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May 17, 2016

Ms. Laurel Ross  
Acting Commission Secretary  
British Columbia Utilities Commission  
Sixth Floor – 900 Howe Street  
Vancouver, BC V6Z 2N3

Dear Ms. Ross:

**RE: Project No. 3698854  
British Columbia Utilities Commission (BCUC or Commission)  
British Columbia Hydro and Power Authority (BC Hydro)  
W.A.C Bennett Riprap Upgrade Project (the Project)  
Written Reply Submission**

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BC Hydro writes in compliance with Commission Order No. G-54-16 to provide its public Written Reply Submission. The redacted portion of this submission responding to the confidential portion of the Saulteau First Nations' Final Submission will be filed under separate cover.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Tom Loski". The signature is written in a cursive, flowing style.

(for) Tom Loski  
Chief Regulatory Officer

gh/rh

Enclosure

Copy to: BCUC Project No. 3698854 (W.A.C Bennett Riprap Upgrade Project)  
Registered Intervener Distribution List.

**W.A.C. Bennett Riprap Upgrade Project**

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**Counsel's Written Reply Submission**  
**on behalf of**  
**British Columbia Hydro and Power Authority**

**May 17, 2016**

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1 BC Hydro submits this Written Reply Submission (**Reply**) with respect to its  
2 Application (also referred to as **Exhibit B-1**) for acceptance of its expenditure  
3 schedule for the W.A.C. Bennett Riprap Upgrade Project (the **Project**) pursuant to  
4 British Columbia Utilities Commission (**BCUC** or the **Commission**)  
5 Order No. G-54-16.

6 There are five interveners in this proceeding. BC Hydro submitted its Final Written  
7 Submission (**BCH Final Submission**) on May 6, 2016. Three interveners filed  
8 Intervener Final Submissions (**Final Submission**):

- 9 • Commercial Energy Consumers of British Columbia (**CEC**);
- 10 • British Columbia Old Age Pensioners Organization (**BCOAPO**); and
- 11 • Sauteau First Nations (**SFN**).

12 This Reply is divided into four parts:

- 13 • Part 1 is BC Hydro's reply to the CEC's Final Submission;
- 14 • Part 2 is BC Hydro's reply to the BCOAPO's Final Submission;
- 15 • Part 3 is BC Hydro's reply to the SFN's Final Submission; and
- 16 • Part 4 is BC Hydro's conclusion.

17 Where BC Hydro has not responded directly to a submission, this should not be  
18 taken as agreement with that submission. BC Hydro has attempted to limit these  
19 submissions to reply on specific points raised by the interveners, and not repeat or  
20 elaborate on submissions made in its BCH Final Submission or address new matters  
21 not raised in its original submission; although BC Hydro notes that some reply  
22 includes reference to prior submissions where necessary.

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## 1 **Part 1 Reply to CEC's Final Submission**

2 In its Final Submissions, the CEC supports the Project and submits that “the  
3 evidentiary record supports a finding that the project as proposed by BC Hydro is in  
4 the public interest” (para. 4). In particular, the CEC submits that:

- 5 • The justification for the riprap upgrade project is clear and definitive (para. 19);
- 6 • The record of examination to date confirms appropriate management of the  
7 riprap failure at the WAC Bennett Dam (para. 17);
- 8 • It is entirely appropriate that BC Hydro's best professional judgement be used  
9 to determine the timing of the project is now and...the evidentiary record  
10 supports that this is an appropriate judgement (para. 29);
- 11 • The schedule for the project is appropriate (para. 69);
- 12 • The accounting for capital costs is appropriate (para. 77);
- 13 • The environment and social impacts of the project are low, mitigable or positive  
14 (para. 87);
- 15 • BC Hydro approach to First Nation accommodation costs is the appropriate  
16 balance (para. 105);
- 17 • BC Hydro has appropriately taken steps to identify the potentially affected First  
18 Nations and their actions in this respect were reasonable and appropriate  
19 (para. 108);
- 20 • The honour of the Crown has been maintained and approval of the Project can  
21 be found to be in the public interest (para. 108); and
- 22 • If SFN is not satisfied with consultation at the end of the consultation process,  
23 the remedy for SFN is with the courts (para. 112)

24 The only concern raised by the CEC is with respect to BC Hydro's cost estimating  
25 accuracy range of +25 per cent to -20 per cent. CEC submits that the range “may be

1 larger than necessary and could appropriately be set as +15 per cent to -20 per cent  
2 or in the alternative +20 per cent to -20 per cent” and recommends that the  
3 Commission “consider tightening the range of estimates and approves the cost  
4 estimate at P50 \$130.7 with the tighter bounds than BC Hydro has in its application”  
5 (para. 44).

6 While it is BC Hydro’s intent to eventually achieve an accuracy of +15 per cent  
7 to -20 per cent, it would not be prudent for BC Hydro to seek, or the Commission to  
8 approve, a tighter range at this time given the complexities and risks associated with  
9 this Project. These risks include, in particular, the geotechnical nature of the Project,  
10 the requirement for the Dam to remain operational during construction, and the  
11 requirement that riprap placement occur in the dry.<sup>1</sup> BC Hydro’s range of  
12 +25 per cent / -20 per cent is consistent with a Class 3 Estimate. Further, an  
13 independent third party reviewer, MWH, supports BC Hydro’s cost estimate.<sup>2</sup>  
14 Accordingly, BC Hydro is still seeking acceptance of a cost range of \$171.4 million  
15 and \$109.7 million (with a P50 of \$137.1 million).

## 16 **Part 2 Reply to BCOAPO’s Final Submission**

17 BCOAPO states in its Final Submission that BC Hydro has sufficiently justified the  
18 need for the Project (para. 18), that there are no viable alternatives to the Project  
19 (para. 22), that the Project costs reasonably account for the risks/uncertainties and  
20 that BC Hydro has made reasonable efforts to control and validate cost estimates  
21 (para. 27), and that substantial delay will increase risk and potentially increase costs  
22 to the ratepayers (para. 22).

23 The only area of concern that the BCOAPO raises in its Final Submission is with  
24 respect to First Nations consultation, specifically with McLeod Lake Indian Band  
25 **(MLIB)** and SFN.

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<sup>1</sup> Exhibit B-1, page 3-20.

<sup>2</sup> Exhibit B-1, Appendix E-3.

1 BCOAPO states that “we understand that MLIB continues to have significant  
2 concerns about BC Hydro’s responsiveness in the consultation process, including its  
3 responses to the First Nations Independent Technical Review (**FNITR**)” (para. 36).  
4 BCOAPO does not provide a source for this submission. There is nothing on the  
5 evidentiary record that supports BCOAPO’s submission. To the contrary, the  
6 evidence on record is that MLIB supports moving forward with the Project this  
7 summer.<sup>3</sup> As such, the only outstanding concern is with respect to BC Hydro’s  
8 consultation with SFN.

9 BCOAO questions the completeness of BC Hydro’s response to  
10 BCOAPO IR 3.18.1,<sup>4</sup> wherein BC Hydro was asked to “specifically identify which  
11 requested workplans or mitigation measures it has rejected” (para. 39). BC Hydro’s  
12 list does not include SFN workplans and mitigation measures that BC Hydro has not  
13 yet accepted at this time but continues to consult on. Those workplans and  
14 mitigation measures have not been “rejected” by BC Hydro. BC Hydro continues to  
15 consider them as part of ongoing consultation, but further detailed information about  
16 whether and, if so, how, they can be integrated into the Project is required.<sup>5</sup> Further,  
17 BC Hydro’s response to BCOAPO IR 3.18.1 illustrates BC Hydro’s responsiveness  
18 to SFN’s request as only a small number of the numerous requests have been  
19 rejected, and the reasons for rejection are in most instances because the impact is  
20 being mitigated through alternate mitigation measures. For example, the FNITR  
21 requests a number of mitigation measures directed at water quality and specifically,  
22 requests BC Hydro adopt the Stream Crossing Quality Indices (**SCQI**). BC Hydro  
23 has rejected this request opting instead for an alternative approach to address the  
24 underlying concern of water quality. BC Hydro’s EMP requires the contractor to  
25 retain a Certified Professional Erosion and Control Specialist (**CPESC**) to develop a  
26 sediment and erosion control plan for the Project. BC Hydro will suggest the SCQI to

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<sup>3</sup> Transcript Volume 1 Procedural Conference January 27, 2016, at page 45-46.

<sup>4</sup> Exhibit B-18, BC Hydro Response to BCOAPO IR 3.18.1.

<sup>5</sup> Exhibit B-14, page 19.

1 the CPESC to consider for use in the plan, but will rely on the professional judgment  
2 of the CPESC. BC Hydro has agreed to provide a draft of the sediment and erosion  
3 control plan to SFN for comment as part of ongoing consultation.<sup>6</sup>

4 BCOAPO acknowledges that First Nations' concerns can be addressed through  
5 ongoing consultation and accommodation, but suggests that the BCUC's regulatory  
6 process should be extended until consultation is complete to avoid possible legal  
7 action (para. 50). BC Hydro respectfully submits that such a position is contrary to  
8 the appropriate legal framework. In *Haida* the Supreme Court of Canada held: "It is  
9 open to governments to set up regulatory schemes to address the procedural  
10 requirements appropriate to different problems at different stages".<sup>7</sup> The  
11 Commission's role is to consider adequacy "up to the point" of the Commission's  
12 decision and based on the evidentiary record before it".<sup>8</sup>

13 BCOAPO questions the urgency of the Project and in doing so cites Commission  
14 Order No. G-15-16 in which the Commission found that "any additional project costs  
15 due to delay will be more than offset by a reduction in ratepayer cost recover as a  
16 result of the corresponding delay to the project in-service dates" (para. 46-48).  
17 BC Hydro has addressed this argument below in response to a similar submission  
18 made by SFN.

### 19 **Part 3 Reply to SFN's Final Submission**

20 SFN believes that the duty to consult in this case is at the medium-level of the *Haida*  
21 spectrum. SFN asserts that the Crown consultation undertaken has not fulfilled the  
22 honour of the Crown. SFN has identified the following main reasons why it says  
23 consultation has been inadequate:

- 24 • BC Hydro's assessment of the scope of consultation is deficient;

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<sup>6</sup> Exhibit B-14, Appendix A, pages 5 & 6.

<sup>7</sup> *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 SCR 511, 2004 SCC 73, para. 51. [*Haida*]

<sup>8</sup> *Kwikwetlem v. British Columbia (Utilities Commission)*, 2009 BCCA 68 (CanLII).

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- 1 • BC Hydro failed to consult about Valued Components (**VCs**);
- 2 • BC Hydro has failed to address impacts from trucking;
- 3 • BC Hydro failed to integrate SFN's concerns into its Environmental
- 4 Management Plan (**EMP**);
- 5 • BC Hydro failed to share relevant information or demonstrate the integration of
- 6 SFN's concerns into the Environmental Protection Plan (**EPP**);
- 7 • BC Hydro failed to address concerns about water withdrawals;
- 8 • BC Hydro made false accusations; and
- 9 • The Sand Flat Quarry (**SFQ**) requires an Environmental Assessment
- 10 Certificate.

11 In light of these alleged deficiencies, SFN requests that the BCUC reject the

12 Expenditure Schedule for the Project on the basis that it is not in the public interest.

13 1. Trigger for the Crown's Duty to Consult

14 SFN correctly observes that BC Hydro and SFN agree that, before the Commission

15 can decide whether the Expenditures are in the public interest, it must assess the

16 adequacy of consultation to the point of the Commission's decision (para. 2).

17 However, in reviewing the remainder of the SFN's submissions, BC Hydro submits

18 that SFN takes an overly expansive view of both the trigger for the Crown's duty to

19 consult and the extent of the Commission's inquiry into the adequacy of consultation.

20 The assessment the Commission is required to undertake only relates to the

21 Application before it. BC Hydro filed the Application for acceptance of the

22 Expenditure Schedule pursuant to section 44.2(1)(b) of the *Utilities Commission Act*

23 (**UCA**). Section 44.2(3) of the *UCA* requires the BCUC to accept the Expenditure

24 Schedule if the BCUC considers it "would be in the public interest" to do so, or to

25 reject the Expenditure Schedule.

1 In the context of a section 44.2 application, the Commission is not tasked with  
2 undertaking a broad, sweeping enquiry in relation to the adequacy of consultation in  
3 respect of any and all aspects of the Project—including matters not within the  
4 purview of the Commission. The BCUC's consideration of the Expenditure Schedule  
5 is but one of several stages in the Project's development. Consultation on the  
6 Project has already advanced through several stages including the Ministry of  
7 Forests, Lands and Natural Resources Operations' (**FLNRO**) and the Ministry of  
8 Energy and Mines' (**MEM**) permitting processes. Ministry representatives undertook  
9 Crown consultation that was found to be adequate for the purposes of those  
10 regulatory processes and the requisite permits and authorizations were issued.  
11 Those permits and authorizations remain valid and unchallenged.<sup>9</sup>

12 To the extent that SFN appears to invoke consultation requirements and/or potential  
13 adverse impacts arising under the FLNRO or MEM permitting processes, SFN is  
14 challenging the consultation and adequacy assessments undertaken by Ministerial  
15 representatives. The adequacy of consultation by Ministerial representatives (and  
16 the validity of the permits issued by FLNRO and MEM) is not before the Commission  
17 in this Application.

## 18 2. Placement on the *Haida* Spectrum

19 SFN argues that it is entitled to a “mid-level” consultation obligation (para. 74). SFN  
20 challenges BC Hydro's assessment of SFN's placement on the *Haida* spectrum on  
21 the following grounds:

- 22 • Approach to Existing Treaty Rights;
- 23 • Consideration of Oral Treaty Promises;
- 24 • Consideration of the “taking up” Provision in Treaty 8; and
- 25 • Assessment of the Seriousness of Potential Impacts.

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<sup>9</sup> Exhibit B-3, BC Hydro's responses to BCUC IRs 1.18.2 and 1.19.1.

1 Each of these will be addressed below.

2 (a) Existing Treaty Rights

3 SFN suggests that, in a case such as this “the presence of established treaty rights”  
4 by itself means that “the consultation is presumptively at the higher end of the  
5 spectrum” (paras. 12-13). Later, SFN suggests that BC Hydro committed a “legal  
6 error” when, after acknowledging SFN’s established treaty rights, it “does not go on  
7 to acknowledge that established treaty rights are located at the higher end of the  
8 *Haida* spectrum” (para. 51).

9 With respect, SFN has conflated (i) the assessment of an established treaty right  
10 with (ii) the ultimate placement on the *Haida* consultation spectrum. It is true that  
11 when assessing the “strength of claim,” an established treaty claim “starts from a  
12 relatively firm footing.” This is the conclusion of the Court of Appeal in *Chartrand*. An  
13 established treaty right is certainly “firm” as compared to the asserted, unproven  
14 rights at issue in *Haida*.

15 However, SFN argues that this one factor (an established treaty right) drives the  
16 entire *Haida* analysis. If SFN’s approach was adopted, it would suggest that any  
17 decision that operated anywhere in treaty territory was “presumptively at the higher  
18 end of the spectrum.” There is no support for this in the case law.

19 In fact, such an approach is clearly inconsistent with the approach articulated and  
20 adopted by the Supreme Court of Canada in its seminal decision on the application  
21 of the duty to consult in a treaty context— *Mikisew Cree First Nation v. Canada*  
22 (*Minister of Canadian Heritage*).<sup>10</sup> In that case, the Court considered Treaty 8—the  
23 same treaty at issue in this case.

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<sup>10</sup> [2005] 3 SCR 388, 2005 SCC 69. [*Mikisew*]

1 However, the conduct contemplated by the Crown in that case clearly had a much  
2 greater potential for adverse effect. Originally, the Crown proposed building a new  
3 winter road across the core of Mikisew territory. As described by the Court:

4 ...the federal government approved a 118-kilometre winter road  
5 that, as originally conceived, ran through the new Mikisew First  
6 Nation Reserve at Peace Point. ... After the Mikisew protested,  
7 the winter road alignment was changed to track the boundary of  
8 the Peace Point reserve instead of running through it... The  
9 modified road alignment traversed the traplines of approximately  
10 14 Mikisew families who reside in the area near the proposed  
11 road, and others who may in that area although they do not live  
12 there, and the hunting grounds of as many as 100 Mikisew  
13 people whose hunt (mainly of moose), the Mikisew say, would  
14 be adversely affected. The fact the proposed winter road directly  
15 affects only about 14 Mikisew trappers and perhaps 100 hunters  
16 may not seem very dramatic (unless you happen to be one of  
17 the trappers or hunters in question) but, in the context of a  
18 remote northern community of relatively few families, it is  
19 significant. (*Mikisew*, para. 3; underlining emphasis added.)

20 The potential for adverse impacts arising from a newly created 118 km road,  
21 immediately adjacent to Reserve lands and traversing many traplines, is clearly  
22 more significant than the contemplated conduct at issue before the Commission in  
23 this matter. However, notwithstanding the obvious impact, the Supreme Court of  
24 Canada concluded that the Crown's duty lies at the *lower* end of the spectrum:

25 In this case, given that the Crown is proposing to build a fairly  
26 minor winter road on *surrendered* lands where the Mikisew  
27 hunting, fishing and trapping rights are expressly subject to the  
28 'taking up' limitation, I believe the Crown's duty lies at the lower  
29 end of the spectrum. The Crown was required to provide notice  
30 to the Mikisew and to engage directly with them ... This  
31 engagement ought to have included the provision of information  
32 about the project addressing what the Crown knew to be  
33 Mikisew interests and what the Crown anticipated might be the  
34 potential adverse impact on those interests. The Crown was  
35 required to solicit and to listen carefully to the Mikisew concerns,  
36 and to attempt to minimize adverse impacts on the Mikisew

1 hunting, fishing and trapping rights.” (*Mikisew*, para. 64; italics in  
2 original; underlining emphasis added.)

3 Given that the Crown’s duty fell at the lower end of the spectrum in *Mikisew*–  
4 notwithstanding the clear existence of established treaty rights and a ‘significant’  
5 impact arising from a proposed new road– there is no basis for SFN’s assertion that  
6 “the presence of established treaty rights means that the consultation is  
7 presumptively at the higher end of the spectrum” (para. 13). In fact, if the  
8 consultation obligation was at the “lower end of the spectrum” in *Mikisew*, it strongly  
9 suggests that the level can be no higher in the current circumstances. This is  
10 consistent with BC Hydro’s conclusion.<sup>11</sup> The approach of the Supreme Court of  
11 Canada has been accepted by the BCUC in previous decisions.<sup>12</sup>

12 SFN further suggests that BC Hydro committed a “legal error” when, after  
13 acknowledging SFN’s established treaty rights, it “does not go on to acknowledge  
14 that established treaty rights are located at the higher end of the *Haida* spectrum  
15 (para. 51). Again, with respect, SFN is conflating consideration of “strength of claim”  
16 with the overall placement on the *Haida* spectrum. Under SFN’s argument, the  
17 Supreme Court of Canada committed an error in *Mikisew*. BC Hydro’s approach is  
18 consistent with the leading authority, *Mikisew*, which is binding on lower courts and  
19 tribunals.

20 (b) Oral Treaty Promises

21 SFN’s submission contains a lengthy discussion of oral treaty promises  
22 (paras. 20-23). Subsequently, SFN suggests that BC Hydro failed to consider the  
23 content of the oral promises and “focuses only on the Treaty text” (para. 52). With  
24 respect, there is no basis for such a suggestion.

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<sup>11</sup> BCH Written Submission, page 11.

<sup>12</sup> British Columbia Utilities Commission, Decision, Certificate of Public Convenience and Necessity for the Dawson Creek/Chetwynd Area Transmission Project (October 10, 2012), at pages 142-145.

1 BC Hydro agrees that treaty promises may include oral promises not captured in the  
2 treaty text. This is long-standing, well-known and well-established law. For example:

- 3 • In *R. v. Badger*, the Supreme Court of Canada considered the oral promises  
4 made in the context of Treaty 8:

5 “...the oral promises made by the Crown’s representatives and  
6 the Indians’ own oral history indicate that it was understood that  
7 land would be taken up and occupied in a way which precluded  
8 hunting when it was put to a visible use that was incompatible  
9 with hunting.”<sup>13</sup>

- 10 • In *Mikisew*, the Supreme Court of Canada again reviewed and considered the  
11 oral promises made in the context of Treaty 8.<sup>14</sup>

12 BC Hydro’s understanding of Treaty 8 was informed and guided by the  
13 well-established approach of the Supreme Court of Canada. This is supported by the  
14 record in this proceeding and the reliance that BC Hydro has placed on the leading  
15 decision that confirms the importance of the oral promises, *Mikisew*<sup>15</sup>. Moreover,  
16 BC Hydro’s assessment was informed by SFN’s TUS which contains further  
17 information regarding the oral context of Treaty 8.<sup>16</sup> Considering BC Hydro’s  
18 approach and the evidence in this proceeding, there is no basis for any suggestion  
19 that BC Hydro ignored or discounted the oral treaty promises and focused “only on  
20 the Treaty text.”

21 Further, while SFN has discussed the case law and the available evidence of the  
22 oral promises reviewed in those court decisions, SFN has not identified any link  
23 between the content of Treaty 8’s oral promises and the proposed activities of  
24 BC Hydro.

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<sup>13</sup> [1996] 1 S.C.R. 771, para. 58. [*Badger*]

<sup>14</sup> *Mikisew*, paras. 25-27.

<sup>15</sup> See Exhibit B-1, page 4-10, and BC Hydro’s Written Submission, page 11.

<sup>16</sup> Exhibit B-14, page 2-4 and Exhibit C5-10, page 13.

1 (c) The “taking up” Clause

2 SFN discusses court decisions that have addressed what constitutes a permissible  
3 “taking up” under Treaty 8 (para. 24). SFN argues that BC Hydro “improperly  
4 narrows the Treaty rights impacted by the Project by inserting into its assessment  
5 the ‘taking up’ clause in Treaty 8” (para. 54). What the SFN submission fails to  
6 consider or address is that the current decision facing the Commission does not  
7 itself entail any material new or additional “taking up.”

8 There is no “taking up” inherent in an application for approval of the Expenditure  
9 Schedule under section 44.2. Nor is there any new or additional “taking up” in  
10 improving the safety of an existing facility in a manner that will not alter its existing  
11 footprint.

12 BC Hydro’s statements regarding the “taking up” clause and its application in this  
13 case were in reference to the Project in general. To the extent that there has been  
14 any “taking up” with this Project, such taking up has already been permitted by the  
15 appropriate regulatory authorities. None of those decisions are before the  
16 Commission in this section 44.2(1)(b) application. None of these existing permits,  
17 licences and approvals have been challenged by the SFN (or any other party). A  
18 review of those permits, licences and approvals and the conduct of the Ministerial  
19 authorities that made them is, with respect, outside the scope of the Commission’s  
20 jurisdiction.

21 (d) Seriousness of Potential Adverse Impacts

22 Beginning at paragraph 29, SFN provides a lengthy discussion of case law regarding  
23 potential adverse impacts. However, the discussion of abstract legal principles  
24 presented is never connected to the potential impacts of the Project.

1 The Supreme Court of Canada has provided clear and unequivocal guidance on  
2 how to approach the question of whether there is an adverse impact in *Rio Tinto*  
3 *Alcan Inc. v. Carrier Sekani Tribal Council*:<sup>17</sup>

4 “The question is whether there is a claim or right that potentially  
5 may be adversely impacted by the *current* government conduct  
6 or decision in question. ... (italics in original.)<sup>18</sup>

7 “*Haida Nation* ... confines the duty to consult to adverse impacts  
8 flowing from the specific Crown proposal at issue – not to larger  
9 adverse impacts of the project of which it is a part. The subject  
10 of the consultation is the impact on the claimed rights of the  
11 *current* decision under consideration.” (italics in original.)<sup>19</sup>

12 BC Hydro’s Final Submission<sup>20</sup> included an extensive review of the evidence  
13 supporting BC Hydro’s position that the potential impacts of the Project on SFN’s  
14 interests are low. SFN does not address these evidentiary points.

15 At paragraph 55, SFN states that it accepts that the “temporary nature of the Project  
16 and the possibility of incorporating effective mitigation measures” can move the  
17 consultation requirement lower on the *Haida* spectrum. However, SFN does not  
18 identify what impact the long list of mitigations measures discussed in the BCH Final  
19 Submission<sup>21</sup> has on the seriousness of the impacts, and consequently the scope of  
20 consultation (para. 55). In fact, SFN’s review of the potential impacts of the Project  
21 contains no discussion of mitigation or reclamation. As discussed in BC Hydro’s  
22 Written Submission, FLNRO and MEM, the authorities responsible for permitting the  
23 Project activities, have included several conditions in their permits and authorization  
24 to address avoidance and mitigation.<sup>22</sup>

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<sup>17</sup> [2010] 2 SCR 650, 2010 SCC 43. [*Rio Tinto*]

<sup>18</sup> *Rio Tinto*, para. 49.

<sup>19</sup> *Rio Tinto*, para. 53.

<sup>20</sup> Pages 13-15.

<sup>21</sup> BC Hydro Written Submission, pages 13-15.

<sup>22</sup> BC Hydro Written Submission, page 18.

1 BC Hydro submits that in the absence of consideration of these mitigation measures,  
2 SFN's assessment of the seriousness of the impacts over states their magnitude.

3 Including and in particular:

- 4 • At paragraph 66 of its submissions, SFN states that the permitted withdrawal  
5 will have a negative effect on water quantity and quality (para. 66). In particular,  
6 SFN states: "One only has to review the *Water Act* section 8 permit that would  
7 allow the Power Authority to pump 5,000 m<sup>3</sup> of water from three creeks during  
8 times of low flow, i.e., summer drought conditions, even when those creeks  
9 would be only 30 cm deep." SFN's interpretation of the conditions in the  
10 section 8 *Water Act* Permit does not recognize the restriction on BC Hydro's  
11 right to withdraw water during periods of low flows. Specifically, the permit  
12 includes the following condition:

13           The maximum water withdrawal rate identified in Appendix B  
14           shall be reduced during low flows to not exceed 10% of the  
15           current flow at anytime.<sup>23</sup>

16           Contrary to SFN's position, BC Hydro is not entitled to withdraw 5,000 m<sup>3</sup> of  
17           water from three creeks during times of low flow. The permit condition provides  
18           that during low flows, BC Hydro's right to withdraw from the permitted streams  
19           is subject to the requirement that it "not exceed 10 per cent of the current flow  
20           at any time."

- 21 • SFN submits that the Project will give rise to "the inability to access SFN's  
22           traditional territory during the lifetime of this Project". In doing so, it cites the  
23           finding in *Mikisew* that " 'dispatching the Mikisew to territories far from  
24           traditional hunting grounds and traplines' breaches the solemn promise in  
25           Treaty 8 that rights would continue after the treaty as they existed before it"  
26           (paras. 69 and 70). BC Hydro respectfully submits that this Project does not  
27           dispatch SFN to "territories far from traditional hunting grounds and traplines"

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<sup>23</sup> Exhibit B-1, Appendix H, at 37.

1 for the “lifetime of the Project”. The evidence is: “The Project will require a  
2 temporary closing of access to the SFQ site and temporary interruptions to  
3 access on the forest roads used for the Project are anticipated.”<sup>24</sup> Moreover, the  
4 public access nature of the forest services roads will not change as a result of  
5 the Project. As discussed below in response to concerns regarding trucking,  
6 BC Hydro has and continues to develop a number of mitigation measures to  
7 ensure that SFN members can still safely access the area surrounding the  
8 Project.

- 9 • At paragraph 70 of its submissions, SFN submits that potential future dam  
10 upgrades must also be considered when assessing the seriousness of the  
11 potential impacts of this Project. As noted in BC Hydro’s response to  
12 BCUC IR 1.2.7, the scope of future projects remains to be determined and  
13 there is no evidence on record to suggest that they will give rise to new  
14 potential impacts to SFN. As such, there is no evidence to support that the  
15 impact of this Project is exacerbated by the future potential additional  
16 construction upgrades intended for the same dam.<sup>25</sup>

17 SFN’s assessment of the seriousness of the impacts from the Project fails to  
18 adequately address how the ultimate findings on the seriousness of impacts in  
19 *Mikisew* are comparable to the case at hand. *Mikisew* continues to be the leading  
20 authority on assessing impacts to Treaty 8 rights. Further, SFN’s assessment is  
21 deficient in that it fails to consider the effect of permit conditions including  
22 reclamation and other mitigation measures on the seriousness of the potential  
23 impacts from the Project.

### 24 3. Adequacy of Consultation

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<sup>24</sup> Exhibit B-14, page 11-12.

<sup>25</sup> In contrast to the situation in *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247, the Project is not an exploratory mining program that would be followed by large industrial mining. There is no future scenario for the Project that is remotely similar to the one canvassed in this *West Moberly First Nations*.

1 (a) Selection of the VCs

2 SFN submits that BC Hydro has been “disingenuous” to the Commission regarding  
3 the extent to which it consulted on VCs. This submission is based on a mistaken  
4 understanding of BC Hydro’s evidence (para. 77), and the incorrect assertion that  
5 BC Hydro “has not provided any evidence to support its claim that the selection of  
6 VCs was informed by meaningful discussions with First Nations including SFN”  
7 (para. 83).

8 In response to an Information Request from the Commission on the issue of VCs,  
9 BC Hydro stated:

10           The Project Assessment (EA) process involved selecting Valued  
11           Components (VC) based on literature searches, field  
12           assessments and discussions with FLNRO, First Nations,  
13           stakeholders and the Power Authority’s experience in the  
14           Project area.

15 SFN has interpreted the above statement as BC Hydro asserting that “First Nations  
16 were asked to provide their views on the selection of VC’s in advance of the Ecofor  
17 Report preparation” (para. 83).

18 To confirm, BC Hydro did not make this assertion. BC Hydro’s statement was that  
19 the selection of VCs was informed by a number of sources including, but not limited  
20 to, discussions with First Nations. The evidentiary record contradicts SFN’s  
21 statement that BC Hydro “has not provided any evidence to support its claim”. For  
22 example, BC Hydro’s original application provides that “On March 25, 2014  
23 BC Hydro met with Saulteau to discuss the Project. Saulteau discussed the  
24 importance of bees within the local ecosystem and expressed a desire to minimize  
25 the potential impacts of the Project on bees.”<sup>26</sup> SFN’s feedback regarding the  
26 importance of bees to their community was conveyed by BC Hydro to Ecofor and  
27 resulted in the selection of bees as a Wildlife EC in the EA: “Through consultation

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<sup>26</sup> Exhibit B-1, Appendix F, page 31.

1 with local First Nations communities, interest was noted regarding potential impacts  
2 to bees.”<sup>27</sup> Similarly, selection of the Moberly caribou herd and fossils as ECs in the  
3 EA were the result of feedback from First Nations.<sup>28</sup> The record demonstrates that  
4 BC Hydro has been honest and forthcoming on this issue.

5 In direct response to a Commission information request<sup>29</sup>, BC Hydro acknowledged  
6 that having SFN’s preferred VCs prior to undertaking the EA would have been  
7 helpful had it been available to BC Hydro in 2014. The standard required of the  
8 Crown in consultation is reasonableness not perfection.<sup>30</sup> In any event, any  
9 deficiencies in consultation on the EA were addressed through the completion of the  
10 FNITR, the TUS and the ongoing consultation on mitigation measures to address the  
11 potential impacts to VC’s identified therein.

12 At paragraph 84 of its submissions, SFN writes that “the decision to haul on the  
13 FSRs was not communicated until August 14, 2015 and although SFN asked about  
14 capacity funding in 2012, funding for the TUS was only agreed to in 2016”. This  
15 statement suggests that BC Hydro was not responsive to a request made in 2012  
16 until 2016. However, the consultation record shows that BC Hydro and SFN reached  
17 agreement on capacity funding for a community liaison on May 7, 2012.<sup>31</sup>  
18 May 14, 2015 is the earliest request on record from SFN for a TUS.<sup>32</sup> BC Hydro  
19 further notes that it sent SFN a letter providing an update on the Project that  
20 described the two transportation options under consideration, the Marine option and  
21 the Roads option on January 27, 2014, and at that time provided a map identifying  
22 the Table and Utah roads. BC Hydro notified SFN of its decision to proceed by way

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<sup>27</sup> Exhibit B-1, Appendix E(2)(a), page 32.

<sup>28</sup> See Exhibit B-18, BC Hydro’s response to BCUC IR 3.30.1 and Exhibit B-1, Appendix E(2)(a), pages 42 (Moberly caribou herd) and 47 (Fossils).

<sup>29</sup> Exhibit B-18, BC Hydro response to BCUC IR 3.30.1.1.

<sup>30</sup> *Haida*, para 62

<sup>31</sup> Exhibit B-1, Appendix F, page 29 of 93.

<sup>32</sup> Exhibit B-14, BC Hydro response to SFN IR 3.22.3, Attachment 1, page 7

1 of road transport once that decision was made; the timing was reasonable and  
2 appropriate.

3 (b) Impacts from Trucking

4 SFN suggests that BC Hydro “has ignored SFN reasonable concerns regarding  
5 trucking impacts” (para 89). SFN further provides that BC Hydro’s response to the  
6 concern regarding safe access “demonstrates the failure to consult and  
7 accommodate” (para. 90). The evidence on record contradicts this position and  
8 supports that BC Hydro has taken the issue of road safety seriously. In particular,  
9 BC Hydro has taken or committed to take the following steps to ensure SFN  
10 members’ safe access to the area surrounding the Project for traditional purposes:

- 11 • Develop and consult with First Nations on a Traffic Management Plan will  
12 include mitigation measures to ensure safe access to roads;<sup>33</sup>
- 13 • Provide SFN a trucking schedule to facilitate safe access;<sup>34</sup>
- 14 • Work with the Contractor and SFN to develop a communication plan or protocol  
15 for the Project which will include communication about trucking issues with  
16 SFN;<sup>35</sup>
- 17 • Require the Project Contractor to undertake a hazard assessment of the roads  
18 to determine safe trucking speeds, which may vary depending on road  
19 conditions;<sup>36</sup>
- 20 • Explore potential daily windows for hauling suspension around dusk;<sup>37</sup>
- 21 • Explore potential planned and targeted stoppage of truck traffic to  
22 accommodate SFN’s traditional activities;<sup>38</sup> and

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<sup>33</sup> Exhibit B-14, Appendix C-1, page 667; Exhibit B-18, BC Hydro’s response to SFN IR 3.18.13.

