impacts based upon a map review of the Project area. A work plan has been developed with the Siksika for the purpose of a more in-depth review. The Dakota Nations of Manitoba have indicated since the land in the area of the Project is primarily</p>
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	<p>agricultural and privately owned, there should be minimal impacts. Discussions are ongoing to confirm this assumption.</p> <p>At the oral portion of the hearing, Standing Buffalo indicated that since all land is sacred, any construction project is an impact to their traditional beliefs. They indicated that traditional use sites are located along the existing and proposed RoW but the Elders would require some time to identify their location in relation to the pipeline.</p> <p>Keystone has agreed to continue meeting with Standing Buffalo and the Dakota Nations of Manitoba to discuss sacred sites which may be impacted by the Project in their territory.</p> <p>Keystone agreed to share further historical resources studies with Aboriginal communities for their input.</p>																				
Mitigation Measures	If it is determined through on-going consultation that traditional use sites or activities would be disturbed, Keystone has committed to adjust mitigation plans and file them with the Board in the EPP, prior to construction.																				
Views of the NEB	The Board notes that the lands required for the Project are previously disturbed, primarily used for agricultural purposes and only a small percentage is Crown land. The Board also notes that Keystone has consulted with Aboriginal groups in the area of the Project and no groups, with the exception of Standing Buffalo, have indicated a concern regarding their ability to carry out any traditional use activities. The Board notes Keystone and Standing Buffalo's commitment to discuss Project impacts and appropriate mitigation. In light of the evidence before it, it appears unlikely the current use of lands and resources for traditional purposes will be impacted by the Project and the Board is satisfied that Keystone has committed to implement and file with the Board in the EPP its mitigation plans to address any impacts to traditional use activities or sites that may arise from ongoing consultation.																				
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6.2.2.9 Land and Resource Use

Background/Issues	The Kessler Landowners Group (KLG), located near the proposed Project in Alberta, intervened in the regulatory proceeding. KLG raised concerns regarding various issues including the impact of the Project on their agricultural operations. Further discussion of their intervention is discussed in the Board's Reasons for Decision.
Mitigation Measures	<p>Keystone committed to the following measures to address concerns:</p> <ul style="list-style-type: none"> ▪ jointly develop and implement a cattle management plan with landowners ▪ based on each landowner's pasture rotation plans and a mutual understanding of the proposed construction schedule, develop measures to ensure ongoing and efficient grazing of lands adjacent to the RoW ▪ reasonable compensation for inconvenience from alteration to grazing activities, loss of grazing lands, loss of crop production and adverse commercial impacts ▪ working with landowners to determine the most efficient way to cross RoW during operation ▪ communicate construction plans and develop mitigation measures to minimize interference with agricultural operations during construction and clean-up operations

Views of the NEB	With respect to the issues raised by the KLG to be considered under the CEA Act, the Board is satisfied that all concerns have been addressed. The Board notes that Keystone has committed to on-going consultation with those impacted by the Project. Should the KLG have concerns with the Project in the future, the Board encourages the KLG to discuss them directly with Keystone.				
Evaluation of Significance	Frequency	Duration	Reversibility	Geographical Extent	Magnitude
	High	Medium Term	Reversible	PDA	Low
	Adverse Effect				
	Not likely to cause significant adverse environmental effects.				

Refer to Table 5 for definitions of the Evaluation of Significance Criteria

6.3 Cumulative Effects Assessment

Background and Methods

Cumulative effects assessment differs from conventional project-specific effects assessment in that it considers larger geographic study areas, longer time frames and other, seemingly unrelated projects or activities. The key difference between determining the significance of project-specific effects and cumulative effects is the influence of other projects and activities. Thus, the incremental cumulative effects of certain projects may be significant when considered with the effects of other projects and activities.

For assessment of cumulative effects, a project inclusion list was developed by Keystone to allow an assessment of effects of the Project in concert with other projects or activities that have been or will be done. Details of cumulative effects for each biophysical and socio-economic resource are discussed in the related sections in the ESA.

Keystone made the following findings in its cumulative effects assessment, presented according to the indicators used in the assessment, which are noted in the following bulleted list:

- *Atmospheric Environment:* Keystone predicts the Project may release CACs and HAPs from the proposed Pipeline Operational Tank Facilities, as well as from publicly known future proposed projects at the Hardisty Terminal. These contaminants may increase the existing concentrations associated with current operations, thereby contributing to cumulative effects on air quality in the surrounding region. Keystone stated that generally, all maximum predicted ground-level concentrations of H₂S, benzene and mercaptans associated with emissions from the model would be well below the referenced regulatory limits.
- *Acoustic Environment:* Keystone predicted the Enbridge Midstream Inc. (Enbridge) expansion of manifolds and booster pumps to be located at the Hardisty Complex are likely to be the largest noise sources. Keystone intends to meet provincial regulatory requirements, and the Enbridge expansion should meet Alberta Energy and Utilities Board - Guide 38 (Guide). This Guide effectively prevents incremental increases in sound levels, particularly at sensitive receptors and minimizes cumulative effects on ambient sound levels. For the pipeline and pump stations to meet the requirements of the Guide, Keystone states the criteria of 40 dB_A at 1.5 km from the facility would be met. The criteria ensure that any newly built receptors in the vicinity of energy developments would not be unduly affected.

- *Soils:* Keystone identified two projects that may overlap with this Project: the proposed Enbridge Alberta Clipper Pipeline and Enbridge's proposed Hardisty tank terminal expansion. Keystone stated the cumulative effects would be limited to the period of construction, and would decrease to background levels shortly afterwards assuming proper implementation of mitigation measures.
- *Vegetation:* Evaluation of residual effects to site specific rare ecological communities requires knowledge of detailed project footprints. Projects considered for inclusion in the Cumulative Effects Assessment (see ESA, Appendix 1A) are largely not at this detailed level of disclosure. As a result, Keystone evaluated local residual effects that were considered to be moderate to high in magnitude and long term to far future in duration. Keystone has predicted a decrease in the area of rare ecological communities as a result of construction. Its prediction is a decrease in area of < 5% in the LSA, and in the RSA (ESA, Table 8-32) resulting in an overall reduction in the area of each rare ecological community potentially effected by the Project. As stated in the Section 6.2.2.1 of this Report, Keystone proposed to mitigate such effects, and the NEB recommends a Native Range Management and Follow-up Program be developed for the construction and operation of the Project.
- *Wildlife:* Keystone submitted that although other projects are planned for the Project area, the only projects with sufficient detail to predict cumulative effects are the proposed development of the powerlines associated with the pump stations. Keystone stated powerlines can pose a threat to raptors known to perch on power poles, and the following powerlines would have a potential effect on wildlife species diversity: PS7-Monitor (6.5 km); PS9-Bindloss (14.4); PS11-Cabri (40 km). Project specific mitigation proposed by Keystone to address these issues includes avian reflectors on shield wires in high potential collision areas (e.g., watercourse crossings, adjacent to wetlands, staging and foraging areas, etc.)
- *Hydrogeology:* Keystone predicted the Enbridge Hardisty Merchant Tank Project (HMTP) to have the potential to interact with the Project and the nearby Battle River. The HMTP would construct 18 crude oil tanks with a total design capacity of 7.5 million barrels. If a spill was not contained at this site, Keystone anticipated that a sub-surface impact would follow the watertable surface towards the regional groundwater discharge area along the Battle River. Keystone concluded that since hydrocarbons float on water this impact would be hydraulically isolated from a similar occurrence at the HMTP on the west side of the Battle River. As a result, Keystone submitted that there would be no cumulative effects on groundwater.
- *Fisheries:* Keystone stated it has determined that upon review of other active or disclosed projects in the RSA, no other projects would be relevant to assessing cumulative effects on fish or habitat productive capacity in the RSAs of the Alberta and Manitoba sections of the Project.
- *Heritage Resources:* Keystone identified that other projects related to oil and gas, road construction, research projects and agricultural activities could result in cumulative effects on heritage resources but that these effects would be minimal. Keystone stated there will be no cumulative effects to palaeontological resources.
- *Lands and Resources for Traditional Purposes:* Keystone identified there no residual effects to lands and resources for traditional purposes by Aboriginal people.

The cumulative effects associated with the construction of the pump stations were considered by Keystone. Given the small magnitude and extent of the residual effects associated with

construction of the proposed pump stations, Keystone concluded that the construction of the proposed pump stations would not add significantly in a cumulative manner to the effects of existing or likely projects and activities.

Views of the Board

The NEB is of the view that the cumulative effects assessment presented by Keystone for the proposed Project fulfills the requirements outlined in the *Scope of the Factors, Keystone Pipeline* (15 March 2007).

The Board notes Keystone has committed to meeting regional, provincial and other relevant standards, guidelines and requirements. In addition, the company has proposed Project-specific mitigation that would minimize potential inter-project interactions.

The NEB is of the view that, taking into consideration Keystone's proposed Project-specific mitigation measures and the conditions that the NEB would impose should the proposed Project be approved, the proposed Project in combination with other projects or activities that have been or will be carried out, would not likely result in significant cumulative environmental effects.

6.4 Follow-Up Program

The NEB considers a follow-up program to be necessary to address potential environmental effects as specified in the tables within Section 6.2.2 of the environmental screening report.

6.5 Recommendations

The following are recommended conditions that may form part of a regulatory decision on the proposed Project under the NEB Act.

Definition for the Commencement of Construction means: clearing of vegetation, ground-breaking and other forms of right-of-way preparation that may have an impact on the environment, but does not include activities associated with normal surveying operations.

- A.** Keystone shall implement or cause to be implemented all of the policies, practices, programs, mitigation measures, recommendations and procedures for the protection of the environment included in or referred to in its application or as otherwise agreed to during questioning in the OH-1-2006 proceeding or in its related submissions.
- B.** Keystone shall maintain at its construction office(s):
 - a) an updated Keystone Environmental Tracking Commitments List listing all regulatory commitments, including but not limited to all commitments resulting from:
 - i. the NEB application and subsequent filings;
 - ii. undertakings made during the OH-1-2007 proceeding; and
 - iii. conditions from permits authorizations and approvals.

- b) copies of any permits approvals or authorizations for the applied-for facilities issued by federal, provincial or other permitting agencies, which include environmental conditions or site-specific mitigative or monitoring measures; and
- c) any subsequent variances to any permits, approvals or authorizations.

Prior to the Commencement of Construction

- C.** Keystone shall file with the Board for approval, at least 60 days prior to the commencement of construction, an updated, Project-specific Environmental Protection Plan (EPP). The EPP shall be a comprehensive compilation of all environmental protection procedures, mitigation measures, fish and wildlife restricted activity periods and monitoring commitments, as set out in Keystone's application for the Project, subsequent filings or as otherwise agreed to during questioning in the OH-1-2007 proceeding or in its related submissions. The EPP shall also include the results of additional studies conducted in 2007, updated Environmental Alignment Sheets and Watercourse Data Sheets. Construction shall not commence until Keystone has received approval of its EPP.
- D.** Keystone shall file with the Board, at least 120 days prior to submission of its first leave to open application, an Emergency Procedures Manual for the Project facilities which will include a table with: valve chainage and GPS locations; leak and rupture information; and environmental features. Keystone shall notify the Board of any modifications to the Manual as they occur. In preparing its Emergency Procedures Manual, Keystone shall refer to the Board's *Onshore Pipeline Regulations, 1999* and the corresponding Guidance Notes.
- E.** Keystone shall file with the Board for approval, at least 45 days prior to construction, a Native Range Management Plan that includes a Follow-up Program for the protection and reclamation of native range. It shall include:
 - a) on a map or Environmental Alignment Sheets, the locations where native range management and follow-up would be applied;
 - b) the measures to be applied, and an assessment of the anticipated effectiveness of the proposed mitigation and reclamation strategy;
 - c) the schedule for implementing the measures as set out in the above;
 - d) evidence demonstrating that Environment Canada, Canadian Wildlife Service and Alberta Sustainable Resource Development have reviewed and commented on the Programs;
 - e) the results, evaluation and recommendations for managing native range;
 - f) the schedule Keystone shall implement to address any unresolved concerns; and
 - g) a schedule for filing follow-up reports for native range management reports with the Board.

- F.** Keystone shall file with the Board, at least 14 days prior to the commencement of construction of the approved facilities, a detailed construction schedule or schedules identifying major construction activities and shall notify the Board of any modifications to the schedule or schedules as they occur. Keystone shall file construction progress reports on a monthly basis until completion. The reports shall include an updated construction schedule identifying major construction activities, information on activities carried out during the reporting period, any environmental and safety issues and non-compliances, and measures undertaken for the resolution of each issue and non-compliance.
- G.** Keystone shall file with the Board, at least 30 days prior to construction:
- a) the comments and recommendations received from the provincial authorities in Saskatchewan and Manitoba regarding the Heritage Resources Impact Assessment; and
 - b) for approval, the mitigation measures Keystone proposes to address the comments and recommendations in (a).
- H.** Keystone shall file any watercourse compensation plan required by Fisheries and Oceans Canada for the Project with the Board, at least 14 days prior to the planned start of excavation at watercourses identified in the plan.
- I.** Keystone shall file with the Board prior to construction, evidence to confirm that Environment Canada, Canadian Wildlife Service and Alberta Sustainable Resource Development have reviewed and commented on the proposed methods for mitigating the effects of construction and operation of the pipeline on *Species at Risk Act* listed amphibian species
- J.** Keystone shall file with the Board prior to construction, confirmation that Environment Canada, Canadian Wildlife Service (for federal lands), and Alberta Sustainable Resource Development (for Crown lands crossed in Alberta), have reviewed and accepted the proposed seed mixes to be used for the reclamation of the Project, and confirmation that these seed mixes have been obtained.

During Construction

- K.** In the event of clearing within restricted activity periods for migratory birds, Keystone shall retain a qualified avian biologist to carry out a survey to identify any migratory birds and nests. The spatial boundaries of the survey will include at least 30 m beyond the disturbance footprint for migratory birds and 100 m beyond the disturbance footprint for raptors, of the Project. Keystone shall file with the Board:
- a) evidence to confirm that Environment Canada and Canadian Wildlife Service have reviewed and commented on the proposed methods for the survey;
 - b) the results of the survey;
 - c) mitigation, including monitoring, developed in consultation with Environment Canada and Canadian Wildlife Service to protect any identified migratory birds or their nests; and
 - d) mitigation, including monitoring, developed in consultation with Environment Canada and Canadian Wildlife Service to protect any identified migratory *Species at Risk Act* birds or their nests.

- L.** Keystone shall notify the Board 14 days prior to the commencement of excavation of any watercourse crossing that has been assessed for fish and fish habitat.
- M.** Keystone shall preserve the riparian vegetation during construction and operation of the pipeline for each of the watercourses listed by KP and name: Boyne River 1174.25, 1174.35, 1174.39; Shannon Creek 1201.25; Deadhorse Creek 1205.1; Unnamed 1217.4; Unnamed 1219.73; and Buffalo Creek 1232.86.
- N.** Keystone shall file with the Board, at least 14 days prior to horizontal directional drill (HDD) activities at the Red Deer River, South Saskatchewan River and Boyne River and any additional locations where HDD may take place, a drill execution plan specific to each crossing. Guidance for execution plans can be found in CAPP Publication, “Planning Horizontal Directional Drilling for Pipeline Construction”. The execution plans shall consider the following:
 - a) use of drill bit detecting and tracking equipment to confirm the drill path;
 - b) workspace requirements for equipment at entry and exit points;
 - c) workspace requirements to construct and layout the pipe drag section;
 - d) drilling mud and water requirements;
 - e) environmental protection and monitoring plan;
 - f) drilling fluid management plans;
 - g) spill or fluid loss contingency, response, cleanup and mitigation plans;
 - h) equipment specifications, condition, and integrity; and
 - i) mitigation of potential detrimental effects of geological formations.
- O.** Keystone shall:
 - a) notify the Board in writing of any change from the proposed HDD watercourse crossing methods including those undertaken to comply with CSA Z662-07, and the reasons for that change prior to implementation;
 - b) provide copies of all correspondence from regulatory authorities relating to the changed crossing method; and
 - c) file for approval, within 30 days of implementing the changed watercourse crossing method, a description of amended reclamation and re-vegetation measures for the affected watercourse crossings.
- P.** Keystone shall file with the Board, at least 30 days prior to pressure testing, an emergency response plan for pressure testing activities, including response to a pressure test failure, for each of the following:
 - a) New pipeline segments;
 - b) Pump stations; and
 - c) Tanks.

Post Construction

- Q.** Keystone shall file with the Board, 6 months after the commencement of operation, and on or before the 31st January for each of the subsequent 5 years, a post-construction environmental monitoring report that:
- a) provides a summary of the effectiveness of the environmental mitigation measures applied during construction;
 - b) identifies deviations from plans and alternate mitigation applied as approved by the Board;
 - c) identifies locations on a map or diagram where corrective action was taken during construction and the current status of corrective actions;
 - d) provides proposed measures and the schedule Keystone shall implement to address any unresolved concerns; and
 - e) evaluates the success of:
 - i. re-vegetation as measured against a 85% survival rate of recommended plantings;
 - ii. non-native plant vegetation management.
- R.** Keystone shall file with the Board for approval, at least 30 days prior to the planned start of operation, a project specific Environmental Protection Program for the operation and maintenance of the pipeline pursuant to section 48 of the *Onshore Pipeline Regulations, 1999*. The Program shall include practices and procedures for:
- a) ongoing environmental training for employees;
 - b) the handling and disposal of all wastes associated with the operation and maintenance of the pipeline;
 - c) vegetation management;
 - d) erosion control on the right-of-way;
 - e) the management of air and noise emissions;
 - f) soil conservation;
 - g) travel on the right-of-way; and
 - h) environmental monitoring and surveillance of the right-of-way.
- S.** Keystone shall file with the Board, at least 30 days prior to the commencement of operations, Keystone's Project-specific internal standards and practices for the protection of the environment referenced in its application and related submissions in the OH-1-2007 proceeding.

7.0 THE NEB'S CONCLUSION

The Board has determined, pursuant to the CEA Act, that, if the Project is approved and taking into account the implementation of Keystone's proposed mitigation measures, compliance with the Board's regulatory requirements and the recommended conditions attached to the ESR, the construction and operation of the pipeline and associated facilities is not likely to cause significant adverse environmental effects.

This Environmental Screening Report was approved by the NEB on 6 September 2007.

8.0 NEB CONTACT

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ADMINISTRATIVE TRIBUNALS ACT

CHAPTER 45 [SBC 2004]

[includes 2007 Bill 33 (B.C. Reg. 311/2007) amendments (effective Oct. 18, 2007)]

Definitions**1.** In this Act:**"applicant"** includes an appellant, a claimant or a complainant;**"application"** includes an appeal, a review or a complaint but excludes any interim or preliminary matter or an application to the court;**"appointing authority"** means the person or the Lieutenant Governor in Council who, under another Act, has the power to appoint the chair, vice chair and members, or any of them, to the tribunal;**"constitutional question"** means any question that requires notice to be given under section 8 of the *Constitutional Question Act*;**"court"** means the Supreme Court;**"decision"** includes a determination, an order or other decision;**"dispute resolution process"** means a confidential and without prejudice process established by the tribunal to facilitate the settlement of one or more issues in dispute;**"intervener"** means a person who is permitted by the tribunal to participate as an intervener in an application;**"member"** means a person appointed to the tribunal to which a provision of this Act applies;**"privative clause"** means provisions in the tribunal's enabling Act that give the tribunal exclusive and final jurisdiction to inquire into, hear and decide certain matters and questions and provide that a decision of the tribunal in respect of the matters within its jurisdiction is final and binding and not open to review in any court;**"tribunal"** means a tribunal to which some or all of the provisions of this Act are made applicable under the tribunal's enabling Act;**"tribunal's enabling Act"** means the Act under which the tribunal is established or continued.

2004-45-1.

**Tribunal without jurisdiction
over constitutional questions**

- 44.** (1) The tribunal does not have jurisdiction over constitutional questions.
 (2) Subsection (1) applies to all applications made before, on or after the date that the subsection applies to a tribunal.

(ADD)
Oct
21/04

2004-45-44; 2004-57-4.

CONSTITUTIONAL QUESTION ACT

CHAPTER 68 [RSBC 1996]

[There have been no amendments to this Act since the 1996 Statute Revision.]

Notice of questions of validity or applicability

8. (1) In this section:

"**constitutional remedy**" means a remedy under section 24 (1) of the *Canadian Charter of Rights and Freedoms* other than a remedy consisting of the exclusion of evidence or consequential on such exclusion;

"**law**" includes an enactment and an enactment within the meaning of the *Interpretation Act* (Canada).

(2) If in a cause, matter or other proceeding

- (a) the constitutional validity or constitutional applicability of any law is challenged, or
- (b) an application is made for a constitutional remedy,

the law must not be held to be invalid or inapplicable and the remedy must not be granted until after notice of the challenge or application has been served on the Attorney General of Canada and the Attorney General of British Columbia in accordance with this section.

(3) If in a cause, matter or other proceeding the validity or applicability of a regulation is challenged on grounds other than the grounds referred to in subsection (2) (a), the regulation must not be held to be invalid or inapplicable until after notice of the challenge has been served on the Attorney General of British Columbia in accordance with this section.

(4) The notice must

- (a) be headed in the cause, matter or other proceeding,
- (b) state
 - (i) the law in question, or
 - (ii) the right or freedom alleged to be infringed or denied,
- (c) state the day on which the challenge or application under subsection (2) or (3) is to be argued, and
- (d) give particulars necessary to show the point to be argued.