<sup>34</sup> Exhibit B-14, Appendix C-1, page 667.

<sup>35</sup> Exhibit B-14, Appendix C-1, page 667.

<sup>36</sup> Exhibit B-18, BC Hydro response to SFN 3.18.12.

<sup>37</sup> Exhibit B-18, BC Hydro response to SFN 3.18.3 and 3.18.6.

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- 1 • Consider making a pilot car available to guide First Nation traditional land users  
2 with adequate notice.<sup>39</sup>

3 As to SFN's request that BC Hydro implement a 30 km/h speed limit on the road,  
4 BC Hydro's response is that it will not commit to a specific speed limit until it has  
5 undertaken a hazard assessment of the road to determine safe speeds as informed  
6 by road conditions.<sup>40</sup> This approach is prudent and reasonable, and most  
7 importantly it is responsive to SFN's underlying the concern of safe speeds.

8 With respect to the request that trucking be suspended daily at dusk, BC Hydro has  
9 not rejected this request; it is simply not prepared to agree to this in the absence of  
10 understanding its impact on the Project. BC Hydro has committed to exploring such  
11 a suspension, but in doing so has notified SFN that the request presents practical  
12 difficulties.<sup>41</sup> Nonetheless, BC Hydro has committed to continue to consult on this  
13 issue as further details of the Project become known.

14 (c) The Failure to Integrate SFN Concerns into the Environmental Management  
15 Plan (**EMP**) and Environmental Protection Plan (**EPP**)

16 SFN suggests that BC Hydro "has failed to show that it is 'demonstrably integrating'  
17 critical SFN's (sic) concerns" in respect of the EMP (para. 100 and following). SFN  
18 makes a similar argument in respect of the EPP (para. 106 and following).

19 With respect, SFN has confused two concepts:

- 20 • The law requires that SFN be provided "an opportunity to express their interests  
21 and concerns, and to ensure that their representations are seriously considered

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<sup>38</sup> Exhibit B-14, Appendix C-1, page 668.

<sup>39</sup> Exhibit B-18, BC Hydro response to SFN IR 3.18.17.

<sup>40</sup> Exhibit B-18, BC Hydro response to SFN 3.18.12.

<sup>41</sup> Exhibit B-18, BC Hydro response to SFN 3.18.3.

1 and, wherever possible, demonstrably integrated into the proposed plan of  
2 action.” [Emphasis added.]<sup>42</sup>

- 3 • The law does not require that the Crown adopt, without amendment, very  
4 detailed and specific mitigation strategies and operational constraints proposed  
5 by a First Nation as a means to address their interests and concerns.

6 BC Hydro acknowledges and accepts the former. SFN is seeking the latter.

7 BC Hydro respectfully submits that SFN’s suggestion that the law requires BC Hydro  
8 to integrate the exact FNITR requested mitigations and workplans into its EMP and  
9 EPP overstates the obligation on BC Hydro. The above-quoted passage provides  
10 that there must be an opportunity to express “interests and concerns” and that  
11 “representations” (based on those interests and concerns) must be “seriously  
12 considered and, wherever possible, demonstrably integrated”. The Court’s use of the  
13 words “interests and concerns” is a clear reference back to the two components of  
14 *Haida*, the asserted or proven aboriginal rights and the potential impacts arising from  
15 the Crown conduct.

16 SFN uses the term “concerns” in its submissions when in fact what it is referring to is  
17 the very specific requested mitigation measures and workplans in the FNITR.<sup>43</sup> The  
18 distinction is important. For instance, the requests for daily trucking suspension at  
19 dusk and a blanket 30 km/h speed limit are the requested mitigation measures to  
20 address the underlying concerns of road safety and access. Similarly, the request  
21 that BC Hydro only use water from Williston Reservoir is the SFN preferred  
22 mitigation measure; the underlying concern is potential impacts to water quantity.

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<sup>42</sup> *Halfway River First Nation v. British Columbia (Ministry of Forests)* (1999), 178 D.L.R. (4<sup>th</sup>) 666. [“**Halfway**” at para. 160; cited with approval in *Mikisew*, para. 64.

<sup>43</sup> See for instance paragraph 104 of SFN’s Written Submission wherein it states: “SFN submits, however, that this response ignores important and reasonable concerns that SFN set out in the FNITR, which ought to be incorporated into the EMP. In particular, it fails to incorporate recommendations made in the workplan on operational wildlife protection, including the recommendation that protection measures includes [*sic*] agreements on “[t]he hours of the day that trucks can be on the road... so that conflict with wildlife are avoided.”

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1 The record clearly supports that BC Hydro has seriously considered the concerns  
2 raised by SFN and has, where possible in light of the current stage of the Project,  
3 “demonstrably integrated” those concerns into its plan of action with respect to the  
4 development of the Project in order to minimize impacts. BC Hydro’s response table  
5 to the FNITR requests clearly supports this.<sup>44</sup>

6 BC Hydro has seriously considered the First Nations’ preferred mitigation measures  
7 set out in the FNITR. BC Hydro has and will continue to do so through ongoing  
8 consultation including SFN’s review and comment on the EPP. That being said,  
9 there is no duty to agree to all of the specific preferred mitigation measures set out in  
10 the FNITR, and failure to adopt those measures is not a failure to seriously consider  
11 them or the underlying concern or interest on which they are based. In making  
12 Project decisions on mitigations, BC Hydro as an agent of the Crown must consider  
13 multiple interests including, but not limited to, First Nations interests.<sup>45</sup> Where  
14 possible, and in light of the other Crown interests that it must consider, BC Hydro is  
15 endeavouring to find reasonable compromise. BC Hydro’s rejection of some of the  
16 requested mitigation measures and workplans and its ongoing consideration of  
17 others does not mean that it failed to “seriously consider and, wherever possible,  
18 demonstrably integrate” SFN’s concerns (i.e., safe access, water quality, etc.) into  
19 the development of the Project.

20 BC Hydro’s approach represents a reasonable balance of the various interests that  
21 form part of the public interest in this case (potential impacts to First Nations, cost  
22 impact to ratepayers, environment and safety). For instance:

- 23 • BC Hydro rejected SFN’s request for a blanket 30 km/h speed limit on the basis  
24 that speed limits must be informed by a hazard assessment of the road  
25 conditions. Such an approach addresses SFN’s concern of safe access despite  
26 not accepting their requested mitigation measures; and

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<sup>44</sup> Exhibit B-14, Appendix A.

<sup>45</sup> Exhibit B-18, BC Hydro’s response to SFN IR 3.11.2.

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- 1 • BC Hydro is still considering SFN's request for a suspension of trucking as the  
2 specific details for undertaking the Project are developed. In addition, BC Hydro  
3 is considering planned and targeted stoppage of truck traffic to accommodate  
4 First Nations traditional activities.<sup>46</sup> Although such an approach is not direct  
5 acceptance of the specific measure requested, it is nonetheless responsive to  
6 the underlying concern of safe use and harm to animals while also balancing  
7 cost and schedule implications to the Project.<sup>47</sup>

8 (d) Sharing Relevant Information

9 SFN asserts that "the Power Authority had not provided any evidence that speaks to  
10 when and how the contractor had been involved in resolving the concerns raised by  
11 First Nations" and submits that the Power Authority "appears to be trying to shield its  
12 discussions with the contractor on these matters from review by the Commission on  
13 the basis that this information regarding the contractor the contractor is not relevant  
14 to the proceedings" (paras. 100 and 112). SFN further submits that BC Hydro's  
15 "refusal to provide the information is unreasonable, particularly in light of the legal  
16 principles requiring the open communication of relevant information, and the  
17 requirement to demonstrably integrate First Nation concerns" (para. 115).

18 SFN's argument that BC Hydro's communications with its contractor are relevant  
19 information that must be provided is founded on its assertion that "the Power  
20 Authority's relying on the contractor to discharge its constitutional consultation  
21 obligations" (para 116). BC Hydro has already confirmed in this proceeding that it  
22 cannot delegate its constitutional obligation to consult to the Contractor<sup>48</sup>.

23 Meaningful consultation requires that BC Hydro provide adequate and timely  
24 information to enable a potentially affected First Nation to identify potential impacts

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<sup>46</sup> Exhibit B-14, Appendix A, page 2-3.

<sup>47</sup> Exhibit B-14, Appendix A, page 3.

<sup>48</sup> Exhibit B-18, BC Hydro Response to BCUC IR 3.29.1.3

1 to their rights. As to the nature of that information the Supreme Court of Canada has  
2 provided the following guidance in *Mikisew*:

3 “The Crown was required to provide notice to the Mikisew and to engage  
4 directly with them [...] This engagement ought to have included the provision  
5 of information about the project addressing what the Crown knew to be  
6 Mikisew interests and what the Crown anticipated might be the potential  
7 adverse impact on those interests.” [emphasis added]<sup>49</sup>

8 The consultation record supports that BC Hydro has provided detailed Project  
9 information, its EA, two separate Archaeological Impact Assessments, and its draft  
10 Environmental Management Plans. Further, BC Hydro has funded a SFN TUS and  
11 FNITR and has committed to consulting on mitigation plans. Adequate information  
12 about the contemplated Crown conduct and its potential impacts to SFN’s rights has  
13 been provided.

14 (e) The Consultation Record

15 SFN submits at paras. 46 and 47 that “attempts to make consultation appear  
16 meaningful by merely papering the file will not meet constitutional obligations” is  
17 relevant for determining the adequacy of BC Hydro’s consultation with SFN.

18 BC Hydro acknowledges that it’s filings with respect to First Nations consultation is  
19 voluminous.<sup>50</sup> BC Hydro is required to satisfy the filing requirements in Commission  
20 Order No. G-51-10, *First Nations Information Filing Guidelines*. BC Hydro does not  
21 rely on the volume of materials filed as proof that consultation has been adequate.  
22 Rather, BC Hydro relies on the substance of its consultations (which is evidenced in  
23 the materials) to demonstrate that the honour or the Crown has been maintained.

24 4. BC Hydro’s Response to pages 40-43 of SFN Final Submission

25 **REDACTED**

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<sup>49</sup> *Mikisew*, para 64

<sup>50</sup> See for example Exhibit B-14.

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1 5. The Existing Project Permits, Approvals and Decisions are not Properly before  
2 the Commission

3 A significant portion of the SFN's submissions<sup>51</sup> raises challenges to permits,  
4 approvals and decisions already granted to BC Hydro to undertake the Project. With  
5 respect, BC Hydro submits that the legality of those valid permits, authorizations and  
6 decisions and the processes that were engaged in their issuance, are not before the  
7 Commission in a section 44.2 Expenditure Review.

8 It is clear from SFN's Final Submissions that a significant portion of their  
9 dissatisfaction with the consultation process is that BC Hydro has already received  
10 the necessary approvals to undertake the Project. In particular, SFN appears to be  
11 taking exception to BC Hydro's section 8 of the *Water Act* permit to withdraw water  
12 from three streams in the Project area and the determination that Project does not  
13 require an Environmental Assessment Certificate pursuant to the *BC Environmental*  
14 *Assessment Act (BCEAA)*.

15 In respect of the section 8 *Water Act* Permit issued by the Comptroller of Water  
16 Rights after FLNRO's consultation process, SFN states:

- 17 • "Furthermore, the MFLNRO permits that the Power Authority has obtained do  
18 not lessen the potential adverse impacts of the Project. One only has to review  
19 the *Water Act* section 8 permit that would allow the Power Authority to pump  
20 5,000m<sup>3</sup> of water from three creeks during times of low flow, i.e., summer  
21 drought conditions, even when those creeks would be only 30 cm deep."  
22 (para. 66);
- 23 • "SFN submits that the permit conditions are not sufficient to address the  
24 impacts that the water withdrawal will have on SFN's rights." (para. 121)  
25 "Moreover, SFN is concerned (not comforted) by the Power Authority's reliance

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<sup>51</sup> SFN's Final Submission, pages 35-41 and 43-54.

1 on a permit that allows for water withdrawals from creeks that are only 30 cm  
2 deep.” (para. 123);

- 3 • “Beyond the inadequate permit protections, [...]” (para. 123);
- 4 • “SFN provided the Power Authority with information about what happens on the  
5 ground rather than on a paper permit.” (para. 131);
- 6 • “From a practical perspective, SFN was not assured by the Power Authority’s  
7 permit conditions because in the past, during dry summers, MFLNRO had a  
8 slow response time in terms of notifying permit holders that they were not  
9 permitted to withdraw water due to drought conditions.” (para. 131); and
- 10 • “There are two permitted water withdrawal points on Williston Reservoir, at  
11 either end of the Project footprint. [footnote 123: Exhibit B-14, Appendix C-1] It  
12 is not reasonable for the Power Authority to refuse to limit its water withdrawals  
13 to those two access points to the Williston Reservoir in the absence of any  
14 analysis.” (para. 135)

15 The above statements by SFN go straight to the heart of the Water Comptroller’s  
16 decision to issue BC Hydro a section 8 *Water Act* Permit. SFN is challenging the  
17 permitted volume of withdrawal, the adequacy of the conditions (mitigation  
18 measures) imposed by the Water Comptroller, the adequacy of FLNRO’s  
19 consultation with First Nations prior to the issuance of the permit and FLNRO’s  
20 process for enforcing the permit conditions.

21 Similarly, in respect of the decision of the Environmental Assessment Office (**EAO**)  
22 that the Project does not require an EAC, SFN states:

- 23 • “SFN submits that the Sand Flat Quarry is a “reviewable project” under the  
24 *Environmental Assessment Act*, [footnote 134] and the *Reviewable Projects*  
25 *Regulation*. [footnote 135]. As such, it cannot proceed without obtaining an  
26 environmental assessment certificate (“Certificate”).” (para. 149);

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- 1 • “It is submitted that Mr. Peterson misinterpreted the relevant provisions and  
2 made two similarly flawed decisions in around 2014 and 2015. The first was  
3 brought to light in the *Fort Nelson* case, and the second has come to light in  
4 these proceedings.” (para. 176);
- 5 • “[...] the SFQ has not properly been submitted to the EAO and been subject to  
6 an Environmental Assessment.” (para. 178);
- 7 • “Moreover, approval of the expenditures would violate s. 9(1)(c) of the BCEAA  
8 which seeks to prevent other government bodies from issuing project approvals  
9 when the proponent has not obtained a valid environmental assessment  
10 certificate.” (para. 179); and
- 11 • “Finally, we submit that there is no evidence that Mr. Peterson or the EAO  
12 consulted – or even notified – Saulteau First Nations before deciding that “the  
13 proposed quarried quantities appear to fall beneath the production capacity  
14 thresholds” in the *Regulation*.” (para. 180)

15 The statements above directly challenge the EAO’s interpretation of its enabling  
16 statute and related legislation. Further, the arguments made take issue with the  
17 process engaged by the EAO in making its decision.

18 As an aside, BC Hydro notes that this is the first time that SFN has ever  
19 communicated to BC Hydro its view that the Project requires an EAC. As noted by  
20 SFN in its Final Submissions, BC Hydro first communicated that the Project likely did  
21 not require an EAC in December 2011. This was again communicated to SFN in  
22 January 2014 and December 2014.<sup>52</sup>

23 The issues raised by SFN on the EAO’s decision are complex and raise further legal  
24 issues including whether all three criteria required to trigger an EA under Table 6 of  
25 the Reviewable Projects Regulation are met,<sup>53</sup> the retroactive application of *Fort*

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<sup>52</sup> SFN’s Final Submission, para. 181.

<sup>53</sup> B.C. Reg. 370/02, Table 6, Item 5.

1 *Nelson*<sup>54</sup> given that the court's decision was issued six months after the EAO  
2 decision on the Project, and the applicability of the decision given that the decision  
3 interprets the criteria in Table 6 for Sand and Gravel Pits, and not the criteria in  
4 Table 6 for 'Construction Stone and Industrial Mineral Quarries'. These questions  
5 are not appropriately before the Commission within the current regulatory process.

6 SFN is seeking to have the BCUC rely on what SFN believes to be inadequacies,  
7 procedural deficiencies, and unreasonable interpretations of these administrative  
8 bodies in issuing their respective approvals and decisions. It is doing so in the  
9 absence of having pursued the appropriate legal mechanisms to raise such issues.  
10 More importantly, it is doing so before a decision maker lacks the necessary  
11 statutory jurisdiction to consider and decide those issues. As stated in *Rio Tinto*,  
12 "administrative tribunals are confined to the powers conferred on them by the  
13 legislature, and must confine their analysis and orders to the ambit of the questions  
14 before them on a particular application".<sup>55</sup> The power in this case is to accept or  
15 reject the Expenditure Schedule. There is no power to review the actions of those  
16 other decision makers.

17 Parties that disagree with the issuance of such permits are not without remedy, but  
18 must follow the designated appeal or review mechanism.<sup>56</sup> The caselaw relied on by  
19 SFN<sup>57</sup> in its Final Submission illustrates the appropriate mechanism through which  
20 challenges to the EAO's decision should be brought. For example *Friends of Davie*  
21 *Bay v. British Columbia (Environmental Assessment Office)* involved a judicial  
22 review to the BC Supreme Court of a decision of the EAO that a specific project did  
23 not require an EAC. Such is the appropriate forum for such reviews. Similarly, any

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<sup>54</sup> *Fort Nelson First Nation v. British Columbia (Environmental Assessment Office)*, 2015 BCSC 1180 (CanLII).  
[**Fort Nelson**]

<sup>55</sup> *Rio Tinto*, 62.

<sup>56</sup> *British Columbia (Workers' Compensation Board) v. Figliola*, [2011] 3 SCR 422; 2011 SCC 52 (CanLII).

<sup>57</sup> *Friends of Davie Bay v. British Columbia (Environmental Assessment Office)*, 2012 BCCA 293 (CanLII) and  
*Fort Nelson*.

1 decisions of the Water Comptroller can be appealed to the Environmental Appeal  
2 Board.

3 All of the permits, authorizations and decisions for the Project were issued by  
4 administrative bodies that are experts in their respective fields and who were  
5 specifically tasked through their enabling legislation to make the decisions they  
6 made. The Commission's regulatory process is not the appropriate mechanism  
7 through which to review the venue or to review the procedures engaged and  
8 decisions rendered by those bodies. There is no support for such a reviewing  
9 function within the *Utilities Commission Act*.

10 6. Remedy

11 SFN submits that:

12 ...a decision to reject the schedule does not mean that the  
13 Project proceed, beginning in 2016. The Power Authority takes  
14 the position a favourable decision by the Commission is not  
15 required for it to begin work on the Project. Moreover, the Power  
16 Authority has confirmed that substantial civil construction work  
17 (i.e., quarrying) will not commence until August 2016, and  
18 trucking of rip-rap will not commence until [insert]. If that is the  
19 case, then the Power Authority has more than two months in  
20 which to demonstrate it has integrated Sauteau First Nation's  
21 views into its plans and has adequately consulted and  
22 accommodated Sauteau First Nations... (para. 196).

23 BC Hydro's position on record is that it may proceed with the Project absent an  
24 accepted expenditure schedule "provided it would otherwise be consistent with  
25 maintaining the honour of the Crown".<sup>58</sup> SFN has requested that the Commission  
26 find that consultation is inadequate (para. 195). BC Hydro's decision whether or not  
27 to implement the Project this year is scheduled for the end of May. In the face of a  
28 determination by the BCUC that consultation has been inadequate, it would likely not

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<sup>58</sup> Exhibit B-18, BC Hydro reply to SFN IR 3.23.3.

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1 uphold the honour of the Crown for BC Hydro to proceed with a positive decision at  
2 the end of the month to implement the Project this year.

3 SFN proposes that the parties return after further consultation with a “joint letter of  
4 commitment” signed by both parties (para. 197). The law does not require  
5 agreement. It requires adequate Crown consultation and where appropriate  
6 accommodation. To require the parties to agree would in effect, give SFN a veto  
7 over the Project proceeding.<sup>59</sup>

8 SFN further submits that “In the alternative, we note that the Commission has found  
9 that rescheduling the start of construction for 2017 will not have significant impacts  
10 on ratepayers” (para. 198).

11 Delay of this Project would result in more harm than just the cost impacts to  
12 ratepayers. As noted in BC Hydro’s Final Submissions, the evidence clearly  
13 supports the need for the Project now.<sup>60</sup> BC Hydro’s legal duty under the Dam  
14 Safety Regulations requires it to properly maintain and repair the Dam and related  
15 works in a manner that keeps the Dam and works in good operating condition. In  
16 meeting these duties BC Hydro must exercise reasonable care to avoid the risk of  
17 significant harm resulting from a defect, insufficiency or failure of the Dam. Further,  
18 as previously noted, the Expert Engineering Panel provided that the riprap condition  
19 is “a serious deficiency that should be remedied as soon as possible”.<sup>61</sup> This  
20 recommendation was made in August 2012. This advice was from an independent,  
21 competent dam safety professional panel of experts in the field of dam safety. There  
22 is no evidence on the record to cast any doubt on their conclusions.

23 BC Hydro respectfully submits that the evidence noted clearly supports the need for  
24 the Project now.

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<sup>59</sup> *Haida*, para 48.

<sup>60</sup> BC Hydro Written Submission, page 5.

<sup>61</sup> Exhibit B-1-4, page 16, section 3.7 [Emphasis added].

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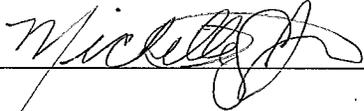
2 **Part 4 BC Hydro Conclusion**

7 The Interveners submissions reveal that none of the parties oppose the need for this  
8 important dam safety project. Further none of the interveners take issue with the  
9 scope, schedule and cost of the Project. The only remaining issue is whether or not  
10 the Crown has adequately consulted with SFN up to the point of the Commission's  
11 decision.

17 A significant portion of SFN's submission on the inadequacy of consultation  
18 challenges the consultation undertaken by other Ministerial representatives.  
19 BC Hydro submits that a review of the procedures engaged and decisions made by  
20 those authorities and is outside the Commission's jurisdiction. With respect to the  
21 remaining alleged deficiencies, BC Hydro submits that it seriously considered all of  
22 SFN's concerns as to impacts and has adopted mitigation measures to address  
23 them where appropriate and will continue to do so. Failure to agree to SFN specific  
24 requested mitigations is not a basis on which to find inadequate consultation. The  
25 Crown's consultation as a whole has been reasonable and the honour of the Crown  
26 has been maintained.

20 SFN argues that the duty to consult in this case is at the "middle range of the *Haida*  
21 spectrum" (para. 49). BC Hydro submits that when compared to the descriptions of a  
22 medium level of consultation in the caselaw,<sup>62</sup>

21 **ALL OF WHICH IS RESPECTFULLY SUBMITTED MAY 17, 2016**

22 Per:  \_\_\_\_\_

23 Michelle Jones, Lawson Lundell,

24 Legal Counsel, British Columbia Hydro and Power Authority

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<sup>62</sup> BC Hydro Final Submission, page 31-34.

**W.A.C. Bennett Riprap Upgrade Project**

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***All other cases were previously provided with BC Hydro's Submissions dated May 6, 2016.***

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v.

**Guiseppe Figliola, Kimberley Sallis, Barry  
Dearden and British Columbia Human  
Rights Tribunal** *Respondents*

and

**Attorney General of British Columbia,  
Coalition of BC Businesses,  
Canadian Human Rights Commission,  
Alberta Human Rights Commission and  
Vancouver Area Human Rights Coalition  
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**INDEXED AS: BRITISH COLUMBIA (WORKERS'  
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**2011 SCC 52**

File No.: 33648.

2011: March 16; 2011: October 27.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps,  
Fish, Abella, Charron, Rothstein and Cromwell JJ.

**ON APPEAL FROM THE COURT OF APPEAL FOR  
BRITISH COLUMBIA**

*Administrative law — Judicial review — Standard of review — Patent unreasonableness — Injured workers receiving compensation pursuant to British Columbia's Workers' Compensation Board chronic pain policy — Workers filing appeal with Board's Review Division claiming policy breached s. 8 of British Columbia Human Rights Code — Board rejecting that policy breached Human Rights Code — Workers subsequently filing complaints with Human Rights Tribunal repeating same arguments — Human Rights Tribunal deciding that this was appropriate question for Tribunal to determine — What is the scope of Tribunal's discretion to determine whether the substance of a complaint has been "appropriately dealt with" when two bodies share jurisdiction over human rights — Whether exercise of discretion by Tribunal was patently unreasonable — Human Rights*

**Workers' Compensation Board de la  
Colombie-Britannique** *Appelante*

c.

**Guiseppe Figliola, Kimberley Sallis, Barry  
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et

**Procureur général de la Colombie-  
Britannique, Coalition of BC Businesses,  
Commission canadienne des droits de la per-  
sonne, Alberta Human Rights Commission  
et Vancouver Area Human Rights Coalition  
Society** *Intervenants*

**RÉPERTORIÉ : COLOMBIE-BRITANNIQUE  
(WORKERS' COMPENSATION BOARD) c. FIGLIOLA**

**2011 CSC 52**

N° du greffe : 33648.

2011 : 16 mars; 2011 : 27 octobre.

Présents : La juge en chef McLachlin et les juges Binnie,  
LeBel, Deschamps, Fish, Abella, Charron, Rothstein et  
Cromwell.

**EN APPEL DE LA COUR D'APPEL DE LA  
COLOMBIE-BRITANNIQUE**

*Droit administratif — Contrôle judiciaire — Norme de contrôle — Décision manifestement déraisonnable — Indemnisation des accidentés du travail en application de la politique de la Workers' Compensation Board de la Colombie-Britannique relative aux douleurs chroniques — Appel interjeté devant la Section de révision de la Commission au motif que la politique contrevient à l'art. 8 du Human Rights Code de la Colombie-Britannique — La Commission ne conclut pas à une contravention au Code — Travailleurs reprenant les mêmes arguments dans des plaintes subséquentes auprès du tribunal des droits de la personne — Le tribunal estime qu'il s'agit d'une question qu'il peut à bon droit considérer — Quelle est la portée du pouvoir discrétionnaire du tribunal de juger s'il a « été statué de façon appropriée sur le fond de la plainte » dans les cas où deux organismes*

*Code, R.S.B.C. 1996, c. 210, ss. 8, 27(1) — Administrative Tribunals Act, S.B.C. 2004, c. 45, s. 59.*

The complainant workers suffered from chronic pain and sought compensation from British Columbia's Workers' Compensation Board. Pursuant to the Board's chronic pain policy, they received a fixed compensation award. They appealed to the Board's Review Division, arguing that a policy which set a fixed award for chronic pain was patently unreasonable, unconstitutional and discriminatory on the grounds of disability under s. 8 of the British Columbia *Human Rights Code* ("Code"). The Review Officer accepted that he had jurisdiction over the *Human Rights Code* complaint and concluded that the Board's chronic pain policy was not contrary to s. 8 of the *Code* and therefore not discriminatory.

The complainants appealed this decision to the Workers' Compensation Appeal Tribunal ("WCAT"). Before the appeal was heard, the legislation was amended removing WCAT's authority to apply the *Code*. Based on the amendments, the complainants' appeal of the Review Officer's human rights conclusions could not be heard by WCAT, but judicial review remained available. Instead of applying for judicial review, the complainants filed new complaints with the Human Rights Tribunal, repeating the same s. 8 arguments about the Board's chronic pain policy that they had made before the Review Division.

The Workers' Compensation Board brought a motion asking the Tribunal to dismiss the new complaints, arguing that under s. 27(1)(a) of the *Code*, the Tribunal had no jurisdiction, and that under s. 27(1)(f) of the *Code*, the complaints had already been "appropriately dealt with" by the Review Division. The Tribunal rejected both arguments and found that the issue raised was an appropriate question for the Tribunal to consider and that the parties to the complaints should receive the benefit of a full Tribunal hearing. On judicial review, the Tribunal's decision was set aside. The Court of Appeal, however, concluded that the Tribunal's decision was not patently unreasonable and restored its decision.

*ont compétence en matière de droits de la personne? — L'exercice par le tribunal de son pouvoir discrétionnaire était-il manifestement déraisonnable? — Human Rights Code, R.S.B.C. 1996, ch. 210, art. 8, 27(1) — Administrative Tribunals Act, S.B.C. 2004, ch. 45, art. 59.*

Les plaignants, des travailleurs, souffraient de douleurs chroniques et ont soumis une demande d'indemnisation à la Workers' Compensation Board de la Colombie-Britannique (la « Commission »). En application de la politique de la Commission relative aux douleurs chroniques, les plaignants ont touché une indemnité d'un montant fixe. Ils ont interjeté appel devant la Section de révision de la Commission, soutenant que la politique de l'indemnité fixe pour les douleurs chroniques était manifestement déraisonnable, qu'elle était inconstitutionnelle et qu'elle constituait de la discrimination fondée sur la déficience interdite à l'art. 8 du *Human Rights Code* de la Colombie-Britannique (« Code »). L'agent de révision, s'estimant compétent pour entendre la plainte fondée sur le *Code*, a conclu que la politique de la Commission relative à la douleur chronique n'enfreignait pas l'art. 8 du *Code* et n'était donc pas discriminatoire.

Les plaignants ont porté cette décision en appel devant le Workers' Compensation Appeal Tribunal (« WCAT »). Avant l'instruction de l'appel, une modification législative a retiré au WCAT sa compétence en matière d'application du *Code*. Du fait de cette modification, le WCAT ne pouvait plus entendre l'appel des plaignants à l'encontre des conclusions de l'agent de révision relatives aux droits de la personne, mais il était toujours loisible aux plaignants de demander un contrôle judiciaire. Ces derniers ont plutôt déposé devant le tribunal des droits de la personne (« Tribunal ») de nouvelles plaintes, reprenant au sujet de la politique de la Commission en matière de douleur chronique les mêmes arguments fondés sur l'art. 8 du *Code* que ceux qu'ils avaient soumis à la Section de révision.

La Commission a présenté au Tribunal une requête pour rejet des nouvelles plaintes, soutenant, d'une part, que le Tribunal n'avait pas compétence aux termes de l'al. 27(1)a) du *Code* et, d'autre part, que la Section de révision avait déjà « statué de façon appropriée » sur le fond de la plainte suivant l'al. 27(1)f) du *Code*. Le Tribunal a rejeté les deux arguments, estimant que la question soulevée était une question que le Tribunal pouvait à bon droit considérer et qu'il convenait que les parties puissent bénéficier d'une audience en bonne et due forme par le Tribunal. À l'issue d'un contrôle judiciaire, la décision du Tribunal a été annulée, mais la Cour d'appel l'a rétablie, concluant que cette décision du Tribunal n'était pas manifestement déraisonnable.

*Held:* The appeal should be allowed, the Tribunal's decision set aside and the complaints dismissed.

*Per* LeBel, Deschamps, Abella, Charron and Rothstein JJ.: Section 27(1)(f) of the *Code* is the statutory reflection of the collective principles underlying the doctrines of issue estoppel, collateral attack and abuse of process — doctrines used by the common law as vehicles to transport and deliver to the litigation process principles of finality, the avoidance of multiplicity of proceedings, and protection for the integrity of the administration of justice, all in the name of fairness.

Read as a whole, s. 27(1)(f) does not codify these actual doctrines or their technical explications, it embraces their underlying principles. As a result, the Tribunal should be guided less by precise doctrinal catechisms and more by the goals of the fairness of finality in decision-making and the avoidance of the relitigation of issues already decided by a decision-maker with the authority to resolve them. Relying on these principles will lead the Tribunal to ask itself whether there was concurrent jurisdiction to decide the issues; whether the previously decided legal issue was essentially the same as what is being complained of to the Tribunal; and whether there was an opportunity for the complainants or their privies to know the case to be met and have the chance to meet it, regardless of how closely the previous process procedurally mirrored the one the Tribunal prefers or uses itself. All of these questions go to determining whether the substance of a complaint has been “appropriately dealt with” under s. 27(1)(f). The Tribunal's strict adherence to the application of issue estoppel was an overly formalistic interpretation of s. 27(1)(f), particularly of the phrase “appropriately dealt with”, and had the effect of obstructing rather than implementing the goal of avoiding unnecessary relitigation.

Section 27(1)(f) does not represent a statutory invitation either to judicially review another tribunal's decision, or to reconsider a legitimately decided issue in order to explore whether it might yield a different outcome. The section is oriented instead towards creating territorial respect among neighbouring tribunals, including respect for their right to have their own vertical lines of review protected from lateral adjudicative poaching. When an adjudicative body decides an issue within its jurisdiction, it and the parties who participated in the process are entitled to assume that, subject to appellate or judicial review, its decision will not only be final, it will be treated as such by other adjudicative bodies.

*Arrêt:* Le pourvoi est accueilli, la décision du Tribunal est annulée et les plaintes sont rejetées.

*Les juges* LeBel, Deschamps, Abella, Charron et Rothstein : L'alinéa 27(1)f) codifie l'ensemble des principes sous-jacents des règles en matière de préclusion découlant d'une question déjà tranchée, de contestation indirecte et d'abus de procédure — auxquelles la common law a eu recours comme véhicule pour porter, en contexte de procédures judiciaires, les principes de caractère définitif des instances, de prévention de leur multiplication et de protection de l'intégrité de l'administration de la justice, dans chaque cas, par souci d'équité.

Considéré dans son ensemble, l'al. 27(1)f) ne codifie pas les doctrines elles-mêmes ou leurs explications techniques, il en englobe les principes sous-jacents. Il s'ensuit que ce ne sont pas tant des dogmes doctrinaux précis qui devraient guider le Tribunal que les objets de la disposition, qui sont d'assurer l'équité du caractère définitif du processus décisionnel et d'éviter la remise en cause de questions déjà tranchées par un décideur ayant compétence pour en connaître. En s'appuyant sur ces principes, le Tribunal est appelé à se demander s'il existe une compétence concurrente pour statuer sur ces questions, si la question juridique tranchée par la décision antérieure était essentiellement la même que celle qui est soulevée dans la plainte dont il est saisi et si le processus antérieur, qu'il ressemble ou non à la procédure que le Tribunal préfère ou utilise lui-même, a offert la possibilité aux plaignants ou à leurs ayants droit de connaître les éléments invoqués contre eux et de les réfuter. Toutes ces questions visent à déterminer s'il « a été statué de façon appropriée » sur le fond de la plainte, le critère établi à l'al. 27(1)f). En s'en tenant à l'application stricte de la préclusion découlant d'une question déjà tranchée, le Tribunal a donné une interprétation trop formaliste à l'al. 27(1)f) et, plus particulièrement, aux mots « a été statué de façon appropriée ». Plutôt que de donner effet à l'objectif de prévention des remises en cause inutiles, une telle interprétation y fait obstacle.

L'alinéa 27(1)f) ne constitue pas une invitation au contrôle judiciaire de la décision d'un autre tribunal ou au réexamen d'une question dûment tranchée pour voir si un résultat différent pourrait en émerger. Cet alinéa vise plutôt à instaurer un respect juridictionnel entre tribunaux administratifs voisins, englobant le respect du droit à la protection de leur propre voie verticale de révision contre les empiétements indirects. L'organisme juridictionnel qui se prononce sur une question qui est de son ressort et les parties en cause doivent tenir pour acquis que, sous réserve d'un appel ou d'un contrôle judiciaire, non seulement la décision sera-t-elle définitive, mais elle sera considérée telle par les autres organismes juridictionnels.

The discretion in s. 27(1)(f) was intended to be limited. This is based not only on the language of s. 27(1)(f) and the legislative history, but also on the character of the other six categories of complaints in s. 27(1), all of which refer to circumstances that make hearing the complaint presumptively unwarranted, such as complaints that are not within the Tribunal's jurisdiction, allege acts or omissions that do not contravene the *Code*, have no reasonable prospect of success, would not be of any benefit to the complainant or further the purposes of the *Code*, or are made for improper motives or bad faith.

What the complainants in this case were trying to do is relitigate in a different forum. Rather than challenging the Review Officer's decision through the available review route of judicial review, they started fresh proceedings before a different tribunal in search of a more favourable result. This strategy represented a "collateral appeal" to the Tribunal, the very trajectory that s. 27(1)(f) and the common law doctrines were designed to prevent. The Tribunal's analysis made it complicit in this attempt to collaterally appeal the merits of the Board's decision and decision-making process. Its analysis represents a litany of factors having to do with whether it was comfortable with the process and merits of the Review Officer's decision: it questioned whether the Review Division's process met the necessary procedural requirements; it criticized the Review Officer for the way he interpreted his human rights mandate; it held that the decision of the Review Officer was not final; it concluded that the parties were not the same before the Workers' Compensation Board as they were before the Tribunal; and it suggested that Review Officers lacked expertise in interpreting or applying the *Code*.

The standard of review designated under s. 59 of the *Administrative Tribunals Act* is patent unreasonableness. Because the Tribunal based its decision to proceed with these complaints and have them relitigated on predominantly irrelevant factors and ignored its true mandate under s. 27(1)(f), its decision is patently unreasonable.

*Per* McLachlin C.J. and Binnie, Fish and Cromwell JJ.: Both the common law and in particular s. 27(1)(f) of the *Code* are intended to achieve the necessary balance between finality and fairness through the exercise of discretion. It is this balance which is at the heart of both

Le pouvoir discrétionnaire conféré par l'al. 27(1)(f) se voulait restreint, non seulement en raison du texte de cette disposition et de l'historique législatif, mais également de la nature des six autres catégories de plaintes mentionnées au par. 27(1), faisant chacune référence à des circonstances qui laissent présumer qu'il ne serait pas justifié d'entendre la plainte : les plaintes qui ne relèvent pas de la compétence du Tribunal, celles qui allèguent des actes ou des omissions qui ne contreviennent pas au *Code*, s'il n'existe aucune possibilité raisonnable que le plaignant ait gain de cause, si les plaintes n'apporteraient rien au plaignant et ne serviraient pas les fins poursuivies par le *Code* ou si elles ont été déposées de mauvaise foi ou à des fins illégitimes.

En l'espèce, les plaignants cherchaient à soulever de nouveau la question devant un autre forum. Plutôt que d'emprunter la voie du contrôle judiciaire, qui leur était ouverte, pour contester la décision de l'agent de révision, ils ont engagé une nouvelle instance devant un autre tribunal administratif dans l'espoir d'obtenir un résultat plus favorable. Cette stratégie constituait un « appel indirect », une démarche que l'al. 27(1)(f) et les doctrines de common law visent précisément à éviter. L'analyse du Tribunal l'a rendu complice de cette tentative de contester indirectement le bien-fondé de la décision de la Commission et du processus suivi; on y trouve une myriade de facteurs en fonction desquels le Tribunal s'est demandé s'il était à l'aise avec le processus de l'instance antérieure et avec les motifs de la décision de l'agent de révision. Il s'est demandé si le processus suivi devant la Section de révision satisfaisait aux exigences procédurales; il a critiqué l'interprétation que l'agent de révision a faite de son mandat en matière de droits de la personne; il a conclu que la décision de l'agent de révision n'était pas définitive; il a conclu que les parties qu'il avait devant lui n'étaient pas les mêmes que celles qui s'étaient présentées devant la Commission; et il a indiqué que l'agent de révision n'avait pas l'expertise voulue pour interpréter ou appliquer le *Code*.

La norme de contrôle applicable est celle de la décision manifestement déraisonnable, aux termes de l'art. 59 de l'*Administrative Tribunals Act*. Parce que la décision du Tribunal de recevoir ces plaintes et de les entendre de nouveau repose principalement sur des facteurs non pertinents et ne tient pas compte du mandat véritable que lui confère l'al. 27(1)(f), elle est manifestement déraisonnable.

*La* juge en chef McLachlin et les juges Binnie, Fish et Cromwell : La common law et en particulier l'al. 27(1)(f) du *Code* tendent tous deux à la réalisation de ce nécessaire équilibre entre le caractère définitif des décisions et l'équité, et ce, par l'exercice du pouvoir discrétionnaire

the common law finality doctrines and the legislative intent in enacting s. 27(1)(f). A narrow interpretation of the Tribunal's discretion under s. 27(1)(f) does not reflect the clear legislative intent in enacting the provision. Rather, s. 27(1)(f) confers, in very broad language, a flexible discretion on the Human Rights Tribunal to enable it to achieve that balance in the multitude of contexts in which another tribunal may have dealt with a point of human rights law.

The grammatical and ordinary meaning of the words of s. 27(1)(f) support an expansive view of the discretion, not a narrow one. Nor can it be suggested that s. 27(1)(f) be read narrowly because of the character of the other six categories of discretion conferred by s. 27(1). The provision's legislative history also confirms that it was the Legislature's intent to confer a broad discretion to dismiss or not to dismiss where there had been an earlier proceeding. The intent was clearly to broaden, not to narrow, the range of factors which a tribunal could consider.

The Court's jurisprudence recognizes that, in the administrative law context, common law finality doctrines must be applied flexibly to maintain the necessary balance between finality and fairness. This is done through the exercise of discretion taking into account a wide variety of factors which are sensitive to the particular administrative law context in which the case arises and to the demands of substantial justice in the particular circumstances of each case. Finality and requiring parties to use the most appropriate mechanisms for review are of course important considerations. But they are not the only, or even the most important considerations. The need for this necessarily broader discretion in applying the finality doctrines in the administrative law setting is well illustrated by the intricate and changing procedural context in which the complainants found themselves in this case and underlines the wisdom of applying finality doctrines with considerable flexibility in the administrative law setting. The most important consideration is whether giving the earlier proceeding final and binding effect will work an injustice. If there is substantial injustice, or a serious risk of it, poor procedural choices by the complainant should generally not be fatal to an appropriate consideration of his or her complaint on its merits.

du Tribunal. C'est la recherche de cet équilibre qui est au cœur tant des doctrines de la common law relatives au caractère définitif des décisions que de l'intention du législateur en édictant l'al. 27(1)(f). En donnant une portée étroite au pouvoir discrétionnaire que l'al. 27(1)(f) confère au Tribunal, on ne tient pas compte de cette intention claire du législateur. En fait, l'al. 27(1)(f) confère en termes très larges au Tribunal un pouvoir discrétionnaire souple propre à lui permettre de réaliser cet équilibre dans la multitude de contextes où d'autres tribunaux administratifs ont pu se prononcer sur une question relevant des droits de la personne.

Le sens ordinaire et grammatical des termes de l'al. 27(1)(f) permet de donner une large portée au pouvoir discrétionnaire, non une portée restreinte. On ne peut considérer qu'il faille interpréter l'al. 27(1)(f) de façon restrictive en raison de la nature des six autres catégories de pouvoirs discrétionnaires conférés au par. 27(1). L'historique législatif de la disposition confirme également que, pour ce qui est du rejet d'une plainte ayant fait l'objet d'une instance antérieure, le législateur a voulu conférer un pouvoir discrétionnaire étendu. Le législateur voulait manifestement élargir et non rétrécir l'éventail des facteurs qu'un tribunal doit prendre en compte.

La jurisprudence de notre Cour reconnaît qu'en contexte de droit administratif, il convient d'appliquer avec souplesse les doctrines de la common law relatives au caractère définitif des décisions afin de maintenir le nécessaire équilibre entre le caractère définitif et l'équité des décisions. À cette fin, l'exercice du pouvoir discrétionnaire nécessite la prise en compte d'un large éventail de facteurs pertinents aux particularités du contexte administratif en cause et aux exigences à satisfaire pour que justice soit rendue dans les circonstances de chaque cas. Le caractère définitif de la décision et l'obligation faite aux parties de recourir aux mécanismes de révision les plus appropriés sont certes des facteurs importants, mais ils ne sont ni les seuls, ni même les plus importants. Le contexte procédural complexe et changeant en cause en l'espèce illustre bien la nécessité du recours à ce pouvoir discrétionnaire nécessairement plus étendu lorsqu'il s'agit d'appliquer les doctrines relatives au caractère définitif des décisions en contexte de droit administratif et montre qu'il n'est que sage d'appliquer avec beaucoup de souplesse, dans le contexte du droit administratif, les doctrines relatives au caractère définitif des décisions. Le facteur le plus important consiste à déterminer si une injustice peut résulter de l'attribution d'une portée définitive et exécutoire à l'instance antérieure. En cas d'injustice substantielle ou de risque sérieux d'une telle injustice, les choix procéduraux malavisés du plaignant ne devraient généralement pas sonner le glas d'un examen au fond approprié de sa plainte.

In this case, the Tribunal's decision not to dismiss the complaint under s. 27(1)(f) was patently unreasonable. While the Tribunal was entitled to take into account the alleged procedural limitations of the proceedings before the Review Officer, it committed a reversible error by basing its decision on the alleged lack of independence of the Review Officer and by ignoring the potential availability of judicial review to remedy any procedural defects. More fundamentally, it failed to consider whether the substance of the complaint had been addressed and thereby failed to take this threshold statutory requirement into account. This requires looking at such factors as the issues raised in the earlier proceedings; whether those proceedings were fair; whether the complainant had been adequately represented; whether the applicable human rights principles had been canvassed; whether an appropriate remedy had been available and whether the complainant chose the forum for the earlier proceedings. This flexible and global assessment seems to be exactly the sort of approach called for by s. 27(1)(f). The Tribunal also failed to have regard to the fundamental fairness or otherwise of the earlier proceeding. All of this led the Tribunal to give no weight at all to the interests of finality and to largely focus instead on irrelevant considerations of whether the strict elements of issue estoppel were present.

The appeal should be allowed and the application of the Workers' Compensation Board under s. 27(1)(f) should be remitted to the Tribunal for reconsideration.

#### Cases Cited

By Abella J.

**Referred to:** *Tranchemontagne v. Ontario (Director, Disability Support Program)*, 2006 SCC 14, [2006] 1 S.C.R. 513; *British Columbia (Ministry of Competition, Science & Enterprise) v. Matuszewski*, 2008 BCSC 915, 82 Admin. L.R. (4th) 308; *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460; *Workers' Compensation Appeal Tribunal (B.C.) v. Hill*, 2011 BCCA 49, 299 B.C.A.C. 129; *Berezoutskaia v. Human Rights Tribunal (B.C.)*, 2006 BCCA 95, 223 B.C.A.C. 71; *Hines v. Canpar Industries Ltd.*, 2006 BCSC 800, 55 B.C.L.R. (4th) 372; *Boucher v. Stelco Inc.*, 2005 SCC 64, [2005] 3 S.C.R. 279; *Rocois Construction Inc. v. Québec Ready Mix Inc.*, [1990] 2 S.C.R. 440; *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248; *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, [2010] 3 S.C.R. 585; *Garland v. Consumers'*

En l'espèce, en refusant de rejeter la plainte en application de l'al. 27(1)f), le Tribunal a rendu une décision manifestement déraisonnable. Certes, le Tribunal pouvait tenir compte des allégations relatives aux limites procédurales du recours devant l'agent de révision, mais il a commis une erreur justifiant l'annulation de sa décision en fondant cette dernière sur le prétendu manque d'indépendance de l'agent de révision et en faisant abstraction de la possibilité de recourir au contrôle judiciaire pour corriger tout vice procédural. Plus fondamentalement encore, il n'a pas examiné s'il avait été statué sur le fond de la plainte, omettant ainsi de prendre en considération une condition imposée par la Loi. Il lui faut tenir compte d'éléments comme les questions soulevées dans l'instance antérieure et les questions de savoir si cette instance s'est déroulée de façon équitable, si le plaignant était bien représenté, si les principes applicables en matière de droits de la personne ont été examinés, si une réparation appropriée pouvait être accordée et si le choix du forum antérieur relevait du plaignant. Cette évaluation globale et souple paraît être exactement la démarche que requiert l'al. 27(1)f). En outre, le Tribunal n'a pas pris en compte l'équité, fondamentale ou autre, de l'instance antérieure. Tout cela a fait en sorte que le Tribunal n'a accordé aucun poids aux intérêts en jeu en matière de caractère définitif de la décision, et qu'il a largement fondé son analyse, plutôt, sur des facteurs non pertinents rattachés à l'existence des stricts éléments constitutifs de la préclusion fondée sur une question déjà tranchée.

Il y a lieu d'accueillir le pourvoi et de renvoyer au Tribunal, pour qu'il la réexamine, la demande de la Workers' Compensation Board présentée aux termes de l'al. 27(1)f).

#### Jurisprudence

Citée par la juge Abella

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By Cromwell J.

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*Attorney General Statutes Amendment Act, 2007*, S.B.C. 2007, c. 14, s. 3.  
*Canadian Charter of Rights and Freedoms*, s. 15.  
*Civil Code of Québec*, S.Q. 1991, c. 64, art. 2848.  
*Human Rights Amendment Act, 1995*, S.B.C. 1995, c. 42.  
*Human Rights Code*, R.S.B.C. 1996, c. 210, ss. 8, 25(2) [rep. & sub. 2002, c. 62, s. 11], (3) [rep. *idem*], 27(1), (2) [rep. & sub. *idem*, s. 12].  
*Human Rights Code Amendment Act, 2002*, S.B.C. 2002, c. 62.  
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Citée par le juge Cromwell

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*Scott A. Nielsen and Laurel Courtenay*, for the appellants.

*Lindsay Waddell, James Sayre and Kevin Love*, for the respondents Guiseppe Figliola, Kimberley Sallis and Barry Dearden.

*Jessica M. Connell and Katherine Hardie*, for the respondent the British Columbia Human Rights Tribunal.

*Jonathan G. Penner*, for the intervener the Attorney General of British Columbia.

*Peter A. Gall, Q.C., and Nitya Iyer*, for the intervener the Coalition of BC Businesses.

*Sheila Osborne-Brown and Philippe Dufresne*, for the intervener the Canadian Human Rights Commission.

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*Scott A. Nielsen et Laurel Courtenay*, pour l'appelante.

*Lindsay Waddell, James Sayre et Kevin Love*, pour les intimés Guiseppe Figliola, Kimberley Sallis et Barry Dearden.

*Jessica M. Connell et Katherine Hardie*, pour l'intimé British Columbia Human Rights Tribunal.

*Jonathan G. Penner*, pour l'intervenant le procureur général de la Colombie-Britannique.

*Peter A. Gall, c.r., et Nitya Iyer*, pour l'intervenante Coalition of BC Businesses.

*Sheila Osborne-Brown et Philippe Dufresne*, pour l'intervenante la Commission canadienne des droits de la personne.

*Janice R. Ashcroft*, for the intervener the Alberta Human Rights Commission.

*Ryan D. W. Dalziel*, for the intervener the Vancouver Area Human Rights Coalition Society.

The judgment of LeBel, Deschamps, Abella, Charron and Rothstein JJ. was delivered by

[1] ABELLA J. — Litigants hope to have their legal issues resolved as equitably and expeditiously as possible by an authoritative adjudicator. Subject only to rights of review or appeal, they expect, in the interests of fairness, to be able to rely on the outcome as final and binding. What they do not expect is to have those same issues relitigated by a different adjudicator in a different forum at the request of a losing party seeking a different result. On the other hand, it may sometimes be the case that justice demands fresh litigation.

[2] In British Columbia, there is legislation giving the Human Rights Tribunal a discretion to refuse to hear a complaint if the substance of that complaint has already been appropriately dealt with in another proceeding. The issue in this appeal is how that discretion ought to be exercised when another tribunal with concurrent human rights jurisdiction has disposed of the complaint.

#### Background

[3] Guiseppe Figliola, Kimberley Sallis, and Barry Dearden suffered from chronic pain. Mr. Figliola suffered a lower back injury while trying to place a sixty-pound, steel airshaft in the centre of a roll of paper. Ms. Sallis fell down a set of slippery stairs while delivering letters for Canada Post. Mr. Dearden, who also worked for Canada Post, developed back pain while delivering mail.

[4] Each of them sought compensation from the British Columbia's Workers' Compensation Board

*Janice R. Ashcroft*, pour l'intervenante Alberta Human Rights Commission.

*Ryan D. W. Dalziel*, pour l'intervenante Vancouver Area Human Rights Coalition Society.

Version française du jugement des juges LeBel, Deschamps, Abella, Charron et Rothstein rendu par

[1] LA JUGE ABELLA — Quiconque est partie à un litige souhaite que les questions juridiques en cause soient tranchées le plus équitablement et rapidement possible par un décideur faisant autorité et, par souci d'équité, veut l'assurance que la décision rendue sera définitive et exécutoire, exception faite du droit d'en demander le contrôle judiciaire ou d'interjeter appel. Personne ne s'attend à ce que les mêmes questions soient réexaminées devant un autre forum à la demande d'une partie déboutée cherchant à obtenir un résultat différent. Il y a cependant des cas où la justice impose de reprendre le litige.

[2] En Colombie-Britannique, la loi confère au tribunal des droits de la personne le pouvoir discrétionnaire de refuser d'entendre une plainte sur le fond de laquelle un décideur s'est déjà prononcé de façon appropriée. En l'espèce, la Cour est appelée à déterminer comment doit s'exercer ce pouvoir discrétionnaire lorsqu'un autre tribunal administratif, qui a une compétence concurrente en matière de droits de la personne, a déjà rendu une décision.

#### Contexte

[3] Guiseppe Figliola, Kimberley Sallis et Barry Dearden sont aux prises avec des douleurs chroniques. M. Figliola s'est blessé dans la région lombaire en tentant d'installer une tige d'aération en acier de soixante livres au centre d'un rouleau de papier. M<sup>me</sup> Sallis est tombée dans un escalier glissant en livrant du courrier pour Postes Canada. M. Dearden, qui travaillait lui aussi pour Postes Canada, a commencé à éprouver des douleurs au dos en livrant du courrier.

[4] Chacun d'eux a soumis à la Workers' Compensation Board de la Colombie-Britannique

for, among other things, their chronic pain. The employers were notified in each case.

[5] The Board's chronic pain policy, set by its board of directors, provided for a fixed award for such pain:

Where a Board officer determines that a worker is entitled to [an] award for chronic pain . . . an award equal to 2.5% of total disability will be granted to the worker.

(*Rehabilitation Services and Claims Manual*, vol. I, Policy No. 39.01, Chronic Pain, at para. 4(b); later replaced by vol. II, Policy No. 39.02, Chronic Pain (online).)

[6] Pursuant to this policy, the complainants received a fixed compensation award amounting to 2.5% of total disability for their chronic pain. The Workers' Compensation Board expresses partial disability as a percentage of the disability suffered by a completely disabled worker. This is intended to reflect "the extent to which a particular injury is likely to impair a worker's ability to earn in the future" (*Rehabilitation Services and Claims Manual*, vol. II, Policy No. 39.00).

[7] Each complainant appealed to the Board's Review Division, arguing that a policy which set a fixed award for chronic pain was patently unreasonable, unconstitutional under s. 15 of the *Canadian Charter of Rights and Freedoms*, and discriminatory on the grounds of disability under s. 8 of the *Human Rights Code*, R.S.B.C. 1996, c. 210.

[8] At the Review Division, the Review Officer, Nick Attewell, found that only the Workers' Compensation Appeal Tribunal ("WCAT") had the authority to scrutinize policies for patent

(la « Commission ») une demande d'indemnisation fondée, entre autres, sur leurs douleurs chroniques. L'employeur a été avisé dans chaque cas.

[5] La politique de la Commission, établie par le comité de direction de l'organisme, prévoit une indemnité d'un montant fixe dans les cas de douleur chronique :

[TRADUCTION] Lorsqu'un agent de la Commission conclut qu'un travailleur a droit à l'indemnité pour douleur chronique [. . .], celle-ci équivaut à 2,5 % de l'indemnité à laquelle il aurait droit en cas d'invalidité totale.

(*Rehabilitation Services and Claims Manual*, vol. I, politique n° 39.01, Chronic Pain, al. 4b); remplacée par vol. II, politique n° 39.02, Chronic Pain (en ligne).)

[6] En application de cette politique, les plaignants ont touché, pour leurs douleurs chroniques, une indemnité d'un montant fixe équivalant à 2,5 % du montant qui aurait été alloué en cas d'invalidité totale. Pour la Commission, l'invalidité partielle s'exprime sous forme de pourcentage de l'incapacité d'un travailleur totalement invalide. On vise ainsi à rendre compte de [TRADUCTION] « la mesure dans laquelle une blessure particulière est susceptible de nuire à la capacité du travailleur de gagner un revenu » (*Rehabilitation Services and Claims Manual*, vol. II, politique n° 39.00).

[7] Chaque plaignant a interjeté appel devant la *Review Division* de la Commission (la « Section de révision »), soutenant que la politique de l'indemnité fixe pour les douleurs chroniques était manifestement déraisonnable, qu'elle était inconstitutionnelle au regard de l'art. 15 de la *Charte canadienne des droits et libertés* et qu'elle constituait de la discrimination fondée sur la déficience au sens où il faut l'entendre pour l'application de l'art. 8 du *Human Rights Code*, R.S.B.C. 1996, ch. 210 (« Code »).

[8] L'agent de révision, Nick Attewell, a conclu que la question de savoir si une politique de la Commission était manifestement déraisonnable relevait exclusivement du Workers' Compensation

unreasonableness. He also concluded that, since the combination of s. 44 of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 (“ATA”), and s. 245.1 of the *Workers Compensation Act*, R.S.B.C. 1996, c. 492, expressly deprived the WCAT of jurisdiction over constitutional questions, this meant that he too had no such jurisdiction.

[9] The Review Officer accepted that he had jurisdiction over the *Human Rights Code* complaint. This authority flowed from this Court’s decision in *Tranchemontagne v. Ontario (Director, Disability Support Program)*, 2006 SCC 14, [2006] 1 S.C.R. 513, where the majority concluded that human rights tribunals did not have exclusive jurisdiction over human rights cases and that unless there was statutory language to the contrary, other tribunals had concurrent jurisdiction to apply human rights legislation.

[10] In careful and thorough reasons, the Review Officer concluded that the Board’s chronic pain policy was not contrary to s. 8 of the *Code* and therefore not discriminatory.

[11] The complainants appealed Mr. Attewell’s decision to the WCAT. Before the appeal was heard, the B.C. legislature amended the *Administrative Tribunals Act* and the *Workers Compensation Act*, removing the WCAT’s authority to apply the *Code (Attorney General Statutes Amendment Act, 2007)*, S.B.C. 2007, c. 14). The effect of this amendment on a Review Officer’s authority to address the *Code* is not before us and was not argued by any of the parties.

[12] Based on the amendments, the complainants’ appeal of the Review Officer’s human rights conclusions could not be heard by the WCAT, but judicial review remained available. Instead of applying for judicial review, however, the complainants filed new complaints with the Human Rights Tribunal, repeating the same s. 8 arguments about the Board’s chronic pain policy that they had made before the Review Division. They did not proceed

Appeal Tribunal (« WCAT »). Il a aussi conclu que le WCAT étant expressément privé de compétence en matière constitutionnelle par effet combiné de l’art. 44 de l’*Administrative Tribunals Act*, S.B.C. 2004, ch. 45 (« ATA »), et de l’art. 245.1 de la *Workers Compensation Act*, R.S.B.C. 1996, ch. 492, il en était lui aussi dépourvu.

[9] L’agent de révision s’est toutefois estimé compétent pour entendre la plainte fondée sur le *Code* en raison de l’arrêt *Tranchemontagne c. Ontario (Directeur du Programme ontarien de soutien aux personnes handicapées)*, 2006 CSC 14, [2006] 1 R.C.S. 513, dans lequel notre Cour a conclu, à la majorité, que les tribunaux des droits de la personne n’étaient pas investis d’une compétence exclusive et, que, à moins de dispositions législatives contraires, d’autres tribunaux administratifs pouvaient exercer une compétence concurrente en matière d’application des lois sur les droits de la personne.

[10] Au terme de motifs minutieux et approfondis, l’agent de révision a conclu que la politique de la Commission relative à la douleur chronique n’enfreignait pas l’art. 8 du *Code* et qu’elle n’était donc pas discriminatoire.

[11] Les plaignants ont porté la décision de M. Attewell en appel devant le WCAT. Avant l’instruction de l’appel, la législature de la Colombie-Britannique a modifié l’*Administrative Tribunals Act* et la *Workers Compensation Act*, et supprimé la compétence du WCAT en matière d’application du *Code (Attorney General Statutes Amendment Act, 2007)*, S.B.C. 2007, ch. 14). Aucune des parties n’a soulevé la question de l’effet de cette modification sur le pouvoir de l’agent de révision de se prononcer sur une question relevant du *Code* et nous n’en sommes pas saisis.

[12] Compte tenu des modifications, l’appel interjeté par les plaignants des conclusions de l’agent de révision relatives aux droits de la personne ne pouvait pas être entendu par le WCAT, mais il leur était toujours loisible de demander un contrôle judiciaire. Or, plutôt que de procéder ainsi, les plaignants ont déposé devant le tribunal des droits de la personne (« Tribunal ») de nouvelles plaintes dans lesquelles ils reprenaient l’argument qu’ils avaient soumis à la

with their appeal to the WCAT from the conclusions of the Review Officer dealing with whether he had jurisdiction to find the chronic pain policy to be patently unreasonable.

[13] The Workers' Compensation Board brought a motion asking the Tribunal to dismiss the new complaints, arguing that under s. 27(1)(a) of the *Code*, the Tribunal had no jurisdiction, and that under s. 27(1)(f), the complaints had already been appropriately dealt with by the Review Division. Those provisions state:

- 27 (1) A member or panel may, at any time after a complaint is filed and with or without a hearing, dismiss all or part of the complaint if that member or panel determines that any of the following apply:
- (a) the complaint or that part of the complaint is not within the jurisdiction of the tribunal;
  - . . .
  - (f) the substance of the complaint or that part of the complaint has been appropriately dealt with in another proceeding;

[14] The Tribunal rejected both arguments (2008 BCHRT 374 (CanLII)). Of particular relevance, it did not agree that the complaints should be dismissed under s. 27(1)(f). Citing *British Columbia (Ministry of Competition, Science & Enterprise) v. Matuszewski*, 2008 BCSC 915, 82 Admin. L.R. (4th) 308, and relying on this Court's decision in *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460, the Tribunal concluded that "the substance of the Complaints was not appropriately dealt with in the review process. . . . [T]he issue raised is an appropriate question for the Tribunal to consider and the parties to the Complaints should receive the benefit of a full Tribunal hearing" (para. 50).

Section de révision, selon lequel la politique de la Commission en matière de douleur chronique était contraire à l'art. 8 du *Code*. Ils n'ont pas poursuivi l'appel interjeté devant le WCAT à l'encontre de la conclusion de l'agent de révision relative à sa compétence pour décider si cette politique est manifestement déraisonnable.

[13] La Commission a présenté au Tribunal une requête pour rejet des nouvelles plaintes, dans laquelle elle soutenait, d'une part, que le Tribunal n'avait pas compétence pour les entendre (27(1)a) du *Code*) et, d'autre part, que la Section de révision avait déjà statué de façon appropriée sur le fond de la plainte (27(1)f) du *Code*). Voici le texte de ces dispositions :

[TRADUCTION]

- 27 (1) Un membre ou une formation peut, à tout moment après le dépôt d'une plainte, la rejeter en totalité ou en partie, avec ou sans audience si, à son avis, l'une ou l'autre des circonstances suivantes est applicable :
- a) la plainte ou une partie de la plainte ne relève pas de la compétence du tribunal;
  - . . .
  - f) il a été statué de façon appropriée sur le fond de la plainte dans une autre instance;

[14] Le Tribunal a rejeté les deux arguments (2008 BCHRT 374 (CanLII)). Il a notamment conclu qu'il n'y avait pas lieu de rejeter les plaintes en vertu de l'al. 27(1)f), conclusion qui intéresse particulièrement la présente espèce. Citant *British Columbia (Ministry of Competition, Science & Enterprise) c. Matuszewski*, 2008 BCSC 915, 82 Admin. L.R. (4th) 308, et s'appuyant sur l'arrêt *Danyluk c. Ainsworth Technologies Inc.*, 2001 CSC 44, [2001] 2 R.C.S. 460, de notre Cour, le Tribunal a jugé qu'il [TRADUCTION] « n'a pas été statué de façon appropriée sur le fond de la plainte dans le cadre du processus de révision. [. . .] [L]a question soulevée est une question que le Tribunal peut à bon droit considérer et il convient que les parties puissent bénéficier d'une audience en bonne et due forme par le tribunal » (par. 50).

[15] On judicial review, the Tribunal's decision was set aside by Justice Stromberg-Stein (2009 BCSC 377, 93 B.C.L.R. (4th) 384). She concluded that the same issues had already been "conclusively decided" by the Review Officer and that the Tribunal had failed to take into proper account the principles of *res judicata*, collateral attack, and abuse of process (paras. 40 and 54). She found that for the Tribunal to proceed would be a violation of the principles of consistency, finality and the integrity of the administration of justice. In her view, the complaints to the Tribunal were merely a veiled attempt to circumvent judicial review:

The Tribunal would be ruling on the correctness of the Review Division decision. That is not the role of the Tribunal and to do so constitutes an abuse of process. [para. 56]

[16] As for which standard of review applied, her view was that the Tribunal's decision ought to be set aside whether the standard was correctness or patent unreasonableness.

[17] The Court of Appeal restored the Tribunal's decision (2010 BCCA 77, 2 B.C.L.R. (5th) 274). It interpreted s. 27(1)(f) as reflecting the legislature's intention to confer jurisdiction on the Tribunal to adjudicate human rights complaints even when the same issue had previously been dealt with by another tribunal. This did not represent the Tribunal exercising appellate review over the other proceeding, it flowed from the Tribunal's role in determining whether the previous proceeding had substantively addressed the human rights issues.

[18] On the question of the standard of review, the Court of Appeal concluded that the issue revolved around s. 27(1)(f). Since a decision under s. 27(1)(f) is discretionary, the appropriate standard according to the jurisprudence is patent unreasonableness: see *Workers' Compensation Appeal Tribunal (B.C.) v. Hill*, 2011 BCCA 49, 299 B.C.A.C. 129;

[15] À l'issue d'un contrôle judiciaire, la juge Stromberg-Stein a annulé cette décision (2009 BCSC 377, 93 B.C.L.R. (4th) 384), estimant que l'agent de révision avait déjà [TRADUCTION] « statué de façon définitive » sur les mêmes questions et que le Tribunal n'avait pas dûment tenu compte des principes applicables en matière d'autorité de la chose jugée, de contestation indirecte et d'abus de procédure (par. 40 et 54). Elle a conclu que, si le Tribunal entendait les plaintes, cela violerait les principes de cohérence, de caractère définitif des instances et d'intégrité de l'administration de la justice. Selon elle, les plaintes déposées devant le Tribunal relevaient d'une tentative déguisée d'é luder le contrôle judiciaire :

[TRADUCTION] Le Tribunal se trouverait à se prononcer sur le bien-fondé de la décision de la Section de révision. Ce n'est pas son rôle, et il y aurait abus de procédure s'il le faisait. [par. 56]

[16] S'agissant de la norme de contrôle applicable, la juge a exprimé l'avis que la décision du Tribunal devait être annulée que l'on applique la norme de la décision correcte ou celle de la décision manifestement déraisonnable.

[17] La Cour d'appel a rétabli la décision du Tribunal (2010 BCCA 77, 2 B.C.L.R. (5th) 274). Suivant son interprétation de l'al. 27(1)(f), cette disposition reflète l'intention du législateur de conférer au Tribunal la compétence de statuer sur les plaintes relevant des droits de la personne, même lorsqu'un autre tribunal s'est déjà prononcé sur les mêmes questions. Cet examen par le Tribunal ne constituait pas l'exercice d'une compétence d'appel, mais découlait de son rôle consistant à déterminer si l'instance antérieure avait permis de statuer de façon appropriée sur le fond des questions relatives aux droits de la personne.