(5) The notice must be served at least 14 days before the day of argument unless the court authorizes a shorter notice.

(6) If in a cause, matter or other proceeding to which this section applies the Attorney General of British Columbia appears, the Attorney General is a party and, for the purpose of an appeal from an adjudication respecting the validity or applicability of a law, or respecting entitlement to a constitutional remedy, has the same rights as any other party.

(7) If in a cause, matter or other proceeding to which this section applies the Attorney General of Canada appears, the Attorney General of Canada is a party and, for the

purpose of an appeal from an adjudication respecting the validity or applicability of a law, or respecting entitlement to a constitutional remedy, has the same rights as any other party.

RS1979-63-8; 1982-5-1.

INDIAN ACT [FEDERAL]

CHAPTER R.S., 1985, c. I-5

[current to December 9, 2008]

INTERPRETATION

Definitions

2. (1) In this Act,

"**band**" means a body of Indians

- (a) for whose use and benefit in common, lands, the legal title to which is vested in Her Majesty, have been set apart before, on or after September 4, 1951,
- (b) for whose use and benefit in common, moneys are held by Her Majesty, or
- (c) declared by the Governor in Council to be a band for the purposes of this Act;

"**Band List**" means a list of persons that is maintained under section 8 by a band or in the Department;

"**child**" includes a legally adopted child and a child adopted in accordance with Indian custom;

"**common-law partner**", in relation to an individual, means a person who is cohabiting with the individual in a conjugal relationship, having so cohabited for a period of at least one year;

"**council of the band**" means

- (a) in the case of a band to which section 74 applies, the council established pursuant to that section,
- (b) in the case of a band to which section 74 does not apply, the council chosen according to the custom of the band, or, where there is no council, the chief of the band chosen according to the custom of the band;

"**Department**" means the Department of Indian Affairs and Northern Development;

"**designated lands**" means a tract of land or any interest therein the legal title to which remains vested in Her Majesty and in which the band for whose use and benefit it was set apart as a reserve has, otherwise than absolutely, released or surrendered its rights or interests, whether before or after the coming into force of this definition;

"**elector**" means a person who

- (a) is registered on a Band List,
- (b) is of the full age of eighteen years, and
- (c) is not disqualified from voting at band elections;

"**estate**" includes real and personal property and any interest in land;

"**Indian**" means a person who pursuant to this Act is registered as an Indian or is entitled to be registered as an Indian;

"Indian moneys" means all moneys collected, received or held by Her Majesty for the use and benefit of Indians or bands;

"Indian Register" means the register of persons that is maintained under section 5;

"intoxicant" includes alcohol, alcoholic, spirituous, vinous, fermented malt or other intoxicating liquor or combination of liquors and mixed liquor a part of which is spirituous, vinous, fermented or otherwise intoxicating and all drinks, drinkable liquids, preparations or mixtures capable of human consumption that are intoxicating;

"member of a band" means a person whose name appears on a Band List or who is entitled to have his name appear on a Band List;

"mentally incompetent Indian" means an Indian who, pursuant to the laws of the province in which he resides, has been found to be mentally defective or incompetent for the purposes of any laws of that province providing for the administration of estates of mentally defective or incompetent persons;

"Minister" means the Minister of Indian Affairs and Northern Development;

"registered" means registered as an Indian in the Indian Register;

"Registrar" means the officer in the Department who is in charge of the Indian Register and the Band Lists maintained in the Department;

"reserve"

- (a) means a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band, and
- (b) except in subsection 18(2), sections 20 to 25, 28, 36 to 38, 42, 44, 46, 48 to 51, 58 to 60 and the regulations made under any of those provisions, includes designated lands;

"superintendent" includes a commissioner, regional supervisor, Indian superintendent, assistant Indian superintendent and any other person declared by the Minister to be a superintendent for the purposes of this Act, and with reference to a band or a reserve, means the superintendent for that band or reserve;

"surrendered lands" means a reserve or part of a reserve or any interest therein, the legal title to which remains vested in Her Majesty, that has been released or surrendered by the band for whose use and benefit it was set apart;

"survivor", in relation to a deceased individual, means their surviving spouse or common-law partner.

- (2) **Definition of "band"** - The expression "band", with reference to a reserve or surrendered lands, means the band for whose use and benefit the reserve or the surrendered lands were set apart.
- (3) **Exercise of powers conferred on band or council** - Unless the context otherwise requires or this Act otherwise provides,
 - (a) a power conferred on a band shall be deemed not to be exercised unless it is exercised pursuant to the consent of a majority of the electors of the band; and
 - (b) a power conferred on the council of a band shall be deemed not to be exercised unless it is exercised pursuant to the consent of a majority of the councillors of the band present at a meeting of the council duly convened.

R.S., 1985, c. I-5, s. 2; R.S., 1985, c. 32 (1st Supp.), s. 1, c. 17 (4th Supp.), s. 1; 2000, c. 12, s. 148.

Grants, etc., of reserve lands void

- 28.** (1) Subject to subsection (2), any deed, lease, contract, instrument, document or agreement of any kind, whether written or oral, by which a band or a member of a band purports to permit a person other than a member of that band to occupy or use a reserve or to reside or otherwise exercise any rights on a reserve is void.
- (2) **Minister may issue permits** - The Minister may by permit in writing authorize any person for a period not exceeding one year, or with the consent of the council of the band for any longer period, to occupy or use a reserve or to reside or otherwise exercise rights on a reserve.

R.S., c. I-6, s. 28.

LANDS TAKEN FOR PUBLIC PURPOSES

Taking of lands by local authorities

35. (1) Where by an Act of Parliament or a provincial legislature Her Majesty in right of a province, a municipal or local authority or a corporation is empowered to take or to use lands or any interest therein without the consent of the owner, the power may, with the consent of the Governor in Council and subject to any terms that may be prescribed by the Governor in Council, be exercised in relation to lands in a reserve or any interest therein.
- (2) **Procedure** - Unless the Governor in Council otherwise directs, all matters relating to compulsory taking or using of lands in a reserve under subsection (1) are governed by the statute by which the powers are conferred.
- (3) **Grant in lieu of compulsory taking** - Whenever the Governor in Council has consented to the exercise by a province, a municipal or local authority or a corporation of the powers referred to in subsection (1), the Governor in Council may, in lieu of the province, authority or corporation taking or using the lands without the consent of the owner, authorize a transfer or grant of the lands to the province, authority or corporation, subject to any terms that may be prescribed by the Governor in Council.
- (4) **Payment** - Any amount that is agreed on or awarded in respect of the compulsory taking or using of land under this section or that is paid for a transfer or grant of land pursuant to this section shall be paid to the Receiver General for the use and benefit of the band or for the use and benefit of any Indian who is entitled to compensation or payment as a result of the exercise of the powers referred to in subsection (1).

R.S., c. I-6, s. 35.

NATIONAL ENERGY BOARD ACT [FEDERAL]

CHAPTER N-7 [R.S. 1985]

[includes 2004 Chap. 25 amendments]

Issuance

52. The Board may, subject to the approval of the Governor in Council, issue a certificate in respect of a pipeline if the Board is satisfied that the pipeline is and will be required by the present and future public convenience and necessity and, in considering an application for a certificate, the Board shall have regard to all considerations that appear to it to be relevant, and may have regard to the following:
- (a) the availability of oil, gas or any other commodity to the pipeline;
 - (b) the existence of markets, actual or potential;
 - (c) the economic feasibility of the pipeline;
 - (d) the financial responsibility and financial structure of the applicant, the methods of financing the pipeline and the extent to which Canadians will have an opportunity of participating in the financing, engineering and construction of the pipeline; and
 - (e) any public interest that in the Board's opinion may be affected by the granting or the refusing of the application.

R.S., 1985, c. N-7, s. 52; 1990, c. 7, s. 18; 1996, c. 10, s. 238.

Terms and conditions of certificates

54. (1) The Board may issue a certificate subject to such terms and conditions as the Board considers necessary or desirable in the public interest.
- (2) [Repealed, 1990, c. 7, s. 19]

R.S., 1985, c. N-7, s. 54; 1990, c. 7, s. 19.

UTILITIES COMMISSION ACT

CHAPTER 473 [RSBC 1996]

[includes B.C. Reg. 18/2010, Sch. 3 amendments (effective Jan. 15, 2010)]

Certificate of public convenience and necessity

- (AM)
May
29/03
45. (1) Except as otherwise provided, after September 11, 1980, a person must not begin the construction or operation of a public utility plant or system, or an extension of either, without first obtaining from the commission a certificate that public convenience and necessity require or will require the construction or operation.
- (2) For the purposes of subsection (1), a public utility that is operating a public utility plant or system on September 11, 1980 is deemed to have received a certificate of public convenience and necessity, authorizing it
- (a) to operate the plant or system, and
- (b) subject to subsection (5), to construct and operate extensions to the plant or system.
- (3) Nothing in subsection (2) authorizes the construction or operation of an extension that is a reviewable project under the *Environmental Assessment Act*.
- (4) The commission may, by regulation, exclude utility plant or categories of utility plant from the operation of subsection (1).
- (5) If it appears to the commission that a public utility should, before constructing or operating an extension to a utility plant or system, apply for a separate certificate of public convenience and necessity, the commission may, not later than 30 days after construction of the extension is begun, order that subsection (2) does not apply in respect of the construction or operation of the extension.
- (6) A public utility must file with the commission at least once each year a statement in a form prescribed by the commission of the extensions to its facilities that it plans to construct.
- (REP)
May
01/08
- (6.1) and (6.2) *Repealed.* [2008-13-8]
- (7) Except as otherwise provided, a privilege, concession or franchise granted to a public utility by a municipality or other public authority after September 11, 1980 is not valid unless approved by the commission.
- (8) The commission must not give its approval unless it determines that the privilege, concession or franchise proposed is necessary for the public convenience and properly conserves the public interest.
- (9) In giving its approval, the commission
- (a) must grant a certificate of public convenience and necessity, and
- (b) may impose conditions about
- (i) the duration and termination of the privilege, concession or franchise, or
- (ii) construction, equipment, maintenance, rates or service,
- as the public convenience and interest reasonably require.
- 1980-60-51, 52; 1994-35-103; 2003-46-6; 2008-13-8.

Procedure on application

46. (1)

An applicant for a certificate of public convenience and necessity must file with the commission information, material, evidence and documents that the commission prescribes.

- (2) The commission has a discretion whether or not to hold any hearing on the application.
- (AM)
May
01/08
- (3) Subject to subsections (3.1) and (3.2), the commission may issue or refuse to issue the certificate, or may issue a certificate of public convenience and necessity for the construction or operation of a part only of the proposed facility, line, plant, system or extension, or for the partial exercise only of a right or privilege, and may attach to the exercise of the right or privilege granted by the certificate, terms, including conditions about the duration of the right or privilege under this Act as, in its judgment, the public convenience or necessity may require.
- (ADD)
May
01/08
- (3.1) In deciding whether to issue a certificate under subsection (3), the commission must consider
- (a) the government's energy objectives,
 - (b) the most recent long-term resource plan filed by the public utility under section 44.1, if any, and
 - (c) whether the application for the certificate is consistent with the requirements imposed on the public utility under sections 64.01 and 64.02, if applicable.
- (ADD)
May
01/08
- (3.2) Section (3.1) does not apply if the commission considers that the matters addressed in the application for the certificate were determined to be in the public interest in the course of considering a long-term resource plan under section 44.1.
- (4) If a public utility desires to exercise a right or privilege under a consent, franchise, licence, permit, vote or other authority that it proposes to obtain but that has not, at the date of the application, been granted to it, the public utility may apply to the commission for an order preliminary to the issue of the certificate.
- (5) On application under subsection (4), the commission may make an order declaring that it will, on application, under rules it specifies, issue the desired certificate, on the terms it designates in the order, after the public utility has obtained the proposed consent, franchise, licence, permit, vote or other authority.
- (6) On evidence satisfactory to the commission that the consent, franchise, licence, permit, vote or other authority has been secured, the commission must issue a certificate under section 45.
- (7) The commission may amend a certificate previously issued, or issue a new certificate, for the purpose of renewing, extending or consolidating a certificate previously issued.
- (8) A public utility to which a certificate is, or has been, issued, or to which an exemption is, or has been, granted under section 45 (4), is authorized, subject to this Act, to construct, maintain and operate the plant, system or extension authorized in the certificate or exemption.

1980-60-53; 1982-54-16; 1983-10-21, 23; 2008-13-9.

Findings of fact conclusive

79. The determination of the commission on a question of fact in its jurisdiction, or whether a person is or is not a party interested within the meaning of this Act, is binding and conclusive on all persons and all courts.

1980-60-94.

Reconsideration by commission

99. The commission may reconsider, vary or rescind a decision, order, rule or regulation made by it, and may rehear an application before deciding it.
1980-60-114 (1).

Appeal to Court of Appeal

101. (1) An appeal lies from a decision or order of the commission to the Court of Appeal with leave of a justice of that court.
- (2) The party appealing must give notice of the application for leave to appeal, stating the grounds of appeal, to the commission, to the Attorney General and to any party adverse in interest, at least 2 clear days before the hearing of the application.
- (3) If leave is granted, within 15 days from the granting, the appellant must give notice of appeal to the commission, to the Attorney General, and to any party adverse in interest.
- (4) The commission and the Attorney General may be heard by counsel on the appeal.
- (5) On the determination of the questions involved in the appeal, the Court of Appeal must certify its opinion to the commission, and an order of the commission must conform to that opinion.

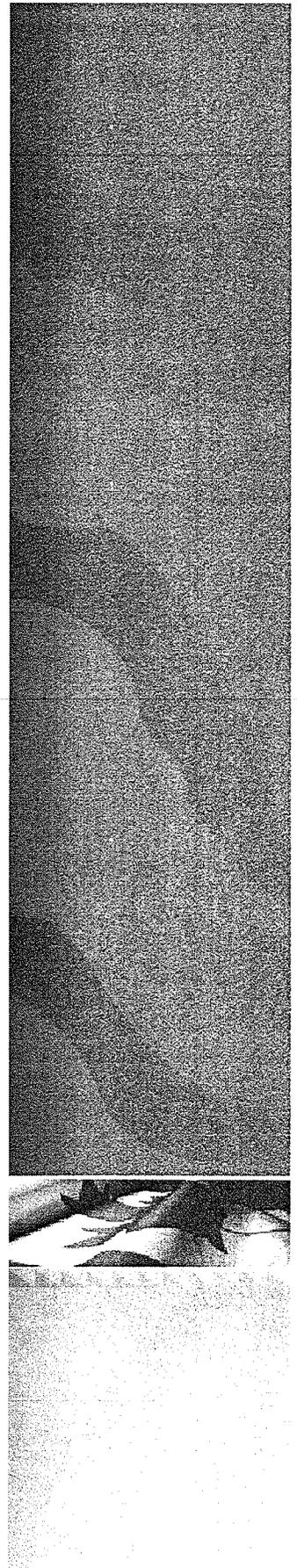
1980-60-115 to 117, 121; 1982-7-107.



Indian and Northern
Affairs Canada

Affaires indiennes
et du Nord Canada

LAND MANAGEMENT MANUAL



Directive 9-1

Transactions Under Section 35

1. Purpose

- 1.1 This document explains when and how reserve lands may be transferred or granted under section 35 of the *Indian Act*.

2. General

- 2.1 Definitions in this directive:

- a) **Exchange Lands**, means lands held by the expropriating authority that form part or all of the compensation to a First Nation for a Section 35 Transaction.
- b) **Expropriating authority**, means a provincial government, a municipal or local authority, or a corporation that federal or provincial law authorizes to take or to use lands or any interest in lands without the consent of the landowner.
- c) **Fact Letter**, means a letter from Canada sent both to a First Nation and to the expropriating authority setting out the substantive facts (including compensation, legal descriptions, the handling of third party interests and other requirements set out in the Federal Requirements List) of the Section 35 Transaction.
- d) **Fair Market Value**, means the most probable price that a property will bring in a competitive and open market under all conditions requisite to a fair transaction and not affected by undue stimulus, with the seller and purchaser each acting prudently and knowledgeably, and assuming that the property is held by the seller in fee simple (notwithstanding that the property may have been reserve lands and inalienable except to the Crown) and has no charges or encumbrances existing against title.
- e) **Federal Requirements List**, means the list of standard legal and policy requirements of Canada necessary to process a Section 35 Transaction, as set out in Annex C: Federal Requirements List.

- f) **Land Status Report**, means a report that contains all the pertinent information regarding the encumbrances and/or interests on a particular parcel of reserve land. The report contains information from the Indian Lands Registry, and appropriate departmental files. The report identifies existing registered interests such as leases, permits, easements, Certificates of Possession, or encumbrances such as cardex holdings or surrenders. It should also contain information on former reserve lands which the expropriating authority may be transferring to Canada; the Lands officer should determine whether there are reversionary interests attached to such former reserve lands.
- g) **Locatee Lands**, means reserve lands which have been validly allotted under section 20 of the *Indian Act*, to which lawful possession is generally evidenced by a Certificate of Possession. Lawful possession is also held under "No Evidence of Title Issued" (NETIs), location tickets, Notices of Entitlement (NEs), or cardex holdings.
- h) Official Plan or **CLSR Survey**, means a graphical description of the boundaries of land prepared from field notes of a survey, confirmed pursuant to section 29, 39, 42, 43, or 44 of the *Canada Lands Surveys Act*.
- i) **Section 24 or 49 Transfer**, means a transfer of the right to possession of lands in a reserve by one or more locatees to the First Nation pursuant to sections 24 or 49 of the *Indian Act*, and approved by the Minister, to facilitate a Section 35 Transfer.
- j) **Section 35 Agreement**, means a final agreement between a First Nation Council and the expropriating authority, usually in the form of a letter or memorandum of understanding with respect to a Section 35 Transaction. This Section 35 Agreement must satisfy the requirements set out in **Annex C: Federal Requirements List**.
- k) **Section 35 Easement**, means the grant or transfer of less than a full interest in reserve lands to an expropriating authority for a specific purpose. When Canada grants or transfers less than a full interest under Section 35 of the *Indian Act*, the underlying interest remains with Canada and continues to have "reserve" status.
- l) **Section 35 Lands**, means reserve lands which are subject to either a proposed Section 35 Transfer or a proposed Section 35 Easement.

- m) **Section 35 Transaction**, is a generic term used to describe a Section 35 Transfer, or a Section 35 Easement, authorized pursuant to section 35 of the *Indian Act* and pursuant to the *Federal Real Property and Federal Immovables Act* ("FRPFIA").
 - n) **Section 35 Transfer**, means the grant or transfer of a full interest in reserve lands to an expropriating authority, in lieu of the expropriating authority acquiring the lands without the consent of the owner pursuant to its expropriation powers. The grant or transfer is usually made for a specific purpose and is subject to a requirement that the lands be returned to Canada when no longer needed for that purpose.
- 2.2 Various federal and provincial statutes allow the taking of private lands by provincial or municipal governments, a local authority and certain corporations. Such takings are known as expropriations. Normally, such powers of expropriation cannot be applied to reserve lands. However, under Section 35 of the *Indian Act* the Governor in Council may consent to the taking or using of reserve lands by an expropriating authority. After the Governor in Council consents to the taking or using of the lands, the lands may be taken or used under the expropriating legislation, or the Governor in Council may authorize a transfer or grant of the lands to the expropriating authority. The authorization of any Section 35 Transfer or Section 35 Easement is subject to any terms that the Governor in Council may prescribe.
- 2.3 Where the Governor in Council authorizes a Section 35 Transfer or Section 35 Easement, the actual grant or transfer is done under the FRPFIA.
- 2.4 A Section 35 Transaction triggers certain Crown responsibilities to the First Nation whose land is the subject of the transaction. In this respect, the Crown is obliged to ensure minimal impairment of the reserve lands by consenting to, granting or transferring only the minimum interest required in order to fulfill the public purpose for which the land is required. It should also be noted that the Governor in Council cannot consent to the taking or using of, nor authorize a grant or transfer of, a greater interest in land than the expropriating authority is authorized to take under its own expropriating legislation. The lands officer should determine (in accordance with any applicable policy or procedures or in consultation with the policy sector of the department and with DOJ) that sufficient evidence exists to support the conclusion that only a minimal interest in the reserve will be granted or transferred. In addition, departmental staff should carefully document all government dealings with the First Nation and the expropriating authority concerning the nature and extent of the interest to be granted under Section 35.

- 2.5 The policy set out in this Chapter is a national policy. However, departmental staff should be aware that it may be necessary for each region to address the specific needs of their respective province(s) in relation to Section 35 Transactions by a province.

3. General: Legal Interests Involved

- 3.1 The nature of the legal interests involved in Section 35 Transactions varies depending on the statutory power of the expropriating authority and the purpose for which the authority requires the land.
- 3.2 Legal title to reserve lands is vested in the federal Crown.
- 3.3 Under Section 35, if the statutory expropriation powers of the expropriating authority allow for the taking or using of a full interest, Canada may convey its full interest in the reserve land or it may convey a lesser interest, such as an easement.
- 3.4 The means used to convey Canada's interest depends on the nature of the expropriating authority. For example:
- a) When Canada conveys an interest in the reserve land to a municipal or local authority or a corporation, it "grants" that interest to the expropriating authority.
 - b) When Canada conveys an interest in reserve lands to a provincial government, it does not transfer the interest but "transfers the administration and control" of that interest in the lands.
- 3.5 When Canada grants its full interest to a municipal or local authority or a corporation, or when it transfers the administration and control **of its full interest** to a provincial authority, the granted or transferred lands lose their "reserve" status.
- 3.6 An easement is a right of use over the property of another. When Canada grants or transfers the administration and control of an easement under Section 35, the underlying interest remains with the Crown and continues to have "reserve" status.