[18] Au sujet de la norme de contrôle, la Cour d'appel a conclu que la question mettait en cause l'al. 27(1)(f) et que, compte tenu de la nature discrétionnaire des décisions fondées sur cette disposition, la norme applicable, suivant la jurisprudence, est celle de la décision manifestement déraisonnable : voir *Workers' Compensation*

*Berezoutskaia v. Human Rights Tribunal (B.C.)*, 2006 BCCA 95, 223 B.C.A.C. 71; *Hines v. Canpar Industries Ltd.*, 2006 BCSC 800, 55 B.C.L.R. (4th) 372; and *Matuszewski*. This was based on s. 59(3) of the ATA, which sets out the relevant standard, and on s. 59(4), which sets out a number of indicia:

*Appeal Tribunal (B.C.) c. Hill*, 2011 BCCA 49, 299 B.C.A.C. 129; *Berezoutskaia c. Human Rights Tribunal (B.C.)*, 2006 BCCA 95, 223 B.C.A.C. 71; *Hines c. Canpar Industries Ltd.*, 2006 BCSC 800, 55 B.C.L.R. (4th) 372; et *Matuszewski*. La cour a fondé cette conclusion sur le par. 59(3) de l'ATA, qui définit la norme applicable, et sur le par. 59(4), qui énonce différents critères présidant à son application :

[TRADUCTION]

59 (1) In a judicial review proceeding, the standard of review to be applied to a decision of the tribunal is correctness for all questions except those respecting the exercise of discretion, findings of fact and the application of the common law rules of natural justice and procedural fairness.

59 (1) Le contrôle judiciaire d'une décision du tribunal s'effectue suivant la norme de la décision correcte, sauf à l'égard des questions relatives à l'exercice d'un pouvoir discrétionnaire, des conclusions de fait et des questions d'application des règles de la common law en matière de justice naturelle et d'équité procédurale.

(3) A court must not set aside a discretionary decision of the tribunal unless it is patently unreasonable.

(3) Une décision discrétionnaire du tribunal n'est susceptible d'annulation par un tribunal judiciaire que si elle est manifestement déraisonnable.

(4) For the purposes of subsection (3), a discretionary decision is patently unreasonable if the discretion

(4) Pour l'application du paragraphe précédent, est manifestement déraisonnable une décision discrétionnaire, si le pouvoir discrétionnaire a été exercé de l'une ou l'autre des façons suivantes :

- (a) is exercised arbitrarily or in bad faith,
- (b) is exercised for an improper purpose,
- (c) is based entirely or predominantly on irrelevant factors, or
- (d) fails to take statutory requirements into account.

- a) arbitrairement ou de mauvaise foi;
- b) à des fins illégitimes;
- c) entièrement ou principalement sur le fondement de facteurs non pertinents;
- d) sans tenir compte d'exigences prévues par la loi.

[19] The Court of Appeal concluded that the Tribunal's decision was not patently unreasonable.

[19] La Cour d'appel a conclu que la décision du Tribunal n'était pas manifestement déraisonnable.

[20] I agree with the conclusion that, based on the directions found in s. 59(3) of the ATA, the Tribunal's decision is to be reviewed on a standard of patent unreasonableness. In my respectful view, however, I see the Tribunal's decision not to dismiss the complaints in these circumstances as reaching that threshold.

[20] Je souscris à la conclusion que, compte tenu des dispositions du par. 59(3) de l'ATA, la norme de contrôle applicable est celle de la décision manifestement déraisonnable. Cela dit, j'estime toutefois respectueusement que la décision du Tribunal de ne pas rejeter les plaintes répond à cette norme.

Analysis

[21] The question of jurisdiction is not seriously at issue in this appeal. Since *Tranchemontagne*, tribunals other than human rights commissions have rightly assumed that, absent legislative intent to the contrary, they have concurrent jurisdiction to apply human rights legislation. That means that at the time these complaints were brought, namely, before the amendments to the *ATA* removed the WCAT's human rights jurisdiction, both the Workers' Compensation Board and the Human Rights Tribunal had ostensible authority to hear human rights complaints. Since the complainants brought their complaints to the Board, and since either the Board or the Tribunal was entitled to hear the issue, the Board had jurisdiction when it decided the complainants' human rights issues. But based on their concurrent jurisdiction when this complaint was brought to the Board, there is no serious question that the Tribunal, in theory, also had authority over these human rights complaints. This means that s. 27(1)(a) of the *Code* is not in play.

[22] The question then arises: when two bodies share jurisdiction over human rights, what ought to guide the Tribunal under s. 27(1)(f) in deciding when to dismiss all or part of a complaint that has already been decided by the other tribunal?

[23] In *Matuszewski*, Pitfield J. explored the contours and concepts of this provision. In that case, the collective agreement had banned the accrual of seniority while an employee was on long-term disability. The union grieved, alleging that the provision was discriminatory. The arbitrator concluded that it was not. The union did not seek judicial review from the arbitrator's decision. One of the employees in the bargaining unit filed a complaint with the Human Rights Tribunal alleging that the same collective agreement provision was discriminatory.

Analyse

[21] La question de la compétence ne se pose pas véritablement en l'espèce. Depuis l'arrêt *Tranchemontagne*, les tribunaux administratifs autres que les commissions des droits de la personne ont raison de considérer que, lorsque le législateur n'exprime pas d'intention contraire, ils exercent une compétence concurrente en matière d'application des lois sur les droits de la personne. Il s'ensuit que, à l'époque où les plaintes en cause en l'espèce ont été déposées, soit avant que les modifications à l'*ATA* ne retirent au WCAT sa compétence en matière de droits de la personne, la Commission et le Tribunal avaient manifestement tous deux compétence pour entendre des plaintes en cette matière. Puisque les plaignants ont saisi la Commission, et puisque celle-ci était habilitée, tout autant que le Tribunal, à entendre l'affaire, la Commission agissait dans le cadre de sa compétence lorsqu'elle s'est prononcée sur les questions de droits de la personne. Cependant, vu leur compétence concurrente au moment où la Commission a été saisie de l'affaire, on ne peut guère douter que le Tribunal était lui aussi habilité, en théorie, à connaître de ces plaintes relatives aux droits de la personne. Par conséquent, l'al. 27(1)a) du *Code* ne joue pas en l'espèce.

[22] La question qui se pose alors est donc celle de savoir sur quoi doit se fonder le Tribunal, en cas de compétence concurrente en matière de droits de la personne, pour déterminer s'il y a lieu de rejeter une plainte en totalité ou en partie en application de l'al. 27(1)f) parce qu'un autre tribunal administratif a déjà statué sur le fond de l'affaire.

[23] Dans *Matuszewski*, le juge Pitfield a examiné les limites de cette disposition ainsi que les concepts qu'elle vise. Dans cette affaire, il était question d'une convention collective qui suspendait l'accumulation d'ancienneté pendant les périodes d'incapacité prolongée. Le syndicat avait soumis un grief fondé sur le caractère discriminatoire de la clause. L'arbitre avait toutefois conclu qu'il n'y avait pas discrimination, et le syndicat n'avait pas exercé de recours en contrôle judiciaire. Un employé de l'unité de négociation avait déposé,

The Human Rights Tribunal refused to dismiss this fresh complaint.

[24] On judicial review of the Tribunal's decision, Pitfield J. concluded that the Tribunal's refusal to dismiss the complaint was patently unreasonable. In his view, s. 27(1)(f) is the statutory mechanism through which the Tribunal can prevent conflicting decisions arising from the same issues. This flows from the concurrent jurisdiction exercised over the *Code* by the Tribunal and other tribunals. While s. 27(1)(f) does not call for a strict application of the doctrines of issue estoppel, collateral attack, or abuse of process, the principles underlying all three of these doctrines are "factors of primary importance that must be taken into account when exercising discretion under s. 27(1)(f) of the *Human Rights Code* to proceed, or to refrain from proceeding, with the hearing of a complaint" (para. 31).

[25] I agree with Pitfield J.'s conclusion that s. 27(1)(f) is the statutory reflection of the collective principles underlying those doctrines, doctrines used by the common law as vehicles to transport and deliver to the litigation process principles of finality, the avoidance of multiplicity of proceedings, and protection for the integrity of the administration of justice, all in the name of fairness. They are vibrant principles in the civil law as well (*Civil Code of Québec*, S.Q. 1991, c. 64, art. 2848; *Boucher v. Stelco Inc.*, 2005 SCC 64, [2005] 3 S.C.R. 279; *Rocois Construction Inc. v. Québec Ready Mix Inc.*, [1990] 2 S.C.R. 440, at p. 448).

[26] As a result, given that multiple tribunals frequently exercise concurrent jurisdiction over the same issues, it is not surprising that the common law doctrines also find expression in the administrative law context through statutory mechanisms such as s. 27(1)(f). A brief review of these doctrines, therefore, can be of assistance in better assessing whether their underlying principles have been respected in this case.

devant le Tribunal des droits de la personne, une plainte alléguant que la même clause de la convention collective était discriminatoire. Le Tribunal a refusé de rejeter la nouvelle plainte.

[24] Saisi d'une demande de contrôle judiciaire, le juge Pitfield a conclu que la décision du Tribunal de ne pas rejeter la plainte était manifestement déraisonnable. Selon lui, l'al. 27(1)f est le moyen que le législateur a mis à la disposition du Tribunal pour éviter le prononcé de décisions contradictoires dans des affaires portant sur les mêmes faits, situation qui peut se produire en raison de la compétence concurrente que le Tribunal et d'autres tribunaux administratifs exercent à l'égard du *Code*. Bien que l'al. 27(1)f n'exige pas la stricte application des règles en matière de préclusion découlant d'une question déjà tranchée, de contestation indirecte ou d'abus de procédure, les principes fondateurs de ces trois doctrines demeurent [TRADUCTION] « des facteurs primordiaux à prendre en compte dans l'exercice du pouvoir discrétionnaire d'entendre ou non une plainte conféré par l'al. 27(1)f du *Human Rights Code* » (par. 31).

[25] Comme le juge Pitfield, je suis d'avis que l'al. 27(1)f reflète l'ensemble des principes sous-jacents de ces règles, auxquelles la common law a eu recours comme véhicule pour porter, en contexte de procédures judiciaires, les principes de caractère définitif des instances, de prévention de leur multiplication et de protection de l'intégrité de l'administration de la justice, dans chaque cas, par souci d'équité. Ces principes animent également le droit civil (*Code civil du Québec*, L.Q. 1991, ch. 64, art. 2848; *Boucher c. Stelco Inc.*, 2005 CSC 64, [2005] 3 R.C.S. 279; *Rocois Construction Inc. c. Québec Ready Mix Inc.*, [1990] 2 R.C.S. 440, p. 448).

[26] Puisque de multiples tribunaux exercent fréquemment des compétences concurrentes quant aux mêmes questions, il n'est pas surprenant que les doctrines de common law s'appliquent également en contexte de droit administratif sous la forme de mécanismes légaux comme celui qu'établit l'al. 27(1)f. Par conséquent, un bref examen de ces doctrines pourrait permettre de mieux évaluer si leurs principes sous-jacents ont été respectés en l'espèce.

[27] The three preconditions of issue estoppel are whether the same question has been decided; whether the earlier decision was final; and whether the parties, or their privies, were the same in both proceedings (*Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248, at p. 254). These concepts were most recently examined by this Court in *Danyluk*, where Binnie J. emphasized the importance of finality in litigation: “A litigant . . . is only entitled to one bite at the cherry. . . . Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided” (para. 18). Parties should be able to rely particularly on the conclusive nature of administrative decisions, he noted, since administrative regimes are designed to facilitate the expeditious resolution of disputes (para. 50). All of this is guided by the theory that “estoppel is a doctrine of public policy that is designed to advance the interests of justice” (para. 19).

[28] The rule against collateral attack similarly attempts to protect the fairness and integrity of the justice system by preventing duplicative proceedings. It prevents a party from using an institutional detour to attack the validity of an order by seeking a different result from a different forum, rather than through the designated appellate or judicial review route: see *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, [2010] 3 S.C.R. 585, and *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629.

[29] Both collateral attack and *res judicata* received this Court's attention in *Boucher*. The Ontario Superintendent of Pensions had ordered and approved a partial wind-up report according to which members of the plan employed in Quebec were not to receive early retirement benefits, due to the operation of Quebec law. The employees were notified, but chose not to contest the Superintendent's decision to approve the report. Instead, several of them started an action against their employer in the Quebec Superior Court claiming their entitlement to early retirement benefits. LeBel J. rejected the employees'

[27] Les trois conditions d'application de la préclusion découlant d'une question déjà tranchée sont que la même question ait été décidée, que la décision déjà rendue soit définitive et que les parties, ou leurs ayants droit, soient les mêmes (*Angle c. Ministre du Revenu National*, [1975] 2 R.C.S. 248, p. 254). La décision la plus récente de notre Cour sur ces notions est l'arrêt *Danyluk*; le juge Binnie y a souligné l'importance du caractère définitif des litiges : « . . . un plaideur n'a droit qu'à une seule tentative. [. . .] Les instances faisant double emploi, les risques de résultats contradictoires, les frais excessifs et les procédures non décisives doivent être évités » (par. 18). Il a indiqué que les parties devaient pouvoir être assurées du caractère définitif des décisions administratives, en particulier, parce que ces régimes visent à faciliter le règlement rapide des différends (par. 50). Tout cela repose sur le principe que « la préclusion est une doctrine d'intérêt public qui tend à favoriser les intérêts de la justice » (par. 19).

[28] La règle interdisant la contestation indirecte vise elle aussi la protection de l'équité et de l'intégrité du système judiciaire en empêchant la répétition des instances. Elle empêche les détours institutionnels ayant pour but d'attaquer la validité d'une ordonnance en tentant d'obtenir un résultat différent devant un forum différent plutôt qu'en suivant la procédure d'appel ou de contrôle judiciaire prescrite : voir *Canada (Procureur général) c. TeleZone Inc.*, 2010 CSC 62, [2010] 3 R.C.S. 585, et *Garland c. Consumers' Gas Co.*, 2004 CSC 25, [2004] 1 R.C.S. 629.

[29] Dans *Boucher*, notre Cour a examiné tant la contestation indirecte que le principe de l'autorité de la chose jugée. Le surintendant des régimes de retraite de l'Ontario avait ordonné une liquidation partielle et approuvé un rapport de liquidation prévoyant que, conformément au droit québécois, les participants employés au Québec ne toucheraient pas de pension anticipée. Les employés ont été prévenus, mais ont décidé de ne pas contester la décision du surintendant d'approuver le rapport. Certains d'entre eux ont plutôt revendiqué leur droit à une pension anticipée dans une action contre leur employeur intentée en Cour supérieure du Québec.

claim. Administrative law, he noted, has review mechanisms in place for reducing error or injustice. Those are the mechanisms parties should use. The decision to pursue a court action instead of judicial review resulted in “an impermissible collateral attack on the Superintendent’s decision”:

Modern adjective law and administrative law have gradually established various appeal mechanisms and sophisticated judicial review procedures, so as to reduce the chance of errors or injustice. Even so, the parties must avail themselves of those options properly and in a timely manner. Should they fail to do so, the case law does not in most situations allow collateral attacks on final decisions . . . [para. 35]

[30] In other words, the harm to the justice system lies not in challenging the correctness or fairness of a judicial or administrative decision in the proper forums, it comes from inappropriately circumventing them (*Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at para. 46).

[31] And finally, we come to the doctrine of abuse of process, which too has as its goal the protection of the fairness and integrity of the administration of justice by preventing needless multiplicity of proceedings, as was explained by Arbour J. in *Toronto (City)*. The case involved a recreation instructor who was convicted of sexually assaulting a boy under his supervision and was fired after his conviction. He grieved the dismissal. The arbitrator decided that the conviction was admissible evidence but not binding on him. As a result, he concluded that the instructor had been dismissed without cause.

[32] Arbour J. found that the arbitrator was wrong not to give full effect to the criminal conviction even though neither *res judicata* nor the rule against collateral attack strictly applied. Because the effect of the arbitrator’s decision was to relitigate

Le juge LeBel a rejeté leur prétention, indiquant que le droit administratif établit des mécanismes de révision visant à réduire les possibilités d’erreur ou d’injustice et que ce sont là les mécanismes auxquels les parties doivent avoir recours. La décision d’intenter une action plutôt que de recourir au contrôle judiciaire constituait « la contestation indirecte inadmissible de la décision du surintendant » :

Le droit judiciaire et le droit administratif modernes ont graduellement établi des mécanismes d’appel divers, voire des procédures élaborées de contrôle judiciaire, pour réduire les possibilités d’erreur ou d’injustice. Encore faut-il que les parties sachent les utiliser à bon escient et en temps opportun. À défaut, la jurisprudence ne permettra pas, en règle générale, la contestation indirecte d’une décision devenue finale . . . [par. 35]

[30] Autrement dit, ce n’est pas la contestation du bien-fondé ou de l’équité d’une décision judiciaire ou administrative devant les forums compétents qui est préjudiciable au système judiciaire, c’est le fait d’éluder ces mécanismes de révision (*Toronto (Ville) c. S.C.F.P., section locale 79*, 2003 CSC 63, [2003] 3 R.C.S. 77, par. 46).

[31] La dernière règle est celle qui régit l’abus de procédure. Elle vise aussi à protéger l’équité et l’intégrité de l’administration de la justice en empêchant le dédoublement inutile d’instances, comme l’a expliqué la juge Arbour dans *Toronto (Ville)*. Dans cette affaire, la municipalité avait congédié un instructeur en loisirs qui avait été déclaré coupable d’agression sexuelle sur la personne d’un jeune garçon confié à sa surveillance. Un grief contestant le congédiement avait été déposé, et l’arbitre qui en avait été saisi, après avoir indiqué que la déclaration de culpabilité était recevable en preuve, mais qu’elle ne le liait pas, avait jugé que l’instructeur avait été congédié sans motif valable.

[32] La juge Arbour a conclu que l’arbitre avait eu tort de ne pas donner plein effet à la déclaration de culpabilité même si, strictement parlant, les doctrines de l’autorité de la chose jugée ou de l’interdiction de la contestation indirecte ne s’appliquaient

the conviction for sexual assault, the proceeding amounted to a “blatant abuse of process” (para. 56).

[33] Even where *res judicata* is not strictly available, Arbour J. concluded, the doctrine of abuse of process can be triggered where allowing the litigation to proceed would violate principles such as “judicial economy, consistency, finality and the integrity of the administration of justice” (para. 37). She stressed the goals of avoiding inconsistency and wasting judicial and private resources:

[Even] if the same result is reached in the subsequent proceeding, the relitigation will prove to have been a waste of judicial resources as well as an unnecessary expense for the parties and possibly an additional hardship for some witnesses. Finally, if the result in the subsequent proceeding is different from the conclusion reached in the first on the very same issue, the inconsistency, in and of itself, will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality. [para. 51]

(See also *R. v. Mahalingan*, 2008 SCC 63, [2008] 3 S.C.R. 316, at para. 106, *per* Charron J.)

[34] At their heart, the foregoing doctrines exist to prevent unfairness by preventing “abuse of the decision-making process” (*Danyluk*, at para. 20; see also *Garland*, at para. 72, and *Toronto (City)*, at para. 37). Their common underlying principles can be summarized as follows:

- It is in the interests of the public and the parties that the finality of a decision can be relied on (*Danyluk*, at para. 18; *Boucher*, at para. 35).
- Respect for the finality of a judicial or administrative decision increases fairness and the integrity of the courts, administrative tribunals and the administration of justice; on the other hand, relitigation of issues that have been previously decided in an appropriate forum may undermine confidence in this fairness

pas. Parce que la décision de l'arbitre avait pour effet de remettre en cause la déclaration de culpabilité pour agression sexuelle, l'instance constituait un « abus flagrant de procédure » (par. 56).

[33] La juge Arbour a conclu que la doctrine de l'abus de procédure peut entrer en jeu, même lorsque les exigences du principe de l'autorité de la chose jugée ne sont pas strictement remplies, lorsqu'il y aurait violation de principes comme ceux « d'économie, de cohérence, de caractère définitif des instances et d'intégrité de l'administration de la justice » si l'instance était autorisée à aller de l'avant (par. 37). La juge a insisté sur l'importance d'éviter les contradictions et le gaspillage de ressources judiciaires et privées :

[Même] si l'instance subséquente donne lieu à une conclusion similaire, la remise en cause aura été un gaspillage de ressources judiciaires et une source de dépenses inutiles pour les parties sans compter les difficultés supplémentaires qu'elle aura pu occasionner à certains témoins. Troisièmement, si le résultat de la seconde instance diffère de la conclusion formulée à l'égard de la même question dans la première, l'incohérence, en soi, ébranlera la crédibilité de tout le processus judiciaire et en affaiblira ainsi l'autorité, la crédibilité et la vocation à l'irrévocabilité. [par. 51]

(Voir aussi *R. c. Mahalingan*, 2008 CSC 63, [2008] 3 R.C.S. 316, par. 106, la juge Charron.)

[34] Ces doctrines existent essentiellement pour prévenir l'inéquité en empêchant « les recours abusifs » (*Danyluk*, par. 20; voir aussi *Garland*, par. 72, et *Toronto (Ville)*, par. 37). On peut résumer ainsi leurs principes sous-jacents communs :

- La capacité de se fier au caractère définitif d'une décision sert l'intérêt public et celui des parties (*Danyluk*, par. 18; *Boucher*, par. 35).
- Le respect du caractère définitif d'une décision judiciaire ou administrative renforce l'équité et l'intégrité des tribunaux judiciaires et administratifs ainsi que de l'administration de la justice; à l'opposé, la remise en cause de questions déjà tranchées par un forum compétent peut miner la confiance envers l'équité et l'intégrité

and integrity by creating inconsistent results and unnecessarily duplicative proceedings (*Toronto (City)*, at paras. 38 and 51).

- The method of challenging the validity or correctness of a judicial or administrative decision should be through the appeal or judicial review mechanisms that are intended by the legislature (*Boucher*, at para. 35; *Danyluk*, at para. 74).
- Parties should not circumvent the appropriate review mechanism by using other forums to challenge a judicial or administrative decision (*TeleZone*, at para. 61; *Boucher*, at para. 35; *Garland*, at para. 72).
- Avoiding unnecessary relitigation avoids an unnecessary expenditure of resources (*Toronto (City)*, at paras. 37 and 51).

[35] These are the principles which underlie s. 27(1)(f). Singly and together, they are a rebuke to the theory that access to justice means serial access to multiple forums, or that more adjudication necessarily means more justice.

[36] Read as a whole, s. 27(1)(f) does not codify the actual doctrines or their technical explications, it embraces their underlying principles in pursuit of finality, fairness, and the integrity of the justice system by preventing unnecessary inconsistency, multiplicity and delay. That means the Tribunal should be guided less by precise doctrinal catechisms and more by the goals of the fairness of finality in decision-making and the avoidance of the relitigation of issues already decided by a decision-maker with the authority to resolve them. Justice is enhanced by protecting the expectation that parties will not be subjected to the relitigation in a different forum of matters they thought had been conclusively resolved. Forum shopping for a different and better result can be dressed up in many attractive adjectives, but fairness is not among them.

du système en créant de l'incohérence et en suscitant des recours faisant inutilement double emploi (*Toronto (Ville)*, par. 38 et 51).

- La contestation de la validité ou du bien-fondé d'une décision judiciaire ou administrative se fait au moyen de la procédure d'appel ou de contrôle judiciaire prévue par le législateur (*Boucher*, par. 35; *Danyluk*, par. 74).
- Les parties ne doivent pas éluder le mécanisme de révision prévu en s'adressant à un autre forum pour contester une décision judiciaire ou administrative (*TeleZone*, par. 61; *Boucher*, par. 35; *Garland*, par. 72).
- En évitant les remises en cause inutiles, on évite le gaspillage de ressources (*Toronto (Ville)*, par. 37 et 51).

[35] C'est sur ces principes que repose l'al. 27(1)(f). Individuellement et collectivement, ils font échec aux arguments voulant que l'accessibilité à la justice soit synonyme d'accès successifs à de multiples forums ou que plus on rend de décisions plus on s'approche de la justice.

[36] Considéré dans son ensemble, l'al. 27(1)(f) ne codifie pas les doctrines elles-mêmes ou leurs explications techniques, il en englobe les principes sous-jacents afin d'assurer le caractère définitif des instances, l'équité et l'intégrité du système judiciaire en prévenant les incohérences, les doublages et les délais inutiles. Il s'ensuit que ce ne sont pas tant des dogmes doctrinaux précis qui devraient guider le Tribunal que les objets de la disposition, qui sont d'assurer l'équité du caractère définitif du processus décisionnel et d'éviter la remise en cause de questions déjà tranchées par un décideur ayant compétence pour en connaître. La justice est accrue par la protection de l'attente des parties qu'elles ne soient pas sujettes à des instances supplémentaires, devant un forum différent, pour des questions qu'elles estimaient résolues définitivement. Le magasinage de forum pour que l'issue d'un litige soit différente et meilleure peut être maquillé de nombreux qualificatifs attrayants, l'équité n'en fait toutefois pas partie.

[37] Relying on these underlying principles leads to the Tribunal asking itself whether there was concurrent jurisdiction to decide human rights issues; whether the previously decided legal issue was essentially the same as what is being complained of to the Tribunal; and whether there was an opportunity for the complainants or their privies to know the case to be met and have the chance to meet it, regardless of how closely the previous process procedurally mirrored the one the Tribunal prefers or uses itself. All of these questions go to determining whether the substance of a complaint has been “appropriately dealt with”. At the end of the day, it is really a question of whether it makes sense to expend public and private resources on the relitigation of what is essentially the same dispute.

[38] What I do *not* see s. 27(1)(f) as representing is a statutory invitation either to “judicially review” another tribunal’s decision, or to reconsider a legitimately decided issue in order to explore whether it might yield a different outcome. The section is oriented instead towards creating territorial respect among neighbouring tribunals, including respect for their right to have their own vertical lines of review protected from lateral adjudicative poaching. When an adjudicative body decides an issue within its jurisdiction, it and the parties who participated in the process are entitled to assume that, subject to appellate or judicial review, its decision will not only *be* final, it will be treated as such by other adjudicative bodies. The procedural or substantive correctness of the previous proceeding is not meant to be bait for another tribunal with a concurrent mandate.

[39] I see the discretion in s. 27(1)(f), in fact, as being limited, based not only on the language of s. 27(1)(f), but also on the character of the other six categories of complaints in s. 27(1) in whose company it finds itself. Section 27(1) states:

**27 (1)** A member or panel may, at any time after a complaint is filed and with or without a

[37] En s’appuyant sur ces principes sous-jacents, le Tribunal est appelé à se demander s’il existe une compétence concurrente pour statuer sur les questions relatives aux droits de la personne, si la question juridique tranchée par la décision antérieure était essentiellement la même que celle qui est soulevée dans la plainte dont il est saisi et si le processus antérieur, qu’il ressemble ou non à la procédure que le Tribunal préfère ou utilise lui-même, a offert la possibilité aux plaignants ou à leurs ayants droit de connaître les éléments invoqués contre eux et de les réfuter. Toutes ces questions visent à déterminer s’il [TRADUCTION] « a été statué de façon appropriée » sur le fond de la plainte. Il s’agit, en définitive, de se demander s’il est logique de consacrer des ressources publiques et privées à la remise en cause de ce qui est essentiellement le même litige.

[38] Ce que *ne fait pas* l’al. 27(1)f), selon moi, c’est inviter au « contrôle judiciaire » de la décision d’un autre tribunal ou au réexamen d’une question dûment tranchée pour voir si un résultat différent pourrait en émerger. Cet alinéa vise plutôt à instaurer un respect juridictionnel entre tribunaux administratifs voisins, englobant le respect du droit à la protection de leur propre voie verticale de révision contre les empiétements indirects. L’organisme juridictionnel qui se prononce sur une question qui est de son ressort et les parties en cause doivent pouvoir tenir pour acquis que, sous réserve d’un appel ou d’un contrôle judiciaire, non seulement la décision *sera-t-elle* définitive, mais elle sera considérée telle par les autres organismes juridictionnels. La justesse de l’instance antérieure quant au fond ou à la forme ne saurait servir d’appât pour d’autres tribunaux administratifs exerçant une compétence concurrente.

[39] Tel que je le conçois, le pouvoir discrétionnaire conféré par l’al. 27(1)f) est en fait restreint, non seulement en raison du texte de cette disposition, mais également de la nature des six autres catégories de plaintes mentionnées au par. 27(1), lequel prévoit ce qui suit :

[TRADUCTION]

**27 (1)** Un membre ou une formation peut, à tout moment après le dépôt d’une plainte, rejeter

hearing, dismiss all or part of the complaint if that member or panel determines that any of the following apply:

- (a) the complaint or that part of the complaint is not within the jurisdiction of the tribunal;
- (b) the acts or omissions alleged in the complaint or that part of the complaint do not contravene this Code;
- (c) there is no reasonable prospect that the complaint will succeed;
- (d) proceeding with the complaint or that part of the complaint would not
  - (i) benefit the person, group or class alleged to have been discriminated against, or
  - (ii) further the purposes of this Code;
- (e) the complaint or that part of the complaint was filed for improper motives or made in bad faith;
- (f) the substance of the complaint or that part of the complaint has been appropriately dealt with in another proceeding;
- (g) the contravention alleged in the complaint or that part of the complaint occurred more than 6 months before the complaint was filed unless the complaint or that part of the complaint was accepted under section 22(3).

une plainte en totalité ou en partie, avec ou sans audience si, à son avis, l'une ou l'autre des circonstances suivantes est applicable :

- a) la plainte ou une partie de la plainte ne relève pas de la compétence du tribunal;
- b) les actes ou omissions allégués ne contreviennent pas au présent Code;
- c) il n'existe aucune possibilité raisonnable que le plaignant ait gain de cause;
- d) connaître en totalité ou en partie de la plainte :
  - (i) n'apporterait rien à la personne, au groupe ou à la catégorie censés avoir été victime de discrimination;
  - (ii) ne servirait pas les fins poursuivies par le présent Code;
- e) la totalité ou partie de la plainte a été déposée de mauvaise foi ou à des fins illégitimes;
- f) il a été statué de façon appropriée sur le fond de la plainte dans une autre instance;
- g) la contravention alléguée dans la plainte ou dans une partie de la plainte est survenue plus de six mois avant le dépôt de la plainte, sauf s'il y a eu acceptation de la plainte en totalité ou en partie en vertu du paragraphe 22(3).

[40] Each subsection in s. 27(1) refers to circumstances that make hearing the complaint presumptively unwarranted: complaints that are not within the Tribunal's jurisdiction; allege acts or omissions that do not contravene the *Code*; have no reasonable prospect of success; would not be of any benefit to the complainant or further the purposes of the *Code*; or are made for improper motives or in bad faith. These are the statutory companions for s. 27(1)(f). The fact that the word "may" is used in the preamble to s. 27(1) means that the Tribunal does have an element of discretion in deciding whether to dismiss these complaints. But it strikes me as counterintuitive to think that the legislature intended to give the Tribunal a wide berth to

[40] Chaque alinéa du par. 27(1) fait référence à des circonstances qui laissent présumer qu'il ne serait pas justifié d'entendre la plainte : les plaintes qui ne relèvent pas de la compétence du Tribunal, celles qui allèguent des actes ou des omissions qui ne contreviennent pas au *Code*, s'il n'existe aucune possibilité raisonnable que le plaignant ait gain de cause, si les plaintes n'apporteraient rien au plaignant et ne serviraient pas les fins poursuivies par le *Code* ou si elles ont été déposées de mauvaise foi ou à des fins illégitimes. Voilà quelles sont les dispositions qui accompagnent l'al. 27(1)f). La présence du verbe « peut » dans le passage introductif du par. 27(1) signifie que le Tribunal dispose d'un certain pouvoir discrétionnaire lorsqu'il décide de

decide, for example, whether or not to dismiss complaints it has no jurisdiction to hear, are unlikely to succeed, or are motivated by bad faith.

[41] This is the context in which the words “appropriately dealt with” in s. 27(1)(f) should be understood. All of the other provisions with which s. 27(1)(f) is surrounded lean towards encouraging dismissal. On its face, there is no principled basis for interpreting s. 27(1)(f) idiosyncratically from the rest of s. 27(1). I concede that the word “appropriately” is, by itself, easily stretched into many linguistic directions. But our task is not to define the word, it is to define it in its statutory context so that, to the extent reasonably possible, the legislature’s intentions can be respected.

[42] Nor does the legislative history of s. 27(1)(f) support the theory that the legislature intended to give the Tribunal a wide discretion to re-hear complaints decided by other tribunals. Formerly, ss. 25(3) and 27(2) of the *Code* required the Tribunal to consider the subject matter, nature, and available remedies of the earlier proceeding in deciding whether to defer or dismiss a complaint without a hearing. These factors were interpreted by the Human Rights Commission to include the administrative fairness of the earlier proceeding, the expertise of the decision-maker, which forum was more appropriate for discussing the issues, and whether the earlier proceeding could deliver an adequate remedy, factors which provided hurdles to the dismissal of complaints: see D. K. Lovett and A. R. Westmacott, “Human Rights Review: A Background Paper” (2001) (online), at pp. 100-101.

[43] The legislature removed these limiting factors in 2002 in the *Human Rights Code Amendment*

rejeter ou non ce type de plaintes. Mais il me semble contre-intuitif de penser que le législateur aurait eu l'intention de conférer au Tribunal une grande latitude pour décider, par exemple, s'il convient de rejeter les plaintes qui ne relèvent pas de sa compétence, qui ne risquent pas d'être accueillies ou qui ont été déposées de mauvaise foi.

[41] C'est dans ce contexte qu'il faut comprendre l'expression [TRADUCTION] « statué de façon appropriée » qui figure à l'al. 27(1)f). Toutes les autres dispositions qui entourent cet alinéa tendent à encourager le rejet. À première vue, il n'existe aucun fondement rationnel pour interpréter l'al. 27(1)f) indépendamment du reste du par. 27(1). Certes, pris isolément, le sens de l'adjectif « approprié » peut facilement, sur le plan linguistique, être étiré dans plusieurs directions. Cela étant dit, notre tâche ne consiste pas à définir ce mot, elle consiste à le définir dans le contexte de la disposition où il se trouve de sorte que, dans la mesure du possible, les intentions du législateur puissent être respectées.

[42] L'historique de l'al. 27(1)f) n'appuie pas non plus la thèse selon laquelle le législateur avait l'intention de donner au Tribunal un vaste pouvoir discrétionnaire de réentendre les plaintes à l'égard desquelles d'autres tribunaux s'étaient déjà prononcés. Antérieurement, les par. 25(3) et 27(2) du *Code* exigeaient que le Tribunal tienne compte du sujet de la procédure antérieure, de sa nature ainsi que des mesures de réparations offertes pour décider s'il reportait ou rejetait une plainte sans audience. Selon l'interprétation qu'en a donné la Commission des droits de la personne, ces facteurs comprenaient l'équité administrative de l'instance antérieure, l'expertise du décideur, une réflexion sur le forum qui était le plus approprié pour discuter des questions en litige et une autre sur la question de savoir si l'instance antérieure permettait d'obtenir une réparation adéquate, tous des facteurs qui étaient des obstacles au rejet des plaintes : voir D. K. Lovett et A. R. Westmacott, « Human Rights Review : A Background Paper » (2001) (en ligne), p. 100 et 101.

[43] Le législateur a retiré ces facteurs limitatifs en 2002, lors de l'édiction du *Human Rights*

*Act, 2002*, S.B.C. 2002, c. 62. By removing factors which argued *against* dismissing a complaint, the legislature may well be taken to have intended that a different approach be taken by the Tribunal, namely, one that made it easier to dismiss complaints. This is consistent with the statement of the then Minister of Government Services, the Hon. U. Dosanjh, on second reading of the *Human Rights Amendment Act, 1995*, S.B.C. 1995, c. 42, which included s. 22(1), the almost identically worded predecessor to s. 27(1). While he did not specifically refer to each of the subsections of s. 22(1) or their discrete purposes, it is clear that his overriding objective in introducing this legislative package, which included these provisions, was to reduce a substantial backlog and ensure “a system . . . which will be efficient and streamlined”:

In this proposed legislation, you now have the power to defer consideration of a complaint pending the outcome of another proceeding, so that there is no unnecessary overlap in the proceedings.

You have the power to dismiss the complaints, as I indicated, and that has been expanded. [Emphasis added.]

(British Columbia, *Official Report of Debates of the Legislative Assembly (Hansard)*, vol. 21, 4th Sess., 35th Parl., June 22, 1995, at p. 16062)

[44] This then brings us to the Tribunal’s use of the *Danyluk* factors. Not only do I resist re-introducing by judicial fiat the types of factors that the legislature has expressly removed, it is not clear to me that the *Danyluk* factors even apply. They were developed to assist courts in applying the doctrine of issue estoppel. Section 27(1)(f), on the other hand, is not limited to issue estoppel. As Pitfield J. explained in *Matuszewski*, s. 27(1)(f) does not call for the technical application of any of the common law doctrines — issue estoppel, collateral attack or

*Code Amendment Act, 2002*, S.B.C. 2002, ch. 62. En procédant ainsi au retrait de facteurs qui militaient *contre* le rejet d’une plainte, on peut en déduire à bon droit que le législateur avait l’intention que le Tribunal adopte une approche différente, soit, une approche qui facilite le rejet des plaintes. Cette interprétation est d’ailleurs compatible avec la déclaration suivante qu’avait faite le ministre des Services gouvernementaux de l’époque, l’honorable U. Dosanjh, lors de la seconde lecture du *Human Rights Amendment Act, 1995*, S.B.C. 1995, ch. 42, qui comprenait le par. 22(1), devenu par la suite le par. 27(1), dont le libellé était pratiquement le même que celui de la disposition antérieure. Bien qu’il n’ait pas fait référence spécifiquement à chaque alinéa du par. 22(1) ou à leurs objets distincts, il est manifeste que l’objectif primordial en présentant l’ensemble législatif en question qui comprenait ces dispositions, consistait à réduire un arriéré considérable et à garantir la mise en place d’[TRADUCTION] « un système [. . .] qui sera efficace et simplifié » :

[TRADUCTION] Selon ce projet de loi, vous aurez dorénavant le pouvoir de reporter l’examen d’une plainte jusqu’à l’issue d’une autre instance, de manière à éviter les chevauchements inutiles de procédures.

Vous aurez le pouvoir de rejeter les plaintes, comme je l’ai mentionné, et ce pouvoir a été étendu. [Je souligne.]

(Colombie-Britannique, *Official Report of Debates of the Legislative Assembly (Hansard)*, vol. 21, 4<sup>e</sup> sess., 35<sup>e</sup> lég., 22 juin 1995, p. 16062)

[44] Cela nous amène à nous pencher sur l’utilisation par le Tribunal des facteurs énoncés dans *Danyluk*. Non seulement suis-je réticente à réintroduire au moyen d’une ordonnance judiciaire les types de facteurs que le législateur a expressément retranchés, mais il ne me semble pas évident qu’il faille même appliquer les critères élaborés dans *Danyluk*. Ces critères ont été élaborés pour aider les tribunaux à appliquer la doctrine de la préclusion découlant d’une question déjà tranchée. Or, la portée de l’al. 27(1)f) ne se limite pas

abuse of process — it calls instead for an approach that applies their combined principles. Notably, neither Stromberg-Stein J. nor the Court of Appeal referred to the *Danyluk* factors in their respective analyses.

[45] Moreover, importing the *Danyluk* factors into s. 27(1)(f) would undermine what this Court mandated in *Tranchemontagne* when it directed that, absent express language to the contrary, all administrative tribunals have concurrent jurisdiction to apply human rights legislation. That means that *Danyluk* factors such as the prior decision-maker's mandate and expertise, are presumed to be satisfied. Encouraging the Tribunal to nonetheless apply a comparative mandate and expertise approach would erode Bastarache J.'s conclusion that human rights tribunals are not the exclusive "guardian or the gatekeeper for human rights law" (*Tranchemontagne*, at para. 39).

[46] This brings us to how the Tribunal exercised its discretion in this case. Because I see s. 27(1)(f) as reflecting the principles of the common law doctrines rather than the codification of their technical tenets, I find the Tribunal's strict adherence to the application of issue estoppel to be an overly formalistic interpretation of the section, particularly of the phrase "appropriately dealt with". With respect, this had the effect of obstructing rather than implementing the goal of avoiding unnecessary relitigation. In acceding to the complainant's request for relitigation of the same s. 8 issue, the Tribunal was disregarding Arbour J.'s admonition in *Toronto (City)* that parties should not try to

à la question de la préclusion découlant d'une question déjà tranchée. Comme l'a expliqué le juge Pitfield dans *Matuszewski*, l'al. 27(1)f) ne commande pas l'application technique de l'une ou l'autre des doctrines de common law — la préclusion découlant d'une question déjà tranchée, la contestation indirecte ou l'abus de procédure — il invite plutôt à adopter une approche qui combine les principes applicables à ces doctrines. D'ailleurs, il convient de le souligner, ni la juge Stromberg-Stein ni la Cour d'appel n'ont fait référence aux critères de *Danyluk* dans leur analyse respective.

[45] En outre, si les critères de *Danyluk* étaient importés dans l'al. 27(1)f), cela contrecarrerait ce que la Cour a prescrit dans *Tranchemontagne* lorsqu'elle a indiqué que, en l'absence d'une disposition expresse à l'effet contraire, tous les tribunaux administratifs ont une compétence concurrente en matière d'application des mesures législatives relatives aux droits de la personne. Cela signifie qu'il doit être présumé qu'il a été satisfait aux critères énoncés dans *Danyluk* tel celui quant au mandat et à l'expertise du décideur dans l'instance antérieure. Encourager le Tribunal à appliquer malgré tout une approche fondée sur une comparaison des mandats et de l'expertise éroderait la conclusion du juge Bastarache selon laquelle les tribunaux des droits de la personne ne sont pas les seuls « gardien[s] des lois relatives aux droits de la personne » (*Tranchemontagne*, par. 39).

[46] Cela nous amène à l'examen de l'exercice de son pouvoir discrétionnaire par le Tribunal en l'espèce. Parce que je vois dans l'al. 27(1)f) l'expression des principes fondant les doctrines de common law plutôt qu'une codification de leurs éléments techniques, je conclus qu'en s'en tenant à l'application stricte de la préclusion découlant d'une question déjà tranchée, le Tribunal a donné une interprétation trop formaliste à la disposition et, plus particulièrement, aux mots [TRADUCTION] « a été statué de façon appropriée ». Selon moi, plutôt que de donner effet à l'objectif de prévention des remises en cause inutiles, une telle interprétation y fait obstacle. En accédant à la demande des plaignants

impeach findings by the “impermissible route of relitigation in a different forum” (para. 46).

[47] “Relitigation in a different forum” is exactly what the complainants in this case were trying to do. Rather than challenging the Review Officer’s decision through the available review route of judicial review, they started fresh proceedings before a different tribunal in search of a more favourable result. This strategy represented, as Stromberg-Stein J. noted, a “collateral appeal” to the Tribunal (para. 52), the very trajectory that s. 27(1)(f) and the common law doctrines were designed to prevent:

... this case simply boils down to the complainants wanting to reargue the very same issue that has already been conclusively decided within the same factual and legal matrix. The complainants are attempting to pursue the matter again, within an administrative tribunal setting where there is no appellate authority by one tribunal over the other. [para. 54]

[48] The Tribunal’s analysis made it complicit in this attempt to collaterally appeal the merits of the Board’s decision and decision-making process. Its analysis represents a litany of factors having to do with whether it was comfortable with the process and merits of the Review Officer’s decision.

[49] To begin, it questioned whether the Review Division’s process met the necessary procedural requirements. This is a classic judicial review question and not one within the mandate of a concurrent decision-maker. While the Tribunal may inquire into whether the parties had notice of the case to be met and were given an opportunity to respond, that does not mean that it can require that the prior process be a procedural mimic of the Tribunal’s own, more elaborate one. But in any event, I agree with Stromberg-Stein J. that there were no complaints

de reprendre l’examen de la même question relative à l’art. 8, le Tribunal n’a pas tenu compte de la mise en garde donnée par la juge Arbour dans *Toronto (Ville)*, qu’il « n’est pas permis [. . .] d’attaquer un jugement en tentant de soulever de nouveau la question devant un autre forum » (par. 46).

[47] En l’espèce, les plaignants cherchaient précisément à « soulever de nouveau la question devant un autre forum ». Plutôt que d’emprunter la voie du contrôle judiciaire, qui leur était ouverte, pour contester la décision de l’agent de révision, ils ont engagé une nouvelle instance devant un autre tribunal administratif dans l’espoir d’obtenir un résultat plus favorable. Comme la juge Stromberg-Stein l’a indiqué, cette stratégie constituait un [TRADUCTION] « appel indirect » (par. 52), une démarche que l’al. 27(1)(f) et les doctrines de common law visent précisément à éviter :

[TRADUCTION] . . . la présente espèce n’est que la tentative des plaignants de rouvrir un débat qui a déjà été tranché de façon définitive en fonction du même fondement factuel et juridique. Ils cherchent à remettre la même question en cause dans un contexte juridictionnel administratif où le nouveau tribunal saisi n’exerce aucune compétence d’appel à l’égard du précédent. [par. 54]

[48] L’analyse du Tribunal l’a rendu complice de cette tentative de contester indirectement le bien-fondé de la décision de la Commission et du processus suivi; on y trouve une myriade de facteurs en fonction desquels le Tribunal s’est demandé s’il était à l’aise avec le processus de l’instance antérieure et avec les motifs de la décision de l’agent de révision.

[49] Il s’est d’abord demandé si le processus suivi devant la Section de révision satisfaisait aux exigences procédurales. Il s’agit là d’une question de contrôle judiciaire classique et non d’une question que se pose un décideur dans l’exercice d’une compétence concurrente. Certes, le Tribunal peut se demander si les parties ont été informées de ce qui était invoqué contre elles et si elles ont pu y répondre, mais cela ne signifie pas qu’il peut exiger que le processus antérieur soit une réplique de celui qui se déroule devant lui, soit un processus plus

about the complainants' ability to know the case to be met or the Board's jurisdiction to hear it:

Each of the complainants participated fully in the proceedings; each knew the case to be met and had the chance to meet it. Each of the complainants had the benefit of competent and experienced counsel who raised the human rights issues within the workers' compensation context. The issues were analyzed and addressed fully by the Review Division. It was implicit in their submissions to the Review Division that they accepted the Review Division had full authority to decide the human rights issue. [para. 52]

(See also *Rasanen v. Rosemount Instruments Ltd.* (1994), 112 D.L.R. (4th) 683 (Ont. C.A.), at p. 705.)

As long as the complainants had a chance to air their grievances before an authorized decision-maker, the extent to which they received traditional "judicial" procedural trappings should not be the Tribunal's concern.

[50] The Tribunal also criticized the Review Officer for the way he interpreted his human rights mandate:

... the Review Officer, who, in the absence of evidence, made findings about the appropriate comparator group, that the dignity of the Complainants was not impacted by the Policy, and that there was a [*bona fide* justification] for the Policy. There was no analysis regarding where the onus lay in establishing a [*bona fide* justification] or what the applicable interpretive principles with respect to human rights legislation are. . . . Further, any discriminatory rule must not discriminate more than is necessary; hence, there must be consideration given to possible alternatives to the impugned rule which would be less discriminatory while still achieving the objective . . . . [para. 46]

These too are precisely the kinds of questions about the merits that are properly the subject of judicial review, not grounds for a collateral attack by a human rights tribunal under the guise of s. 27(1)(f).

complexe. Quoi qu'il en soit, je souscris à la conclusion de la juge Stromberg-Stein selon laquelle la capacité des plaignants de connaître les éléments invoqués contre eux et de les réfuter n'était pas en cause :

[TRADUCTION] Chaque plaignant a pleinement participé à l'instance; chacun savait ce qui était invoqué contre lui et a eu l'occasion d'y répondre. Chacun d'eux était représenté par un avocat compétent et expérimenté qui a soulevé les questions relatives aux droits de la personne dans le contexte de l'indemnisation des accidents de travail. La Section de révision a pris ces questions en compte et les a analysées en détail. Il ressort implicitement de l'argumentation qu'ils ont soumise à la Section de révision qu'ils reconnaissaient que celle-ci avait entière compétence pour statuer en matière de droits de la personne. [par. 52]

(Voir aussi *Rasanen c. Rosemount Instruments Ltd.* (1994), 112 D.L.R. (4th) 683 (C.A. Ont.), p. 705.)

Du moment que les plaignants ont eu la possibilité d'être entendus par un décideur compétent en la matière, l'appréciation du caractère « judiciaire » classique de la procédure n'est aucunement du ressort du Tribunal.

[50] Le Tribunal a également critiqué l'interprétation que l'agent de révision a faite de son mandat en matière de droits de la personne :

[TRADUCTION] . . . en l'absence de preuve, l'agent de révision a formulé des conclusions au sujet du groupe de comparaison et a déterminé que la politique n'avait pas eu d'incidence sur la dignité des plaignants et conclu qu'il existait un motif justifiable de l'adopter. Il n'a pas examiné à qui incombe la preuve du motif justifiable ni quels sont les principes d'interprétation à appliquer aux dispositions législatives relatives aux droits de la personne. [ . . . ] De plus, une règle discriminatoire ne doit pas aller au-delà de ce qui est nécessaire; il faut donc tenir compte de solutions de rechange possibles permettant d'atteindre l'objectif poursuivi en étant moins discriminatoires . . . [par. 46]

Il s'agit encore là précisément de questions se rapportant au bien-fondé qui relèvent du contrôle judiciaire et qui ne sauraient autoriser un tribunal des droits de la personne à accueillir une contestation indirecte sous le régime de l'al. 27(1)f).

[51] In addition, the Tribunal held that the decision of the Review Officer was not final. It is not clear to me what the Tribunal was getting at. “Final” means that all available means of review or appeal have been exhausted. Where a party chooses not to avail itself of those steps, the decision is final. Even under the strict application of issue estoppel, which in my view is not in any event what s. 27(1)(f) was intended to incorporate, the Review Officer’s decision was a final one in these circumstances. Having chosen not to judicially review the decision as they were entitled to do, the complainants cannot then claim that because the decision lacks “finality” they are entitled to start all over again before a different decision-maker dealing with the same subject matter (*Danyluk*, at para. 57).

[52] The Tribunal concluded that the parties were not the same before the Workers’ Compensation Board as they were before the Tribunal. This, the Tribunal held, precluded the application of the doctrine of issue estoppel. This too represents the strict application of issue estoppel rather than of the principles underlying all three common law doctrines. Moreover, it is worth noting, as Arbour J. observed in *Toronto (City)*, that the absence of “mutuality” does not preclude the application of abuse of process to avoid undue multiplicity (para. 37).

[53] Finally, the Tribunal suggested that Review Officers lacked expertise in interpreting or applying the *Code*. As previously mentioned, since both adjudicative bodies had concurrent jurisdiction at the time the complaint was heard and decided, this is irrelevant. Bastarache J., in *Tranchemontagne*, expressly rejected the argument that the quasi-constitutional status of human rights legislation required that there be an expert human rights body exercising a supervisory role over human rights jurisprudence. As he explained, human rights legislation must be offered accessible application to further the purposes of the *Code* by fostering “a general culture of respect for human rights in the

[51] Le Tribunal a, en outre, conclu que la décision de l’agent de révision n’était pas définitive. Ce que le Tribunal voulait dire ne m’apparaît pas clair. Une décision est « définitive » lorsque toutes les voies d’appel ou de contrôle judiciaire ont été épuisées. Lorsqu’une partie décide de ne pas se prévaloir de ces mesures, la décision est définitive. Dans ces circonstances, la décision de l’agent de révision était définitive, même au regard de l’application stricte des règles de la préclusion découlant d’une question déjà tranchée — que le législateur n’avait pas, selon moi, l’intention d’incorporer à l’al. 27(1)f). Les plaignants, après avoir décidé de ne pas exercer leur droit de demander le contrôle judiciaire de la décision, ne peuvent prétendre que l’absence de « caractère définitif » de la décision les autorise à remettre la même question en jeu devant un autre décideur (*Danyluk*, par. 57).

[52] Le Tribunal a conclu que les parties qu’il avait devant lui n’étaient pas les mêmes que celles qui s’étaient présentées devant la Commission, de sorte que les règles de la préclusion découlant d’une question déjà tranchée étaient inapplicables. Cette conclusion également procède d’une application stricte des règles plutôt que des principes sous-jacents aux trois doctrines de common law. Il importe en outre de rappeler l’observation formulée par la juge Arbour dans *Toronto (Ville)*, selon laquelle l’absence de « réciprocité » n’est pas un obstacle à l’application des règles régissant l’abus de procédure afin d’éviter la multiplication indue des litiges (par. 37).

[53] Enfin, le Tribunal a indiqué que l’agent de révision n’avait pas l’expertise voulue pour interpréter ou appliquer le *Code*. Tel que mentionné précédemment, cette conclusion est dépourvue de pertinence puisque les deux organismes avaient une compétence concurrente en cette matière à l’époque où les plaintes ont été entendues et tranchées. Dans *Tranchemontagne*, le juge Bastarache a expressément rejeté l’argument voulant que la nature quasi constitutionnelle des lois sur les droits de la personne exige qu’un organisme spécialisé exerce une fonction de surveillance sur la jurisprudence rendue en cette matière. Comme il l’a expliqué, il faut assurer à ces lois une application accessible

administrative system” (paras. 33 and 39; *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504; and *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650).

[54] Because the Tribunal based its decision to proceed with these complaints and have them relitigated on predominantly irrelevant factors and ignored its true mandate under s. 27(1)(f), its decision, in my respectful view, is patently unreasonable. Since it was patently unreasonable in large part because it represented the unnecessary prolongation and duplication of proceedings that had already been decided by an adjudicator with the requisite authority, I see no point in wasting the parties' time and resources by sending the matter back for an inevitable result.

[55] I would therefore allow the appeal, set aside the Tribunal's decision and dismiss the complaints. In accordance with the Board's request, there will be no order for costs.

The reasons of McLachlin C.J. and Binnie, Fish and Cromwell JJ. were delivered by

CROMWELL J. —

#### I. Introduction

[56] I agree with my colleague Abella J. that the decision of the Human Rights Tribunal was patently unreasonable (2008 BCHRT 374 (CanLII)). However, I do not, with respect, share Abella J.'s interpretation of the discretion conferred by s. 27(1)(f) of the *Human Rights Code*, R.S.B.C. 1996, c. 210, nor do I agree with her decision not to remit the complaints to the Tribunal.

pour favoriser l'atteinte des objets du *Code* en développant « une culture générale de respect des droits de la personne dans le système administratif » (par. 33 et 39; *Nouvelle-Écosse (Workers' Compensation Board) c. Martin*, 2003 CSC 54, [2003] 2 R.C.S. 504; et *Conseil des Canadiens avec déficiences c. VIA Rail Canada Inc.*, 2007 CSC 15, [2007] 1 R.C.S. 650).

[54] Parce que la décision du Tribunal de recevoir ces plaintes et de les entendre de nouveau repose principalement sur des facteurs non pertinents et ne tient pas compte du mandat véritable que lui confère l'al. 27(1)f), elle est, à mon avis, manifestement déraisonnable. Puisque ce caractère manifestement déraisonnable tient en grande partie au fait que la décision a entraîné la prolongation et le dédoublement inutiles d'une instance sur laquelle un décideur investi de la compétence voulue avait déjà statué, je ne vois pas l'utilité de faire perdre du temps et de l'argent aux parties par un renvoi de l'instance au Tribunal alors que le résultat est inévitable.

[55] Je suis donc d'avis d'accueillir le pourvoi, d'annuler la décision du Tribunal et de rejeter les plaintes. Conformément à la demande de la Commission, il n'y aura pas d'ordonnance quant aux dépens.

Version française des motifs de la juge en chef McLachlin et des juges Binnie, Fish et Cromwell rendus par

LE JUGE CROMWELL —

#### I. Introduction

[56] Tout comme ma collègue la juge Abella, j'estime que la décision du tribunal des droits de la personne (« Tribunal ») était manifestement déraisonnable (2008 BCHRT 374 (CanLII)). Toutefois, avec respect pour l'opinion qu'elle exprime, je ne partage pas son interprétation du pouvoir discrétionnaire que confère l'al. 27(1)f) du *Human Rights Code*, R.S.B.C. 1996, ch. 210, et je ne puis souscrire à sa décision de ne pas renvoyer les plaintes devant le Tribunal.

[57] I do not subscribe to my colleague's understanding of what lies at the heart of the common law finality doctrines or of the principles underlying s. 27(1)(f) of the *Human Rights Code*. Abella J. writes that what is at the heart of these finality doctrines is preventing abuse of the decision-making process and that the discretion conferred by s. 27(1)(f) is a limited one, concerned only with finality, avoiding unnecessary relitigation and pursuing the appropriate review mechanisms. I respectfully disagree.

[58] The common law has consistently seen these finality doctrines as being concerned with striking an appropriate balance between the important goals of finality and fairness, more broadly considered. Finality is one aspect of fairness, but it does not exhaust that concept or trump all other considerations. As for s. 27(1)(f), it confers, in very broad language, a flexible discretion on the Human Rights Tribunal to enable it to achieve that balance in the multitude of contexts in which another tribunal may have dealt with a point of human rights law. In my view, both the common law and in particular s. 27(1)(f) of the *Code* are intended to achieve the necessary balance between finality and fairness through the exercise of discretion. It is this balance which is at the heart of both the common law finality doctrines and the legislative intent in enacting s. 27(1)(f). In my respectful view, a narrow interpretation of the Tribunal's discretion under s. 27(1)(f) does not reflect the clear legislative intent in enacting the provision.

[59] I would allow the appeal and remit the Workers' Compensation Board's motion to dismiss the complaints under s. 27(1)(f) to the Tribunal for reconsideration in light of the principles I set out.

[57] Je n'adhère pas à l'interprétation que donne ma collègue de la nature fondamentale des doctrines de la common law relatives au caractère définitif des décisions ou des principes qui sous-tendent l'al. 27(1)f) du *Human Rights Code*. La juge Abella écrit que ces doctrines ont essentiellement pour effet d'éviter que l'on abuse du processus décisionnel, et que le pouvoir discrétionnaire conféré par l'al. 27(1)f) n'a qu'une portée restreinte et ne vise qu'à assurer le caractère définitif des décisions, qu'à éviter que des questions soient inutilement redébat- tues et qu'à voir à l'utilisation des mécanismes de révision appropriés. Je ne saurais partager cet avis.

[58] La common law considère depuis toujours que le rôle de ces doctrines consiste à établir un juste équilibre entre deux objectifs importants, à savoir le caractère définitif des décisions et l'équité, envisagée plus globalement. Le caractère définitif des décisions est un aspect de l'équité, mais il ne recoupe pas entièrement cette notion ni ne supplante toutes les autres considérations. Quant à l'al. 27(1)f), il confère en termes très larges au Tribunal un pouvoir discrétionnaire souple propre à lui permettre de réaliser cet équilibre dans la multitude de contextes où d'autres tribunaux administratifs ont pu se prononcer sur une question relevant des droits de la personne. Selon moi, la common law et en particulier l'al. 27(1)f) du *Code* tendent tous deux à la réalisation de ce nécessaire équilibre entre le caractère définitif des décisions et l'équité, et ce, par l'exercice du pouvoir discrétionnaire du Tribunal. C'est la recherche de cet équilibre qui est au cœur tant des doctrines relatives au caractère définitif des décisions que de l'intention que poursuit le législateur en édictant l'al. 27(1)f). Avec respect pour l'opinion qu'exprime ma collègue, je suis d'avis qu'en donnant une portée étroite au pouvoir discrétionnaire prévu à l'al. 27(1)f), on ne tient pas compte de cette intention claire du législateur.

[59] Je suis d'avis d'accueillir le pourvoi et de renvoyer au Tribunal, pour qu'il la réexamine à la lumière des principes qui suivent, la requête pour rejet des plaintes présentée par la Workers' Compensation Board (la « Commission ») aux termes de l'al. 27(1)f).

## II. Analysis

### A. *Common Law Finality Doctrines*

[60] The leading authorities from this Court on the application of finality doctrines in the administrative law context are *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460, and *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77. Both emphasized the importance of balance and discretion in applying these finality doctrines.

[61] In *Danyluk*, the question was whether Ms. Danyluk's court action for damages for wrongful dismissal was barred by issue estoppel arising from an adverse decision of an employment standards officer. Writing for a unanimous Court, Binnie J. noted that while finality is a compelling consideration, issue estoppel is a public policy doctrine designed to advance the interests of justice (para. 19). He noted that the common law finality doctrines of cause of action estoppel, issue estoppel, and collateral attack have been extended to the decisions of administrative officers. Importantly, however, he added that in the administrative law context, "the more specific objective [of applying these doctrines] is to balance fairness to the parties with the protection of the administrative decision-making process" (para. 21). Thus, even when the traditional elements of the finality doctrines are present, the court must go on to exercise a discretion as to whether or not to allow the claim to proceed. He noted that this discretion existed even when the estoppel was alleged to arise from a court decision, but added that such discretion "is necessarily broader in relation to the prior decisions of administrative tribunals because of the enormous range and diversity of the structures, mandates and procedures of administrative decision makers": para. 62 (emphasis added); see also D. J. Lange, *The Doctrine of Res Judicata in Canada* (3rd ed. 2010), at pp. 227-29. Binnie J. quoted Finch J.A. (as he then was) to the effect that "[t]he doctrine of issue estoppel is designed as an implement of justice, and a protection against injustice. It inevitably

## II. Analyse

### A. *Les doctrines de la common law relatives au caractère définitif des décisions*

[60] Les décisions clés de notre Cour sur l'application de ces doctrines dans le contexte du droit administratif sont les arrêts *Danyluk c. Ainsworth Technologies Inc.*, 2001 CSC 44, [2001] 2 R.C.S. 460, et *Toronto (Ville) c. S.C.F.P., section locale 79*, 2003 CSC 63, [2003] 3 R.C.S. 77. Dans les deux cas, on a souligné l'importance de l'équilibre et du pouvoir discrétionnaire lorsqu'il s'agit d'appliquer les doctrines susmentionnées.

[61] Dans *Danyluk*, la Cour devait établir si l'action en dommages-intérêts intentée par M<sup>me</sup> Danyluk pour congédiement injustifié était irrecevable du fait de la préclusion découlant de la décision négative déjà rendue par une agente des normes d'emploi. Rédigeant l'opinion unanime de la Cour, le juge Binnie a indiqué que, bien que le caractère définitif des décisions constitue une considération impérieuse, la préclusion découlant d'une question déjà tranchée est une doctrine d'intérêt public qui tend à favoriser les intérêts de la justice (par. 19). Il a souligné que l'application des doctrines de la common law relatives au caractère définitif des décisions — la préclusion fondée sur la cause d'action, la préclusion découlant d'une question déjà tranchée et la règle interdisant les contestations indirectes — a été étendue aux décideurs administratifs. Fait important, il a ajouté que, en contexte de droit administratif, « l'objectif spécifique poursuivi [par l'application de ces doctrines] consiste à assurer l'équilibre entre le respect de l'équité envers les parties et la protection du processus décisionnel administratif » (par. 21). Ainsi, même lorsque les éléments traditionnels de ces doctrines sont présents, les tribunaux judiciaires doivent exercer leur pouvoir discrétionnaire pour décider s'il y a lieu de permettre ou non l'instruction de la demande. Il a fait remarquer que l'exercice de ce pouvoir discrétionnaire était possible même lorsque la préclusion pourrait découler d'une décision judiciaire, ajoutant cependant que ce pouvoir « est nécessairement plus étendu à l'égard des décisions des tribunaux administratifs,

calls upon the exercise of a judicial discretion to achieve fairness according to the circumstances of each case”: *British Columbia (Minister of Forests) v. Bugbusters Pest Management Inc.* (1998), 50 B.C.L.R. (3d) 1 (C.A.), at para. 32, cited in *Danyluk*, at para. 63. Binnie J. then held that it is “an error of principle not to address the factors for and against the exercise of the discretion . . . . The objective is to ensure that the operation of issue estoppel promotes the orderly administration of justice but not at the cost of real injustice” (paras. 66-67).

étant donné la diversité considérable des structures, missions et procédures des décideurs administratifs » : par. 62 (je souligne); voir aussi D. J. Lange, *The Doctrine of Res Judicata in Canada* (3<sup>e</sup> éd. 2010), p. 227-229. Le juge Binnie a aussi cité le juge Finch (plus tard Juge en chef de la Colombie-Britannique), selon lequel [TRADUCTION] « [l]a doctrine de la préclusion découlant d’une question déjà tranchée se veut un moyen de rendre justice et de protéger contre l’injustice. Elle implique inévitablement l’exercice par la cour de son pouvoir discrétionnaire pour assurer le respect de l’équité selon les circonstances propres à chaque espèce » : *British Columbia (Minister of Forests) c. Bugbusters Pest Management Inc.* (1998), 50 B.C.L.R. (3d) 1 (C.A.), par. 32, cité au par. 63 de *Danyluk*. Le juge Binnie a ensuite statué qu’on commettait « une erreur de principe en omettant de soupeser les facteurs favorables et défavorables à l’exercice du pouvoir discrétionnaire [. . .] L’objectif est de faire en sorte que l’application de la préclusion découlant d’une question déjà tranchée favorise l’administration ordonnée de la justice, mais pas au prix d’une injustice concrète » (par. 66-67).

[62] To assist decision-makers in achieving the appropriate balance, the Court set out a detailed (although non-exhaustive) list of factors for a court to consider when exercising its discretion: the wording of the statute from which the power to issue the administrative order derives; the purpose of the legislation; the availability of an appeal; the safeguards available to the parties in the administrative procedure; the expertise of the administrative decision-maker; the circumstances giving rise to the prior administrative proceedings; and the potential injustice (*Danyluk*, at paras. 68-80). I note in passing that this list reflects a much broader conception of the discretion at common law than my colleague Abella J. envisions under s. 27(1)(f). The three factors to be considered set out at para. 37 of her reasons are limited to whether the previous decision-maker had concurrent authority to decide the matter, whether the issue was essentially the same and whether in the earlier proceeding the parties (or their privies) had an

[62] Pour aider les décideurs à réaliser l’équilibre recherché, la Cour a dressé une liste détaillée (mais non exhaustive) de facteurs à prendre en compte dans l’exercice du pouvoir discrétionnaire : le libellé du texte de loi accordant le pouvoir de rendre l’ordonnance administrative, l’objet de la loi, l’existence d’un droit d’appel, les garanties offertes aux parties dans le cadre de l’instance administrative, l’expertise du décideur administratif, les circonstances ayant donné naissance à l’instance administrative initiale et le risque d’injustice (*Danyluk*, par. 68-80). Je fais incidemment remarquer que cette liste témoigne d’une interprétation du pouvoir discrétionnaire reconnu en common law beaucoup plus large que celle qu’envisage ma collègue la juge Abella à l’égard du pouvoir conféré par l’al. 27(1)f). Les trois facteurs qu’elle énumère au par. 37 de ses motifs se limitent aux questions de savoir si le décideur antérieur avait une compétence concurrente pour trancher la question, si la question était essentiellement la même et si l’instance

opportunity to know the case and have a chance to meet it.

[63] Nothing would be served by my reviewing the *Danyluk* factors in detail. It is particularly noteworthy, however, that in that case, the Court refused to apply issue estoppel even though Ms. Danyluk, represented by counsel, had not pursued an administrative review of the employment standards officer's decision and that her claim of substantial injustice turned largely on the facts that she had received neither notice of the employer's allegation nor an opportunity to respond (para. 80). Also of importance was that the legislation did not view the employment standards proceedings as an exclusive forum for complaints of this nature (para. 69). To characterize *Danyluk* as simply emphasizing the importance of finality in litigation is an incomplete account of the Court's approach in that case.

[64] I turn next to *Toronto (City) v. C.U.P.E., Local 79*. It concerned the role of the abuse of process doctrine when an arbitrator reviewing an employee's dismissal decided to make his own assessment of the facts relating to the conduct giving rise to a criminal conviction and on which the dismissal was based. Front and centre in Arbour J.'s analysis (on behalf of a unanimous Court on this point) was the importance of maintaining a "judicial balance between finality, fairness, efficiency and authority of judicial decisions" (para. 15). Referring to *Danyluk*, she acknowledged that there are many circumstances in which barring relitigation would create unfairness and held that "[t]he discretionary factors that apply to prevent the doctrine of issue estoppel from operating in an unjust or unfair way are equally available to prevent the doctrine of abuse of process from achieving a similar undesirable result" (para. 53). She thus emphasized the importance of maintaining a balance between fairness and finality and the need for a flexible discretion to ensure that this is done.

antérieure a offert la possibilité aux plaignants (ou à leurs ayants droit) de connaître les éléments invoqués contre eux et de les réfuter.