- 3.7 As a matter of policy, when Canada grants or transfers the administration and control of any interest in reserve lands under Section 35, the Crown expressly retains a reversionary interest in those lands. The effect of this reversionary interest is that when the expropriating authority no longer requires the land for the purpose for which they acquired it, the interest granted or transferred is returned to Canada. This land is returned to Canada, but is not necessarily returned as reserve.

4. General: Use of Section 35

- 4.1 While not a requirement of the *Indian Act*, Section 35 is usually used when an expropriating authority has negotiated an arrangement with the First Nation. The First Nation then asks Canada to grant or transfer the land or an interest in the land to the expropriating authority. If granting or transferring a less intrusive or destructive interest in the land can meet the expropriating authority's need for the land, it is the department's obligation to use the less intrusive option. At the very least, the best practice would be for the department to make the First Nation aware of the less intrusive option, if there is one.
- 4.2 Section 35 Easements are commonly used when a public utility requires land to run transmission lines through a reserve. Examples of such Section 35 Easements are aerial easements for high tension transmission lines and underground easements for pipelines, water lines and gas lines. However, following the *Opetchesah* decision, many of these may be given by way of section 28(2).
- 4.3 The following example illustrates the range of uses which section 35 may satisfy. Remember that the expropriating authority's expropriation legislation must allow the proposed use and must allow for the expropriation of the interest proposed to be transferred; ie., the full or fee simple interest if that is the interest proposed to be transferred. Whenever possible, grant a less intrusive interest, such as a lease or permit, in any of the following situations.
- 4.4 When a grant or transfer of an interest in reserve land by the use of a Section 35 Transaction is proposed to be completed, the expropriating authority must provide the department with the following:
- a) evidence of its statutory power to expropriate the interest (tenure) it proposes be transferred to it;
 - b) a written rationale adequate to justify why such tenure is necessary for the use for which the land is proposed to be granted or transferred; and

- c) the methodology for assessing the value of the compensation proposed to be paid to the First Nation, which compensation should be shown to compensate for the full Fair Market Value and for the loss to the First Nation of the benefit of reserve status of the land to be granted or transferred. The First Nation's consent must acknowledge the granting or transferring of such an interest.

5. Authorities

5.1 Section 35 of the *Indian Act* states that:

- 35(1) *Where by an Act of Parliament or a provincial legislature Her Majesty in right of a province, a municipal or local authority or a corporation is empowered to take or to use lands or any interest therein without the consent of the owner, the power may, with the consent of the Governor in Council and subject to any terms that may be prescribed by the Governor in Council, be exercised in relation to lands in a reserve or any interest therein.*
- (2) *Unless the Governor in Council otherwise directs, all matters relating to compulsory taking or using of lands in a reserve under subsection (1) are governed by the statute by which the powers are conferred.*
- (3) *Whenever the Governor in Council has consented to the exercise by a province, a municipal or local authority or a corporation of the powers referred to in subsection (1), the Governor in Council may, in lieu of the province, authority or corporation taking or using the lands without the consent of the owner, authorize a transfer or grant of the lands to the province, authority or corporation, subject to any terms that may be prescribed by the Governor in Council.*
- (4) *Any amount that is agreed on or awarded in respect of the compulsory taking or using of land under this section or that is paid for a transfer or grant of land pursuant to this section shall be paid to the Receiver General for the use and benefit of the band or for the use and benefit of any Indian who is entitled to compensation or payment as a result of the exercise of the powers referred to in subsection (1).*

- 5.2 Section 35 creates a two-step process for the authorization of transfers or grants to expropriating authorities. The two steps are processed concurrently. First, consent to the taking or using of reserve lands is given under subsection 35(1) by Order-in-Council. Second, the transfer or grant of reserve lands is authorized under subsection 35(3) by Order-in-Council, or the lands are taken or used under the applicable expropriating legislation under subsection 35(2).

5.3 The provisions of FRPFIA govern the actual transfer or grant of an interest in reserve lands. The FRPFIA creates a mechanism for the conveyance of interests in federal lands. The following provisions are most relevant to section 35 grants or transfers:

2. *In this Act, ... "interest" means*
 - (a) *in relation to land in any province other than Quebec, any estate, right title or interest in or to the land, and includes an easement, a servitude and a lease ...*
4. *Subject to any other Act, no disposition or lease of federal real property or federal immovables shall be made and no licence shall be given in respect of any such property except in accordance with this Act.*
- 5.(1) *Federal real property may be granted and federal immovables may be conceded*
 - (a) *by letters patent under the Great Seal; or*
 - (b) *by an instrument of grant or an act of concession, in a form satisfactory to the Minister of Justice, stating that it has the same force and effect as if it were letters patent.*
- (2) *Federal real property and federal immovables within Canada may, at the discretion of the Minister of Justice, be granted or conceded, as the case may be, by any instrument or act by which, under the laws in force in the province in which the property is situated, real property and immovables may be transferred by a natural person.*
- 11.(1) *An instrument transferring administration and control of federal real property or an act transferring administration and control of federal immovables to Her Majesty in any right other than Canada pursuant to regulations made under paragraph 16(2)(e) shall be signed by the Minister having the administration of the property and countersigned by the Minister of Justice.*
- (2) *A grant, concession, vesting order or other conveyancing instrument or transfer act in favour of Her Majesty in respect of any real property or immovable belonging to Her Majesty in any right other than Canada results, on its acceptance, in Her Majesty having administration and control of the property.*

5.4 The regulations under FRPFIA further provide that:

- 5.(1) *A Minister may transfer to Her Majesty in right of a province, by instrument satisfactory to the Minister of Justice, the administration and control of the entire or any lesser interest of Her Majesty in any federal real property, either in perpetuity or for any lesser term.*
- (2) *A Minister may accept on behalf of Her Majesty a transfer of the administration and control satisfactory to the Minister of Justice of the entire or any lesser interest of Her Majesty in right of a province in any real property, including such transfers made by grant, vesting order or other conveyancing instrument, either in perpetuity or for any lesser term.*

11.(1) *The Minister of Justice shall establish and operate a document depository at the Department of Justice that shall contain copies of the following instruments:*

- (a) *grants of federal real property ...*
- (b) *transfers of administration and control of real property and acceptances of such transfers;*

6. Policy

- 6.1 The expropriating authority must obtain First Nation Council's consent before seeking the Governor in Council's consent to the taking or using of reserve lands. The taking or using of reserve lands without First Nation consent must only be sought in exceptional circumstances, with the support of departmental headquarters and the Department of Justice ("DOJ").
- 6.2 The department will not assume an active role in negotiations between the expropriating authority and the First Nation unless requested by the First Nation, and/or a locatee. It is up to the First Nation and the locatees to retain their own expert advisors, including legal counsel. In most cases Canada's role is limited to the administration of the details set out in this Policy. The First Nation and all locatees must obtain independent legal advice whether or not Canada has consented to assist them.
- 6.3 The final **Section 35 Agreement** between the expropriating authority and the First Nation must address, at a minimum, the following points:
- a) **Purpose:** The purpose of the Section 35 Agreement is to clearly articulate the terms agreed to by the First Nation and the expropriating authority.
 - b) **Compensation:** The payment of compensation does not authorize the use or occupation of the lands. Compensation is paid to the Receiver General for Canada to be held in suspense until the Order-in-Council is passed, and the Section 35 Transaction is completed under FRPFIA.
 - c) **Minerals:** Canada retains all rights to mines and minerals and their extraction.
 - d) **Surveys and Land Descriptions:** The expropriating authority must provide a registerable legal description for both Section 35 Lands and any Exchange Lands to be reviewed and approved by the Regional Surveyor, Natural Resources Canada. A CLSR Survey is required. The expropriating authority should assume the survey costs.

- e) **Appraisals:** The expropriating authority must provide an estimate or one or more independent appraisal reports for Section 35 Lands or Exchange Lands depending on the value of the lands. The purpose of the estimate or appraisal report(s) is to confirm the adequacy of the compensation. The estimate or appraisal report(s) must be based on an assessment of the present day Fair Market Value, and may be reviewed by the Real Estate Division of Public Works and Government Services Canada ("PWGSC"). Refer to the "Treasury Board Open and Fair Real Property Transactions Policy" to find the required number and form of reports.
- f) **Environmental Protection:** Where the expropriating authority is a federal entity, either DIAND or the other federal authority must ensure that any environmental requirements under *CEAA* are met. Where the expropriating authority is not a federal entity (i.e. a provincial entity), DIAND must ensure that any environmental requirements under the *CEAA* are met. Where lands are exchanged, DIAND must ensure that an environmental assessment, and any required environmental clean-up, are done on the land that will become reserve land. The expropriating authority will fund the assessment and clean-up. Refer to Chapter 12 of this manual for further details about environmental assessments.
- g) **Individual Interests:** The expropriating authority must negotiate either directly with a locatee or through the First Nation. In those cases where a Section 35 Transfer is contemplated, the expropriating authority must obtain from the locatee(s) an executed form for the "Transfer of Land in an Indian Reserve" pursuant to section 24 of the *Indian Act*.
- h) **Encumbrances:** Any existing surrenders and interests of non-Indian third parties, such as registered leases or permits, must be dealt with to the satisfaction of Canada.

The expropriating authority is responsible for obtaining the consent of lessees or permittees. If the Section 35 Lands are encumbered by a leasehold or permit interest, then, subject to the expropriating authority obtaining the consent of the lessee or permittee, the department may cancel or amend such lease or permit, as the case may be, prior to the Section 35 Transaction. The expropriating authority is responsible for all costs to obtain such cancellation or amendment. DOJ should be consulted in cases where the lessee or the permittee does not provide its consent. If the Section 35 Lands are subject to a surrender (e.g. leasing, merchantable timber, etc.), then Canada may require an amendment or revocation of the surrender prior to processing the Section 35 Transaction. However, some surrenders or designations are not incompatible with, and may make provision for the granting of Section 35 Transfers.

- i) **Interim Use and Occupation:** Without a Section 28(2) or Section 53(1) interim use and occupation permit (see Directive 9-2), the expropriating authority cannot use or occupy the reserve land in question until the Section 35 Transaction is complete.
- 6.4 The department must obtain First Nation consent to the proposed grant or transfer by way of a valid **Band Council Resolution** ("BCR"). Accompanying, but not part of, the BCR must be the appropriate documentation reflected in **Annex C: Federal Requirements List**, which includes the following:
- a) a copy of the Section 35 Agreement between the First Nation and the expropriating authority;
 - b) any applicable executed locatee Section 24 Transfer documents;
 - c) A copy of the estimate or independent appraisal(s) of land value information;
 - d) A copy of the environmental assessment completed by the expropriating authority;
 - e) A copy of the CLSR Survey.
- 6.5 The **BCR** should be accompanied by the documentation referred to in **Annex C: Federal Requirements List**. The BCR must contain the following information:
- a) **Request:** The BCR must include a request that Canada's full interest in the lands be granted or transferred or that an easement be granted or transferred pursuant to section 35 of the *Indian Act*.
 - b) **Compensation:** The BCR must identify separately the total compensation package to be paid to the First Nation and any individual locatees.
 - c) **Locatee Interests (if applicable):** If the Section 35 Transaction deals with Locatee Lands only, then the BCR must specify the split, if any, of the compensation to be paid to the locatee and/or the First Nation.
 - d) **First Nation Support:** The BCR should preferably say whether the proposed grant or transfer has the support of the First Nation membership. If it is a contentious issue among the First Nation members, this should be indicated and details attached.

The BCR should also contain -

- e) **Legal Advice:** The First Nation Council should provide evidence satisfactory to Canada that it has obtained independent legal advice with respect to the execution of the Section 35 Agreement.

7. Policy: Individual Land Holders ("locatees")

- 7.1 The Lands Officer will complete a **Land Status Report** (see Annex B) to identify and inform the expropriating authority of any **individual locatee** whom the proposed grant or transfer may affect.
- 7.2 The expropriating authority should conduct all negotiations directly with individual locatees. However, the expropriating authority may also deal with a First Nation Council or the department, where locatees have asked the First Nation, or the department to act for them, and the Band Council or the Department has agreed. See Section 7.5 in respect of the requirement that the locatee obtain a certificate of independent legal advice. In cases of a grant or transfer of the full interest in the land, and not just an easement interest, the expropriating authority should deal with the First Nation Council to negotiate any additional payment designed to compensate the First Nation for the loss of reserve status of those lands.
- 7.3 The expropriating authority must compensate those locatees identified by the Land Status Report as being affected for their loss of the use of the land, in an amount agreed to by the locatee(s), based on an estimate or one or more independent appraisals of the present day Fair Market Value of the Locatee Lands.
- 7.4 Subject to section 6.1, the Lands Officer may not make a recommendation to proceed without the consent of a locatee unless the transaction has the support of the First Nation Council, and all germane locatee objections have been discussed and addressed internally, with the support of DOJ.
- 7.5 Locatee interests must be dealt with in the following manner:
 - a) The individual locatees' interests are to be considered as separate from the interests of the First Nation, for the purposes of compensation.
 - b) In the case of a Section 35 Transfer, upon acceptance of the offered compensation, locatees must execute a form for a Section 24 Transfer, or the executors/administrators of the estate for a Section 49 Transfer.
 - c) Locatees should provide evidence satisfactory to Canada that he or she has obtained independent legal advice.

8. Policy: Use of Land before a Section 35 Transaction

- 8.1 In some cases, an expropriating authority has used reserve lands without reaching a final Section 35 Agreement. The expropriating authority may have negotiated an agreement with a First Nation, but this agreement may not meet all the federal requirements for Canada to complete an Order-in-Council submission to the Governor in Council.
- 8.2 If the expropriating authority and the First Nation have never reached a Section 35 Agreement which addresses all the federal requirements, the Lands Officer must take the following steps:
- a) Complete a current **Land Status Report** to determine the current status of the lands and any possibly affected locatees and/or third parties;
 - b) Provide DOJ with the Land Status Report and discuss the outstanding issues as soon as possible;
 - c) In consultation with DOJ, draft a letter to the First Nation and the expropriating authority setting out the current status and substantive facts (including compensation, legal descriptions, the handling of third party interests and other requirements set out in the Federal Requirements List) of the Section 35 Transaction. This letter should clearly identify any outstanding requirements to be actioned by each of the parties to complete the transaction;
 - d) In consultation with DOJ, consider whether further information is required regarding compensation for the Section 35 Lands. The handling of the compensation for an outstanding Section 35 Transaction is often the most difficult issue to resolve. The expropriating authority's position may be that compensation should reflect the date of the "understanding or arrangement" with the First Nation to use the reserve land. However, many factors must be considered, including the fact that pursuant to subsection 28(1) of the *Indian Act*, an *"...agreement of any kind,...by which a band or a member of a band purports to permit a person other than a member of that band to occupy or use a reserve... is void,"* unless authorized by the Minister.

As is often the case in these types of situations, the Lands Officer, with the support of DOJ, must consider these files on a case-by-case basis, but, generally speaking, Canada requires compensation to reflect, at a minimum, the present day Fair Market Value of the lands. Therefore, files may require updates of existing estimates or appraisals to be completed and forwarded to PWGSC for review.

- e) Consider whether the situation warrants an interim use and occupation permit (refer to directive 09-02) until the federal requirements for a Section 35 Transaction have been met.
- 8.3 Sometimes a final Section 35 Agreement between the expropriating authority and the First Nation exists, but no Order-in-Council authorizing the Section 35 Transaction was ever obtained. In these circumstances, the Lands Officer shall:
- a) Complete a current **Land Status Report** to ensure no new encumbrances, interests or locatees have been created since the original Section 35 Agreement;
 - b) Provide DOJ upon request with the **Land Status Report** and confirm that all federal requirements have been addressed;
 - c) Proceed with a Fact Letter to the First Nation and the expropriating authority to ensure the department understands the terms of the Section 35 Agreement, and to clarify any possible issues.
- 8.4 If at any time after a Section 35 Agreement has been entered into the First Nation withdraws its consent to the transaction, DIAND and DOJ should review all the circumstances of the file before deciding whether or not to proceed.

9. Process

- 9.1 A brief outline of the Section 35 Transaction process is outlined in **Annex A: The Section 35 Transaction Process**.
- 9.2 Usually the process begins with an expropriating authority looking for a portion of a reserve for a specific purpose (usually highway purposes or other works of public utility), and therefore requesting a Section 35 Transaction for reserve land.
- 9.3 As soon as the Lands Officer is aware that initial discussions are underway between an expropriating authority and a First Nation, the Lands Officer should provide the parties with a current **Land Status Report**.
- a) The completed **Land Status Report** (see Annex B) will identify and inform the expropriating authority of any individual **locatee** or **third party** interests which the proposed Section 35 Transaction may affect.
 - b) The Land Status Report must identify existing registered interests such as locatees, leases, permits or easements, or potential encumbrances such as cardex holdings or surrenders.

- c) The Lands Officer should provide a copy of this Land Status Report, and supporting documentation to the expropriating authority and the First Nation as soon as possible.

9.4 The following section provides a detailed overview of the process, the major issues, and the steps the Lands Officer, in consultation with PWGSC and DOJ, must address prior to completing a Section 35 Transaction:

9.4.1 Confirm Authority and Title

- a) The Lands Officer completes a Land Status Report to review the legal status of the lands which are subject to a particular Section 35 Transaction.
- b) The Lands Officer's Land Status Report should include those lands which are to be granted or transferred to the expropriating authority to determine any encumbrances and/or interests, as well as identification of former reserve lands which the expropriating authority may be transferring to Canada, and whether or not any reversionary interests may be applicable to lands to be transferred to Canada.
- c) The Lands Officer must confirm with the expropriating authority that it has the power to expropriate land for the stated purpose. The expropriating authority should also be asked to confirm the nature and extent of its statutory expropriation power, the purpose of the Section 35 Transaction, the area and location of the land proposed to be granted or transferred, and the reasons why the interest sought is necessary for its purposes rather than a lesser interest. (See section 4.4 above.)
- d) The expropriating authority must provide to the Lands Officer evidence of title satisfactory to Canada to all lands bordering the Section 35 Lands which the expropriating authority claims to hold, and to all lands which the expropriating authority wishes to transfer to Canada.

9.4.2 Surveys

- a) All applicable surveys for a Section 35 Transaction are paid for by the expropriating authority;
- b) Canada requires all surveys to be Official Plans or CLSR Surveys;
- c) The expropriating authority must obtain survey instructions from Natural Resources Canada. To obtain instructions, the expropriating authority must obtain evidence of permission from the First Nation consenting to a survey of reserve land and allowing the surveyor on the reserve and a Land Status Report from the Lands Officer.

Surveys (continued)

- d) The Lands Officer should ensure that provisional survey plans identify each parcel that will be affected by the Section 35 Transaction, including remainders of Locatee Lands, and clearly define which lands are presently held by the expropriating authority and which lands are subject to the proposed transaction. These parcels should be clearly defined in the CLSR Survey book of reference.
- e) The Lands Officer should also review provisional survey plans against any applicable draft drawing or plans to verify encumbrances and possible variances.
- f) Natural Resources Canada will write the legal descriptions for the Section 35 Transaction once the CLSR Survey has been approved (to be used as the description in the Order-in-Council and the FRPFIA documents).

NOTE:

Of all the requirements for a Section 35 Transaction, a survey can take the longest to complete. Therefore, for pending transactions, pressing for completion of an outstanding survey or a survey that requires amendment should be one of the first priorities in terms of moving the file forward towards completion.

9.4.3 Encumbrances

- a) The expropriating authority should obtain the consent of any affected third parties, such as lessees or permittees, if amendments or cancellations of these interests are required. DOJ should be consulted in cases where the lessee or the permittee is not willing to provide its consent.
- b) The expropriating authority is responsible for all costs to obtain such cancellation or amendment.
- c) If the Section 35 Lands are encumbered by a leasehold or permit interest, then, subject to the expropriating authority obtaining the consent of the lessee or permittee, the Lands Officer may cancel or amend such lease or permit, as the case may be, prior to the Section 35 Transaction.
- d) If the Section 35 Lands are subject to a surrender (e.g. leasing, merchantable timber, etc.), then Canada may require an amendment or revocation of the surrender prior to processing the Section 35 Transaction, however, some surrenders or designations are not incompatible with, and may make provision for the granting of Section 35 Transfers.

9.4.4 Environmental Compliance

- a) Under the *Canadian Environmental Assessment Act*, ("CEAA") environmental assessments are carried out as early as practicable in the planning stages of a project.
- b) The Lands Officer must ensure that the proposed Section 35 Transaction is subjected to an environmental assessment, which the expropriating authority funds. Based on the assessment, the departmental Environmental Specialist completes an environmental screening report. Where lands are exchanged, an environmental clean-up, if required, must be done by the expropriating authority on the land that is proposed to become reserve land. The addition to reserve of any Exchange Lands is subject to the Additions to Reserves/New Reserves Policy and the prerogative of the Crown and the department can provide no guarantee to the First Nation that Exchange Lands will become reserve. See Chapter 12 of this manual for further information on environmental assessments and Chapter 10 for further information on additions to reserve.
- c) Upon receipt of appropriate environmental reports from the expropriating authority, the Lands Officer should provide the reports to the departmental Environmental Specialist for review, comments and a CEAA Screening Decision.