[63] Il serait inutile d'examiner en détail les facteurs énumérés dans *Danyluk*. Il importe cependant de signaler que dans cette affaire, la Cour a refusé d'appliquer la préclusion même si M<sup>me</sup> Danyluk, qui était représentée par avocat, n'avait pas demandé une révision administrative de la décision rendue par l'agente des normes d'emploi, et que l'injustice importante qu'elle alléguait était largement attribuable aux faits qu'elle n'avait pas été informée des allégations de l'employeur et n'avait pas eu la possibilité d'y répondre (par. 80). Autre élément important, selon la loi, l'agent des normes d'emploi ne constituait pas un forum exclusif pour les plaintes de cette nature (par. 69). On ne rend pas entièrement compte du raisonnement de la Cour dans *Danyluk* si l'on considère que cet arrêt souligne simplement l'importance du caractère définitif des décisions rendues dans les litiges.

[64] Quand à l'arrêt *Toronto (Ville) c. S.C.F.P., section locale 79*, il portait sur le rôle de la doctrine de l'abus de procédure, dans un contexte d'arbitrage de grief en matière de congédiement où l'arbitre avait décidé de procéder à sa propre appréciation des faits ayant mené à la déclaration de culpabilité au criminel à l'origine du congédiement. La juge Arbour (qui exposait l'opinion unanime de la Cour sur ce point) a articulé son analyse autour de l'importance de réaliser un « équilibre entre l'irrévocabilité, l'équité, l'efficacité et l'autorité des décisions judiciaires » (par. 15). Mentionnant l'arrêt *Danyluk*, elle a reconnu que, dans de nombreuses circonstances, empêcher la réouverture d'un litige serait source d'inéquité, et elle a affirmé que « [l]es facteurs discrétionnaires qui visent à empêcher que la préclusion découlant d'une question déjà tranchée ne produise des effets injustes, jouent également en matière d'abus de procédure pour éviter de pareils résultats indésirables » (par. 53). Elle a ainsi souligné l'importance de maintenir un juste équilibre entre l'équité et le caractère définitif de la décision, de même que la nécessité d'un exercice souple du pouvoir discrétionnaire en vue d'assurer le maintien de cet équilibre.

[65] I conclude that the Court's jurisprudence recognizes that, in the administrative law context, common law finality doctrines must be applied flexibly to maintain the necessary balance between finality and fairness. This is done through the exercise of discretion, taking into account a wide variety of factors which are sensitive to the particular administrative law context in which the case arises and to the demands of substantial justice in the particular circumstances of each case. Finality and requiring parties to use the most appropriate mechanisms for review are of course important considerations. But they are *not* the *only*, or even the most important considerations.

[66] The need for this "necessarily broader" discretion (to use Binnie J.'s words at para. 62 of *Danyluk*) in applying the finality doctrines in the administrative law setting is well illustrated by the intricate and changing procedural context in which the complainant workers found themselves in this case. I will use the facts of Mr. Figliola's case as an example.

[67] As a result of a workplace injury, Mr. Figliola received a 3.5% functional disability award from the Workers' Compensation Board, consisting of 1% for lumbar spine and 2.5% for chronic pain, determined under the Board's Policy No. 39.01. He appealed the Board's decision to the Review Division which is an internal appeal body. He raised four issues. He complained that his injury had not been properly assessed under the policy and in addition that the policy was patently unreasonable, violated s. 15 of the *Canadian Charter of Rights and Freedoms* and was contrary to the *Human Rights Code*.

[68] Subject to Board practices and procedures, the Review Officer may conduct a review as the officer considers appropriate: *Workers Compensation Act*, R.S.B.C. 1996, c. 492 ("Act"), s. 96.4(2). As I understand the record, the review in this case was a paper review on the basis of written submissions on behalf of Mr. Figliola. His employer

[65] En conclusion, la jurisprudence de notre Cour reconnaît qu'en contexte de droit administratif, il convient d'appliquer avec souplesse les doctrines de la common law relatives au caractère définitif des décisions afin de maintenir le nécessaire équilibre entre le caractère définitif et l'équité des décisions. À cette fin, l'exercice du pouvoir discrétionnaire nécessite la prise en compte d'un large éventail de facteurs pertinents aux particularités du contexte administratif en cause et aux exigences à satisfaire pour que justice soit rendue dans les circonstances de chaque cas. Le caractère définitif de la décision et l'obligation faite aux parties de recourir aux mécanismes de révision les plus appropriés sont certes des facteurs importants, mais ils ne sont *ni les seuls*, ni même les plus importants.

[66] Le contexte procédural complexe et changeant en cause en l'espèce illustre bien la nécessité du recours à ce pouvoir discrétionnaire « nécessairement plus étendu » (les termes qu'emploie le juge Binnie au par. 62 de *Danyluk*) lorsqu'il s'agit d'appliquer les doctrines relatives au caractère définitif des décisions en contexte de droit administratif. Le cas de M. Figliola me servira d'exemple.

[67] Victime d'un accident du travail, M. Figliola s'est vu attribuer par la Commission une indemnité d'invalidité fonctionnelle de 3,5 %, soit 1 % pour douleur lombaire et 2,5 % pour douleur chronique, en application de la politique 39.01 de la Commission. Il a porté la décision en appel devant la Review Division (la « Section de révision ») — un organe de révision interne — invoquant quatre points. Il a allégué que sa lésion n'avait pas été évaluée comme il se doit sous le régime de la politique et que la politique était manifestement déraisonnable, violait l'art. 15 de la *Charte canadienne des droits et libertés* et contrevenait au *Human Rights Code*.

[68] Sous réserve des règles de pratique et de procédure de la Commission, un agent de révision peut procéder à la révision de la décision de la manière qu'il estime indiquée : *Workers Compensation Act*, R.S.B.C. 1996, ch. 492 (la « Loi »), par. 96.4(2). Je crois comprendre qu'en l'espèce, il a mené une révision sur dossier, sur la base d'observations écrites

did not participate and there was no oral hearing. Although the Review Officer was undoubtedly the only appropriate forum in which to review the application of the Board's policy to the facts of Mr. Figliola's case, the role of the Review Officer with respect to his other complaints is much less clear.

[69] With respect to Mr. Figliola's claims that the policy was patently unreasonable, the Review Officer found that he had no authority at all. He noted that he was bound by s. 99 of the Act to apply a Board policy that applied to the case. While the appeals tribunal to which appeals lie from the Review Division had authority to consider the validity of a policy (s. 251 of the Act), even it had no authority "to make binding determinations as to the validity of policy. Rather, it is required to refer to the Board of Directors its determinations and is bound by the decision of the Board of Directors as to whether the policy should be maintained or changed" (A.R., vol. I, at p. 6). The Review Officer reasoned that "[i]t would be odd if [the appeals tribunal] was required to go through such a process but the Review Division had even greater authority of considering and deciding whether a policy was valid" (*ibid.*). He therefore concluded that the Review Division had no general jurisdiction to find a policy of the Board invalid on the basis that it was patently unreasonable.

[70] As for Mr. Figliola's *Charter* claims, the Review Officer similarly found that he had no jurisdiction to consider them at all. As he put it,

[a]mendments to the *Act* resulting from the *Administrative Tribunals Act* (the "ATA") took effect on December 3, 2004. Those amendments stated that [the appeals tribunal] has no jurisdiction over constitutional questions . . . . Although this change did not specifically refer to the Review Division, the Review Division considers that the change indicates a statutory intent that it does not have jurisdiction over constitutional questions, including *Charter* questions. [A.R., vol. I, at p. 7]

soumises au nom de M. Figliola. L'employeur n'a pas participé à la révision et il n'y a pas eu d'audience. Bien que l'agent de révision constituait sans aucun doute le seul forum approprié permettant l'examen de l'application de la politique de la Commission au cas de M. Figliola, le rôle de l'agent de révision à l'égard des autres moyens invoqués par l'intéressé est beaucoup moins clair.

[69] L'agent de révision a considéré qu'il n'avait nullement compétence pour examiner la prétention de M. Figliola que la politique était manifestement déraisonnable. Il a signalé qu'aux termes de l'art. 99 de la Loi, il était tenu d'appliquer une politique de la Commission. Alors que le tribunal d'appel des décisions de la Section de révision avait compétence pour examiner la validité d'une politique (art. 251 de la Loi), même lui n'avait pas compétence pour [TRADUCTION] « rendre des décisions exécutoires sur la validité d'une politique. Il doit plutôt déférer la question au conseil d'administration de la Commission, et il est lié par la décision de ce dernier quant au maintien ou à la modification de la politique » (d.a., vol. I, p. 6). Suivant le raisonnement de l'agent de révision, [TRADUCTION] « [i] serait étrange que le [tribunal d'appel] soit tenu de procéder ainsi mais que la Section de révision jouisse du pouvoir plus étendu d'examiner et de trancher la question de la validité d'une politique » (*ibid.*). Il a donc conclu que la Section de révision ne dispose pas de la compétence générale de déclarer une politique de la Commission invalide en raison de son caractère manifestement déraisonnable.

[70] L'agent de révision a pareillement jugé qu'il n'avait pas compétence pour connaître de la prétention de M. Figliola fondée sur la *Charte*. Ainsi qu'il l'a exposé,

[TRADUCTION] [I]es modifications apportées à la Loi par l'*Administrative Tribunals Act* (l'« ATA ») sont entrées en vigueur le 3 décembre 2004. Selon ces modifications, le [tribunal d'appel] n'a pas compétence en matière constitutionnelle [. . .] Bien que la Section de révision n'y soit pas expressément mentionnée, elle voit dans ce changement l'indication de l'intention du législateur de ne pas lui donner compétence en matière constitutionnelle, y compris à l'égard des questions relatives à la *Charte*. [d.a., vol. I, p. 7]

[71] Turning finally to Mr. Figliola's claims under the *Human Rights Code*, the Review Officer relied on *Tranchemontagne v. Ontario (Director, Disability Support Program)*, 2006 SCC 14, [2006] 1 S.C.R. 513, for his conclusion that he had authority to decline to apply the policy if it conflicted with the *Code*, given the provision in s. 4 of the *Code* that it prevails in the event of conflict with any other enactment. If I am reading the Review Officer's decision correctly, I understand him to reason that his statutory obligation to apply Board policies (s. 99 of the Act) conflicts with the *Code's* prohibitions against discrimination. However, because the *Code* prevails in the event of conflict, the Review Officer can determine whether the policy is consistent with the *Code*. Assuming, without deciding, that this is the correct view and therefore that the Review Officer can assess the policy's compliance with the *Code*, there remains the question of what remedy the Review Officer can fashion if he or she concludes that the policy is not compliant. According to the Board's submissions, the process that was followed at the relevant time (although it was not formalized until later) was this: if the Review Officer found the *Code* challenge had merit, he or she would not apply the policy to the particular case. The policy itself would be referred to the Board "for inclusion in the Policy and Research Division's work plan as a high priority project" (A.F., at para. 59).

[72] As noted earlier, the Review Officer's decisions are appealable to the Workers' Compensation Appeal Tribunal ("WCAT"), with certain exclusions not relevant here. Mr. Figliola pursued such an appeal and it was set down for an oral hearing. The WCAT, it should be noted, has extensive authority to review the matter, including hearing evidence; it is not simply an appeal in the usual sense (ss. 245 to 250 of the Act). However, the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 ("ATA"), was amended effective October 18, 2007, removing the WCAT's jurisdiction to apply the *Code: Attorney General Statutes Amendment Act, 2007*, S.B.C. 2007, c. 14, s. 3. Thus in midstream, Mr. Figliola lost the right to a thorough, evidence-based review

[71] Enfin, pour ce qui est des prétentions de M. Figliola relevant du *Human Rights Code*, l'agent de révision, s'appuyant sur l'arrêt *Tranchemontagne c. Ontario (Directeur du Programme ontarien de soutien aux personnes handicapées)*, 2006 CSC 14, [2006] 1 R.C.S. 513, a conclu que, compte tenu de l'art. 4 du *Code* portant que ses dispositions ont préséance en cas de conflit avec celles de toute autre loi, il était habilité à refuser d'appliquer la politique si elle entraînait en conflit avec le *Code*. Si j'interprète correctement la décision de l'agent de révision, il a estimé que l'obligation légale qui lui est faite d'appliquer les politiques de la Commission (art. 99 de la Loi) entre en conflit avec les dispositions du *Code* interdisant la discrimination. Toutefois, vu la préséance du *Code* en cas de conflit, l'agent de révision peut se prononcer sur la conformité de la politique au *Code*. En supposant, sans en décider, que ce raisonnement soit juste et que l'agent de révision peut donc évaluer la conformité de la politique au *Code*, il reste quand même à déterminer la réparation qu'il peut accorder s'il conclut que la politique n'est pas conforme au *Code*. La Commission plaide que le processus appliqué pendant la période en cause (bien qu'il n'ait été officialisé que plus tard) était le suivant : l'agent de révision qui estimait fondé le motif de contestation relevant du *Code* n'appliquait pas la politique. La politique elle-même était déferée à la Commission [TRADUCTION] « qui devait lui accorder une priorité élevée dans le plan de travail de la Policy and Research Division » (m.a., par. 59).

[72] Ainsi que je l'ai déjà indiqué, les décisions des agents de révision sont susceptibles d'appel devant le Workers' Compensation Appeal Tribunal (« WCAT »), sous réserve de certaines exclusions non pertinentes en l'espèce. M. Figliola s'est adressé à ce tribunal et une date d'audience a été fixée. Il convient de signaler que le WCAT jouit d'un pouvoir de révision étendu lui permettant notamment de recevoir des éléments de preuve; il n'entend pas un appel au sens usuel de ce terme (art. 245 à 250 de la Loi). Par suite de modifications apportées à l'*Administrative Tribunals Act*, S.B.C. 2004, ch. 45 (« ATA ») et entrées en vigueur le 18 octobre 2007, toutefois, le WCAT n'a plus compétence pour appliquer le *Code : Attorney General Statutes*

of the merits of the Review Officer's decision on the human rights issue.

[73] The question of what this amendment did to the Review Officer's authority to address the *Code* issues is not before us. However, the amendment taking away the WCAT's jurisdiction would appear to engage the same reasoning that led the Review Officer to conclude that he had no jurisdiction with respect to the attacks on the Board's policy as being patently unreasonable and contrary to the *Charter*. As noted earlier, the Review Officer reasoned that as the WCAT did not have this jurisdiction, it followed that the Review Division did not have that jurisdiction either. Thus it seems (although I need not decide the point) that the *ATA* amendments taking away the WCAT's *Code* jurisdiction not only took away a right of review on the merits, but also had the effect of taking away the Review Officer's authority to test Board policies against the *Code* which he exercised in this case. I recognize that the Board takes the opposite view, maintaining that even though *Code* jurisdiction was removed from the WCAT, a review officer may still review Board policies for consistency with the *Code*. It is not my task to resolve this issue here. One thing is certain, however. The amendments were intended to reverse the effects of the Court's decision in *Tranchemontagne* in relation to the human rights jurisdiction of the WCAT (British Columbia, *Official Report of Debates of the Legislative Assembly (Hansard)*, vol. 21, 3rd Sess., 38th Parl., May 16, 2007, at pp. 8088-93).

[74] I simply wish to note the rather complex, changing and at times uncertain process available in the workers' compensation system to address the human rights issue in this case. To my mind, this underlines the wisdom of applying finality doctrines

*Amendment Act, 2007*, S.B.C. 2007, ch. 14, art. 3. Ainsi, M. Figliola a perdu, à mi-parcours, le droit de soumettre à un examen approfondi reposant sur des éléments de preuve le bien-fondé de la décision de l'agent de révision relative à la question des droits de la personne.

[73] La question de l'effet de ces modifications législatives sur la compétence des agents de révision en matière d'examen des dispositions du *Code* ne nous a pas été soumise. Il semble toutefois que le retrait de la compétence du WCAT en cette matière permette de tenir le même raisonnement que celui qui a amené l'agent de révision à se déclarer sans compétence pour connaître de la prétention suivant laquelle la politique de la Commission est manifestement déraisonnable ou qu'elle est contraire à la *Charte*. Comme je l'ai indiqué, l'agent de révision a considéré que, puisque le WCAT ne possède pas cette compétence, la Section de révision ne peut elle non plus l'exercer. Il semble donc (bien que je n'aie pas à me prononcer sur ce point) que les modifications apportées à l'*ATA* qui ont aboli la compétence du WCAT relative au *Code* ont non seulement supprimé le droit à une révision du bien-fondé des décisions mais ont également enlevé aux agents de révision le pouvoir d'examiner la conformité au *Code* des politiques de la Commission, pouvoir que l'agent avait exercé en l'espèce. Je reconnais que la Commission soutient le contraire, affirmant que malgré le retrait de la compétence du WCAT relative au *Code*, les agents de révision peuvent encore déterminer si les politiques de la Commission sont conformes au *Code*. Il ne m'appartient pas ici de trancher cette question. Une chose est certaine toutefois. Les modifications visaient à annuler l'effet de la décision de notre Cour dans *Tranchemontagne* relativement à la compétence du WCAT en matière de droits de la personne (Colombie-Britannique, *Official Report of Debates of the Legislative Assembly (Hansard)*, vol. 21, 3<sup>e</sup> sess., 38<sup>e</sup> lég., 16 mai 2007, p. 8088-8093).

[74] Je tiens simplement à montrer le caractère passablement complexe, changeant et, parfois, incertain du mécanisme prévu par le régime d'indemnisation des accidents du travail pour trancher dans le présent cas la question des droits de

with considerable flexibility in the administrative law setting. The decision that is relied on by the Board in this case as being a final determination is in fact an internal review decision given after a paper review in which the employer did not participate. Whether the Review Officer had authority to consider the question is at least debatable. (Of course, Mr. Figliola's position before the Review Officer was that he did have authority.) The remedy available in the proceedings was a decision not to apply the policy and refer it to the Board for study. At the time Mr. Figliola raised the point before the Review Officer, there was a right of appeal to the WCAT which included the opportunity to call evidence. In the midst of the proceedings, that right was removed and indeed the whole authority of the WCAT to even consider *Code* issues was removed. It surely cannot be said that there was any legislative intent that the Review Officer was to have exclusive jurisdiction over the human rights questions.

[75] It seems to me that whether a Review Officer's decision in these circumstances should bar any future consideration by the Human Rights Tribunal of the underlying human rights complaint cannot properly be addressed by simply looking at the three factors identified by my colleague, viz., whether the Review Officer had concurrent jurisdiction to decide a point that was essentially the same as the one before the Human Rights Tribunal and whether there had been an opportunity to know the case to meet and a chance to meet it. There is, as *Danyluk* shows, a great deal more to it than that. The kinds of complications we see in this case are not uncommon in administrative law, although this case may present an unusually cluttered jurisdictional and procedural landscape. The point, to my way of thinking, is that these are the types of factors that call for a highly flexible approach to applying the finality doctrines, a flexibility that in my view exists both at the common law and, as I will discuss next, under s. 27(1)(f) of the *Code*.

la personne. Selon moi, cela montre qu'il n'est que sage d'appliquer avec beaucoup de souplesse, dans le contexte du droit administratif, les doctrines relatives au caractère définitif des décisions. La décision dont la Commission invoque le caractère définitif en l'espèce est en fait une décision interne de révision rendue à la suite d'un examen sur dossier auquel l'employeur n'a pas pris part. La compétence de l'agent de révision d'examiner la question était à tout le moins contestable. (M. Figliola a bien sûr soutenu devant l'agent de révision que celui-ci avait compétence.) La réparation qui pouvait être accordée au terme du processus consistait en une décision de ne pas appliquer la politique et de la soumettre à la Commission pour analyse. Quand M. Figliola a soulevé ce point devant l'agent de révision, il pouvait exercer devant le WCAT un droit d'appel comportant la possibilité de présenter des éléments de preuve. Pendant l'instance, ce droit a été aboli, et le WCAT a même perdu toute compétence relativement au *Code*. On ne peut certes pas dire que l'intention du législateur était d'investir les agents de révision d'une compétence exclusive en matière de droits de la personne.

[75] Il me semble qu'un simple examen des trois facteurs énumérés par ma collègue — la compétence concurrente de l'agent de révision de statuer sur un point qui était essentiellement le même que celui qui a été soumis au Tribunal, l'existence d'une possibilité de connaître les éléments invoqués, et une occasion de les réfuter — ne permet pas d'examiner comme il se doit la question de savoir si la décision d'un agent de révision dans ces circonstances devrait empêcher tout examen ultérieur par le Tribunal des aspects de la plainte qui relèvent des droits de la personne. Comme le montre l'arrêt *Danyluk*, beaucoup d'autres considérations entrent en ligne de compte. Bien que le contexte juridictionnel et procédural de la présente affaire paraisse anormalement confus, des complications de cette nature ne sont pas inhabituelles en droit administratif. C'est à cause de considérations de ce genre qu'il faut selon moi appliquer avec une plus grande souplesse les doctrines relatives au caractère définitif des décisions, et j'estime que tant la common law que l'al. 27(1)(f) du *Code*, comme je l'explique ci-après, autorisent cette souplesse.

B. *Statutory Interpretation*

[76] My colleague is of the view that s. 27(1)(f) confers a “limited” discretion, the exercise of which is to be guided uniquely “by the goals of the fairness of finality in decision-making and the avoidance of the relitigation of issues” (para. 36). Putting aside for the moment whether the discretion is “limited” or “broad”, I have difficulty with my colleague’s treatment of the relevant factors which she identifies.

[77] I repeat the three factors identified as those to be considered: whether the previous adjudicator had concurrent authority to decide the matter, whether the issue decided was essentially the same, and whether the previous process provided an opportunity to the parties or their privies to know the case to be met and have a chance to meet it (Abella J.’s reasons, at para. 37). However, at para. 49 of my colleague’s reasons, the question of whether the Review Division’s process met the “necessary procedural requirements” is dismissed as “a classic judicial review question and not one within the mandate of a concurrent decision-maker”. Thus if I understand correctly, the Tribunal is to consider whether the earlier process was fair but cannot consider at all whether the earlier process met the “necessary procedural requirements”. I would have thought that the “necessary procedural requirements” would include the obligation to act fairly. But if that is so, I do not understand how procedural fairness can be at the same time a question beyond the concurrent decision-maker’s mandate (para. 49) and a proper factor for the Tribunal to consider in exercising its discretion under s. 27(1)(f) (para. 37).

[78] It would also seem to me that whether the adjudicator had authority to decide the matter is generally the sort of issue that is raised on judicial review, but it figures here as a factor to be considered in exercising the Tribunal’s discretion (para. 37). In my respectful view, relevant factors cannot

B. *Interprétation législative*

[76] Selon ma collègue, l’al. 27(1)f confère un pouvoir discrétionnaire « restreint » dont l’exercice doit être guidé uniquement « [par] les objets de la disposition, qui sont d’assurer l’équité du caractère définitif du processus décisionnel et d’éviter la remise en cause de questions déjà tranchées » (par. 36). Écartant provisoirement la question du caractère « restreint » ou « large » de ce pouvoir, j’ai de la difficulté à accepter l’analyse que fait ma collègue des facteurs applicables qu’elle a relevés.

[77] Je répète les trois facteurs à examiner que relève ma collègue : si le décideur antérieur avait compétence concurrente pour trancher la question, si la question tranchée était essentiellement la même, et si le processus antérieur a offert la possibilité aux parties ou à leurs ayants droit de connaître les éléments invoqués contre eux et de les réfuter (motifs de la juge Abella, par. 37). Toutefois, ma collègue écarte, au par. 49 de ses motifs, la question de savoir si le processus suivi devant la Section de révision satisfait aux « exigences procédurales », estimant qu’il s’agit là d’une « question de contrôle judiciaire classique et non d’une question que se pose un décideur dans l’exercice d’une compétence concurrente ». Donc, si je comprends bien, le Tribunal doit vérifier l’équité du processus antérieur, mais il ne peut d’aucune façon déterminer si ce processus satisfait aux « exigences procédurales ». Je serais enclin à penser que l’obligation d’agir équitablement est incluse dans les « exigences procédurales ». Mais, si tel est le cas, je ne m’explique pas comment l’équité procédurale peut à la fois excéder la compétence concurrente du décideur (par. 49) et constituer un facteur que le Tribunal doit considérer dans l’exercice du pouvoir discrétionnaire conféré à l’al. 27(1)f (par. 37).

[78] Il me semble aussi que la compétence d’un décideur de trancher un point est généralement une question qui se pose lors d’un contrôle judiciaire, mais elle fait ici partie des facteurs à prendre en compte dans l’exercice du pouvoir discrétionnaire du Tribunal (par. 37). À mon avis, on ne peut

simply be dismissed as “classic judicial review question[s]” and therefore “not one within the mandate of a concurrent decision-maker” (para. 49). This was not the approach in *Danyluk*. Rather, all relevant factors need to be considered and weighed in exercising the discretion.

[79] Be that as may be, it remains that my colleague’s conception of s. 27(1)(f) is that it confers a more limited discretion to apply the finality doctrines than has been recognized at common law with respect to decisions of administrative decision-makers. With respect, and for the following reasons, I cannot accept this interpretation of the provision.

[80] We must interpret the words of the provision “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”: *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26, quoting E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21.

[81] I turn first to the grammatical and ordinary sense of the words. It is difficult for me to imagine broader language to describe a discretionary power than to say the Tribunal may dismiss a complaint if the substance of it has been appropriately dealt with elsewhere. To my way of thinking, the grammatical and ordinary meaning of the words support an expansive view of the discretion, not a narrow one. I agree with my colleague that this provision reflects the principles of the finality doctrines rather than codifies their technical tenets (para. 46). However, as I discussed earlier, the “principles” of those doctrines, especially as they have developed in administrative law, include a search for balance between finality and fairness and a large measure of discretion to allow that balance to be struck in the wide variety of decision-making contexts in which they may have to be applied. The provision’s focus on the “substance” of the complaint and the use of the broad words “appropriately dealt

simplement écarter un facteur pertinent parce qu’il s’agit d’une « question de contrôle judiciaire classique » qui, par conséquent, n’est pas de celles « que se pose un décideur dans l’exercice d’une compétence concurrente » (par. 49). Telle n’était pas la démarche retenue dans *Danyluk*. Il faut plutôt, dans l’exercice du pouvoir discrétionnaire, prendre en compte et apprécier tous les facteurs pertinents.

[79] Quoi qu’il en soit, il reste que, tel que ma collègue le conçoit, l’al. 27(1)f) confère, en matière d’application des doctrines relatives au caractère définitif des décisions, un pouvoir discrétionnaire plus restreint que celui qui a été reconnu en common law à l’égard des décisions administratives. Avec égards, et pour les motifs exposés ci-dessous, je ne puis souscrire à cette interprétation.

[80] Il faut interpréter les termes de cette disposition [TRADUCTION] « dans leur contexte global en suivant le sens ordinaire et grammatical qui s’harmonise avec l’esprit de la loi, l’objet de la loi et l’intention du législateur » : *Bell ExpressVu Limited Partnership c. Rex*, 2002 CSC 42, [2002] 2 R.C.S. 559, par. 26, citant E. A. Driedger, *Construction of Statutes* (2<sup>e</sup> éd. 1983), p. 87; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27, par. 21.

[81] Considérons d’abord le sens ordinaire et grammatical des termes. Il m’est difficile d’envisager l’octroi d’un pouvoir discrétionnaire en des termes plus larges si l’on dit que le tribunal peut rejeter une plainte s’il a été statué de façon appropriée sur le fond de la plainte dans une autre instance. Selon moi, le sens ordinaire et grammatical de ces termes permet de donner une large portée au pouvoir discrétionnaire, non une portée restreinte. Je considère tout comme ma collègue que la disposition est l’expression des principes fondant les doctrines relatives au caractère définitif des décisions plutôt qu’une codification de leurs éléments techniques (par. 46). Toutefois, comme je l’ai déjà indiqué, ces « principes », tels qu’ils ont évolué en droit administratif en particulier, comportent la recherche d’un juste équilibre entre, d’une part, le caractère définitif et l’équité, et, d’autre part, un pouvoir discrétionnaire d’une ampleur propre à réaliser cet équilibre dans la multitude des contextes

with” seem to me clear indications that the breadth of the common law discretion is expanded, not restricted.

[82] I turn next to look at the provision in the context of the rest of the section in which it is found. It is suggested that s. 27(1)(f) should be read narrowly because the character of the other six categories of discretion conferred by s. 27(1) relates to clear circumstances in which dismissal would be appropriate. The premise of this view is that all of the other parts of s. 27(1) clearly call for a narrow discretion. Respectfully, I do not accept this premise. It is the case, of course, that some of the other grounds of discretionary dismissal set out in s. 27(1) do indeed arise in circumstances in which it would be demonstrably undesirable to proceed with the complaint: Abella J.'s reasons, at paras. 39-41. For example, it is hard to see how the Tribunal has discretion, in any meaningful sense of the word, to refuse to dismiss a complaint not within its jurisdiction (s. 27(1)(a)), or which discloses no contravention of the *Code* (s. 27(1)(b)). However, not all of the categories set out in s. 27(1) are of this character: see, e.g., *Becker v. Cariboo Chevrolet Oldsmobile Pontiac Buick GMC Ltd.*, 2006 BCSC 43, 42 Admin. L.R. (4th) 266, at paras. 38-42. In my view, the nature of the discretion in the various paragraphs of s. 27(1) is influenced by the content of each paragraph rather than the use of “may” in the section's opening words.

[83] Section 27(1)(d) confers discretion to dismiss where the proceeding would not benefit the person, group or class alleged to have been discriminated against or would not further the purposes of the *Code*. Exercising this discretion requires the Tribunal to consider fundamental questions about the role of human rights legislation and human rights adjudication. The discretion with respect to these matters is thus wide-ranging, grounded in policy and in the Tribunal's specialized human

décisionnels où ils sont appelés à s'appliquer. La disposition met l'accent sur le [TRADUCTION] « fond » de la plainte, et l'emploi des termes larges « a été statué de façon appropriée » indique clairement, selon moi, qu'elle élargit plutôt qu'elle ne restreint la portée du pouvoir discrétionnaire prévu par la common law.

[82] Examinons ensuite la disposition dans le contexte du reste de l'article. Ma collègue considère qu'il faut interpréter l'al. 27(1)f) de façon restrictive parce que les six autres catégories de pouvoirs discrétionnaires conférés au par. 27(1) ont trait, de par leur nature, à des circonstances où le rejet de la plainte est clairement approprié. Ce raisonnement repose sur la prémisse que tous les autres alinéas du par. 27(1) confèrent clairement un pouvoir discrétionnaire restreint. Je ne puis accepter cette prémisse. Certes, certains des autres motifs de rejet discrétionnaire énumérés au par. 27(1) s'appliquent effectivement dans des circonstances où il ne serait nettement pas souhaitable de donner suite à la plainte : motifs de la juge Abella, par. 39-41. On voit difficilement, par exemple, comment le Tribunal pourrait jouir du pouvoir discrétionnaire réel de refuser de rejeter une plainte qui ne relèverait pas de sa compétence (al. 27(1)a)), ou qui ne révélerait aucune contravention au *Code* (al. 27(1)b)). Ce ne sont pas toutes les catégories mentionnées au par. 27(1) qui sont de cette nature, cependant : voir, p. ex., *Becker c. Cariboo Chevrolet Oldsmobile Pontiac Buick GMC Ltd.*, 2006 BCSC 43, 42 Admin. L.R. (4th) 266, par. 38-42. Selon moi, c'est plutôt le contenu des différents alinéas du par. 27(1) et non le mot [TRADUCTION] « peut », employé dans les premiers mots de cet article, qui influe sur la nature du pouvoir discrétionnaire.

[83] L'alinéa 27(1)d) investit le Tribunal du pouvoir discrétionnaire de rejeter une plainte qui n'apporterait rien à la personne, au groupe ou à la catégorie censés avoir été victimes de discrimination, ou qui ne servirait pas les fins du *Code*. L'exercice de ce pouvoir oblige le Tribunal à faire l'examen de questions fondamentales concernant le rôle de la législation relative aux droits de la personne et des instances décisionnelles chargées de l'appliquer. Il s'agit donc là d'un pouvoir discrétionnaire large

rights mandate (*Becker*, at para. 42). It does not share the character of some of the other more straightforward provisions in s. 27(1), but is similar in breadth to the discretion set out in s. 27(1)(f). In s. 27(1)(f), the breadth of the discretion is apparent from the very general language relating to the “substance” of the complaint and whether it has been dealt with “appropriately”. I see nothing in the structure of or the context provided by s. 27(1) read as a whole that suggests a narrow interpretation of the discretion to dismiss where the “substance” of a complaint has been “appropriately” dealt with.

[84] A further element of the statutory context is the provision’s legislative history. That history confirms that it was the legislature’s intent to confer a broad discretion to dismiss or not to dismiss where there had been an earlier proceeding. It is significant that the *Human Rights Code* previously set out in s. 25(3) mandatory factors to take into account in the exercise of this discretion in *deferring* a complaint. The now repealed s. 27(2) provided that those same factors had to be considered when *dismissing* a complaint. These factors included the subject matter and nature of the other proceeding and the adequacy of the remedies available in the other proceeding in the circumstances. However, the legislature removed these specified factors (*Human Rights Code Amendment Act, 2002*, S.B.C. 2002, c. 62, ss. 11 and 12). This is consistent with an intention to confer a more open-ended discretion. That intention is explicit in the *Official Report of Debates of the Legislative Assembly (Hansard)*. Indeed, in response to the question as to why the mandatory factors were removed, the Honourable Geoff Plant, then-Attorney General of British Columbia and responsible minister for this legislation, said the following:

fondé sur des considérations de politique générale et sur la mission spécialisée du Tribunal en matière de droits de la personne (*Becker*, par. 42). Le pouvoir n’est pas de la même nature que celui conféré par certaines des autres dispositions plus simples du par. 27(1), mais son étendue est comparable à celle du pouvoir discrétionnaire prévu à l’al. 27(1)(f). Dans ce dernier alinéa, la portée du pouvoir discrétionnaire se dégage des termes très généraux employés, concernant le [TRADUCTION] « fond » de la plainte et la question de savoir s’il a été statué sur ce fond « de façon appropriée ». Je ne relève dans la structure ou le contexte du par. 27(1) pris dans son ensemble aucune indication qu’il faille interpréter restrictivement le pouvoir discrétionnaire de rejet lorsqu’il a été statué « de façon appropriée » sur le « fond » d’une plainte.