9.4.5 Locatee Interests

- a) The Lands Officer must complete a thorough Land Status Report with respect to any affected Locatee Lands.
- b) A locatee's interests are to be considered as separate from the interests of the First Nation, for the purposes of compensation.
- c) Surveys of any proposed Section 35 Lands must adequately deal with Locatee Lands to ensure proper updates of title. This includes, among other things, the proper surveys of cardex holdings, proper subdivisions of existing parcels, and adequate descriptions of parcels separating band lands from Locatee Lands. The Lands Officer should liaise with Natural Resources Canada with respect to these issues.
- d) The expropriating authority negotiates with the First Nation Council on band lands and directly with applicable locatees on those lands held by Certificate of Possession. The expropriating authority needs to obtain the consent of the locatees with respect to the proposed grant or transfer of Locatee Lands and the consent of the First Nation Council since the First Nation is affected by the proposed grant or transfer of Locatee Lands.

Locatee Interests (continued)

- e) In some cases, locatees and a First Nation agree to a percentage split of compensation for Locatee Lands (e.g., 90% for the locatee and 10% for the First Nation). This may be more prominent where a transaction involves only Locatee Lands, and no band land at all. In the normal case, the share for the Locatee should be at least Fair Market Value. However, the department is not a party to these negotiations and, therefore, the Lands Officer should not promote or discourage these internal First Nation decisions.
- f) Upon acceptance of the offered compensation for a Section 35 Transfer, locatees must execute a form for a Section 24 Transfer, or the executors/administrators of the estate for a Section 49 Transfer, pursuant to the *Indian Act*. (Note: a Section 24 or Section 49 Transfer is not required for a Section 35 Easement.)
- g) The executed form for a Section 24 Transfer must be attached to the Section 35 Agreement and the BCR requesting the Section 35 Transfer.
- h) Upon receipt of the Order-in-Council authorizing the Section 35 Transfer, the Lands Officer should have the executed form for the Section 24 or Section 49 Transfer approved by the Minister's delegated authority authorized by the *Delegation of Authority Under the Indian Act and Regulations* (refer to the relevant regional delegation instrument).
- i) Upon the completion of the FRPFIA grant or transfer of the land to the expropriating authority, the approved Section 24 or Section 49 Transfer should then be registered in the Indian Lands Registry.
- j) The Registrar of the Indian Lands Registry will then issue a new Certificate of Possession for the remaining lands held by the locatee.

9.4.6 Appraisals

- a) Every Section 35 Transaction requires at least one estimate or independent appraisal for Section 35 Lands or Exchange Lands, based on Treasury Board policies, and paid for by the expropriating authority. The estimate or appraisal(s) must be based on terms of reference approved by PWGSC, and must reflect the present day Fair Market Value of the lands.

Appraisals (continued)

- b) Upon receipt of the estimate or appraisal(s), the Lands Officer's Manager must (except in regions where there are other practices) forward a copy to PWGSC for review, to determine if the proposed compensation is fair and reasonable. Part of the determination of whether the proposed compensation is fair and reasonable will involve a determination of whether it includes reasonable compensation for loss of reserve status for any land for which a full interest is proposed to be granted or transferred and for which the expropriating authority is providing no equivalent Exchange Lands that might be eligible for reserve status.
- c) If the estimate or appraisal(s) is/are not current, ie. more than one year old, case by case decisions must be made by departmental management, PWGSC, and DOJ on how to proceed.

9.4.7 Compensation

- a) As early as possible in the discussions regarding a proposed Section 35 Transaction, the Lands Officer should notify the expropriating authority that the compensation is to be paid to the Receiver General for Canada, and not paid directly to a First Nation Council or locatees.
- b) Canada must be satisfied that the compensation for a Section 35 Transaction is fair and reasonable. In most cases, that means ensuring that at least present day Fair Market Value is paid for the Section 35 Transaction.
- c) Canada requires that compensation for Section 35 Lands be paid to the Receiver General for Canada prior to the passing of the Section 35 Order-in-Council. It is recommended that the Lands Officer receive the compensation at the Fact Letter stage, and deposit it into a departmental suspense account prior to processing an Order-in-Council submission.

9.4.8 Interim Use and Occupation Permit

- a) Although rarely allowed, the expropriating authority may request the issuance of a permit authorizing interim use and occupation of the Section 35 Lands in those cases where there is a **demonstrated urgency**. See Directive 9-2 for further information.

9.4.9 Section 35 Agreement & BCR

- a) Once all required information has been obtained, the expropriating authority finalizes the negotiations and completes a final Section 35 Agreement with the First Nation and/or applicable locatees. While Canada is not a party to the Agreement, Canada requires that the Agreement include the terms on which the expropriating authority is requesting the Section 35 Transaction and the information included in the standard legal and policy requirements of Canada as set out in Annex C: Federal Requirements List, as confirmation that these matters have been considered and addressed by the parties to the Agreement. The Section 35 Agreement may also include terms that have been agreed to among the First Nation, the locatees and the expropriating authority but which are not part of the request for a Section 35 Transaction. The Agreement, or other written assurances satisfactory to Canada, should specify which terms are not part of the request for a Section 35 Transaction. The expropriating authority then delivers this Section 35 Agreement to DIAND for review and processing.
- b) The Lands Officer reviews the Section 35 Agreement and supporting documents to ensure that the information and documents required under the standard legal and policy requirements have been provided (see **Annex C: Federal Requirements List**).
- c) The First Nation's consent to the proposed Section 35 Transaction and Section 35 Agreement should be obtained to confirm that the First Nation has been consulted by the expropriating authority with respect to the proposed Section 35 Transaction and matters of concern to the First Nation. This consent must be obtained by way of a valid BCR. The BCR will confirm the terms of the Section 35 Agreement and provide the consent to the Section 35 Transaction and the allocation of compensation as between the First Nation and the locatees as set out in paragraph 6.5 of this Directive. If requested, the Lands Officer, with the support of DOJ, can provide the First Nation with sample wording for the BCR.
- d) The completed documentation (i.e. the Section 35 Agreement, the BCR, and supporting documentation) is forwarded to DOJ for review. Justice will identify and assist in the resolution of any outstanding legal issues.

- e) The Lands Officer should suggest to the expropriating authority that the Section 35 Agreement contain clauses that:
 - i) allow for amendment to such agreement to be made by way of confirmation of the Fact Letter by both the First Nation, by way of BCR, and the expropriating authority; and provide that,
 - ii) if there is an inconsistency between the Section 35 Agreement and the Fact Letter, the Fact Letter will govern.

9.4.10 **Fact Letter**

- a) Upon review of the Section 35 Agreement between the expropriating authority and the First Nation, the Lands Officer drafts a Fact Letter.
- b) The Fact Letter should include:
 - 1) the nature of the transaction agreed to by the parties, ie. either a transfer or grant of Canada's full interest or an easement interest;
 - 2) that the interest will be transferred or granted by Canada to the expropriating authority for a specific public purpose and will be returned to Canada should that use cease; and
 - 3) that lands where the full interest has been granted or transferred by Canada which are returned to Canada will not have reserve status, and any proposal by the First Nation for reserve status for any returned lands will be subject to the Crown's royal prerogative, and Canada's policies on reserve creation or additions to reserve in effect upon the date of such proposal.
- c) The Lands Officer should provide opportunity for the expropriating authority and the First Nation to comment on the Fact Letter. There may be circumstances or Regions where this will have to be a confirmation by the expropriating authority and the First Nation that the Fact Letter reflects the agreement between those parties.

9.4.11 Order-in-Council Submission

- a) The Lands Officer, with the support of DOJ then drafts the Order-in-Council submission (commonly referred to as the Red Jacket).
- b) DOJ reviews the Red Jacket as to form and content, and provides the Lands Officer with a letter confirming its approval, or setting out its concerns.
- c) The Lands Officer then sends the completed Order-in-Council submission to departmental headquarters for the recommendation of the Minister, and the authorization of the Governor in Council.

9.4.12 Federal Real Property and Federal Immovables Act Document

- a) Once the Order-in-Council has been passed by the Governor in Council, it is returned to the regional office.
- b) DOJ or the Region will prepare four (4) original documents relating to the land interest under FRPFIA to be approved by the delegated authority authorized to grant or transfer federal lands. (Refer to the "Treasury Board Real Property Transactions Processes and Authorities Policy").
- c) The FRPFIA documents are forwarded to DOJ for countersignature.
- d) This step completes the process for Section 35 Transactions.

9.4.13 Registration

- a) The Lands Officer then sends an original of the Order-in-Council, the Section 24 or Section 49 Transfers, if any, and an original of the FRPFIA documents to the Indian Lands Registry for registration.
- b) DOJ will send a copy of the FRPFIA documents to the Federal Real Property Document Depository.
- c) A copy of the executed FRPFIA documents together with the Orders-in-Council are then distributed by the Lands Officer to the expropriating authority, the First Nation, Natural Resources Canada and locatees, and notices provided to the affected third parties.

9.4.14 Release of Section 35 Compensation

- a) Once the Order-in-Council is passed and the FRPFIA documents are executed by the appropriate delegated authority and countersigned by DOJ, the compensation can be released by the Lands Officer as follows:

For band land:

- a) the principal of the monies which are compensation for band land (not locatee land) must be deposited to the First Nation's **Capital Account**;
- b) any accrued **interest** on these monies is paid to the First Nation's **Revenue Account**.

For locatee land:

In the case of a locatee, the department may pay the locatee directly from the departmental suspense account, all monies - **principal** and accrued **interest** - to which the locatee is entitled, pursuant to Section 35(4) of the Indian Act.

- 9.5 **Additions to Reserve:** Where a land exchange is proposed as part of the compensation, the additions to reserve policy as set out in Chapter 10 should be initiated concurrent with the Section 35. The department has precedent OIC documents for use in this exchange situation. The Crown can not guarantee that lands proposed in exchange will be eligible for or be granted reserve status.

10. References

- 10.1 Besides the *Indian Act*, you may want to consult:

- a) *Indian Lands Registration Manual*
- b) *Manual for the Administration of Band Moneys*
- c) The Real Property Management section of the Treasury Board Manual. The INTERNET URL is: www.tbs-sct.gc.ca/pubpol_e.html
- d) Any Federal/Provincial Protocol specific to roads

Chapter 9

Directive 9-1: Transactions Under Section 35

Annex A: Section 35 Transaction Process

Annex A

Section 35 Transaction Process

Generally speaking, here is how a Section 35 Transaction usually unfolds:

1. The expropriating authority wants a portion of a reserve for a specific purpose (usually highway purposes or other works of public utility), and therefore requests a Section 35 Transaction of federal reserve land.
2. The expropriating authority initiates discussions and negotiates a Section 35 Agreement with the First Nation and/or applicable locatees, addressing:
 - (1) Title
 - (2) Surveys
 - (3) Encumbrances
 - (4) Environmental Assessments
 - (5) Locatee Interests
 - (6) Appraisals
 - (7) Compensation.
3. The expropriating authority delivers a Section 35 Agreement to DIAND for review and processing.
4. The First Nation provides to Canada a BCR which consents to the proposed Section 35 Transaction, the Section 35 Agreement, the compensation and, where necessary, the allocation of the compensation between the First Nation and the locatees and directs Canada to pay the locatees from the compensation provided by the expropriating authority.
5. Canada (DIAND, DOJ & PWGSC) reviews the Section 35 Agreement and BCR to ensure legal and policy requirements have been met.
6. DIAND completes federal requirements which include:
 - (1) Land Status Report
 - (2) Environmental Screening
 - (3) Appraisal Review
 - (4) Compensation Review
 - (5) Applicable Interim Use and Occupation Permits
 - (6) Federal Fact Letter

- (7) Order-in-Council which authorizes the transaction to the expropriating authority
 - (8) Federal Real Property and Federal Immovables Act (FRPFIA) grant or transfer.
7. The Order-in-Council is effected by a FRPFIA grant or transfer executed by DIAND or PWGSC and countersigned by DOJ once the federal Order-in-Council is passed.
 8. Compensation is paid to the First Nation and/or applicable locatee.
 9. The Order-in-Council, any Section 24 or Section 49 Transfers, and FRPFIA documents are registered in the Indian Lands Registry.
 10. FRPFIA documents are also registered in Federal Document Depository.
 11. Copies of documentation are provided to the expropriating authority and First Nation.

Chapter 9

Directive 9-1: Transactions Under Section 35

Annex B: Sample Land Status Report

Annex B LAND STATUS REPORT

Reserve Name: _____ No.: _____ First Nation: _____

<p>Proposed Purpose (check box):</p> <table style="width: 100%; border: none;"> <tr> <td style="width: 50%; vertical-align: top;"> <ul style="list-style-type: none"> •• Band land Lease •• Locatee land Lease •• Easement •• Other: (specify) _____ </td> <td style="width: 50%; vertical-align: top;"> <ul style="list-style-type: none"> •• Permit •• Designation •• Section 35 Transfer </td> </tr> </table>	<ul style="list-style-type: none"> •• Band land Lease •• Locatee land Lease •• Easement •• Other: (specify) _____ 	<ul style="list-style-type: none"> •• Permit •• Designation •• Section 35 Transfer
<ul style="list-style-type: none"> •• Band land Lease •• Locatee land Lease •• Easement •• Other: (specify) _____ 	<ul style="list-style-type: none"> •• Permit •• Designation •• Section 35 Transfer 	

<p>Status of Land (check box or boxes if the lands described below cover more than one type of land):</p> <ul style="list-style-type: none"> •• Band Land (not designated or Surrendered); or, •• Designated Land; or Locatee Land.

<p>Legal Description (attach copy of plan and/or NRCAN letter of description to Land Status Report):</p> <p>Lands: Lot _____ Block _____ Plan No. _____ (R/CLSR)</p> <p>Textual Description: _____</p> <p>_____</p> <p>_____</p> <p>_____</p>
--

If Designated or Surrendered Land, Complete the following (attach copy of designation or surrender to Land Status Report):

Number Order-in-Council: P.C _____ - _____

Date of Order-in-Council: _____ (Month/day/year)

Term or Period of Designation or Surrender: From _____ (m/d/y) To _____ (m/d/y)

Purpose(s) of Designation or Surrender: _____

If Locatee Land, Complete the following:

Locatee: _____
Last name First name Band No.

Address: _____
Street City Postal Code

Locatee's phone no.: _____ (h) _____ (w) _____ (cell)

Lawfully Held by: (attach copy of documentation, including Parcel Abstract to Land Status Report): (checkbox)

- CP - ILR Registration No: _____ ; or,
- NE - ILR Registration No: _____ ; or,
- NETI - ILR Registration No: _____ ; or,
- Cardex - ILR Registration No: _____ ; or,

Encumbrances (attach documentation, including Reserve General Abstract, to Land Status Report):

List of registered instruments which may affect this parcel: (check box)

- Lease - ILR Registration No: _____ ; or,
- Permit - ILR Registration No: _____ ; or,
- Surrender - ILR Registration No: _____ ; or,
- Easement - ILR Registration No: _____ ; or,
- Section 35 - ILR Registration No: _____ ; or,
- Cardex: - ILR Registration No: _____ ; or,
- _____ - ILR Registration No: _____ ; or,
- _____ - ILR Registration No: _____ ; or,

Comments and/or matters to be dealt with:

I have reviewed the proposed land transaction and have searched the Indian Lands Registry records relating to the parcels affected by this transaction. According to these records the proposed transaction: (check box)

- will not cause a conflict with existing registered interests;
- will cause a conflict with existing registered interests as identified herein, and must be dealt with as per comments above.

Name, Title	Signature	Date
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Chapter 9

Directive 9-1: Transactions Under Section 35

Annex C: Federal Requirements List

Annex C

Federal Requirements List

Requirements of Canada for Section 35 Transactions:

1. The First Nation and expropriating authority must enter into an agreement with respect to a proposed Section 35 Transaction, (the "Section 35 Agreement").
2. The First Nation, by BCR, must formally accept the terms and conditions of the Section 35 Agreement and request that Canada grant a full interest or an easement or transfer administration and control of a full interest or of an easement in the lands to the expropriating authority.
3. The expropriating authority must submit a request in writing to take the lands pursuant to subsection 35(1) of the *Indian Act* and that, in lieu of such taking, Canada grant or transfer the lands pursuant to subsection 35(3) of the *Indian Act* and FRPFIA.
4. Evidence satisfactory to Canada must be provided to Canada of a justification for the type of tenure requested for any lands being granted or transferred by Canada to the expropriating authority and of the expropriating authority's statutory power to expropriate same.
5. All lands must be legally described by a CLSR Survey, in accordance with the requirements of Natural Resources Canada.
6. The Section 35 Agreement shall set out the legal description of the lands and any lands forming part of the compensation package.
7. In order to comply with subsection 35(4) of the *Indian Act*, monies paid solely as consideration for the Section 35 Transaction must be deposited in favour of the Receiver General for Canada for the use and benefit of the First Nation or any locatee who is entitled to compensation or payment. In implementing this legislative requirement the Section 35 Agreement should stipulate the compensation being provided for the lands (whether that compensation is in the form of money, land or other gratuity such as employment opportunities or material works), and Canada must satisfy itself as to the adequacy of the compensation.

(The monies may be held by legal counsel for the First Nation or a locatee, as the case may be, before the monies are paid to Canada, but the Lands Officer should not recommend the Section 35 Transaction proceed to departmental headquarters prior to receipt of the monies in favour of the Receiver General. At the latest, the monies should be paid to the Receiver General upon confirmation of a Fact Letter, by the First Nation and the expropriating authority. Canada would like First Nations to be aware that it is usual for monies held by it in suspense to earn a higher rate of interest than monies held by legal counsel in a trust account.)

8. If a locatee is in possession of any portion of the Section 35 Lands and the proposed Section 35 Transaction is the grant or transfer of a full interest in the lands, then the expropriating authority must obtain from the locatee an executed form for the "Transfer of Land in an Indian Reserve" pursuant to Section 24, or if the locatee is deceased, the executor or administrator transfer pursuant to Section 49 of the *Indian Act*.
9. If one or more locatees are involved, the First Nation must stipulate if and how the compensation is to be divided between the First Nation and the locatee(s) and direct Canada to pay the locatees directly from the compensation provided by the expropriating authority.
10. Evidence satisfactory to Canada must be provided to Canada of the value of any lands being transferred to Canada for the use and benefit of the First Nation and any lands being granted or transferred by Canada to the expropriating authority.

(Although the amount of compensation provided by the expropriating authority for the lands is a matter to be negotiated between the expropriating authority and the First Nation, Canada must satisfy itself that adequate compensation has been provided for the lands. The First Nation should keep in mind during its negotiations the value of any merchantable timber or topsoil located on the lands and the loss to the First Nation of the value of the reserve status that is being lost in respect of land in which a full interest is intended to be granted or transferred.)

11. The Section 35 Agreement must acknowledge in writing that any costs incurred in construction or otherwise by the expropriating authority, or on its behalf, prior to the grant or transfer of the lands, are incurred at its own risk, unless previously agreed to otherwise in an interim use permit or in some other agreement in writing with the First Nation and Canada.

12. The expropriating authority must acknowledge in the Section 35 Agreement that, unless otherwise agreed to in writing, it is solely responsible for any surveys, appraisals, and environmental assessments or audits.
13. The Section 35 Agreement must confirm that the expropriating authority shall transfer any Exchange Lands and reversionary lands to Canada.
14. The expropriating authority must comply with all environmental laws, regulations and policies of Canada in order for Canada to accept the transfer of the Exchange Lands and reversionary lands.
15. In order for the Minister to comply with the *Canadian Environmental Assessment Act*, the expropriating authority must provide the required documentation to the satisfaction of Canada for the project to be constructed on the lands.
16. The First Nation should provide evidence satisfactory to Canada that it has obtained independent legal advice with respect to the execution of the Section 35 Agreement.
17. Locatees, or executors/administrators whose land is affected should provide evidence satisfactory to Canada that they have obtained independent legal advice with respect to the execution of the Section 35 Agreement and the Section 24 or Section 49 Transfer.
18. All encumbrances on the Section 35 Lands and any lands being transferred to Canada must be dealt with to the satisfaction of Canada.

Directive 9-2

Interim Use and Occupation

1. Purpose

- 1.1 This directive describes when and how to issue an interim use and occupation permit pursuant to subsection 28(2) of the *Indian Act*, or, in some cases, pursuant to subsection 53(1) of the *Indian Act*, before an expropriating authority takes lands under section 35.

2. General

2.1 What is an interim use and occupation permit?

- a) An interim use and occupation permit allows the expropriating authority to use and occupy reserve lands to carry out construction before those lands have been granted or transferred to the expropriating authority according to Section 35.
- b) The interim use and occupation permit authorizes the expropriating authority to go on specified reserve lands for a certain purpose. However, it must not give the expropriating authority any interest in reserve lands. This permit does not grant exclusive use or occupation and it must not be assignable to third parties.

2.2 When are interim use and occupation permits used?

- a) The general rule is that an expropriating authority **cannot** use or occupy reserve lands until the issuance of an Order-in-Council authorizing the Section 35 Transaction, and the actual grant or transfer of the land to the expropriating authority pursuant to FRPFIA.
- b) However, construction may be authorized prior to the FRPFIA grant or transfer where there is a **demonstrated urgency**. In most cases, this urgency would be related to public health and safety issues, such as a washed out road due to flooding, or other natural disasters.

- c) It is the expropriating authority's responsibility to demonstrate to Canada that the situation is exceptional.
- 2.3 Refer to Chapter 06 for further information on the drafting, issuing and cancelling of permits generally.

3. Authorities

- 3.1 If the lands are not designated lands, the authority for issuing an interim use and occupation permit is subsection 28(2) of the *Indian Act*, which states that:

28(2) The Minister may by permit in writing authorize any person for a period not exceeding one year, or with the consent of the council of the band for any longer period, to occupy or use a reserve or to reside or otherwise exercise rights on a reserve.

If the lands are designated lands, the terms of the designation may, in some cases, allow the Minister to enter into permits. In such cases, the authority for issuing an interim use and occupation permit is the designation and paragraph 53(1)(b) of the *Indian Act*, which states that:

53(1) The Minister or a person appointed by the Minister for the purpose may, in accordance with this Act and the terms of the absolute surrender or designation, as the case may be,

(a) ...

(b) manage, lease or carry out any other transaction affecting designated lands.

The terms of the designation must be carefully examined in each case to ensure that it allows the issuance of an interim use and occupation permit for the purposes set out in the permit.

4. Policy

- 4.1 **As previously stated, an interim use and occupation permit is only appropriate in exceptional circumstances.** For example, a permit for interim use and occupation may be issued where, for legitimate reasons, construction cannot be delayed until the Order-in-Council is issued. In most cases, this urgency would be related to construction windows involving fish bearing streams, or obvious circumstances, such as a washed out road due to flooding, or other natural disasters.

- 4.2 Unless there are potential public health and safety concerns, an interim use and occupation permit will only be authorized after the expropriating authority and the First Nation have entered into a Section 35 Agreement setting out the terms and conditions of the Section 35 Transaction. For more details on the content of the Section 35 Agreement refer to Directive 09-01, paragraph 6.3.

NOTE:

It should be anticipated that in some circumstances, all the federal requirements of a Section 35 Agreement, such as a CLSR Survey, may not be completed at the time of the requirement of the permit.

- 4.3 See Chapter 6 for the policy applicable to subsection 28(2) permits generally. In addition, an interim use and occupation permit must address the following points:
- a) **Term:** In most cases the permit should be issued for a term not to exceed one year or such greater length of time as is required to complete the proposed construction and prepare the appropriate survey plan.
 - b) **Termination:** The permit should cease upon completion of the Section 35 Transaction and may be terminated at any time prior to the completion of the transaction, at the discretion of the Minister.
 - c) **Compensation:** Normally, as with most instruments, a permit requires at least one estimate and/or independent appraisal, and the permit fee must reflect the present day Fair Market Value of the lands. Deviations from this policy, such as a nominal permit fee, should be discussed with DOJ.
 - d) **Subsection 35(3):** The expropriating authority must acknowledge that the issuance of the permit is not to be construed as implying any right to the granting of an Order-in-Council pursuant to subsection 35(3) of the *Indian Act*. The permit should state that the department will not submit a recommendation to the Governor in Council for a final order authorizing the grant or transfer of the lands in question to the expropriating authority until a plan of survey is registered and all of the conditions set forth in the authorizing BCR have been met.
 - e) **Engineering design plans:** These should be incorporated in the permit.

- 4.4 The consent of the First Nation Council to the Section 28(2) interim use and occupation permit must be obtained in the form of a Band Council Resolution ("BCR"), which must, at a minimum, include the following terms:
- a) **Term:** The term must be specified.
 - b) **Land Description:** Where the term is for more than one year, the permit area should be identified by reference to an acceptable survey plan.
 - c) **Individual Locatees:** The BCR should confirm that any individual interests affected by the proposed use have been dealt with.
 - d) **Proposed Use:** This should be clearly identified in the BCR.
 - e) **Compensation:** The permit fee must be specified.
 - f) **Request for Permit:** The BCR must contain an express request that the Minister issue a permit pursuant to subsection 28(2) of the *Indian Act*, or, if applicable, pursuant to subsection 53(1) of the *Indian Act* and the associated designation.
 - g) **Agreement:** The executed Section 35 Agreement between the First Nation and the expropriating authority must be attached to the BCR.
 - h) **Permit:** Attach the draft permit to the BCR.

5. Process

- 5.1 Before initiating the permit process, the following procedural steps must be completed:
- a) **Section 35 Agreement:** The expropriating authority and the First Nation council must negotiate a Section 35 Agreement incorporating the terms and conditions upon which the lands will be transferred pursuant to section 35.
 - b) **Review of Agreement:** The Section 35 Agreement must be reviewed by the Lands Officer and DOJ.

- c) **Obtain BCR:** The First Nation Council must pass a BCR requesting that the Minister issue an interim use and occupation permit pursuant to subsection 28(2), or, if applicable, pursuant to subsection 53(1) and the associated designation.

5.2 Once these preconditions have been met, the procedure for obtaining an interim use and occupation permit is the same as that which is set out in Chapter 06, which contains a detailed process for the issuance of subsection 28(2) permits.

6. References

6.1 In addition to the *Indian Act*, you may want to consult:

- a) Indian Lands Registration Manual
- b) The Real Property Management section of the *Treasury Board Manual*.
The INTERNET URL is: www.tbs-sct.gc.ca/pubpol_e.html



5th Session, 37th Parliament

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5TH SESSION, 37TH PARLIAMENT

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Penner, Barry (L)	Chilliwack-Kent
Plant, Hon. Geoff (L)	Richmond-Steveston
Reid, Judith (L)	Nanaimo-Parksville
Reid, Hon. Linda (L)	Richmond East
Richmond, Hon. Claude (L)	Kamloops
Roddick, Valerie (L)	Delta South
Sahota, Patty (L)	Burnaby-Edmonds
Santori, Hon. Sandy (L)	West Kootenay-Boundary
Stephens, Lynn (L)	Langley
Stewart, Ken (L)	Maple Ridge-Pitt Meadows
Stewart, Richard (L)	Coquitlam-Maillardville
Suffredine, Blair F. (L)	Nelson-Creston
Sultan, Ralph (L)	West Vancouver-Capilano
Thorpe, Hon. Rick (L)	Okanagan-Westside
Trumper, Gillian (L)	Alberni-Qualicum
van Dongen, Hon. John (L)	Abbotsford-Clayburn
Visser, Rod (L)	North Island
Weisbeck, John (L)	Kelowna-Lake Country
Whittred, Katherine (L)	North Vancouver-Lonsdale
Wilson, John (L)	Cariboo North
Wong, Patrick (L)	Vancouver-Kensington

LIST OF MEMBERS BY RIDING

Abbotsford-Clayburn	Hon. John van Dongen
Abbotsford-Mount Lehman	Hon. Michael de Jong
Alberni-Qualicum	Gillian Trumper
Bulkley Valley-Stikine	Dennis MacKay
Burnaby North	Richard T. Lee
Burnaby-Edmonds	Patty Sahota
Burnaby-Willingdon	John Nuraney
Burquitlam	Harry Bloy
Cariboo North	John Wilson
Cariboo South	Walt Cobb
Chilliwack-Kent	Barry Penner
Chilliwack-Sumas	Hon. John Les
Columbia River-Revelstoke	Wendy McMahon
Comox Valley	Hon. Stan Hagen
Coquitlam-Maillardville	Richard Stewart
Cowichan-Ladysmith	Hon. Graham P. Bruce
Delta North	Reni Masi
Delta South	Valerie Roddick
East Kootenay	Bill Bennett
Esquimalt-Metchosin	Arnie Hamilton
Fort Langley-Aldergrove	Hon. Rich Coleman
Kamloops	Hon. Claude Richmond
Kamloops-North Thompson	Kevin Krueger
Kelowna-Lake Country	John Weisbeck
Kelowna-Mission	Hon. Sindi Hawkins
Langley	Lynn Stephens
Malahat-Juan de Fuca	Brian J. Kerr
Maple Ridge-Mission	Randy Hawes
Maple Ridge-Pitt Meadows	Ken Stewart
Nanaimo	Mike Hunter
Nanaimo-Parksville	Judith Reid
Nelson-Creston	Blair F. Suffredine
New Westminster	Hon. Joyce Murray
North Coast	Bill Belsey
North Island	Rod Visser
North Vancouver-Lonsdale	Katherine Whittred
North Vancouver-Seymour	Daniel Jarvis
Oak Bay-Gordon Head	Hon. Ida Chong
Okanagan-Vernon	Hon. Tom Christensen
Okanagan-Westside	Hon. Rick Thorpe
Peace River North	Hon. Richard Neufeld
Peace River South	Blair Lekstrom
Penticton-Okanagan Valley	Hon. Bill Barisoff
Port Coquitlam-Burke Mountain	Karn Manhas
Port Moody-Westwood	Hon. Christy Clark
Powell River-Sunshine Coast	Harold Long
Prince George North	Hon. Pat Bell
Prince George-Mount Robson	Hon. Shirley Bond
Prince George-Omineca	Paul Nettleton
Richmond Centre	Greg Halsey-Brandt
Richmond East	Hon. Linda Reid
Richmond-Steveston	Hon. Geoff Plant
Saanich North and the Islands	Hon. Murray Coell
Saanich South	Hon. Susan Brice
Shuswap	Hon. George Abbott
Skeena	Hon. Roger Harris
Surrey-Cloverdale	Hon. Kevin Falcon
Surrey-Green Timbers	Brenda Locke
Surrey-Newton	Tony Bhullar
Surrey-Panorama Ridge	Gulzar S. Cheema
Surrey-Tynehead	Dave S. Hayer
Surrey-Whalley	Elayne Brenzinger
Surrey-White Rock	Gordon Hogg
Vancouver-Burrard	Lorne Mayencourt
Vancouver-Fairview	Hon. Gary Collins
Vancouver-Fraserview	Ken Johnston
Vancouver-Hastings	Joy MacPhail
Vancouver-Kensington	Patrick Wong
Vancouver-Kingsway	Rob Nijjar
Vancouver-Langara	Val J. Anderson
Vancouver-Mount Pleasant	Jenny Wai Ching Kwan
Vancouver-Point Grey	Hon. Gordon Campbell
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Victoria-Hillside	Sheila Orr
West Kootenay-Boundary	Hon. Sandy Santori
West Vancouver-Capilano	Ralph Sultan
West Vancouver-Garibaldi	Ted Nebbeling
Yale-Lillooet	Dave Chutter

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Morning Sitting

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TUESDAY, MAY 18, 2004

The House met at 10:05 a.m.

Prayers.

Orders of the Day

Hon. G. Collins: I call Committee of the Whole for consideration of Bill 39.

Committee of the Whole House

FINANCIAL INSTITUTIONS STATUTES AMENDMENT ACT, 2004

The House in Committee of the Whole (Section B) on Bill 39; J. Weisbeck in the chair.

The committee met at 10:07 a.m.

Section 1 approved.

On section 2.

Hon. G. Collins: I move the amendment to section 2 standing in my name on the orders of the day.

[SECTION 2 (b), by deleting "other than a central credit union," and substituting "other than a central credit union or a corporation designated by regulation,".]

Amendment approved.

Section 2 as amended approved.

Sections 3 to 5 inclusive approved.

On section 6.

Hon. G. Collins: I move the amendment to section 6 standing in my name on the orders of the day.

[SECTION 6, in the proposed section 15.1 (5) (b) by adding "unless" before "the commission".]

Amendment approved.

Section 6 as amended approved.

Sections 7 to 10 inclusive approved.

On section 10.1.

Hon. G. Collins: I move the amendment to section 10.1 standing in my name on the order paper.

[SECTION 10.1, by adding the following section:
10.1 Section 73 is renumbered as section 73 (1) and the following subsection is added:

(2) If the rules of a credit union with more than 10 000 members provide for voting by electronic means, a reference in subsection (1) to voting by ballot or mail ballot may be read by the credit union as a reference to voting by electronic means.]

Amendment approved.

Section 10.1 as amended approved.

Section 11 approved.

On section 12.

Hon. G. Collins: I move the amendment to section 12 standing in my name on the orders of the day.

[SECTION 12, by deleting section 12 and substituting the following:

12 Section 81 (1) is repealed and the following substituted:

(1) Subject to subsection (1.1), a credit union or its subsidiary, other than a central credit union or a subsidiary of a central credit union, must not carry on business outside of British Columbia.

(1.1) With the consent of the commission and the deposit insurance corporation, a credit union or a subsidiary of a credit union may carry on business outside of British Columbia to the extent permitted under the laws of another jurisdiction.]

Amendment approved.

Section 12 as amended approved.

Sections 13 and 14 approved.

On section 15.

Hon. G. Collins: I move the amendment to section 15 standing in my name on the orders of the day.

[SECTION 15, in the proposed section 93 (2) by deleting ", 81 (1)" and substituting ", 81 (1.1)".]

Amendment approved.

Section 15 as amended approved.

Sections 16 to 26 inclusive approved.

On section 27.

Hon. G. Collins: I move the amendment to section 27 standing in my name on the orders of the day.

[SECTION 27 (b), by deleting "subsection (3)" and substituting "subsections (3) and (6)".]

Amendment approved.

Section 27 as amended approved.

Sections 28 to 105 inclusive approved.

On section 106.

Hon. G. Collins: I move the amendment to section 106 standing in my name on the orders of the day.

[SECTION 106, by deleting the proposed section 243 (4) (c) and substituting the following:

(c) an inquiry, examination or investigation under this Act, or.]

Amendment approved.

Section 106 as amended approved.

Sections 107 to 113 inclusive approved.

On section 114.

Hon. G. Collins: I move the amendment to section 114 standing in my name on the orders of the day.

[SECTION 114, in the proposed section 253.1 (4) (b) by deleting "under section 242".]

Amendment approved.

Section 114 as amended approved.

Sections 115 to 121 inclusive approved.

On section 122.

Hon. G. Collins: I move the amendment to section 122 standing in my name on the orders of the day.

[SECTION 122 (c), by deleting "paragraph (b)" and substituting "paragraph (c)".]

Amendment approved.

Section 122 as amended approved.

Sections 123 to 143 inclusive approved.

Title approved.

Hon. G. Collins: I move the committee rise and report the bill complete with amendments.

Motion approved.

The committee rose at 10:10 a.m.

The House resumed; Mr. Speaker in the chair.

Reporting of Bills

Bill 39, Financial Institutions Statutes Amendment Act, 2004, reported complete with amendments.

Third Reading of Bills

Mr. Speaker: When shall the bill be considered as read?

Hon. G. Collins: By leave, now, Mr. Speaker.

Leave granted.

Bill 39, Financial Institutions Statutes Amendment Act, 2004, read a third time and passed.

Hon. G. Collins: I call Committee of the Whole House for consideration of Bill 52.

Committee of the Whole House

ELECTORAL REFORM REFERENDUM ACT

The House in Committee of the Whole (Section B) on Bill 52; J. Weisbeck in the chair.

The committee met at 10:13 a.m.

On section 1.

J. MacPhail: I raised a couple of questions at second reading. The Attorney General answered one question clearly on the double majority and how it works, so that's fine. That's under section 3, and we may be discussing that later.

Under section 1 — which is "Referendum required if Citizens' Assembly recommends change" — who writes the question for the referendum?

Hon. G. Plant: There has not been a final decision made about that, but I think the way it's likely to unravel or unroll, depending on the perspective, is that the assembly will probably take the first cut at drafting the question and....

J. MacPhail: The Citizens' Assembly?

Hon. G. Plant: The Citizens' Assembly; sorry. The Citizens' Assembly will take the first cut at drafting the question. Then we'll want to have it looked at by legislative counsel or lawyers in the legal services branch to make sure it's the right language technically to do what the assembly wants. We've heard the assembly speak already about their desire to ensure that the issue they want to present to voters, if they decide change is to be recommended, should be presented with as much control by them as possible. That's fair enough, but I think we would do ourselves a disservice if we didn't also make sure the question was examined by the legislative counsel and/or lawyers in the legal services branch to make sure the question as proposed would actually achieve the result the assembly wants for it.

[1015]

J. MacPhail: Is it the Attorney General's view that the Citizens' Assembly final report would include, if they decide to recommend a question for referendum, a recommended language for the referendum question that then would be accepted or modified by government?

Hon. G. Plant: The assembly could include a proposal with respect to the question in their final report. I'm not sure I want to make that an obligation on the

assembly. But if the Citizens' Assembly were to propose a draft question, I would hope they would understand why we think it's necessary to ensure that we get a chance to have a look at the question.

I'm being careful in answering the question because I don't necessarily want to impose on the assembly the obligation to draft the question. I have heard that they're thinking about that. If that is how they want their report to be written, then that's fine.

J. MacPhail: Yes, I understand. I guess I'm urging as much the Citizens' Assembly to participate in the.... If they do recommend a change to go to referendum, that they also recommend language around that.... I have just recently been reviewing the history of referenda in Quebec, and the way the question is written is often as much up for debate as the actual vote itself.

Hon. G. Plant: In that context maybe, at least for the purpose of introducing this subject here on the floor of this chamber, I'll take this topic one step further, not so that it needs to be resolved now. But there is already some discussion about whether the referendum question that might emerge from a decision by the Citizens' Assembly to recommend a new form of electoral representation should be a one-sentence yes-or-no question that would go something like: "Do you wish to support a change to the way we elect our MLAs consistent with the recommendation of the Citizens' Assembly in their report dated XYZ?" Bang-o. Or does the referendum question need to have more detail about the actual model?

Of course the more detail, then the longer the ballot becomes. At some point there is a question about the printing cost of three million ballots, but on the other hand, if there is no detail in the actual referendum question, how are we going to ensure that the voting public knows what they're voting on?

As I said, these are not questions on which I have any settled opinion as yet. We're going to have to continue to work on them as the assembly continues to do its work of deciding whether or not it wants to recommend change.

G. Halsey-Brandt: I, too — as the Leader of the Opposition has — have been sort of looking at other examples around the world. I believe it was New Zealand. I don't know quite how it was built into the system. My question, I guess, is as much to the Citizens' Assembly as to the Attorney General. I don't know whether it was part of the referendum or part of the legislation, or perhaps it was in the bill that went through their Legislature. They recommended that if the referendum was approved to change the voting system, it be two complete election cycles, and then the public would have the opportunity to have another referendum on that. If that sort of idea was considered by the Citizens' Assembly — and it may well be — would that come back, probably, as their report or perhaps another question in the referendum? Would the

next government, if it was approved after 2005, consider that in future legislation?

Hon. G. Plant: That is not in the terms of reference for the Citizens' Assembly. Of course, there would be nothing to stop a future government from initiating a process of review, if there was to be a change. Some years down the road a government could decide that they wanted to ask the public whether they thought the change was working or not, but that's not in the terms of reference for the Citizens' Assembly in the work that they are currently doing.

Section 1 approved.

On section 2.

J. MacPhail: Section 2 says: "Subject to this Act, the Referendum Act applies to a referendum required under section 1." Does the Elections Act apply?

[1020]

Hon. G. Plant: To the extent that the Referendum Act makes the Elections Act applicable to referenda, then it also applies.

J. MacPhail: Today there was a Supreme Court of Canada decision on third-party advertising. This is a Supreme Court of Canada decision about third-party spending that applies to the federal Elections Act, but it also will, I think, have consequences for provincial elections law. I'm just curious as to whether the Attorney General knows immediately whether there is anything in the Referendum Act that talks about third-party spending on a referendum question.

Hon. G. Plant: Without actually having pieced together the pieces of the jigsaw puzzle in a minute or two, I think what has happened is this. We legislated a removal of third-party spending restrictions in the Election Act, and there are no spending rules in the Referendum Act that are independent, so the removal of the spending provisions in the Election Act would have the same.... It would have that impact on referenda, and that would mean there would be no third-party spending restrictions on this referendum.

Having said that, I have not had the opportunity to look at the decision the member says was handed down this morning. I will want an opportunity to do that and to consider its implications, if any, for the Citizens' Assembly work, but I think the law at present in British Columbia is that there are no third-party spending restrictions on provincial referenda.

Section 2 approved.

On section 3.

The Chair: Minister, on the amendment to section 3.

Hon. G. Plant: I wanted to say that we had a look at one issue after the bill had already been prepared for printing, and I wanted to bring it to the attention of members.

The Referendum Act works so that the results of referenda are announced by the Lieutenant-Governor-in-Council. I think that was probably designed for referenda that were conducted at some time other than in the context of a general election, but the referendum that would flow from a recommendation by the Citizens' Assembly will be conducted on an election day, and I'm sure that the people of British Columbia will want to know the results of that referendum as soon as they can.

Cabinet would not be in a position, really, to make the results public that night. It has occurred to us that the best way to ensure the results are made public as quickly as possible would be to give the chief electoral officer both the power and the obligation to report the results as quickly as he thought he could.

There are two ways you could get there. I think it is possible you could get there by passing a regulation now to make sure that happened, but it might be more straightforward and transparent to actually include an amendment to section 3 of the bill.

[SECTION 3,

(a) by renumbering the proposed subsection (1) as subsection (2) and the proposed subsection (2) as subsection (3), and

(b) by adding the following subsection:

(1) Section 3 of the Referendum Act does not apply and, instead, the Chief Electoral Officer must announce the results of the referendum in a manner that the Chief Electoral Officer considers will inform the electorate of the results of the referendum.]

On the amendment.

Hon. G. Plant: The amendment would add a subsection that would, in effect, read as follows: "Section 3 of the Referendum Act does not apply and, instead, the Chief Electoral Officer must announce the results of the referendum in a manner that the Chief Electoral Officer considers will inform the electorate of the results of the referendum."

[1025]

I realize I didn't table this yesterday, so this would be the first opportunity the members would have had to consider that as a proposed amendment. I don't want to move forward with it if it would cause serious concern. I think it's pretty innocuous, and I would be prepared to move the amendments if necessary.

I know it's sort of an informal way to do things. I wanted members to understand the issue and the proposed way of dealing with it and to know whether or not members have any concerns before deciding whether to move forward with the actual amendments.

J. MacPhail: I'm fine with the amendment, but I will use this opportunity to raise the question of what resources the chief electoral officer will have (1) to conduct the referendum and (2) to be able to ensure that he or she can properly carry out their duty under this

amendment — i.e., to report broadly and consistently across the province.