[84] L’historique législatif d’une disposition fait également partie de son contexte. Cet historique confirme que, pour ce qui est du rejet d’une plainte ayant fait l’objet d’une instance antérieure, le législateur a voulu conférer un pouvoir discrétionnaire étendu. Il est significatif que le *Human Rights Code* ait déjà énuméré, au par. 25(3), des facteurs qui devaient être pris en compte dans l’exercice du pouvoir discrétionnaire d’*ajourner* ou non l’examen d’une plainte. Le par. 27(2), maintenant abrogé, exigeait l’examen de ces mêmes facteurs lorsqu’il s’agissait de *rejeter* une plainte. Ces facteurs comprenaient l’objet et la nature de l’autre instance ainsi que le caractère suffisant des mesures de réparation offertes dans l’autre instance dans les circonstances. Toutefois, le législateur a aboli ces facteurs (*Human Rights Code Amendment Act, 2002*, S.B.C. 2002, ch. 62, art. 11 et 12), ce qui manifeste une intention de conférer un pouvoir discrétionnaire moins limitatif. Cette intention est explicitement formulée dans le *Official Report of Debates of the Legislative Assembly (Hansard)* de l’assemblée législative. Interrogé au sujet des raisons de la suppression des facteurs obligatoires, l’honorable Geoff Plant, qui était procureur général de la Colombie-Britannique et ministre responsable de l’application de cette loi à l’époque, a répondu ce qui suit :

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The fundamental issue in any attempt to seek the exercise of this power is whether there is another proceeding capable of appropriately dealing with the substance of the complaint. Our view is that that test is sufficient to ensure that the power is exercised in a case-by-case way in accordance with the principles and purposes of the code. It may well be that the panel members will consider the facts and factors that are now referred to in subsection (3), but we did not think it was necessary to tie the hands of a panel or a tribunal member with those specific criteria.

[TRADUCTION] La question essentielle qui se pose chaque fois que l'on envisage l'exercice de ce pouvoir est celle de l'existence d'un autre mécanisme permettant de statuer de façon appropriée sur le fond de la plainte. Selon nous, il s'agit là d'un test suffisant pour faire en sorte que le pouvoir soit exercé dans chaque cas conformément aux principes et aux objectifs du *Code*. Il est fort possible que les membres du Tribunal prennent en compte les faits et les facteurs qui sont à présent mentionnés au paragraphe (3), mais nous n'avons pas jugé nécessaire que ces critères particuliers lient les membres du Tribunal.

... [What the amendment] does is express the principle or the test pretty broadly and pretty generally. [Emphasis added.]

... [Ce qu'accomplit la modification], c'est exprimer le principe ou le test de façon assez large et générale. [Je souligne.]

(*Official Report of Debates of the Legislative Assembly (Hansard)*, vol. 9, 3rd Sess., 37th Parl., October 28, 2002, at p. 4094)

(*Official Report of Debates of the Legislative Assembly (Hansard)*, vol. 9, 3<sup>e</sup> sess., 37<sup>e</sup> lég., 28 octobre 2002, p. 4094)

[85] The intent was clearly to broaden, not to narrow, the range of factors which a tribunal could consider. I would also add, with respect, that the comments of the Minister of Government Services at second reading of the *Human Rights Amendment Act, 1995*, S.B.C. 1995, c. 42, cited by Abella J., at para. 43, have nothing to do with the scope of discretion under s. 27(1)(f) or its predecessor provisions.

[85] Le législateur voulait manifestement élargir l'éventail des facteurs qu'un tribunal doit prendre en compte, et non le rétrécir. J'ajouterais que les observations qu'a faites le ministre des Services gouvernementaux en deuxième lecture de la *Human Rights Amendment Act, 1995*, S.B.C. 1995, ch. 42, que cite la juge Abella au par. 43, n'ont aucun rapport avec la portée du pouvoir discrétionnaire exercé aux termes de l'al. 27(1)(f) ou des dispositions qui l'ont précédé.

[86] A further aspect of the legislative context is the legal framework in which the legislation is to operate. I have developed earlier my understanding of the common law approach to the discretionary application of finality doctrines in the administrative law context. Read against that background, my view is that the provision may most realistically be viewed as further loosening the strictures of the common law doctrines.

[86] Le cadre législatif dans lequel s'inscrit cette Loi constitue un autre aspect de son contexte législatif. J'ai déjà exposé mon interprétation des principes de la common law régissant l'application discrétionnaire des doctrines relatives au caractère définitif des décisions en droit administratif. Dans ce contexte, j'estime qu'il est plus réaliste de voir dans la disposition en cause un assouplissement des restrictions posées par la common law.

[87] It is also part of the pre-existing legal framework that under earlier legislation (*Human Rights Code*, R.S.B.C. 1996, c. 210, s. 27), the Commissioner of Investigation and Mediation had developed a policy about how to decide whether to proceed with a complaint that had been the subject

[87] Le cadre juridique préexistant comportait aussi une politique élaborée par le commissaire aux enquêtes et à la médiation sous le régime de la loi antérieure (*Human Rights Code*, R.S.B.C. 1996, ch. 210, art. 27) pour guider la prise de décision au sujet des suites à donner à une plainte ayant fait

of other proceedings. That policy called for consideration of factors such as these:

(1) the administrative fairness of the other proceeding; (2) the expertise of the decision-makers and investigators; (3) whether the case involves important human rights issues which invoke the public interest enunciated by the Code; (4) which forum is more appropriate for discussion of the issues; (5) whether the other proceeding protects the complainant against the discriminatory practice; and (6) whether there is a conflict between the goals and intent of the Code and the other proceedings, and practical issues including the time which each procedure would take and the consequences in terms of emotional strain, personal relations and long term outcome of processes.

(D. K. Lovett and A. R. Westmacott, "Human Rights Review: A Background Paper" (2001) (online), at p. 100, fn. 128)

[88] The use of the broad language employed in s. 27(1)(f), introduced into the pre-existing practice, does not support the view that the discretion was narrowly conceived; it supports the opposite inference.

[89] A final contextual element relates to the similarly worded power to defer a complaint pending its resolution in another forum under s. 25(2) of the *Code*. That provision reads as follows:

25. . . .

- (2) If at any time after a complaint is filed a member or panel determines that another proceeding is capable of appropriately dealing with the substance of a complaint, the member or panel may defer further consideration of the complaint until the outcome of the other proceeding.

[90] The power to defer a complaint is not based on the finality doctrines because when deferral is being considered there has been no other final decision. Nonetheless, the legislature chose to use essentially the same language to confer discretion to defer as it did to confer the discretion to dismiss. The repetition of this language in s. 27(1)(f)

l'objet d'une autre instance. Cette politique demandait l'examen de facteurs tels les suivants :

[TRADUCTION] (1) l'équité administrative de l'autre instance, (2) l'expertise des décideurs et enquêteurs, (3) la possibilité que l'instance comporte l'examen d'importantes questions de droits de la personne relevant des considérations d'intérêt public énoncées au Code, (4) le forum le plus approprié pour l'examen de ces questions, (5) la protection que l'autre instance offre au plaignant contre la pratique discriminatoire, et (6) l'existence d'un conflit entre les buts et objets du Code et l'autre instance, et des considérations pratiques incluant la durée probable de chaque instance, leurs conséquences en termes de tension psychologique et de relations personnelles et le résultat à long terme des processus.

(D. K. Lovett et A. R. Westmacott, « Human Rights Review : A Background Paper » (2001) (en ligne), p. 100, note 128)

[88] La formulation générale employée à l'al. 27(1)f), introduite dans la pratique préexistante, ne renforce pas le point de vue selon lequel on voulait donner une portée étroite au pouvoir discrétionnaire; elle permet de déduire le contraire.

[89] Le pouvoir d'ajourner l'examen d'une plainte jusqu'à ce qu'elle soit tranchée dans un autre forum, conféré en termes similaires au par. 25(2) du *Code*, fournit un dernier élément contextuel. Voici le texte de cette disposition :

[TRADUCTION]

25. . . .

- (2) Un membre ou une formation qui est d'avis qu'une autre instance permet de statuer de façon appropriée sur le fond de la plainte peut à tout moment après le dépôt de celle-ci en ajourner l'examen jusqu'à l'issue de l'autre instance.

[90] Le pouvoir discrétionnaire d'ajourner l'examen d'une plainte ne repose pas sur les doctrines relatives au caractère définitif des décisions parce qu'au moment de l'examen de l'ajournement, aucune autre décision définitive n'a encore été rendue. Néanmoins, le législateur a choisi de conférer le pouvoir dans les termes mêmes qu'il a

suggests to me that a broad and flexible discretion was intended.

[91] Looking at the text, context and purpose of the provision, I conclude that the discretion conferred under s. 27(1)(f) was conceived of as a broad discretion.

*C. Exercising the Discretion*

[92] As I see it, s. 27(1)(f) broadens the common law approach to the finality doctrines in two main ways. By asking whether the substance of the complaint has been addressed elsewhere, the focus must be on the substance of the complaint — its “essential character” to borrow a phrase from *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, at para. 52; and *Villella v. Vancouver (City)*, 2005 BCHRT 405, [2005] B.C.H.R.T.D. No. 405 (QL), at para. 21. The focus is not on the technical requirements of the common law finality doctrines, such as identity of parties, mutuality, identity of claims and so forth. The section compels attention to the substance of the matter, not to technical details of pleading or form. If the Tribunal concludes that the substance of the complaint has not in fact been dealt with previously, then its inquiry under s. 27(1)(f) is completed and there is no basis to dismiss the complaint. Where the substance of the matter has been addressed previously, the important interests in finality and adherence to proper review mechanisms are in play. It then becomes necessary for the Tribunal to exercise its discretion, recognizing that those interests must be given significant weight.

[93] Faced with a complaint, the substance of which has been addressed elsewhere, the Tribunal must decide whether there is something in the circumstances of the particular case to make it inappropriate to apply the general principle that the earlier resolution of the matter should be final. Other than by providing that the previous dealing with the substance of the complaint has been appropriate, the statute is silent on the factors that may properly be considered by the Tribunal in exercising its

employés pour conférer le pouvoir discrétionnaire de rejeter une plainte. Ce recours à la même formulation à l'al. 27(1)f) indique à mon avis que le législateur souhaitait accorder un pouvoir discrétionnaire large et souple.

[91] Compte tenu du texte, du contexte et de l'objectif de l'al. 27(1)f), je suis d'avis que le pouvoir discrétionnaire qu'il confère se voulait large.

*C. L'exercice du pouvoir discrétionnaire*

[92] À mon sens, l'al. 27(1)f) élargit de deux façons la portée des doctrines de la common law relatives au caractère définitif des décisions. Puisqu'il faut déterminer si le fond de la plainte a été examiné dans une autre instance, l'accent doit porter sur le fond de la plainte — son « essence », pour reprendre le terme employé dans *Weber c. Ontario Hydro*, [1995] 2 R.C.S. 929, par. 52; et *Villella c. Vancouver (City)*, 2005 BCHRT 405, [2005] B.C.H.R.T.D. No. 405 (QL), par. 21. Il ne porte pas sur les exigences techniques de ces doctrines, telles l'identité des parties, la réciprocité, l'identité des demandes, etc. Cette disposition fait porter l'attention sur le fond de l'affaire, non sur les aspects procéduraux ou formels. Si le Tribunal conclut qu'il n'a pas dans les faits été statué sur le fond de la plainte, l'examen prévu à l'al. 27(1)f) est terminé, et le rejet de la plainte n'est pas fondé. Si la plainte a déjà été examinée au fond, les intérêts importants que revêtent le caractère définitif de la décision et le recours aux mécanismes de révision applicables entrent en jeu, et le Tribunal doit alors exercer son pouvoir discrétionnaire en reconnaissant qu'il y a lieu d'attribuer à ces intérêts un poids appréciable.

[93] Si le fond de la plainte a fait l'objet d'un examen dans une autre instance, le Tribunal doit établir si un élément des circonstances de l'affaire fait en sorte qu'il ne conviendrait pas d'appliquer le principe général du caractère définitif de la décision antérieure. La Loi ne mentionne aucun facteur que le Tribunal doit prendre en compte dans l'exercice de son pouvoir discrétionnaire de rejeter ou non la plainte, hormis le caractère approprié de son examen antérieur au fond. Ce pouvoir discrétionnaire est

discretion to dismiss or not to dismiss. This exercise of discretion is “necessarily case specific and depends on the entirety of the circumstances”: *Schweneke v. Ontario* (2000), 47 O.R. (3d) 97 (C.A.), at paras. 38 and 43, cited with approval in *Danyluk*, at para. 63. *Danyluk*, however, provides a useful starting point for assembling a non-exhaustive group of relevant considerations.

[94] The mandate of the previous decision-maker and of the Tribunal should generally be considered. Is there a discernable legislative intent that the other decision-maker was intended to be an exclusive forum or, on the contrary, that the opposite appears to have been contemplated? The purposes of the legislative schemes should also generally be taken into account. For example, if the focus and purpose of the earlier administrative proceeding was entirely different from proceedings before the Human Rights Tribunal, there may be reason to question the appropriateness of giving conclusive weight to the outcome of those earlier proceedings. The existence of review mechanisms for the earlier decision is also a relevant consideration. Failure to pursue appropriate means of review will generally count against permitting the substance of the complaint to be relitigated in another forum. However, as *Danyluk* shows, this is not always a decisive consideration (paras. 74 and 80). The Tribunal may also consider the safeguards available to the parties in the earlier administrative proceedings. Such factors as the availability of evidence and the opportunity of the party to fully present his or her case should be taken into account. A further relevant consideration is the expertise of the earlier administrative decision-maker. As Binnie J. noted in *Danyluk*, the rule against collateral attack has long taken this factor into account. While not conclusive, the fact that the earlier decision is “based on considerations which are foreign to an administrative appeal tribunal’s expertise or *raison d’être*” may suggest that it did not appropriately deal with the matter: para. 77, citing *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706, at para. 50. The circumstances giving rise to the prior administrative proceedings may also be a relevant consideration. In *Danyluk*, for example, the fact that the employee had undertaken the earlier administrative proceedings at a

[TRADUCTION] « nécessairement exercé au cas par cas et son application dépend de l’ensemble des circonstances » : *Schweneke c. Ontario* (2000), 47 O.R. (3d) 97 (C.A.), par. 38 et 43, cité et approuvé dans *Danyluk*, au par. 63. Toutefois, l’arrêt *Danyluk* expose un point de départ utile pour l’établissement d’un ensemble non exhaustif de facteurs pertinents.

[94] Il faut généralement considérer la mission du décideur antérieur et celle du tribunal. Peut-on discerner une intention du législateur de conférer une compétence exclusive à l’autre décideur ou plutôt l’intention opposée? Il convient habituellement aussi de prendre en compte les objectifs des deux régimes établis par la loi. Par exemple, si l’orientation et l’objet de l’instance administrative antérieure diffèrent complètement de ceux d’une instance devant le Tribunal, il y a peut-être lieu de se demander s’il convient d’attribuer un caractère concluant au résultat de l’instance antérieure. L’existence de mécanismes de révision de la décision antérieure constitue aussi un facteur pertinent. L’omission de se prévaloir des voies de révision appropriées militera généralement contre la remise en cause du fond d’une plainte devant un autre forum. Comme l’illustre l’arrêt *Danyluk*, toutefois, il ne s’agit pas toujours là d’un facteur déterminant (par. 74 et 80). Le Tribunal peut également examiner les garanties offertes aux parties dans l’instance administrative antérieure. Des critères comme la disponibilité d’éléments de preuve et la possibilité pour l’intéressé de faire valoir tous ses moyens devraient être pris en compte. L’expertise du décideur administratif antérieur est aussi un facteur pertinent. Comme le juge Binnie l’a indiqué dans *Danyluk*, ce facteur intervient depuis longtemps dans l’application de la règle prohibant les contestations indirectes. Le fait que la décision antérieure « repose sur des considérations étrangères à l’expertise ou à la raison d’être d’une instance administrative d’appel », bien qu’il ne soit pas déterminant, peut indiquer qu’il n’a pas été statué de façon appropriée sur la question : par. 77, citant *R. c. Consolidated Maybrun Mines Ltd.*, [1998] 1 R.C.S. 706, par. 50. Les circonstances ayant mené à l’instance antérieure peuvent aussi constituer un facteur pertinent. Dans *Danyluk*, par exemple, le fait que l’employée ait entrepris le

time of “personal vulnerability” was taken into account (para. 78).

[95] The most important consideration, however, is the last one noted by Binnie J. in *Danyluk*, at para. 80: whether giving the earlier proceeding final and binding effect will work an injustice. If there is substantial injustice, or a serious risk of it, poor procedural choices by the complainant should generally not be fatal to an appropriate consideration of his or her complaint on its merits.

[96] The Tribunal’s approach to the s. 27(1)(f) discretion is in line with the *Danyluk* factors. For example, in *Villella*, the Tribunal discussed a number of the factors which it should consider. It emphasized that the question was not whether, in its view, the earlier proceeding was correctly decided or whether the process was the same as the Tribunal’s process. The Tribunal recognized that it is the clear legislative intent of s. 25 that proceedings before the Tribunal are not the sole means through which human rights issues can be appropriately addressed. However, the Tribunal also noted that s. 27(1)(f) obliged it to examine the substance of the matter and not to simply “rubber stamp” the previous decision (para. 19). This requires looking at such factors as the issues raised in the earlier proceedings; whether those proceedings were fair; whether the complainant had been adequately represented; whether the applicable human rights principles had been canvassed; whether an appropriate remedy had been available; and whether the complainant chose the forum for the earlier proceedings. This flexible and global assessment seems to me to be exactly the sort of approach called for by s. 27(1)(f).

#### D. Application

[97] At the end of the day, I agree with Abella J.’s conclusion that the Tribunal’s decision not to dismiss the complaint under s. 27(1)(f) was patently unreasonable within the meaning of s. 59 of the

recours administratif antérieur à un moment qui faisait d’elle une « personne vulnérable » a été pris en compte (par. 78).

[95] Le facteur le plus important, toutefois, est celui que le juge Binnie mentionne en dernier lieu dans *Danyluk*, au par. 80 : l’injustice pouvant résulter de l’attribution d’une portée définitive et exécutoire à l’instance antérieure. En cas d’injustice substantielle ou de risque sérieux d’une telle injustice, les choix procéduraux malavisés du plaignant ne devraient généralement pas sonner le glas d’un examen au fond approprié de sa plainte.

[96] La façon dont le Tribunal a abordé l’exercice du pouvoir discrétionnaire prévu à l’al. 27(1)(f) est conforme aux facteurs énumérés dans *Danyluk*. Par exemple, dans *Villella*, il a examiné un certain nombre de facteurs à prendre en compte. Il a souligné que la question n’était pas de savoir si, à son avis, la décision antérieure était bien fondée ou si la procédure appliquée était la même que celle devant le Tribunal. Il a reconnu que selon l’intention législative claire à la base de l’art. 25, le recours devant le Tribunal n’est pas le seul moyen permettant qu’il soit statué de façon appropriée sur une question de droits de la personne. Il a également indiqué, toutefois, que l’al. 27(1)(f) l’oblige à examiner le fond de la plainte et non à simplement entériner [TRADUCTION] « les yeux fermés » la décision antérieure (par. 19). Il lui faut, en conséquence, tenir compte d’éléments comme les questions soulevées dans l’instance antérieure et les questions de savoir si cette instance s’est déroulée de façon équitable, si le plaignant était bien représenté, si les principes applicables en matière de droits de la personne ont été examinés, si une réparation appropriée pouvait être accordée et si le choix du forum antérieur relevait du plaignant. Cette évaluation globale et souple me paraît être exactement la démarche que requiert l’al. 27(1)(f).

#### D. Application

[97] En dernière analyse, je souscris à la conclusion de la juge Abella qu’en refusant de rejeter la plainte en application de l’al. 27(1)(f), le Tribunal a rendu une décision manifestement déraisonnable

ATA. For the purposes of that section, a discretionary decision is patently unreasonable if, among other things, it “is based entirely or predominantly on irrelevant factors” (s. 59(4)(c)), or “fails to take statutory requirements into account” (s. 59(4)(d)). While in my view, the Tribunal was entitled to take into account the alleged procedural limitations of the proceedings before the Review Officer, it committed a reversible error by basing its decision on the alleged lack of independence of the Review Officer and by ignoring the potential availability of judicial review to remedy any procedural defects. More fundamentally, it failed to consider whether the “substance” of the complaint had been addressed and thereby failed to take this threshold statutory requirement into account. It also, in my view, failed to have regard to the fundamental fairness or otherwise of the earlier proceeding. All of this led the Tribunal to give no weight at all to the interests of finality and to largely focus instead on irrelevant considerations of whether the strict elements of issue estoppel were present.

[98] However, I do not agree with my colleague’s proposed disposition of the appeal. In her reasons, Abella J. would allow the appeal, set aside the Tribunal’s decision and dismiss the complaints. In my opinion, the appeal should be allowed and, in accordance with what I understand to be the general rule in British Columbia, the Workers’ Compensation Board’s application to dismiss the complaints under s. 27(1)(f) should be remitted to the Tribunal for reconsideration. As the Court of Appeal held in *Workers’ Compensation Appeal Tribunal (B.C.) v. Hill*, 2011 BCCA 49, 299 B.C.A.C. 129, at para. 51, “the general rule is that where a party succeeds on judicial review, the appropriate disposition is to order a rehearing or reconsideration before the administrative decision-maker, unless exceptional circumstances indicate the court should make the decision the legislation has assigned to the administrative body” (see also *Allman v. Amacon Property Management Services*

au sens de l’art. 59 de l’ATA. Suivant cet article, est manifestement déraisonnable une décision procédant d’un pouvoir discrétionnaire exercé [TRADUCTION] « entièrement ou principalement sur le fondement de facteurs non pertinents » (al. 59(4)c) ou « sans tenir compte d’exigences prévues par la loi » (al. 59(4)d)). Or, bien que j’estime que le Tribunal pouvait tenir compte des allégations relatives aux limites procédurales du recours devant l’agent de révision, il a selon moi commis une erreur justifiant l’annulation de sa décision en fondant cette dernière sur le prétendu manque d’indépendance de l’agent de révision et en faisant abstraction de la possibilité de recourir au contrôle judiciaire pour corriger tout vice procédural. Plus fondamentalement encore, il n’a pas examiné s’il avait été statué sur le « fond » de la plainte, omettant ainsi de prendre en considération une condition imposée par la Loi. Je suis également d’avis qu’il n’a pas pris en compte l’équité, fondamentale ou autre, de l’instance antérieure. Tout cela a fait en sorte que le Tribunal n’a accordé aucun poids aux intérêts en jeu en matière de caractère définitif de la décision, et qu’il a largement fondé son analyse, plutôt, sur des facteurs non pertinents rattachés à l’existence des stricts éléments constitutifs de la préclusion fondée sur une question déjà tranchée.

[98] Toutefois, je ne puis souscrire à la solution que propose ma collègue dans ce pourvoi. Dans ses motifs, la juge Abella se dit d’avis d’accueillir le pourvoi, d’annuler la décision du Tribunal et de rejeter les plaintes. Selon moi, il y a lieu d’accueillir le pourvoi et, comme le veut à mon avis la règle générale en Colombie-Britannique, de renvoyer au Tribunal, pour qu’il la réexamine, la demande de rejet des plaintes présentée par la Commission aux termes de l’al. 27(1)f). Comme l’a affirmé la Cour d’appel dans *Workers’ Compensation Appeal Tribunal (B.C.) c. Hill*, 2011 BCCA 49, 299 B.C.A.C. 129, par. 51, [TRADUCTION] « suivant la règle générale, lorsqu’une partie a gain de cause à l’issue d’un contrôle judiciaire, il convient d’ordonner une nouvelle audition ou un nouvel examen devant le décideur administratif, à moins que des circonstances exceptionnelles justifient la cour de rendre la décision qui, selon la loi, appartient à l’organisme administratif » (voir également *Allman c.*

*Inc.*, 2007 BCCA 302, 243 B.C.A.C. 52). This case does not present exceptional circumstances justifying diverging from this general rule.

[99] I would therefore allow the appeal without costs and remit the Workers' Compensation Board's application under s. 27(1)(f) to the Tribunal for reconsideration.

*Appeal allowed.*

*Solicitor for the appellant: Workers' Compensation Board, Richmond.*

*Solicitor for the respondents Guiseppa Figliola, Kimberley Sallis and Barry Dearden: Community Legal Assistance Society, Vancouver.*

*Solicitor for the respondent the British Columbia Human Rights Tribunal: British Columbia Human Rights Tribunal, Vancouver.*

*Solicitor for the intervener the Attorney General of British Columbia: Attorney General of British Columbia, Victoria.*

*Solicitors for the intervener the Coalition of BC Businesses: Heenan Blaikie, Vancouver.*

*Solicitor for the intervener the Canadian Human Rights Commission: Canadian Human Rights Commission, Ottawa.*

*Solicitor for the intervener the Alberta Human Rights Commission: Alberta Human Rights Commission, Calgary.*

*Solicitors for the intervener the Vancouver Area Human Rights Coalition Society: Bull, Housser & Tupper, Vancouver.*

*Amacon Property Management Services Inc.*, 2007 BCCA 302, 243 B.C.A.C. 52). En l'espèce, aucune circonstance exceptionnelle ne justifie que l'on écarte cette règle générale.

[99] Je suis donc d'avis d'accueillir le pourvoi sans dépens et de renvoyer au Tribunal, pour qu'il la réexamine, la demande de la Commission présentée aux termes de l'al. 27(1)f).

*Pourvoi accueilli.*

*Procureur de l'appelante : Workers' Compensation Board, Richmond.*

*Procureur des intimés Guiseppa Figliola, Kimberley Sallis et Barry Dearden: Community Legal Assistance Society, Vancouver.*

*Procureur de l'intimé British Columbia Human Rights Tribunal : British Columbia Human Rights Tribunal, Vancouver.*

*Procureur de l'intervenant le procureur général de la Colombie-Britannique : Procureur général de la Colombie-Britannique, Victoria.*

*Procureurs de l'intervenante Coalition of BC Businesses : Heenan Blaikie, Vancouver.*

*Procureur de l'intervenante la Commission canadienne des droits de la personne : Commission canadienne des droits de la personne, Ottawa.*

*Procureur de l'intervenante Alberta Human Rights Commission : Alberta Human Rights Commission, Calgary.*

*Procureurs de l'intervenante Vancouver Area Human Rights Coalition Society : Bull, Housser & Tupper, Vancouver.*

Editor's note: Corrigendum released on September 17, 2015. Original judgment has been corrected with text of corrigendum appended.

## IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Fort Nelson First Nation v. British Columbia (Environmental Assessment Office)*,  
2015 BCSC 1180

Date: 20150707  
Docket: S146183  
Registry: Vancouver

2015 BCSC 1180 (CanLII)

Between:

**Chief Liz Logan in her own right on behalf of  
the Members of the Fort Nelson First Nation**

Petitioners

And

**Executive Director of the British Columbia Environmental  
Assessment Office, Canadian Silica Industries Inc. and Jeffrey Bond**

Respondents

Corrected Judgment: The text of the judgment was corrected at paragraphs 28, 114, 119, 151, 153, 158, 164, 165, and 274 on September 17, 2015

Before: The Honourable Mr. Justice Davies

On judicial review from: A decision of the British Columbia Environmental Assessment Office, dated August 8, 2013

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Place and Date of Trial/Hearing:

Vancouver, B.C.  
January 21 - 23 and  
April 1, 2015

Place and Date of Judgment:

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July 7, 2015

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## **INTRODUCTION**

[1] This judgment concerns the threshold production capacity that will trigger an environmental assessment under Table 6 (Mine Projects) of the *Reviewable Projects Regulation*, B.C. Reg. 370/2002 (the *Regulation*) of the *Environmental Assessment Act*, S.B.C. 2002, c. 43 (the *Act*) for a new Sand and Gravel Pit. That new pit is proposed for development by the respondents, Canadian Silica Industries and Jeffrey Bond (collectively CSI). It is identified as the Komie North Mine.

[2] The Komie North Mine will be located on lands within the traditional territory of the petitioner, Fort Nelson First Nation (FNFN) in an area about 80 kilometers northeast of the City of Fort Nelson near Komie Creek.

[3] In addition to the Komie North Mine, CSI may eventually seek to develop up to five other new sand and gravel mines, all on lands within the FNFN's traditional territory.

[4] Three of those other potential mines would also be located in the area near Komie Creek and two would be located about 100 miles southeast of Fort Nelson, near Dazo Creek.

[5] CSI's development of the Komie North Mine and potentially the other five mines is intended for the extraction of "silica" or "frac" sand for use in the "hydraulic fracturing (or 'fracking') process" used in the extraction of natural gas.

[6] Many existing and potential deposits of natural gas are located in or near the FNFN traditional territory, making the frac sand sought to be extracted by CSI a particularly valuable commodity due to proximity to the needs of the developers of gas deposits.

[7] The FNFN is concerned about the potential environmental impact that the Komie North Mine may have upon its traditional territory and existing treaty rights. Those concerns are exacerbated by the magnitude of the potential environmental impact of five additional mines in the same territory.

[8] The FNFN has made those concerns known to the Environmental Assessment Office (EAO) as well as other governmental authorities from whom approval must be obtained by CSI for the development and operation of the Komie North Mine as well as the other potential mines identified by CSI.

[9] More specifically, as it relates to this petition, the FNFN has asserted in numerous communications with the EAO that the Komie North Mine should be designated as a reviewable project under the *Regulation*.

[10] However, on August 8, 2013, without consultation with the FNFN, the EAO determined (the Decision) that the Komie North Mine will not be a reviewable project.

[11] The EAO reached that conclusion by accepting that the annual production capacity for the Komie North Mine, as determined and represented by CSI, does not meet the threshold criteria of Table 6 of the *Regulation* that would make the project reviewable.

## **ISSUES**

[12] The Decision and the circumstances that led to the EAO's making of it are each the subject of this petition for judicial review.

[13] The FNFN alleges that the EAO's failure to designate the Komie North Mine as a reviewable project under the *Regulation* resulted from an unreasonable interpretation and application of the threshold criteria in Table 6.

[14] The FNFN also alleges that in reaching the Decision the EAO and the respondent Province of British Columbia (the Province) breached the constitutional obligations of the Crown in Right of the Province (the Crown) to consult with the FNFN and, if necessary accommodate its interests when making the Decision which adversely affects its aboriginal treaty rights.

[15] In response, the EAO asserts that the Decision both correctly and reasonably interpreted the threshold criteria in Table 6 of the *Regulation* applied in determining that the Komie North Mine is not a reviewable project.

[16] In further response, although the Province does not dispute that the Province had a duty to consult with the FNFN with respect to the Komie North Mine generally, it says that additional consultation with the FNFN by the EAO specifically related to its interpretation and application of the threshold criteria in Table 6 of the *Regulation* to the Komie North Mine was and is not required.

[17] Determination of the issues raised by this petition engages consideration and interpretation of: the provisions of the *Act* and the *Regulation*; consideration of Treaty No. 8 (Treaty 8) as it relates to the Komie North Mine project; and, the applicable standard of judicial review to be applied by the court in respect of the Decision and in relation to the alleged breach of the Province's duty to consult.

[18] Further, while the Decision specifically under review relates only to CSI's proposed development of the Komie North Mine, CSI's potential development of additional frac sand extraction mining operations in the FNFN's traditional territory is also relevant.

[19] That is so because the interpretation and application of the threshold criteria by the EAO with respect to the Komie North Mine will obviously impact environmental assessment decision making in relation to the all of the sand and gravel operations in the FNFN's territory contemplated by CSI and especially the three located in the immediate vicinity of the Komie North Mine.

## **BACKGROUND**

[20] The FNFN's traditional territory is located in the northeast corner of British Columbia. It stretches to both the Yukon Territory and Northwest Territory borders on the north and the Alberta border on the east. To the west it extends beyond the Kechika River.

[21] The FNFN is a band as defined by the *Indian Act*, R.S.C. 1985, c. I-5. It has approximately 800 members who are governed by an elected Chief (presently the petitioner Chief Liz Logan) and council.

[22] The ancestors of the FNFN adhered to Treaty 8 in 1910. Treaty 8 consists of both oral and written terms.

[23] Among other things, Treaty 8 provides:

...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 and other purposes.

[24] In addition to those specific terms in evidence on this petition is a report from the Treaty Commissioners (who negotiated Treaty 8) to the Government of Canada which stated among other things:

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.

[25] That report went on to say:

We assured them that the treaty would not lead to any forced interference with their mode of life, that it did not open the way to the imposition of any tax, and that there was no fear of enforced military service.

[26] Ms. Lana Lowe, the Director of the FNFN's Department of Lands and Resources (the "FNFN Lands Department") has deposed that:

11. The traditional FNFN mode of life is based on our lands and rivers. Our families have always tended and harvested resources from the areas around their villages, using patterns known as a “seasonal round”.
12. These traditions and patterns are alive today. Among other things, FNFN members:
  - (a) travel throughout the Territory, by foot, boat, and other means;
  - (b) gather plants for food and medicine;
  - (c) build and maintain cabins;
  - (d) catch fish;
  - (e) hunt animals such as moose, bear, rabbits, caribou; and
  - (f) trap furbearing animals such as beaver and lynx.
13. Each FNFN family has a lake and river area for use in the season round. For example, a family from Náduhi Deezé (Snake River) would travel from that village to Deer River, then down the Nelson River, up to Two Island Lake, over to the Tsea Lakes and River, then to Komie Lake, down to Kotcbo Lake, and then back to Snake River.
14. Our ancestors used knowledge developed over centuries to make decisions about these activities and otherwise manage the natural resources in the Territory.
15. FNFN works hard to maintain, improve, and use this knowledge today because our members remain connected with and responsible for the lands, waters, plants, and animals that our ancestors tended for so long.