Hon. G. Plant: I'm advised that with respect to the first issue, the chief electoral officer will have to bring a budget for conducting the referendum to the Finance Committee of the Legislature as part of his annual budget. I'm certain that the government members of that committee will provide the necessary level of scrutiny to ensure that the budget is the appropriate amount. We will want to support the chief electoral officer in doing that work.

I think the announcement of the results is probably not much more than standing up in a room with a bunch of TV cameras and making the statement about the announcement. If there is more the chief electoral officer will want to do to make sure that the results of the referendum are well known, then that will be something he can bring forward along with his other budget requests.

Amendment approved.

On section 3 as amended.

J. MacPhail: This would be, I think, an appropriate time for the Attorney General to reiterate the logic behind the double majority in a way that the public can understand, as we move forward a year from now perhaps to have the referendum.

Hon. G. Plant: The formula the member refers to is expressed legislatively here in section 3(1). The results of any such referendum would be binding on the government according to this formula only if at least 60 percent of the validly cast ballots vote the same way on the question that is stated for the referendum, and if in at least 48 of the 79 electoral districts more than 50 percent of the validly cast ballots vote that same way on the question. And 48 out of 79 is a way of expressing numerically the requirement that there be majority support for the referendum in at least 60 percent of the electoral districts.

[1030]

The logic behind this double majority requirement is that the view of government is that the issue of whether to change our electoral system is sufficiently important that it ought to enjoy the support of a significant percentage of the populace. We had some discussion about where to set the percentage figure, given that we had decided it was going to be a higher threshold than a bare majority. We looked at a number of examples of situations where a higher threshold than a simple majority is required, and they range across the universe of these kinds of situations from 55 percent for some kinds of decisions up to 75 percent in other kinds of decisions. It depends on whether the issue is redesigning the constitution of a corporation or perhaps redesigning the constitution of a country. Government was of the view that 60 percent struck the fair balance among the different alternatives. If you've got a

got a 60 percent majority, you've got significantly more than half of the people who voted who want change, and that sends a strong message that change should be acted on.

The second component, which is the component that there be at least a majority in at least 60 percent of the constituencies, reflects a second set of considerations, and that is making sure that we don't have a situation where one region of the province ends up driving or causing electoral reform over the lack of support in other regions. We introduced what really amounts to a bit of a regional requirement here. You've got to get majority support in at least 60 percent of the electoral districts. Again, the question of how high you set that threshold was discussed, and we looked at a number of different levels at which the threshold could be set. We thought that putting that threshold at at least 60 percent of the electoral districts spread the net out widely enough to give the regions the voice they need here without rendering it impractical to expect that the referendum would ever pass.

I don't know that you want to give any particular corner of the province a veto over change. But we did want to raise the stakes high enough so that we could be assured that support for change was widespread across the province as a whole — hence the 60 percent first threshold — and that there was support across most of the province for change. That is the logic behind imposing the double majority requirement.

J. MacPhail: This legislation is implementing the resolution that was passed by the Legislative Assembly for which the opposition voted in favour. I just want to make sure that as we move forward in what I believe will be a historic time — if indeed there is a referendum — people understand the thoughts behind the legislators in determining this greater than a simple majority threshold — two thresholds.

But I want to urge this. The Referendum Act under section 6, which will still apply, says that without limiting subsection (1)... Well, let me just read the whole thing into the record, if I may:

"Regulations on how the referendum is to be conducted.
6 (1) The Lieutenant Governor in Council may make regulations that the Lieutenant Governor in Council considers necessary or advisable respecting the manner by which a referendum under this Act is to be conducted. (2) Without limiting subsection (1), the regulations may (a) specify what provisions of the Election Act apply, and (b) adapt any of the provisions of the Election Act with changes that the regulations may provide."

I urge caution here to the Attorney General to ensure that as much of the Election Act as is feasible applies to this referendum and that the government is assuring with this double majority — one simple and one 60 percent — that there is a resounding view cast by the electorate. I am urging to make sure that as many British Columbians as is feasible get to have a voice in that referendum.

[1035]

Hon. G. Plant: Well, I agree that the referendum, if it is to be meaningful, needs to be an opportunity for all British Columbians to express their views. The chief electoral officer always has before him the challenge and the task of trying to make sure that elections are conducted in a way that gives as many British Columbians as possible a chance to participate.

I think I share the member's concerns and goals in that respect. There is some flexibility here in part, I think, because the chief electoral officer needs to have some flexibility to make rules that are intended to accomplish those objectives.

One thing that the member's comments reminded me of, though, was that while it was government that came up with the idea around the double majority, it was the Legislature as a whole that had the opportunity to express an opinion on it and did endorse it. I will speak to the staff who are responsible for doing the detailed work around this initiative to make sure that we continue to move it forward on a — I'm not sure of the right word — non-partisan or bipartisan basis so that the members of her caucus are as informed as possible about the details so that we can continue to work together to give the people of British Columbia this historic opportunity, if that is what the Citizens' Assembly wants them to do.

Section 3 as amended approved.

Section 4 approved.

Title approved.

Hon. G. Plant: I move that the committee rise and report the bill complete with amendment.

Motion approved.

The committee rose at 10:37 a.m.

The House resumed; Mr. Speaker in the chair.

Reporting of Bills

Bill 52, Electoral Reform Referendum Act, reported complete with amendment.

Third Reading of Bills

Mr. Speaker: When shall the bill be considered as read?

Hon. G. Plant: By leave, now, Mr. Speaker.

Leave granted.

Bill 52, Electoral Reform Referendum Act, read a third time and passed.

Hon. G. Plant: I call second reading of Bill 54.

Second Reading of Bills

MISCELLANEOUS STATUTES AMENDMENT ACT (No. 2), 2004

Hon. G. Plant: I move that the bill be now read a second time.

Mr. Speaker, this bill, Miscellaneous Statutes Amendment Act (No. 2), 2004, makes amendments to quite a number of statutes — 19, I think, to be exact. In seeking to explain what all of these amendments are about, I will briefly describe the changes in the order they appear in the bill with an attempt to cluster some of the related changes as I go. I will try to provide a bit more detail about some of the more significant amendments.

First, there are two minor changes needed as a result of the recently enacted Cremation, Interment and Funeral Services Act. A drafting error was made in the consequential change to the Community Charter, and a consequential change to the School Act was inadvertently missed. This bill will correct these errors and in so doing will ensure the continuation of current taxation policies with respect to cemeteries.

Second, this bill proposes amendments to the Election Act to help ensure the quality and accuracy of the provincial list of voters. As I mentioned last fall during second reading on Bill 90, Miscellaneous Statutes Amendment Act (No. 3), 2003, we had been looking for ways to ensure that we have an election list for general election purposes prior to the next general election that is as up to date as possible.

[1040]

One of the things we've been looking at is the idea that we could use the federal list kept by Elections Canada, which we believed could be merged with our provincial list to generate a much more up-to-date voters list. We have since found that is indeed the case, and so these amendments permit the use of the national register of electors, also known as the federal voters list, for the purpose of updating the provincial list of voters.

The amendments to the Election Act allow for the automatic provincial registration of qualified voters who are on the federal voters list. At the same time, these amendments greatly improve the quality of the provincial voters list. They should enhance convenience for voters and eliminate duplication of effort, particularly the effort of enumeration between Elections B.C. and Elections Canada. These amendments are estimated to save the taxpayers of British Columbia up to \$11.5 million by eliminating the need for a provincewide door-to-door enumeration and the need to set up preregistration centres for new voters during the next general election.

We also anticipate that using the federal data will allow automatically for the addition of over 700,000 voters to the provincial list, which will make a full door-to-door enumeration unnecessary. Door-to-door enumerations are not only becoming a very expensive undertaking, but experience is showing that they are

no longer as effective an expenditure of public dollars as they once were, because the number of names you get to add to the list by undertaking those kinds of enumerations no longer produces the return on investment, if you will, that used to be the case some decades ago. This is a good step in adding a significant number of voters to the provincial list.

Bill 54 also amends the Election Act to remove the requirement for a voter's signature at the time of registration. This will permit innovations such as on-line voter registration. A signature will, of course, be required at the time of voting to maintain the integrity of the voting process. In other words, you might be able to register on line, but when you show up to vote, you will still have to sign a document to say that you are in fact qualified to vote.

There are further amendments that will provide greater flexibility to the chief electoral officer of British Columbia in the appointment of district registrars of voters.

Using the federal list is, I'm told, consistent with a trend across Canada. Using the national register of electors is, I suggest, essential to a long-term, sustainable, low-cost solution to voter registration and voters list maintenance in British Columbia. Obviously, it goes without saying — but maybe it goes better with saying it — that having an accurate list of voters is also essential to a fair and democratic election, and I am very pleased to say that we will be putting this list in place with these proposed amendments contained in Bill 54.

The third set of amendments made by this bill is made in response to a recommendation made by the Hon. Gary Filmon in his Firestorm 2003 report. That report highlighted the inconsistent levels of preparedness — or lack of preparedness — among adjacent geographical areas because regional districts are not currently required to have emergency plans.

At least 88 of 164 electoral areas, or a full two-thirds of the land mass of the province, are not covered by written, current or adequate plans to address emergencies and disasters for B.C. residents. Planning and response efforts can only work when all regional districts and municipalities have adequate, integrated and current emergency plans. In response to this, this government is introducing amendments to the Emergency Program Act to make all regional districts, not just municipalities, responsible for emergency planning and maintaining emergency management organizations. In addition, a package of supports to municipalities and regional districts will include increased provincial emergency program staffing, \$1 million for emergency planning, plus an additional \$300,000 for emergency preparedness training.

[1045]

These supports will be available to all regional districts, whether or not the district already has an emergency plan, so that all regional districts can implement the lessons learned from the Firestorm 2003 report. This amendment, along with this financial support, will ensure consistent emergency planning and preparedness for British Columbia.

Fourth, this bill makes some amendments to the Employee Investment Act and, consequentially, to the Employee Investment Amendment Act, 2002, the Income Tax Act and the Miscellaneous Statutes Amendment Act (No. 2), 1999. These amendments, which will streamline regulations and ensure consistent treatment for companies and investors under the legislation, will do three things.

They will increase the amount that a labour-sponsored fund may invest in any single eligible business from \$5 million to \$10 million within a two-year period and, by doing so, increase the amount of capital available to those businesses. Secondly, they will allow tax credits to be issued over multiple years for employee share-ownership plans, successorship plans. Thirdly, they will repeal the grandfathering of hardship dispositions to ensuring a level playing field for all labour-sponsored investment fund shareholders.

The government is committed to providing increased investment, enhanced competitiveness and a stronger, more dynamic British Columbia economy that attracts business from around the world and creates new opportunities right here in British Columbia. These amendments will help us achieve these goals.

Fifth, Bill 54 will also amend section 105(1) of the Gaming Control Act in order to enhance certain regulation-making authorities in that act. This regulation-making authority will be used to give certainty to and define the consultation obligations that are legislatively required of local governments in regard to gaming facilities. The regulations made under the amendments will also be used to give certainty to and define the time lines associated with a dispute resolution process provided for in section 21 of the Gaming Control Act.

Sixth, this bill makes some minor housekeeping amendments to the Health Professions Act in order to correct minor drafting problems, mostly problems with cross-references from one section to another arising from the enactment of the Health Professions Amendment Act, 2003.

Seventh, in order to support the establishment of an independent authority to administer the land title and land survey functions, amendments are proposed by Bill 54 to the Land Title Act in order that fees for certain land title office transactions be increased by approximately 8 percent. These transactions include registering a title or charge, filing a caveat, general filing, filing a change of name and registering a cancellation or discharge of a registered charge.

Most of these fees are in either the \$20 or the \$60 range. A \$60 fee, for example, will rise by \$4.75 to \$64.75. This independent authority — that is, the independent authority that will be established to administer the land title and land survey functions — will be established at a later date, but its establishment requires this fee increase to fund the transition.

Eighth, this makes a number of changes to local government legislation. The first of these is a minor housekeeping amendment to correct a drafting error. A

reference to the words "a municipal bylaw" in the Local Government Act is struck out and replaced with a reference to the words "a regional district bylaw."

More significantly, section 910 of the Local Government Act and the Municipalities Enabling and Validating Act (No. 3) are amended in response to concerns expressed by some local governments and their legal counsel about the sufficiency of statutory authority to allow local governments to administer floodplain issues to the degree intended by the Flood Hazard Statutes Amendment Act, 2003. That was an amendment act that, among other things, amended section 910 of the Local Government Act.

[1050]

The amendments in Bill 54 respond to those concerns and, in particular, provide certainty that local governments will be able to pass floodplain bylaws that incorporate variations in their provisions in accordance with a set of considerations relating to localized conditions in types of development or amend existing floodplain bylaws. The amendments also grant site-specific exemptions from these bylaw provisions as circumstances warrant, so long as these exemptions are consistent with provincial guidelines and plans or are supported by a professional report stating that the site can be safely used for the intended purpose.

Related amendments to the Municipalities Enabling and Validating Act (No. 3) are also made in order to provide certainty that floodplain bylaws adopted and exemptions granted prior to November 17, 2003, are automatically continued in effect until such time as local governments choose to make changes to them. There are yet more amendments to local government legislation in this bill.

In addition to the floodplain amendments, the Municipalities Enabling and Validation Act (No. 3) is amended to validate bylaws of the resort municipality of Whistler related to the proposed development of a hotel and passenger rail station at Nita Lake. These amendments are a response to a request from the municipality of Whistler for legislation to validate a flawed bylaw so that the Nita Lake development, which has already seen significant financial investment and legal commitments, can proceed. Without this legislation, Whistler is concerned that the Nita Lake development may not be completed, even though the development clearly has the support of the Whistler community. The amendments recognize that this development reflects provincial as well as local goals, given the contribution that the project will make to helping meet transportation and accommodation needs for the 2010 Olympics as well as supporting economic development and the growth of the tourism industry generally.

Further with respect to local governments, Bill 54 amends the Vancouver Charter to provide the city of Vancouver with authority to adopt a bylaw to prohibit street fighting and to make such physical altercations in public places a ticketable offence. The amendment was requested by the city of Vancouver to provide it with another tool for responding to the impact that

street fighting can have on public safety and police resources.

I note that under the Community Charter, which applies to municipalities other than the city of Vancouver, other municipalities in B.C. already have the authority necessary to prohibit such activities in public places. In other words, this amendment gives to the city of Vancouver a bylaw-making authority which other municipalities governed by the Community Charter already have. The kind of street fighting we're talking about here tends to be street fighting that is voluntary in nature and not someone being assaulted involuntarily.

Next, following from the various changes made to local government legislation, Bill 54 makes some changes dealing with the regulation of video games and motion pictures. Basically, these changes involve the repeal of the Video Games Act, which was never brought into force, and the amendment of the Motion Picture Act to fill the gap brought by that repeal and address a couple of other issues.

Some of the changes to the Motion Picture Act include the following. First, the term "video games" is added to the definition of motion picture. Second, a power is added to allow the official named in the act — the Motion Picture Act — to reconsider a film classification decision set by an external rating agency, and power is given to change this classification. Third, powers of investigation are strengthened. Government determined that the Video Games Act was unnecessary and that the Motion Picture Act could be easily adapted to deal effectively with the regulation of video games.

[1055]

In fact, the vast majority of video game regulation now takes place through an industry self-regulation classification system administered and created by the group known by the acronym ESRB. What we've got here is a recognition that there is no need in British Columbia to reinvent that complete universe. For most cases and on most occasions, that system of self-regulation will be used and relied upon, but there are times and places where it may be necessary to find a way to provide a rating or change a classification for a particular video. As a result of these amendments, we will have the regulatory framework that will allow us to do that by using the regulatory framework that applies to motion pictures. I think that strikes a very good balance between the need to protect the public and the need to not impose costs of regulation that are out of proportion to the return on investment.

Tenth, Bill 54 amends the Probate Fee Act to prevent the loss of probate revenue. This change is made in response to a recent court decision that ruled certain shares to be outside the province and therefore outside the reach of the legislation. The amendments clarify that probate fees apply to the value of intangible personal property for estates where the deceased was ordinarily resident in British Columbia.

Finally, Bill 54 makes a series of amendments to the Railway Act, one of the oldest statutes in British Co-

lumbia, in order to repeal the incorporation and corporate governance provisions of that act as they are no longer necessary in light of the Business Corporations Act and to transfer the administration of those railways incorporated under the Railway Act to the Business Corporations Act. The amendments also repeal provisions allowing railway constables to be appointed under the act, as these constables will in future be appointed under the Railway Act. None of the changes to the Railway Act affect B.C. Rail.

That constitutes a summary of the provisions of Bill 54.

L. Mayencourt: I just want to speak for a moment on second reading, Mr. Speaker.

Mr. Speaker: Please proceed.

L. Mayencourt: Thank you very much.

Miscellaneous statutes acts are often a favourite of mine because they tend to do a lot of the cleanup of things that have been important to communities. One of those is, of course, the amendment to the Vancouver Charter.

Vancouver city council asked us as a government, as did the Vancouver police department and community groups like Barwatch, to make this amendment so that it would be possible for them to make a consensual street fight a ticketable fine. I think that is a demonstration of this government being able to work with communities to increase the safety of our cities throughout the province. In fact, it was only required under the Vancouver Charter because the Community Charter facilitates that for the rest of British Columbia.

I also want to speak in favour of it because of the changes to the electoral act. I think those are important. They make clear the ability and rights of individuals that are in temporary housing or homeless, or what have you, as to their rights to be able to vote. I think it moves forward in a direction that the chief electoral officer has requested of our Public Accounts Committee and our Finance Committee on a number of occasions with respect to using the national register of electors as a way of saving money and being more efficient with the use of chief electoral dollars.

The other point I want to make is that I've talked a lot to people in the Working Opportunity Fund. That's a labour-sponsored fund. They have won the opportunity to leverage their labour-sponsored funds with a little bit more freedom. I think this bill actually does that by raising the cap to \$10 million as opposed to \$5 million.

There are other pieces of this legislation that are very, very important to British Columbians, but I just want to conclude by saying that I think this reflects what our communities have been telling us about some of the previously passed acts. We're making those adjustments, so I salute the AG for putting this forward. I think it's important that we work with our communities when they need special recognition for certain problems.

[1100]

Motion approved.

Hon. G. Plant: I move that the bill be referred to a Committee of the Whole House to be considered at the next sitting of the House after today.

Bill 54, Miscellaneous Statutes Amendment Act (No. 2), 2004, read a second time and referred to a Committee of the Whole House for consideration at the next sitting of the House after today.

H. Bloy: I ask leave to make two belated introductions.

Leave granted.

Introductions by Members

H. Bloy: This past May 7 there were 120 extraordinary students from Forest Grove Elementary School in my riding of Burquitlam that visited the Legislature. They were accompanied by 16 parents and their teachers Peggy Tooley, Dini Dahlen, Peter Dubniskey and Patti Long.

I visited these 120 students at their school on May 10, and we had a 45-minute question-and-answer period. I can tell you, Mr. Speaker, they had some great and really challenging questions. I know I was speaking to the future leadership of British Columbia. Amongst that group of 120 students there were a school mayor and student council representatives. I know that I have met future elected officials of this country. I want to say what a pleasure it was to meet these students, and I want the House to join me in congratulating the students and their dedicated teachers.

Mr. Speaker, it gives me a real personal pleasure to.... I want to acknowledge the ninetieth birthday of my dad. This past Saturday, May 15, my dad turned 90. My dad has been my mentor and friend forever. He has always encouraged me to strive to be the best I could, to do what I wanted to do and to follow my dreams. I can say that I've challenged my dad on some of my decisions, and he has challenged me back, but he has always encouraged me and stood behind me. This past Saturday I was joined by my brother Randy and his family, my sister Debbie and her husband, Dean, my family and other relatives to celebrate my dad's birthday.

I wanted to say happy birthday, Dad. I love you.

Hon. G. Plant: Resisting the urge to break out in song, I call second reading debate of Bill 56.

Debate Continued

ADMINISTRATIVE TRIBUNALS ACT

Hon. G. Plant: Mr. Speaker, I move that the bill be now read a second time.

Bill 56 is the second and last major component of the legislative reform that government has initiated to modernize British Columbia's administrative justice system. This bill provides a consistent and comprehensive approach to statutory powers for 24 administrative tribunals. It furthers the government's interrelated goals of decision-making independence and public accountability, and it provides a firm foundation for future public policy decisions about new administrative institutions and their essential powers and procedures.

Administrative tribunals provide an informal and efficient alternative to the courts. They resolve disputes and make decisions with less expense than the courts. They do so from a framework of developed public policy expertise in a range of areas that this assembly has decided should be decided by and the responsibility of agencies in the first instance rather than the courts.

Administrative tribunals are also intended to be more accessible to people who may be unfamiliar with judicial proceedings or who are unrepresented by legal counsel. This administrative justice system we have in British Columbia has grown on an ad hoc basis, one tribunal at a time, over the course of many decades. As a consequence, it has often developed without a comprehensive or consistent policy framework. The bill that we are debating this morning acknowledges the importance of this part of our justice system and moves us forward by providing a wide array of statutory powers for administrative tribunals that are based upon well-thought-out principles and expressed in clear and consistent legislative language.

[1105]

Last fall I had the privilege to stand in this House and table the Administrative Tribunals Appointment and Administration Act, which was the first step in the government's program of legislative reform in this area. That act introduced the principle of merit for appointments to British Columbia's administrative tribunals, and it established clear accountability to the government for tribunal chairs in the management and operation of their tribunals. The provisions in that act, the Administrative Tribunals Appointment and Administration Act, are incorporated into the bill we are considering today so that if this bill passes, we will have one comprehensive piece of legislation addressing administrative tribunal appointments, administration, powers and procedures.

The bill before us today also culminates work that began last summer with the release of a widely circulated paper entitled *Model Statutory Powers Provisions for Administrative Tribunals*. That paper in turn built on work going back to the White Paper, which was an important part of the early stages of the administrative justice project. The *Model Statutory Powers* paper examined the operations and processes that are currently in use by individual tribunals in our province. It describes how the complexities of the administrative justice system's statutory powers have caused unnecessary challenges and questions for the courts. It makes comprehensive recommendations for changes to the system to better serve the people of British Columbia.

For the benefit of the House and for the people of British Columbia who are interested in this issue, I want to look closely at some of the key aspects of this bill. I intend to spend some time talking about how this legislation codifies the common law and introduces consistent standards and practices for the benefit of all tribunals, especially small and medium-sized tribunals with part-time members and perhaps few in-house resources to address the many varied and complex procedural issues that arise during the course of tribunal proceedings.

I want to speak about how the bill introduces other modernizing initiatives such as alternative dispute resolution, and I want to talk about the innovative steps we're taking to address some difficult legal questions — for example, the need to clarify the role of the courts in their review of tribunal decisions and, secondly, to address the authority of individual tribunals to consider questions of constitutional law. These are important matters of government policy where legislative intent is much in need of clarification.

Moving to the first theme, the theme of consistency through codification. In the exercise of their powers, administrative tribunals are generally bound by the authority granted to them in their enabling statutes. Accordingly, if a tribunal's legislation is silent or unclear, the courts may or may not imply certain powers so that the tribunal can discharge its mandate effectively. Much of the bill that we are considering today codifies powers that the courts have recognized. Codification means we're expressing in legislation things that the courts have found to be principled or part of the common law. The list of each tribunal's powers will be set out here in this bill expressly in common form in one place for all to see. This will provide greater certainty and clarity for the people who use individual tribunals and will make the administrative justice system as a whole more transparent, accessible and understandable.

I'd like to offer a few examples to illustrate how the bill will work. First, under the heading of statutory powers, tribunals need clear statutory powers to carry out their mandates effectively. These powers allow tribunals to maintain order in their proceedings, to require the attendance of witnesses and to order the production of relevant documents. Statutory powers also address the conduct of hearings by the tribunal and the respective roles of parties, witnesses and any authorized interveners.

The bill we are considering today establishes clear expectations for tribunals. There are new requirements that a tribunal set out in practice directives how long each step in a proceeding is expected to take. There are also new legislative standards for tribunal decisions. Decisions must be given in writing with reasons, and subject to certain limitations protecting vulnerable people, decisions must be accessible to the public.

[1110]

The bill also places limits on the enforcement powers of tribunals. In exceptional circumstances where a tribunal is unable to maintain order in its own proceed-

ings, either by excluding parties or by dismissing a matter before it, the tribunal may call a peace officer for assistance. In addition, if the conduct of a participant is contemptuous, the tribunal may ask a court to intervene by imposing either a fine or a term of imprisonment.

This approach is balanced and proportional. It allows tribunals to control and manage their own processes in a way that's respectful of the rights of the parties. It also gives the tribunals the authority they need to call for outside assistance in exceptional circumstances where there may be serious issues of misconduct or contempt.

The next subject is rules governing practice and procedure. In addition to statutory powers, most tribunals make rules setting out in greater detail what the participants are expected to do, what steps the parties must take and when certain events must take place. Rules like these are critical to the effective and efficient management of tribunal processes and resources. This bill provides a more transparent and principled approach to the establishment of practice and procedural rules. It gives express authority to tribunals to make rules on a comprehensive list of enumerated subject matters. It also gives tribunals the flexibility to waive or modify those rules in exceptional circumstances. Finally, the bill provides that all tribunal rules must be accessible to the public.

The next topic is alternative dispute resolution. This bill introduces express authority for tribunals to engage in alternative dispute resolution processes. Under the provisions of this bill, most tribunals will have the power to develop and offer innovative approaches so that disputes are resolved earlier and with less expense.

The move to encourage alternative dispute resolution is an important part of rethinking the justice system, and administrative tribunals have an opportunity to show leadership in this regard. What citizens want more often than not is an outcome and a result rather than a process. They want their problems solved. They want the relationship improved, they want the benefit they believe they're entitled to, and they want government to stop doing what it is that is harming them.

Anything we can do to move forward dispute resolution so that it happens sooner is, in my view, a step in the right direction, and we are doing a lot as government to try to encourage alternative dispute resolution not just in the administrative justice system but across the justice system as a whole. In fact, part of rethinking justice involves rethinking the idea of alternative dispute resolution so that it is no longer alternative but, rather, so that mediation, settlement, conciliation and settlement conferences are all part of the basic tools of all dispute resolution so that litigants can in fact have their problems solved as early, efficiently, affordably and — yes — also as fairly as possible.

There are also, however, some important protections that need to be put in place to ensure that these alternatives to traditional adjudication are nurtured and that the litigants who participate in them are pro-

tected. Like proceedings before the courts, most tribunal proceedings are open to the public, but many dispute resolution processes depend for their success on their confidential nature. This bill will protect the confidential character of settlement negotiations. It also ensures the effectiveness and transparency of the settlement process by allowing parties to file and enforce settlement agreements as orders of the tribunal if the settlement terms are consistent with the provisions of the tribunal's enabling legislation.

[1115]

The next subject is known as standards of review. One of the most innovative changes in this bill is the clarification it will provide to questions about the standard a court must apply when it is asked to review tribunal decisions. Superior courts have an inherent supervisory jurisdiction over decisions of provincial administrative tribunals. In legal terms, this oversight is referred to as "judicial review," and through the judicial review process the courts ensure that tribunals are subject to supervision by the courts if they act outside their statutory mandates or if they operate unfairly or violate basic principles of natural justice.

While the authority of the courts to oversee the work of administrative tribunals is vital and unquestioned, there has been a huge amount of debate and uncertainty about what standard of review should be applied by the courts in reviewing tribunal decisions. There is a large body of jurisprudence that tries to make sense of this area of the law, but unfortunately, as the jurisprudence has developed, it has tended to create confusion rather than certainty.

The question of what the standard of review should be on a case-by-case basis is often interpreted by the courts as a search for legislative intent. The words "legislative intent" are, in fact, the words that you see in the judicial decisions. What the courts are trying to do is find out what the intention of the Legislature was around the role of the courts in supervising decisions of administrative tribunals. Frankly, the Legislature does not always do as good a job as it should in making its intent clear. Accordingly, searching for that intent tends to be a time-consuming, expensive and sometimes disruptive exercise.

Really, in practical terms, what often happens is that when there is a challenge made to a decision of a tribunal, particularly a tribunal that is newly constituted, then a significant amount of time and money must be spent by lawyers on constructing the argument about what the standard of review is before the parties get to argue the merits of the case.

Absent express legislation — that is, in cases where there is not a clear statement of the legislative intent in this area — what the courts have done is develop standards of review on a case-by-case basis within the factual context of individual decisions and according to some basic principles of approach. But the result is that there are a number of different standards, and the standards are sometimes confusing. The variety of standards in itself is a source of confusion. Sometimes the standards conflict with each other, and they are

often difficult to apply when questions are raised in other contexts and circumstances.

In some situations the courts are willing to give significant deference to tribunal decisions, particularly if a tribunal has — relative to the courts — a substantial amount of subject matter expertise. In the case of an expert tribunal, such as the Workers Compensation Appeal Tribunal, a court will not substitute its own view about a decision in a proceeding unless the tribunal's decision is extremely unreasonable.

In other situations the courts show less deference to tribunal decisions, preferring instead to determine whether the tribunal has made the right decision. For tribunals like the Human Rights Tribunal, for example, the courts generally review decisions using a standard of correctness. That really is what the standard of correctness is about. It is asking the question of whether the tribunal got it right, whereas in situations where the courts are willing to give more deference to a tribunal where the test may be a higher test, it's possible for the tribunal to make a mistake. So long as the mistake is not egregious, then the courts will not intervene.

These are ways of starting to add text and flesh to the bones of this general challenge of finding out or determining what the standard is that ought to be applied when someone seeks judicial review of a tribunal decision.

[1120]

In the bill before us today, this government is for the first time taking up the challenge of defining legislative intent by simplifying and codifying the standards of review that we want courts to apply in their review of tribunal decisions. For tribunals with specialized expertise, like the Farm Industry Review Board and the Employment Standards Tribunal, this bill generally provides that a court must defer to a tribunal's decision unless the decision is patently unreasonable or the tribunal has acted unfairly. For other tribunals — including, for example, the mental health review panels — the bill provides that with limited exceptions, a court must adopt a standard of correctness in reviewing the tribunal's decisions.

In addition, the government is providing in this bill, for the first time, a statutory time limit of 60 days for filing applications for judicial review. Until now there was no time limit, and accordingly, judicial review applications could be filed many months or sometimes even years after the tribunal's decision. This new time limit will end the uncertainty, and it brings judicial review applications into line with other appellate or review practices. The provisions in this bill that codify the standards of review will shift the focus from what has been largely a scholarly debate about fine points of law to matters of greater immediate concern to the parties in tribunal proceedings. I believe these provisions offer the promise of greater certainty and finality to those British Columbians who want tribunals to help them on the matters that concern their health, their jobs and their futures.

This leads me to the next major question, which is the role of tribunals in dealing with questions of consti-

tutional law that come before them. There has been a great deal of litigation in recent years over this question too. There have been recent decisions from the Supreme Court of Canada that have brought this issue to the forefront and have, in my view, invited a legislative response. This bill responds to that invitation.

The courts have said that in the absence of express legislation, an administrative tribunal with jurisdiction to decide questions of law has jurisdiction to decide questions of constitutional law, including questions about the division of powers between federal and provincial governments, questions about aboriginal rights and title, and questions about individual rights under the Charter of Rights and Freedoms. Again, the courts have moved in this direction, in part because they have searched for the intent of the Legislature in relation to these questions and have not found much helpful guidance. The intent behind this bill is, in fact, to provide that guidance.

The kinds of questions that we're talking about, the kinds of questions I referred to a minute ago — questions about the division of powers, questions about aboriginal rights and title, questions about Charter rights — are inevitably complex questions. They involve a wide-ranging consideration of a great number of legal issues, and they have far-reaching implications. The expertise required to decide these issues often goes well beyond the specialized expertise of most tribunals. There is no doubt that most tribunal members have quite a bit of expertise in the areas they are asked to make decisions about. That is why they are appointed to become tribunal members, but that expertise may be in areas that are quite a long way away from the core questions that arise in constitutional disputes.

Expertise in science, medicine, finance, social policy, forestry or engineering may not necessarily be expertise in these questions of constitutional law. In fact, in many of these tribunals, our hope as government is to appoint tribunal members who have that subject matter expertise but don't necessarily have to be people with legal training at all. It's that subject matter expertise that tribunals need in order to come to good decisions within their statutory mandates.

Constitutional litigation is a highly specialized discipline within the more generalized practice of law. There is specific legislation in place that recognizes the importance of constitutional questions by requiring that notice be given to the Attorney General whenever a constitutional issue is raised in the course of an administrative or judicial proceeding.

[1125]

This notice procedure, which is found in the Constitutional Question Act, is by its nature a time-consuming and expensive undertaking. It may involve notice being given not just to the provincial Attorney General but also to Attorneys General in federal or other provincial jurisdictions. The resolution of these questions is neither simple nor easy. They inevitably involve an extensive commitment of public resources and a highly developed institutional capacity if they are to be dealt with in an effective way.

As I've said earlier, the consequences of constitutional decisions can have far-reaching public policy implications for institutions of parliamentary democracy and for the government's legislation, programs and resources. These implications themselves are generally beyond the specialized expertise of most administrative tribunals and their members. We hope that for most administrative tribunals, parties can appear before them to have their issues resolved without the need to hire legal counsel.

As a general rule, lay litigants are not well equipped to respond to complex constitutional arguments. In a constitutional matter this works to the disadvantage of both the lay litigant and the tribunal by delaying decisions, increasing the costs and complexity of the decision-making process, and undermining the fundamental goals of the administrative justice system in providing an accessible, effective and speedy dispute resolution process.

The courts have stated clearly that when an inferior administrative tribunal — and that's not intended as a value statement, just as a hierarchical statement — makes a decision on constitutional questions, that decision is always subject to review by the courts on a standard of correctness. In other words, the tribunal has to get it right. However, unlike court decisions that establish precedent in future matters involving similar questions, a tribunal decision in a specific case is not binding in other cases before the same or a similar tribunal. Furthermore, because tribunals are not courts, they do not have the institutional competence to grant constitutional remedies like declaratory relief.

As Attorney General, I have an obligation to ensure that constitutional litigation is carried out responsibly and in an accountable manner and that scarce public resources are not allocated to repetitive constitutional proceedings addressing the same issues with inconsistent, inconclusive or ineffective results. Yet that is what can happen with the status quo. You can go before a tribunal, argue a constitutional point and then find that while that constitutional point is resolved in a way that assists you in the matter that you brought it forward, the view about the constitutional issue does not govern the next meeting or hearing of the tribunal on another matter. You could end up with a series of tribunal decisions on constitutional issues that go in different directions.

It's also possible that that not be the case, but in fact that risk exists. That risk adds to the range of reasons I'm trying to develop here to illustrate why it is, in a way, fundamentally inconsistent with the basic objectives of an administrative justice system that we allow tribunals to divert significant amounts of resources, time and effort — usually at the expense of the parties — towards a consideration of complex questions of common constitutional law. Really, what we want tribunals to do is problem-solve. If there are complex constitutional law questions raised, those are questions for courts.

We place a high value on the underlying goals of the administrative justice system. That's why over the

last three years we have undertaken a broad program of law reform and review. Given the complexity of constitutional litigation, given the lack of constitutional expertise possessed by most administrative tribunals, given the lack of deference the courts will extend to tribunals on constitutional questions and given the fact that tribunal decisions are not binding in subsequent proceedings, the bill we are considering today provides another course, another route. It provides an express legislated process for resolving most constitutional questions through the courts.

[1130]

With a few limited exceptions that I will come to in a minute, these provisions will apply to all administrative tribunals and to all constitutional questions that arise in the course of proceedings before them.

The provisions in the bill in this regard are innovative and unique. They build on the existing mechanisms for resolving constitutional questions. They draw a clear distinction between the specialized jurisdiction of a tribunal over non-constitutional questions and the role of the courts in deciding fundamental issues of constitutional law. The provisions in the bill allow tribunals to focus resources on their areas of specialized expertise so they can continue to provide high-quality services to the people of British Columbia. The provisions in the bill also recognize that the courts are the most appropriate forum for the determination of most constitutional questions.

I said that there are limited exceptions to this general policy. In this respect, the courts have indicated that the Labour Relations Board and the Securities Commission have the expertise necessary to address constitutional questions in the course of their proceedings. The deference that the courts are willing to accord to these tribunals is reflected in the bill. In addition, these two tribunals are given authority to refer constitutional questions to the courts by way of a stated case at the request of the parties on their own motion or if directed to do so by the Attorney General.

I want to say this editorially. We have recognized that the courts have afforded this deference to the Labour Relations Board and the Securities Commission. I do so with a certain measure of reluctance because even in those tribunals, I think we find that the people who staff those tribunals are there because they have expertise in labour relations. They're there because they have expertise in securities regulation. They're not there because they are constitutional law scholars.

When we introduce constitutional law questions, even into those proceedings, there are significant risks that the real issues will be taken away from the parties in a distraction, so I am going to continue to monitor and watch the process put into place by this bill. I would say that to the extent that my views are relevant, I would encourage the tribunals I've mentioned — the Securities Commission and the Labour Relations Board — to, where appropriate, use the authority to refer constitutional questions by way of stated case as the preferred way of dealing with constitutional questions.

There are some other exceptions. Three other tribunals — the Employment Standards Tribunal, the Farm Industry Review Board and the Human Rights Tribunal — are each given limited constitutional jurisdiction to consider questions about the division of powers between federal and provincial governments. These questions can arise in the course of tribunal proceedings, and the tribunals' expertise in resolving them has been acknowledged by the courts.

These three tribunals will also be given authority to refer division-of-powers questions to the courts by way of a stated case at the request of the parties on their own motion or if directed to do so by the Attorney General. Here I would like to make this exception practical by illustrating how it might operate. There are many people who believe they have a human rights complaint, who will phone the Human Rights Tribunal because they want to file a complaint. In fact, their complaint concerns a matter which has arisen within federal legislative jurisdiction. They may have a human rights complaint, but they should take it to the Canadian Human Rights Commission, not to the B.C. Human Rights Tribunal. In part, the provisions in this bill are intended to reflect that very practical reality and that very practical need to ensure that the Human Rights Tribunal has the authority to reject complaints which are not brought to them within their constitutional jurisdiction.

That summarizes what the bill does. I do want to spend a minute or two explaining how the bill works.

First, Bill 68 from last fall, the Administrative Tribunals Appointment and Administration Act, will be repealed. The first ten sections of that act will become the first ten sections of the new legislation we are considering today. The remaining sections of Bill 68 are spent, as they have become part of the legislation amended by it.

[1135]

Then we have sections 11 to 61 of the bill before us today. Those sections provide a code of statutory powers for administrative tribunals. I've already covered the majority of the subject matters of that code, but in addition to the topics I have discussed, these sections address issues like notice requirements; public access to rules; the details around orders, decisions and tribunal proceedings; the service of documents; time limits for decisions; fees, costs and appeals.

Now, these sections are either adopted by reference or through direct amendment in each tribunal's enabling legislation. Not all of the sections will apply to each tribunal, and there are some variations in language reflected in provisions enacted directly in a tribunal's home statute. In general, the policy reflected in the bill applies to the provisions amended and enacted directly in the individual statutes. We have created a code, but we are applying it in a way that is responsive to the flexible needs and circumstances of individual tribunals. To use the time-honoured language, we recognize that one-size-fits-all solutions don't always fit, so we've adopted a somewhat flexible approach.

The third part of the bill is from section 62 to the end of the bill, and those are consequential amendments to the enabling statutes for the 24 administrative tribunals that are affected by this legislation. There are a few tribunals like the Environmental Appeal Board and the Forest Appeals Commission that are currently the subject of other reviews, and the principles set out in this bill today will inform those reviews and establish principles for any future legislative changes not only for those tribunals but also for new administrative tribunals, processes and procedures.

If I can just elaborate on that. Really, the goal here is to move past this tradition of ad hoc approaches to these issues into a place where we have a consistent and principled, comprehensive and disciplined approach to this. The hope is that this framework of principles and rules and powers will be used by government as the framework that should apply to any tribunals that are created down the road so that we won't end up going off this path we've worked so hard to create.

Let me conclude by saying that I think this bill is important for many reasons. As I have said at the outset, the model that we have developed provides a firm foundation for future public policy decisions about the administrative justice system and its institutions. Systemwide reforms on the issues of standard-of-review and constitutional questions address the most current and critical areas of government policy with respect to administrative tribunals, and these are issues that are both current and of critical interest in the legal community.

I think the codification of common-law principles will increase the efficiency of administrative justice and will also make it more transparent and effective. The focus in the consequential amendments on small and medium-sized tribunals brings consistency of approach to tribunal powers and rules where it is needed most. In essence, these reforms modernize the administrative justice system by making its processes more transparent, more consistent and more predictable, and by making the system itself more comprehensible to the public it serves.

Finally, I want to close by acknowledging the many people who have helped make all this possible. I wish to thank, in particular, the circle of chairs — the British Columbia Council of Administrative Tribunals, the Law Society of British Columbia and the B.C. branch of the Canadian Bar Association — who have supported and been involved in this work since its outset.

I want to thank the individual tribunal members and practitioners who have participated actively and positively in what has been a strong, open and very collaborative process. Their hard work and commitment to the values we have embraced is reflected in the bill that you see today. I want also to express my appreciation to the administrative justice project and to all of the people inside government who have worked so hard to bring us to this important point of reform.

[1140]

Motion approved.

Hon. G. Plant: I move that the bill be referred to a Committee of the Whole House for consideration at the next sitting of the House after today.

Bill 56, Administrative Tribunals Act, read a second time and referred to a Committee of the Whole House for consideration at the next sitting of the House after today.

L. Stephens: I request leave to make an introduction.

Leave granted.

Introductions by Members

L. Stephens: In the House today we have upwards of 60 students from my riding in Langley. They are from Blacklock Elementary School. They are joined by their teachers, Ms. Anderson and Ms. Kelly. There are about ten or so parents with them here today as well. They've been up since 4:30 this morning to catch the ferry for Victoria. They've so far had a very good tour of the buildings, are impressed with our buildings and certainly have had an opportunity to see what we do in this chamber today. Would the House please make them all very welcome.

Debate Continued

Hon. G. Plant: I call committee stage debate on Bill 55.

Committee of the Whole House

TEACHING PROFESSION AMENDMENT ACT, 2004

The House in Committee of the Whole (Section B) on Bill 55; J. Weisbeck in the chair.

The committee met at 11:42 a.m.

Sections 1 to 22 inclusive approved.

Title approved.

Hon. T. Christensen: I move that the committee rise and report the bill complete without amendment.

Motion approved.

The committee rose at 11:43 a.m.

The House resumed; Mr. Speaker in the chair.

**Report and
Third Reading of Bills**

Bill 55, Teaching Profession Amendment Act, 2004, reported complete without amendment, read a third time and passed.

Hon. G. Plant: Well, having failed to excite any controversy about the Administrative Tribunals Act... Oh, sorry — different subject.

Mr. Speaker, I move that the House do now adjourn.

Hon. G. Plant moved adjournment of the House.

Motion approved.

Mr. Speaker: The House stands adjourned until 2 o'clock this afternoon.

The House adjourned at 11:44 a.m.

THE CURRENT POSITION

Categories abolished. As the review above indicates, judicial use of legislative history in the past turned on a series of distinctions involving the type of material at issue (for example, commission reports rather than debate in *Hansard*), the nature of the problem (for example, constitutional validity rather than intended application) and the way the material was used (for example, as indirect evidence of purpose rather than direct evidence of intended meaning). The recent case law of the Supreme Court of Canada ignores and appears to have abolished these distinctions. It also ignores traditional distinctions between the handling of legislative history in civil law as opposed to common law¹²¹ and in international law as opposed to domestic law.¹²² This reflects a general tendency in the modern evolution of statutory interpretation to move from a rule-based to a principle-based approach.

In the leading case on statutory interpretation, *Re Rizzo & Rizzo Shoes Ltd.*,¹²³ the Supreme Court of Canada made it clear that legislative history is a legitimate source of assistance in statutory interpretation cases. To support the preferred understanding of an amendment to Ontario's *Employment Standards Act*, Iacobucci J. relied on statements made by the Minister when introducing the amendment to the legislature. To justify this reliance, he wrote:

Although the frailties of *Hansard* evidence are many, this Court has recognized that it can play a limited role in the interpretation of legislation. Writing for the Court in *R. v. Morgentaler*, ... Sopinka J. stated:

...until recently the courts have balked at admitting evidence of legislative debates and speeches.... The main criticism of such evidence has been that it cannot represent the "intent" of the legislature, an incorporeal body, but that is equally true of other forms of legislative history. Provided that the court remains mindful of the limited reliability and weight of *Hansard* evidence, it should be admitted as relevant to both the background and the purpose of legislation.¹²⁴

Iacobucci J. here applies the rule governing the use of legislative history in a division of powers case to a case of ordinary statutory interpretation. However, although the material is said to be relevant to "the background and the purpose" of the Act, it is relied on by the Court as direct evidence of legislative intent, thus moving beyond the rule in *Morgentaler*.

The issue in *Rizzo* was whether under Ontario's *Employment Standards Act* an employer owed employees severance pay when the termination of employ-

¹²¹ See, for example, *Doré v. Verdun (City)*, [1997] S.C.J. No. 69, [1997] 2 S.C.R. 862, at para. 14 (S.C.C.); *Construction Gilles Paquette Ltée v. Entreprises Végo Ltée*, [1997] S.C.J. No. 57, [1997] 2 S.C.R. 299, at 202 (S.C.C.).

¹²² See, for example, *Canada (Attorney General) v. Ward*, [1993] S.C.J. No. 74, [1993] 2 S.C.R. 689 (S.C.C.). See especially pp. 717, 730ff, and 752-53.

¹²³ [1998] S.C.J. No. 2, [1998] 1 S.C.R. 27 (S.C.C.).

¹²⁴ *Ibid.*, at para. 35.

ment was caused by involuntary bankruptcy. Section 40a of the Act required severance pay when "one or more employees have their employment terminated by an employer" In concluding that "terminated by an employer" was meant to apply to terminations caused by bankruptcy, Iacobucci J. relied on legislative history:

This interpretation is also consistent with statements made by the Minister of Labour at the time he introduced the 1981 amendments to the ESA. With regard to the new severance pay provision he stated:

The circumstances surrounding a closure will govern the applicability of the severance pay legislation in some defined situations. For example, a bankrupt or insolvent firm will still be required to pay severance pay to employees to the extent that assets are available to satisfy their claims.¹²⁵

Since the *Rizzo* case was decided, the Supreme Court of Canada has come to routinely rely on a wide range of legislative history materials¹²⁶ for a wide range of purposes.

Uses of legislative history. Legislative history continues to be relied on as evidence of the external context in which legislation was made and as direct evidence of purpose. When introducing a bill to the legislature, it is customary for the Minister sponsoring the bill to explain why, in the view of the government, new legislation was needed and what the government hopes to accomplish by enacting the bill. This is the type of legislative history most often relied on by courts, and this is the use to which it is most often put, in ordinary interpretation cases as well as challenges to constitutional validity. This use reflects the often repeated pronouncement of the courts, that legislative history is admissible to show both the background and the purpose of legislation.

However, as the *Rizzo* case illustrates, legislative history is also relied on as evidence of specific legislative intent. In *Re Canada 3000 Inc.*,¹²⁷ the Supreme Court of Canada relied on legislative history materials to establish the intended meaning of a particular word. One of several issues in the case was whether the legal titleholders of aircraft were the owners of the aircraft for the purposes of the *Civil Air Navigation Services Commercialization Act (CANSCA)*. Subsection 55(1) of the Act provided that the owners and operators of aircraft were jointly and severally liable for the payment of any service charges owing to NAV Canada. Subsection 55(2) defined "owner" as including the registered owner of the aircraft and any person in possession of the aircraft as conditional purchaser, chattel mortgagor, lessee or hiree. Although titleholders do not fall into any of these categories, they are nonetheless owners within the ordinary meaning of the word. While acknowledging this to be true, the Court ruled that the title holders were not captured by the section. Speaking for the Court, Binnie J. wrote:

¹²⁵ *Ibid.*, at para. 34.

¹²⁶ The range of material that may be labeled legislative history is considered *supra* at p. 593.

¹²⁷ [2006] S.C.J. No. 24, [2006] 1 S.C.R. 865 (S.C.C.).

Though of limited weight, Hansard evidence can assist in determining the background and purpose of legislation; ... In this case, it confirms Parliament's apparent intent to exclude legal titleholders from personal liability for air navigation charges. The legislative history and the statute itself make it clear that Parliament did not intend *CANSCA* to replace or override the existing regulatory framework but rather to fit cohesively within it. In introducing *CANSCA*, the Minister of Transport stated that the *Aeronautics Act*, which establishes the essential regulatory framework to maintain safety in the aviation industry, "will always take precedence over the commercialization legislation" (*House of Commons Debates*, March 25, 1996, at p. 1154). In the Ontario Court of Appeal, Cronk J.A. highlighted a number of other instances where government spokespersons emphasized to Members of Parliament that *CANSCA* was to fit within the existing regulatory framework which generally favours the narrow meaning of "owner"; see, e.g. *House of Commons Debates*, May 15, 1996, at p. 2834; May 29, 1996, at p. 3144; June 4, 1996, at pp. 3394 and 3410; and *Debates of the Senate*, June 10, 1996, at pp. 588-89.

In 1985, during passage of the *Aeronautics Act*, a concern was raised in Parliament that liability under s. 4.4(5) (that Act's liability provision) could extend to legal titleholders. In response, the Government inserted the term "registered owner". The Parliamentary Secretary to the Minister of Transport specifically stated that the change was made to ensure that liability did not extend to those who had a security or other financial interest in the aircraft; *House of Commons Debates*, vol. IV, 1st Sess., 33rd Parl., June 20, 1985, pp. 6065-66.

In 1996, the Government considered Bill C-20 (which became *CANSCA*) as it transferred the operation of the civil navigation system from Transport Canada to NAV Canada. The Clause by Clause Analysis brief presented to the Senate Committee explained that s. 55 is based on the wording of the equivalent section of the *Aeronautics Act* which, as stated, restricts "owner" to *registered owner*; see "Clause by Clause Analysis for the *Civil Air Navigation Services Commercialization Act*", as presented to the Senate Committee on Transport and Communications, at pp. 51-52.¹²⁸

[Emphasis in original]

The several materials relied on here, all of which make the same point, are quite persuasive of Parliament's intent.

Legislative history may be relied on to identify the scope of enabling powers, to determine whether legislation was meant to be retroactive or to establish that legislation implements, or only partly implements, an international obligation. In one recent case, it was relied on by the Supreme Court of Canada to establish that certain provisions in a statute were intended to re-enact rather than amend existing law. In *H.L. v. Canada (Attorney General)*,¹²⁹ the issue was whether the

¹²⁸ *Ibid.*, at paras. 57-59. See also *Tele-Mobile Co. v. Ontario*, [2008] S.C.J. No. 12 (S.C.C.) speaking for the Supreme Court of Canada, set out the legislative history of the provisions to be interpreted "in some detail" because of its critical role" in the Court's analysis.

¹²⁹ [2005] S.C.J. No. 24, [2005] 1 S.C.R. 401 (S.C.C.).

Court of Appeal Act, 2000 (Saskatchewan) expanded the Saskatchewan Court's powers on an appeal from a power to review the trial judge's findings of fact for palpable error to a power to make its own findings of fact, as in a rehearing. Section 14 of the Act provided:

14. On an appeal from, or on a motion against, the decision of a trial judge or on any rehearing, the court is not obliged to grant a new trial or to adopt the view of the evidence taken by the trial judge, but the court shall act on its own view of what, in its judgment, the evidence proves, and the court may draw inferences of fact and pronounce the decision that, in its judgment, the trial judge ought to have pronounced.

The language of this provision could certainly be read as authorizing the appellate court to conduct a rehearing. However, a majority of the Court concluded that the powers of the Court of Appeal had not been changed. In support of this conclusion, Fish J. relied on the following legislative history:

Hon. Mr. Axworthy: — Thank you, Mr. Speaker. I rise today to move second reading of *The Court of Appeal Act, 2000*. Mr. Speaker, *The Court of Appeal Act* was first passed when the court was created in 1915, and a number of provisions in the Act have remained unchanged since that time. Therefore, Mr. Speaker, *there's a need to update and clarify some of these provisions.*

The present section of the Act relating to jurisdiction is incomprehensible to anyone other than a legal historian. *The Bill before the House doesn't change the jurisdiction of the Court of Appeal in any way, it simply restates the historical jurisdiction of the court in a way that can be understood by users of the Act.*

...
(*Saskatchewan Hansard*, at pp. 1625-26 (emphasis added))¹³⁰

Since the powers of the court had previously been understood as permitting a limited review of the facts, that limitation continued to apply.

In *Doré v. Verdun (City)*, the Supreme Court of Canada relied on legislative history to resolve a conflict between two legislative provisions. Section 575 of the *Cities and Towns Act* provided for the dismissal of actions against municipalities unless prior notice had been given. Article 2930 of the *Civil Code of Québec* set out a general prescription rule. The issue was whether this general rule, which was enacted later, displaced the earlier specific rule. Normally a specific provision prevails over a general one, regardless of which comes first. In this case, however, two documents tabled by the Minister in connection with the new *Civil Code* indicated that the general rule was to prevail. Both stated that actions against municipalities could no longer be dismissed for lack of prior

¹³⁰ *Ibid.*, at paras. 105-06. For other examples, see *R. v. Lavigne*, [2006] S.C.J. No 10, [2006] 1 S.C.R. 392, at paras. 40-42 (S.C.C.); *H.J. Heinz Co. of Canada Ltd. v. Canada (Attorney General)*, [2006] S.C.J. No. 13, [2006] 1 S.C.R. 441, at para. 22 (S.C.C.); *Merk v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771*, [2005] S.C.J. No. 72, [2005] 3 S.C.R. 425, at para. 20 (S.C.C.).

notice. The same point was made by various members of the legislature during debate. In relying on this material, Gonthier J. pointed out:

Parliamentary history "must be read with caution, because [it is] not always a reliable source for the legislature's intention".¹³¹ In the case at bar, the parliamentary history makes a number of references to the scope of art. 2930 C.C.Q. and even expresses a unanimous intention on the part of the legislators.¹³²

The fact that all the parties in the legislature affirmed the primacy of the Code in these circumstances lent the legislative history significant weight.

Limitations on use of legislative history. As part of the context, legislative history is admissible in every case, even if the text to be interpreted is not ambiguous on its face. In *Castillo v. Castillo*, Bastarache J. wrote:

The appellant contends that where the plain language of a legislative provision is clear and unambiguous, extrinsic evidence of legislative intent should not be admissible. I do not find the ordinary meaning of s. 12 to be clear and unambiguous. I would also question whether statutory interpretation should ever proceed solely on the basis of the plain language of the legislation, without consideration of the entire context, including the purpose and the scheme of the Act. In approving of Professor Driedger's approach to statutory interpretation, Iacobucci J. recognized that "statutory interpretation cannot be founded on the wording of the legislation alone"¹³³ It is now well accepted that legislative history, Parliamentary debates and similar material may be quite properly considered as long as they are relevant and reliable and not assigned undue weight.¹³⁴

To be admissible, then, legislative history must be relevant to the interpretation issue facing the court and it must not be inherently unreliable. Once admitted, it must not receive more weight than it deserves.

With the demise of the exclusionary rule, the courts now face the challenge of formulating principles that may be used in assessing the weight of this material. Some things are clear. For example legislative history that is itself ambiguous or inconclusive may be disregarded. In *Placer Dome Canada Ltd. v. Ontario (Minister of Finance)*, LeBel J. wrote:

Although both parties rely on Hansard evidence related to the movement of the hedging provision from the Regulation to the Act, I find that evidence to be ambiguous and of little assistance in this case. Accordingly, any analysis of the 1987 amendments must be grounded in an examination of the scheme and context of the revised Act.¹³⁵

¹³¹ *Construction Gilles Paquette Ltée v. Entreprises Végo Ltée*, [1997] S.C.J. No. 57, [1997] 2 S.C.R. 299, at para. 20 (S.C.C.).

¹³² [1997] S.C.J. No. 69, [1997] 2 S.C.R. 862, at para. 37 (S.C.C.).

¹³³ *Rizzo*, *supra* note 123, at para. 21

¹³⁴ [2005] S.C.J. No. 68, [2005] 3 S.C.R. 870, at para. 23 (S.C.C.), citing *Reference re: Firearms Act*, [2000] S.C.J. No. 31, [2000] 1 S.C.R. 783, at para. 17 (S.C.C.). In this concurring judgment, Bastarache J. spoke for himself alone. The other judgments did not address this point.

¹³⁵ [2006] S.C.J. No. 20, [2006] 1 S.C.R. 715, at para. 39 (S.C.C.).

In *A.Y.S.A. Amateur Youth Soccer Association v. Canada (Revenue Agency)*, McLachlin C.J. wrote:

I have difficulty accepting the government's "occupied field" argument based on excerpts from *Hansard*. While *Hansard* may offer relevant evidence in some cases, comments of MPs or even Ministers may or may not reflect the parliamentary intention to be deduced from the words used in the legislation....

In any event, there is nothing in the passages cited by the government to indicate that the creation of the [registered Canadian amateur athletic association] RCAA regime precluded the registration of other sports associations as charities. Parliament can be taken to have put its mind to the question of which athletic associations would qualify as RCAAs and to have chosen nationwide organizations only. It may also be that Parliament was operating under the assumption that athletic associations were not considered charitable at common law, which explains the special provisions ensuring charity-like status for RCAAs (*House of Commons Debates*, vol. VII, 1st Sess., 28th Parl., April 2, 1969, at p. 7423). However, neither of these propositions evince a parliamentary intent to freeze the development of the common law on charitable status or to occupy the field for all amateur sports....¹³⁶

It is less clear how courts should respond when the evidence of legislative intent is clear and compelling, but in the view of the court cannot be reconciled with the text. In *R. v. Daoust*, Bastarache J. wrote:

We can conclude from the legislative history of the enactments pertaining to the laundering of proceeds of crime that Parliament's true intent was to criminalize all acts ... in relation to the proceeds of crime Nevertheless, the legislative intent revealed by the history must be one that could reasonably be supported by the text of the statute. Such is not the case here. Parliament did not achieve what it intended when it drafted s. 462.31.... Here, we are concerned with discovering not only the intent that Parliament was pursuing, but also the intent it expressed.¹³⁷

When the text fails to express what the legislature clearly intended to enact, the proper inference is that a mistake in drafting has occurred. Although the courts have a jurisdiction to correct drafting mistakes, they generally decline to exercise it in the criminal law context, or in any context where rule of law concerns are acute. In *Daoust*, correcting the mistake would have entailed convicting the accused on the basis of words that did not appear in the French version of the *Criminal Code*.

In most cases, neither the inferences drawn from the legislative history nor those drawn from the text are compelling and decisive. Ordinarily the court must engage in a weighing and balancing process. The weight accorded particular materials is appropriately assessed in terms of the court's reasons for admitting them in the first place. There are two main justifications for admitting legislative history. First, when materials that explain the purpose or meaning of legislation

¹³⁶ [2007] S.C.J. No. 42, [2007] 3 S.C.R. 217, at paras. 12-13 (S.C.C.).

¹³⁷ [2004] S.C.J. No. 7, [2004] 1 S.C.R. 217, at para. 44 (S.C.C.).

or its intended effects are brought to the attention of the legislature, which then proceeds to enact it, an interpreter may legitimately infer that the legislature enacted the legislation on the understanding expressed in the materials. Second, although courts are the official and ultimate interpreters of legislation, they are appropriately influenced by expert opinion, whether offered by legal experts or experts in the subject dealt with in the legislation.

As suggested above,¹³⁸ the key to both justifications is authority. It is reasonable to assume that a legislature has passed legislation on the basis of materials brought to its attention only if the legislature had reason to regard those materials as authoritative. Similarly, it is reasonable to defer to another interpreter's opinion only if that interpreter expresses authoritative insights or offers authoritative information.

Assessing authority. In judging the authority of legislative history materials, there is no reason why the courts should not acknowledge the actual role played by Cabinet and government bureaucracies in the preparation of legislation. Formal and prepared statements by responsible ministers delivered to the legislature at second reading are the most frequently relied on legislative history, presumably because those statements are taken to express the government's intent. Although government intent is not the same as legislative intent, in a parliamentary system the government is most often the source of the legislative impulse and the author of the legislative text.¹³⁹ An explanation of the meaning or purpose of a text or its intended application is normally considered authoritative when it issues from the person who made the text as opposed to some third party. In addition to the remarks of the sponsoring Minister, reliance may also be placed on the explanations of the parliamentary secretary who typically speaks for the Minister at third reading and on the testimony of ministry officials before legislative committees. In the case of private member's bills, the authority of the maker would attach to the remarks of the member introducing the bill, who is assumed to be responsible for its content.

The authority of a minister or an official can be undermined, of course, if it appears that partisan politics may have distorted the accuracy of their statements to the legislature or a legislative committee. In *Ontario Teachers' Federation v. Ontario (Attorney General)* Gouge J.A. wrote:

While the court can consider admissible extrinsic evidence of purpose, it must be careful to ensure that the evidence has an institutional quality that reflects the intention of the legislature and not just the individual motivation of a particular member of the government.

¹³⁸ See *supra*, at p. 598.

¹³⁹ Government bills typically begin with a memorandum from Cabinet which sets out the parameters of the legislation. No government bill goes forward without Cabinet approval.

Expressions of motivation by individual government actors must be scrutinized to see that they truly reflect legislative intent, rather than simply individual concerns.¹⁴⁰

Also, the views of the minister or official must be expressed to the institution during the legislative process, rather than received in testimony afterwards.¹⁴¹

The other main source of authority is expertise, whether legal expertise or expertise in a particular subject matter. This kind of authority is relied on by legislative committees in preparing legislative studies and recommendations and in considering bills. In considering a bill on aviation safety, for example, a committee might hear from witnesses with specialized knowledge about aircraft, communication systems, risk analysis and the like. The committee's report to the legislature, with or without amendments, will reflect that testimony to a greater or lesser extent. In a given case, the answer to a question proposed by a committee member might be the basis of an amendment accepted by the legislature. In such a case, a court might well assign significant weight to committee proceedings. In other circumstances, where there is nothing to link the remarks of particular witnesses to a particular understanding of the text, committee proceedings should receive only modest weight.

Regulations. Until recently, the legislative history of regulations received little attention, largely because the materials that might be relied on to assist interpretation were disparate and mostly inaccessible. A sovereign legislature can delegate its authority to any person or body it thinks fit and can make the validity of delegated legislation subject to whatever formal, procedural or substantive prerequisites it thinks fit. Many regulations are made by the Governor or Lieutenant Governor in Council, but others are made by individual Ministers, government Agencies or independent bodies such as human rights commissions or self-governing professional associations. The kind and extent of consultation that precedes regulation making is highly variable.

However, in recent years at the federal level the process has become increasingly rule-governed and standardized. Before being made, most federal regulations must be justified by a regulatory impact analysis in which the reasons for legislating, possible alternatives to legislation and the costs and benefits of the proposed regulations are laid out and assessed. The resulting "regulatory impact analysis statement" (RIAS) is published along with the regulation itself in Part 2 of the *Canada Gazette*. Before reaching that stage, however, most federal regulations must be "pre-published" in the *Canada Gazette* Part 1, giving an oppor-

¹⁴⁰ [2000] O.J. No. 2094, 49 O.R. (3d) 257, at paras. 32-34 (Ont. C.A.). On this basis, ministerial statements or government publications of the sort relied on in the *Upper Churchill Water Reversion Act Reference*, made outside the legislature and addressed to the public at large, arguably should receive only minimal weight.

¹⁴¹ See *Ontario (Ministry of Natural Resources) v. Ontario Federation of Anglers and Hunters*, [2001] O.J. No. 750, at paras. 12ff. But see also *Ontario (Provincial Police) v. Cornwall (Public Inquiry)*, [2008] O.J. No. 153, at paras. 34ff, where Moldaver J.A. relies on excerpts from Hansard post-dating the relevant legislation.