[27] The FNFN Lands Department has been set up to promote environmental stewardship in the FNFN’s traditional territory. Its responsibilities include dealing with referrals from Crown agencies and proponents of projects in relation to activities proposed to take place in the FNFN’s territory.

[28] In May of 2010, in order to undertake exploration and development of a frac sand quarry in the Komie North area the respondent, Jeffrey Bond on his own behalf and on behalf of CSI submitted an application for a License of Occupation under s. 11 of the *Land Act*, R.S.B.C. 1996, c. 245 for a 210 hectare parcel of land adjacent to Komie Road.

[29] On August 30, 2010, the Province provided a copy of that application to the FNFN Lands Department.

[30] By letters dated October 13, 2010 and December 9, 2010, the FNFN Lands Department advised the Province's Integrated Lands Management Bureau of concerns with respect to potential adverse impact of the proposed Komie North Mine on the FNFN's rights and interests. Among other things the FNFN sought "an adequate and meaningful consultation process" and the provision of detailed documentation concerning CSI's proposal. Those letters also referenced concerns about the lack of an environmental assessment for the project.

[31] On March 24, 2011, a tenure offer for a five year term commencing March 21, 2011 for the area which comprises the site that is now the proposed location of the Komie North Mine was made to CSI by the Ministry of Forests, Lands and Natural Resources Operations (Ministry of FLNRO) for a License of Occupation comprised of an investigative phase and a production phase.

[32] On May 24, 2011, the Ministry of FLNRO advised the FNFN that a License of Occupation for 199.9 hectares comprising the Komie North Mine site had been approved for a term of five years for quarry purposes. The letter also stated that:

...

A referral letter was sent on August 30, 2010 requesting comments on how this application may impact your rights. A faxed letter was received on October 13, 2010 that did not specifically outline how the rights of Fort Nelson First Nation would be impacted by approving this application.

In the absence of site specific comments we have been left to use existing knowledge of the area and previous consultation to mitigate the low potential impact to rights.

[33] No mention in that correspondence was made in respect of the December 9, 2010 letter from the FNFN that had also raised the concerns addressed by the FNFN in its October 13, 2010 letter.

[34] While processing of its application for a License of Occupation for the Komie North Mine was underway, CSI had also made applications for Licenses of Occupation relating to sand and gravel quarries for two other sites in the vicinity of the Komie North Mine as well as two in the Dazo Creek area.

[35] Those additional four applications were brought to the attention of the FNFN Lands Department before it was advised on May 24, 2011 of the approval by the Ministry of FLNRO of the License of Occupation of the Komie North Mine site.

[36] After approval of the License of Occupation of the Komie North Mine site was made known to the FNFN it was also notified in August of 2011 of an application for a License of Occupation for a fourth sand and gravel quarry in the Komie Creek area sought by CSI.

[37] The total land area for the six Licences of Occupation for sand and gravel quarrying sought by CSI is approximately 4,800 acres.

[38] In addition to the total of six Licenses of Occupation for sand and gravel quarries applied for by it CSI also applied (on July 11, 2011) to the Province for an investigative use permit over 216,368 hectares of land in the FNFN's traditional territory that also encompassed CSI's four applications in the vicinity of Komie Creek.

[39] CSI's investigative permit application was forwarded by the Province to the FNFN Lands Department on September 11, 2011 with the advice that the permit would be used to "identify potential sites for frac sand extraction".

[40] At that time and up until the hearing of this petition there were no frac sand quarries in the FNFN's traditional territory although other traditional sand and gravel pits did exist.

[41] On June 13, 2012, Chief Kathy Dickie, then Chief of the FNFN wrote to the Honourable Terry Lake, then the Minister of Environment for the Province (the Minister) "formally" requesting that the Minister designate the four sand and gravel quarries proposed near Komie Creek as well as the two Dazo Creek sites for which Licenses of Occupation had been sought by CSI as reviewable projects under s. 6 of the *Act*.

[42] Among other things, in that letter the Chief Dickie wrote concerning the four Komie North applications and proposed quarries:

The Komie North Applications

As you can see in the table attached as Schedule 1 to this letter, there are five applications for the Komie North area. Please see the attached map (Schedule 2 - Komie North) which sets out the location of these applications and demonstrates their geographic proximity to each other...All five of the Komie North applications are from a single proponent, Jeffrey Bond and Canadian Silica Industries Inc. ("Bond-C5II"), for the same purpose - quarrying sand and gravel...the other applications are for licences of occupation and cover 1,000.6 ha. As you can see on the Schedule 2 map, applications 8015273, 8015425 and 8015352 are all contiguous. Application 8015443 is 1.9 km away from the site of those three applications. Applications 8015425 and 8015352 have estimated production limits of 240,000 tonnes per year. Application 8015443 has an estimated production limit of 249,000 tonnes per year. No production estimate is provided for 8015273, but it seems reasonable to assume that it would be similar to the other applications put forward by the Bond-C5II proponent in Komie North and Dazo Creek which all have production estimates between 240,000-249,000 tonnes per year. Applications 8015425 and 8015443 indicate that gravel will also be quarried, but it is not clear whether the gravel is included in the production estimates, as it should be. This may increase the estimates. Notably, all of these estimates fall just short of the production capacity criteria set out in Table 6 (Mine Projects) of the EAA's Reviewable Project Regulation ("Regulation"). Under the Regulation, any sand and gravel pit project which produces  $\geq 1,000,000$  tonnes of sand or gravel or both over a period of  $\leq 4$  years is subject to an environmental assessment ("EA"). Also under the Regulation, any construction stone and industrial mineral quarry project which produces it 250,000 tonnes/year and is regulated as a mine under the *Mines Act* is subject to an EA. All four applications note that they will utilize the same processing facility that is to be situated on the land subject to application 8015352.

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[43] Chief Dickie also wrote:

Environmental, social, heritage and health effects

It is likely the projects these applications represent will have significant adverse environmental effects and may have significant adverse social, heritage and health effects. It is difficult to set out many details in this regard because more information is required from the proponents, and assessments of the values [e.g. ecological and cultural] in these areas need to be undertaken, before effects can be determined. Without an EA, much of this information may not be provided and these assessments may not be undertaken. However, the information available points to the potential for significant adverse environmental effects. These applications affect very large areas: the four Komie North applications affect 1,000.6 ha (= 2,500 acres) and the three remaining Dazo Creek applications affect 7,560 ha (= 18,900 acres). The estimated rates of production for each of the applications taken

alone is nearly sufficient to trigger an EA under the Regulation; any two taken together would trigger an EA. This raises questions as to the veracity of the estimates - were they purposefully under-estimated to avoid triggering an EA? This is particularly so as all of the applications have approximately the same production estimates, despite a tremendous variance in the size of the areas affected by the applications (from 50.7 to 4,124 ha.). Presumably the thresholds in the Regulation are set at levels at which there is concern that projects could result in adverse effects which should be assessed and mitigated through the EA process. Further, the Dazo Creek applications are adjacent to RRAs which have been temporarily set aside from development because they represent remnant core caribou habitat; extensive industrial development on these adjacent lands could significantly affect the value of this scarce habitat, particularly given the scale of these developments. Also, a proper cumulative effects assessment would require these applications be considered together in a single EA.

The lands these applications affect are within FNFN's territory and are areas where members practice their treaty rights. As an example, the Dazo Creek proposals are set between two FNFN village sites - Fontas and Kantah, which is a strong indicator that the Dazo Creek area subject to these applications has seen intensive traditional use over thousands of years and to this day. Both the Komie North and Dazo Creek areas are used for hunting, fishing, trapping, habitation, gathering and travel. These areas contain important habitats supporting animals we are reliant on for the practice of our treaty rights.

This information on potential effects is, by necessity, provisional only and very general as we do not have (nor do we believe the Province has) sufficient information from the proponents to properly evaluate these proposals at this time. Further, we have not undertaken any site and project specific assessments to determine what FNFN interests may be affected and to what extent they may be affected. We only provide this general information to assist you in your inquiries as to whether you should exercise your discretion under the EAA to designate these applications as a reviewable project. This information is not provided in the context of a consultation on these applications as it is not yet clear how these projects will be assessed by the Province and how FNFN and the Province will consult on these applications (e.g., under what regulatory framework). Certainly, no proper consultation about impacts to our interests can be achieved when these projects are proposed in such a fragmented fashion.

[44] The total area of concern addressed by Chief Dickie with respect to the Dazo Creek applications (7,650 hectares) included three applications by proponents other than CSI.

[45] Chief Dickie also went on to express concerns with "project splitting" which she asserted should require designation of the projects as reviewable projects under

the *Act* and *Regulation*. Specifically with respect to the four Komie North vicinity applications she wrote:

#### Project Splitting

It would appear these applications have been designed and submitted in such a fashion as to avoid triggering an EA through project splitting, by ensuring that the estimated production capacity for each application "split off" from the whole (all applications taken together) falls just short of the EA threshold for projects of this type in the Regulation. It is our view that the four Komie North applications for licences of occupation are all a single reviewable project for the following reasons (summarized here but as set out in more detail above):

- three applications are contiguous and a fourth is only 1.9 km. away;
- all are proposed by the same proponent - Bond-CSII;
- all are for the same industrial activity-quarrying sand and gravel; and
- all of the product quarried will be processed at the same facility.

Further, the proponent has explicitly stated in correspondence to us that their applications in Komie North "may all be considered effectively as one application" and their application materials note that each application complements the others (e.g. the 8015443 application notes "this application compliments [sic] our Komie North, Cabin-Komie North and Brandt-Komie North applications that were previously submitted...").

[46] In requesting designation as a reviewable project Chief Dickie concluded by stating:

#### Summary

It is FNFN's request of you that the applications for Komie North and Dazo Creek be designated a single reviewable project under the EAA because of the interrelatedness of these applications. These applications represent projects which may have significant adverse environmental, social, heritage and health effects, given the scope of the industrial activity proposed. Designation of these applications as a reviewable project is in the public interest, as it will enable the engagement of the public in a proper assessment and it will uphold the public interest in environmental protection that the EA process represents. It is also in the public interest to ensure the EA process is properly triggered and that efforts to circumvent it do not succeed.

Thank you for your time and attention to this matter. We look forward to hearing from you as to your decision on an EA of these applications. If you have any questions, please do not hesitate to contact us

[47] Chief Dickie's letter of request was responded to by Ms. Karen Christie, Executive Project Director of the EAO on February 8, 2013. In responding she wrote:

On June 20, 2012, Fort Nelson First Nation wrote to the Honourable Terry Lake, Minister of Environment, to request that the Minister designate seven frac sand mine proposals near Dazo Creek and Komie Creek in northeast BC as a reviewable project (or projects) pursuant to section 6 of the *Environmental Assessment Act* (Act). The frac sand mine proposals are described in seven License of Occupation applications under the *Land Act*.

I am writing to let you know that the Minister has decided not to designate the frac sand mine proposals as a reviewable project (or projects) under the Act. The Minister concluded that the proposals are preliminary, and not yet sufficiently defined to be considered proposed projects. As such, it is premature to assess their suitability for designation as a reviewable project (or projects) under section 6 of the Act.

Environmental Assessment Office (EAO) is of the opinion that the six frac sand mine proposals described in the License of Occupation applications jointly submitted by Jeffrey Bond and Canadian Silica Industries Inc. may, when further advanced in terms of design, constitute a single project that requires an environmental assessment (EA). EAO has informed Jeffrey Bond and Canadian Silica Industries Inc. of the Minister's decision and EAO's opinion by letter, and has requested that they contact EAO prior to initiating the development stage of any of the six Licences of Occupation, should they be issued by Ministry of Forests, Lands and Natural Resource Operations (FLNRO), in order to determine whether an EA will be required

[Emphasis added.]

[48] On December 1, 2012, three months before that response on February 8, 2013 to the FNFN's designation request of June 13, 2012, CSI had, unbeknownst to the FNFN, already submitted a Notice of Work application for the Komie North Mine to the Ministry of Energy and Mines (the Mines Ministry) for a permit under the *Mines Act*, R.S.B.C. 1996, c. 293.

[49] Among other things, the Komie North Mine Notice of Work application stated that the estimated annual extraction from the site was 240,000 tonnes per year.

[50] On May 2, 2013 the Ministry of FLNRO notified the FNFN that CSI had submitted a Sand and Gravel/Quarry Operation and Notice of Work application for the Komie North Mine and had also applied for an Occupant License to Cut.

[51] That notification enclosed documents relevant to the proposed development including the Notice of Work application that CSI had submitted to the Mines Ministry on December 1, 2012. Also included with the notification were copies of:

- 1) an "Updated Management Plan (Development Plan)" dated March 13, 2013; and
- 2) a "Borrow Pit and Reclamation Plan for Komie North Project" dated November 28, 2012 prepared by CSI's consultant AMEC Environment and Infrastructure.

[52] CSI has submitted (at para. 23 of its written submissions) that:

23. The Updated Management Plan differed from the Preliminary Management Plan, in that it included a detailed mine plan, a more detailed water management plan, a reclamation plan, and better defined estimate of the quantity of saleable material and included the results of further investigative work, including a non-invasive surface investigation, a sonic drill investigation and an AIA [Archeological Impact Assessment]. The description of the production capacity of the mine in the Updated Management Plan is:

Based upon current market conditions, 240,000 tonnes of product will be produced annually.

... Based on a production rate of 240,000 tonnes of product per year, the Phase I, 5 years of mining would produce 1,200,000 tonnes of product sand per year and 950,000 tonnes of waste gravel material to be backfilled into the pit. The remaining resource at the 4.3m extraction depth for Phase II, years 6-12 is estimated at 1,764,000 tonnes and 1,386,000 waste backfill.

[53] The Executive Summary of the Borrow Pit and Reclamation Plan stated, amongst other things, that:

The Komie North Sand Project consists of approximately 206.5 hectares, which includes three separate pits, processing plant, light industrial area and a truck haul road between pits and the processing plant. The land is under Crown Lease Tenures. The property has been drilled by 28 drill holes and test pits and the sand and gravel resources extensively sampled and tested. The finished product after processing will be washed and dried sand used in the fracking industry. The boulders, gravel, silt and clay material extracted as run-of-mine material and processed through the plant as waste material will be used as backfill after mining extraction is completed. The filler press material from de-watering process at the wash plant will also be deposited as backfill in the mine out areas.

...

The sand and gravel deposit to be exploited is up to 15 m thick; however only product down to the water table is currently planned to be extracted; additional extraction will require art assessment of site hydrogeology. Annual production will not exceed 240,000 tonnes.

[54] On June 3, 2013 the FNFN Lands Department responded to the Ministry of FLNRO's letter of May 2, 2013, and the documentation provided with it.

[55] In that response Ms. Lowe complained about what she asserted was an inadequate review period and also what she claimed were incomplete and inaccurate application materials provided by CSI. She also provided particulars of those assertions.

[56] Concerning the need for an environmental assessment that had first been requested in June of 2012 when Chief Dickie wrote to the Minister Ms. Lowe wrote:

Referral to the EAO

In the EAO's letter of February 8, 2013, on behalf of the Minister of Environment, the EAO stated its opinion that the frac sand proposals of the Proponent may, "when further advanced in terms of design", constitute a reviewable project subject to an environmental assessment ("EA"). In this letter, the EAO requested notification from the Proponent "prior to initiating the development stage of any of the six Licences of Occupation, should they be issued," to enable the EAO to determine whether an EA would be required. The EAO needs to be made aware that the Proponent has initiated the development stage of its only existing Licence of Occupation for the Komie North parcel, as the Proponent has applied for the Authorizations in order to allow it to proceed with construction of a frac sand processing facility on that parcel. Please confirm that the EAO has been made aware of this development application. The EAO must have the opportunity to assess these current applications of the Proponent's.

As part of its application to proceed to development on the Komie North parcel, the Proponent has amended its Development Plan in order to provide more detail on its proposed development activities. The production estimates in the amended Development Plan considerably exceed the threshold necessary to classify the proposed project as reviewable under the *Reviewable Projects Regulation* (the "*Regulation*") under the EAA, and leave no doubt that the Proponent's proposal for the Komie North parcel must be subject to an EA, and receive approval under the EAA, before further provincial approvals are issued.

Table 6 of the *Regulation* establishes that a sand and gravel pit is a reviewable project subject to an EA if the new pit facility:

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... will have a production capacity of

- (a)  $\geq 500\,000$  tonnes/year of excavated sand or gravel or both sand and gravel during at least one year of its operation, or
- (b) over a period of  $\leq 4$  years of operation,  $\geq 1\,000\,000$  tonnes of excavated sand or gravel or both sand and gravel,

The amended Development Plan states at page 3, that during the first five years of mining on the Komie North parcel, the Proponent will excavate an estimated 1,200,000 tonnes of sand and 950,000 tonnes of gravel. This works out to an estimated extraction of 430,000 tonnes of sand and gravel annually, or 1,720,000 tonnes of excavated sand and gravel over four years. It is abundantly clear that those numbers exceed the threshold in the *Regulation* of 1,000,000 tonnes of excavated sand and gravel over four years. Thus the Proponent's proposed project is a reviewable project under the *Regulation* which is subject to an EA.

The Proponent has apparently tried to circumvent the threshold in the *Regulation* by only counting sand in the project's production estimate and characterizing the gravel as "waste". This is inaccurate in both law and fact. The *Regulation* clearly sets the threshold number for a reviewable project based on the tonnage of excavated sand and gravel, counted together. What the proponent chooses to do with the sand or gravel once it is excavated does not affect the determination of a reviewable project under the *Regulation*. In any event, the Proponent clearly intends to put the gravel to use. The amended Development Plan states at page 4 that "gravel material from the processing of the sand will be used as road base and topping" and later states at page 9 that "the roads and areas surrounding all of the plant's facilities will be gravelled for safety".

It is clear that the estimated excavation of all sand and gravel from the Komie North parcel must be included in the determination of whether the Proponent's proposal constitutes a reviewable project according to the thresholds set out in the *Regulation*. It is equally evident that, according to its own estimates, the Proponent proposes to excavate an amount of sand and gravel that classifies its proposal as a reviewable project, which must be subject to an EA before any further provincial approvals for the development can be issued. It is critical that the EAO review this application and determine the applicability of the *EAA* to the proposed project before FLNRO proceeds to issue any Authorizations respecting the Proponent's applications, FNFN will be writing to the EAO requesting the EAO assess whether the Proponent's current applications for the Komie North parcel constitute a reviewable project under the *EAA* (and making the argument as set out above that they do) and that the EAO communicate to the respective provincial agencies that the Proponent's proposal is a reviewable project and, as such, section 9 of the *EAA* prevents the issuance of the Authorizations sought until an EA certificate has been issued.

In closing Ms. Lowe stated:

FNFN looks forward to answers from the province as to the issues raised in this correspondence: Has the EAO been provided with notice of and full information concerning the Proponent's applications that are the subject of this referral? What is the province's rationale for determining that this project could be authorized as a "phased" tenure? What is the status of the province's internal consideration as to whether the Proponent's frac sand extraction proposals should be treated as a major project? We also look forward to receiving complete and corrected materials to support the applications in question.

At an appropriate time, FNFN and the province will need to meet to determine what a mutually-agreeable process for consultation on the proposed Authorizations should be. However, before that occurs, these current applications of the Proponent must be forwarded to the EAO. Then, further to the EAO's letter of February 8, 2013 on this matter, a review must be undertaken by the EAO and a decision taken by the EAO with respect to the application of the EAA to this project. As noted earlier, FNFN will be engaging directly with the EAO and the Minister of Environment on the application of the EAA to the Proponent's Komie North project and the current applications. Until such time as that review has been completed, and the EAO has communicated the results of their review, the province (FLNRO) is not in a position to process this referral as to do otherwise could be contrary to the EAA, We look forward to your assurance that a hold will be put on FLNRO's processing of this referral until such time as the EAO's decision has been taken.

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[57] In a letter dated June 18, 2013, Ms. Lowe also wrote to Ms. Christie of the EAO addressing many of the same concerns raised with the Ministry of FLNRO in her letter of June 3, 2013, concerning the development of the Komie North Mine and the need for an environmental assessment as a reviewable project.

[58] On June 19, 2103, Ms. Christie responded to Ms. Lowe by advising that:

...EAO is aware of the proponent's application to move to the development stage of its License of Occupation for the Komie North parcel.

Mike Peterson is the Project Assessment Manager working on this file, and is discussing the application with the project proponent, MEM and FNLR. Mike will respond to Fort Nelson First Nation once he has the required information.

[59] On July 19, 2013, CSI sent a letter to Mr. Peterson requesting "confirmation that the Komie North Project is not reviewable".

[60] In that letter CSI wrote:

The purpose of this letter is to seek confirmation that, the Komie North Project (LOO 815115) is not a reviewable project under the *Reviewable Projects Regulation*. This letter also provides clarification on the production level and product use stated in the reclamation and development plan submitted to Forests, Lands and Natural Resource Operations (FLNRO) for LOO 815115.

We have reviewed the proposed project against the *Reviewable Projects Regulation*. Our review concludes that the project falls below the thresholds.

The threshold for a Sand and Gravel Pit under the *Reviewable Projects Regulation* is:

- (1) A new pit facility that will have a production capacity of
  - (a) > 500 000 tonnes/year of excavated sand or gravel or both sand and gravel during at least one year of its operation, or
  - (b) over a period of < 4 years of operation, >1 000 000 tonnes of excavated sand or gravel or both sand and gravel.

The production level for products sold and used (sand and gravel) from the operation will be  $\leq$  240 000 tonnes per year (or 960 000 tonnes over 4 years). The total area of disturbance in the first 12 years of operations as shown in the mine plan will be approximately 77.5 ha.

As the production level for this proposed project will not exceed 1 000 000 tonnes of excavated sand or gravel (or both) over any 4 year operation period, the project does not trigger the *Reviewable Projects Regulation*.

In Appendix E of the development and reclamation plan, under the processing plant section, we had stated we will use the waste gravels from the processing of the sand for road base and topping. The total amount of any sand and/or gravel from this project that is sold as product, or used in construction or maintenance material, will not exceed 240 000 tonnes/year.

In the development and reclamation plan, we have stated in years 1-5 (5 years of operations) that the production from the facility will be 240 000 tonnes per year or 1 200 000 tonnes total for 5 years. In phase 2, years 6 - 12 (7 years of production), 240 000 tonnes per year will be produced or 1 680 000 tonnes total for the next 7 years. The document contains an error in the gross tonnage for phase 2 stating 1 764 000 tonnes of sand will be produced. Please accept the correction to 1 680 000 gross tonnes of product. We are sending a letter of amendment to fix this error in the development and reclamation plan to FLNRO which is dated July 19, 2013.

As per the Feb 8th, 2013 letter from EAO, should we decide to initiate the production phase of additional five Licences of Occupation we submitted to FLNRO, we will contact EAO prior to submitting NoW application(s) to the Ministry of Energy and Mines.

[61] The FNFN was not provided with a copy of that letter when it was received by the EAO.

[62] On July 19, 2013, CSI also sent a letter to the Ministry of FLNRO seeking to amend its Borrow Pit and Reclamation Plan for the Komie North Project to accord with its communications of the same date to Mr. Peterson of the EAO.

[63] The FNFN was also not provided with a copy of that letter when it was received by the Ministry of FLNRO.

[64] On August 8, 2013, without any consultation with the FNFN, Mr. Peterson authored the Decision in which he advised CSI :

I am writing in response to your letter of July 19, 2013, regarding the proposed Komie North Project (proposed Project). In your letter you request confirmation of whether the proposed Project constitutes a reviewable project for the purposes of the *Environmental Assessment Act* (Act).

Project proponents are responsible for making their own determination as to whether or not their proposed project falls within the thresholds set out in the Reviewable Projects Regulation (the Regulation). While Environmental Assessment Office (EAO) is willing to provide its position in this regard, nothing in this letter should be construed as advice respecting the application of the Regulation to the proposed Project.

The *Reviewable Projects Regulation* (Regulation) prescribes the criteria for when projects are reviewable under the Act. Under the Regulation, the proposed Project would be a sand and gravel pit, and the criteria for reviewability are provided in Part 3 of the Regulation. A new sand and gravel pit facility constitutes a reviewable project if the facility will have a production capacity of:

- (a)  $\geq 500,000$  tonnes/year of excavated sand or gravel or both sand and gravel during at least one year of its operation, or
- (b) over a period of  $\leq 4$  years of operation,  $\geq 1,000,000$  tonnes of excavated sand or gravel or both sand and gravel.

According to the information provided in your letter of July 19, 2013, for the proposed Project,  $\leq 240,000$  tonnes per year ( $\leq 960,000$  tonnes over 4 years) of sand and gravel products would be sold or used as construction or maintenance material for the operation. Based on this information, the proposed Project does not meet the criteria for a reviewable project under the Regulation.

[Emphasis added.]

[65] The Decision was copied to the Mines Ministry as well as the Ministry of FLNRO but not to the FNFN.

[66] On September 13, 2013, after the Decision had, unbeknownst to the FNFN already been made on August 8, 2013, the FNFN wrote to the Ministry of FLNRO (with a copy to the EAO) advising that the FNFN had still not received a full response to its June 3, 2013 correspondence.

[67] In that communication the FNFN stated the Ministry of FLNRO should not “process further or approve the [Komie North Mine Project] until full responses to its outstanding correspondence had been given “by both the Ministry of FLNRO and the EAO (concerning the FNFN’s June 18 letter”); and “a full consultation with the FNFN has been conducted and concluded by the crown on this application”.

[68] On September 26, 2013, still without knowing that the Decision had already been made, Ms. Lowe again wrote to the Ministry of FLNRO (with a copy to Ms. Christie at the EAO) stating:

...

We note at the outset that FNFN has not received any response from FLNRO to the numerous issues raised in our letter of June 3, 2013 respecting the Proponent’s Applications. Nor have we received any response to our June 18, 2013 letter to the BC Environmental Assessment Office (“EAO”) concerning the Applications (cc’d to FLNRO) although we did receive an email notification from the EAO that they were aware the Proponent was moving one of its seven applications in FNFN territory to the development stage, that they were reviewing it and would respond to FNFN in due course. These responses are outstanding and it is our view that FLNRO is not in a position to further process or approve the Applications until such time as substantive responses to these letters have been received, and the concerns and issues set out in them (including consultation with FNFN) have been meaningfully addressed with FNFN.

FNFN has significant ongoing concerns regarding the Applications and all of the proposals the Proponent has for frac sand mine development in our traditional territory. These include the Proponent’s attempts to split a large project into several separate proposals and applications in an apparent attempt to avoid environmental assessment (as addressed in our June 20, 2012 letter to Minister Lake and in numerous letters to FLNRO); what appears to be a misrepresentation or misunderstanding respecting the thresholds for triggering EAs under the BC *Environmental Assessment Act* and Reviewable Projects Regulation (the “Regulation”); the need for meaningful consultation between the Crown and FNFN on these proposed developments; the significant impacts to our constitutionally-protected Treaty rights that have the potential to arise out of the development that is proposed; and, as noted above, fulsome responses to the issues raised in the above-noted correspondence.

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The Proponent's Amendment does not affect the application of the Regulation to the Applications; an EA is still triggered for the Applications due to the amounts of sand and gravel proposed to be extracted by the Proponent, even with the Amendment taken into account. It is not the amount of material that will be "sold as product" or "used as construction or maintenance material" that is relevant to the threshold which triggers an EA for a sand and gravel pit under the Regulation - it is; the amount of material excavated (as set out in some detail in our June 3 and June 16, 2013 letters to FLNRO and the EAO respectively).

Table 6 of the Regulation establishes that a sand and gravel pit is a reviewable project subject to an environmental assessment if the new pit facility:

... will have a production capacity of

- (a)  $\geq 500\,000$  tonnes/year of excavated sand or gravel or both sand and gravel during at least one year of its operation, or
- (b) over a period of  $\leq 4$  years of operation,  $\geq 1\,000\,000$  tonnes of excavated sand or gravel or both sand and gravel.

On the basis of the numbers provided by the Proponent in its Development Plan for the Applications, including the Amendment,  $\geq 1,720,000$  tonnes of material will be excavated over a four-year period ( $1,720,000$  tonnes on average over four years in Phase 1 and  $1,752,000$  tonnes on average over four years in Phase II) when both the sand and gravel to be excavated are taken into account, as is required by the Regulation. It is clear an EA is required for the development that is subject to the Applications due to the fact that over  $1,000,000$  tonnes of material will be excavated in a four-year period (leaving aside for the time being FNFN's view that all of the Proponent's frac sand mine proposals in our territory need to be considered as a single project due to their inter-relatedness, to enable proper assessment and consultation).

As noted, FNFN looks forward to receiving responses from the provincial Crown (FLNRO and EAO) to our June, 2013 correspondence and to our further discussions on these Applications as they affect FNFN's rights and interests.

[Emphasis added]

[69] On September 30, 2013 (in a letter incorrectly dated September 30, 2012) Mr. Peterson of the EAO for the first time after the Decision had been made almost two months earlier responded to the FNFN's outstanding correspondence and concerns.

[70] Most germane to the issues requiring determination on this petition for judicial review of the Decision are the following statements made by Mr. Peterson in that

letter concerning issues raised by the FNFN with the EAO and the other involved ministries more than three months earlier:

I am writing in response to your June 18, 2013 correspondence to Environmental Assessment Office (EAO) regarding the application of Jeffrey Bond and Canadian Silica Industries Inc. (the Proponent) to move to the development stage of the License of Occupation (LOO) for land file number 8015273 (Komie North parcel). The Proponent proposes to construct and operate a sand and gravel pit that would produce  $\leq 240,000$  tonnes per year of sand and/or gravel for sale and use for approximately 12 years. The total area of disturbance, as described in the Proponent's Borrow Pit and Reclamation Plan (the Plan), would be approximately 78 hectares.

Within your letter you posed several questions and interpretations to EAO that I would like to address and clarify:

1. *Fort Nelson First Nation (Fort Nelson) requests confirmation that EAO has been notified by the Proponent to move to development on the Komie North parcel.*

As requested by EAO, both the Proponent and representatives from the Ministry of Forests Lands and Natural Resource Operations (FLNR) notified EAO that the Proponent has applied to develop the Komie North parcel. FLNR provided EAO with the Plan for the proposed Project as well as the accompanying documentation, including an amendment to the Plan (dated July 19, 2013) which clarifies the production estimates.

2. *Fort Nelson expresses its strong view that the proposed Project constitutes a reviewable project subject to environmental assessment under the Reviewable Projects Regulation (the "Regulation") of the Environmental Assessment Act.*

Under the Regulation, a sand and gravel pit is a reviewable project if it is:

A new pit facility that will have a production capacity of:

- (a)  $> 500\,000$  tonnes/year of excavated sand or gravel or both sand and gravel during at least one year of its operation, or
- (b) over a period of  $< 4$  years of operation,  $> 1\,000\,000$  tonnes of excavated sand or gravel or both sand and gravel.

It is EAO's understanding that Fort Nelson is of the opinion that all material excavated at the site should be included in the calculation of production capacity.

EAO's view is that production capacity includes sand and gravel produced for sale or for use. Production capacity does

not include that portion of the excavated material which would not be sold or used in the operation.

The context of the *Environmental Assessment Act* favours thresholds that can be applied by proponents in advance without undue speculation. Estimates for product and non-product material are generally ascertained from low intensity sampling and testing. Non-product material can include overburden, silts, and clays and can be difficult to accurately measure.

For the proposed Project, the Proponent has confirmed that both sand and gravel products (for sale and/or use within the proposed operation) would be included in the ≤240 000 tonnes per year production. After consideration of this information and the project description, it is EAO's position that the proposed Project does not meet the criteria for a reviewable project under the Regulation. While the EAO is willing to provide its position in this regard, nothing in this letter should be construed as legal advice, and the Proponent has been advised that it is responsible for making its own determination as to whether the proposed Project falls within the thresholds set out in the Regulation.

3. *Fort Nelson expressed concerns regarding licensing and permitting under FLNR and Ministry of Energy and Mines (MEM)*

I understand that Greg Belyea at FLNR has responded or will be responding to your concerns regarding the use of a phased licence of occupation.

EAO is aware of the 5 additional applications for LOO that were submitted by the Proponent to FLNR. FLNR will notify EAO if any of the additional LOO's are granted. The Proponent has also committed to contacting EAO prior to submitting Notice of Work application(s) to MEM for any of the submitted LOO.

Should the Notice of Work for the proposed Komie North operation be granted by MEM, any subsequent Notices of Work submitted by the Proponent may potentially be considered a modification to the Komie North operation. The criteria to determine if a modification of a sand and gravel pit would be subject to an environmental assessment is defined in s. 8(2) of the Reviewable Projects Regulation.

[Emphasis added.]

[71] Not surprisingly the FNFN took issue with the Decision and the EAO's interpretation and application of the threshold criteria in Table 6 of the *Regulation* in deciding that the Komie North Mine Project did not meet the threshold requirement for designation as a reviewable project.

[72] In a letter dated October 22, 2013, Ms. Lowe wrote to Ms. Christie of the EAO advising:

...

We disagree with the EAO's position that, under the Regulation production capacity of a Sand and Gravel Pit does not include the portion of the excavated sand and gravel that would not be "sold or used in the operation".

The Regulation clearly sets the threshold for a reviewable project based on the volume of "excavated sand or gravel or both sand and gravel". Under the Regulation, what a proponent chooses to do with the sand or gravel once it is excavated is irrelevant. In any event, as we noted in our letter of June 18, the Proponent has indicated that it intends to put the excavated gravel or some of it to use. The Proponent intends to excavate a quantity of sand and gravel in excess of the threshold established in section 8 of the Regulations. As a result, the project is a reviewable project.

In addition to being in accordance with the plain language of the Regulation, this interpretation is consistent with the scheme and object of the *Environmental Assessment Act* and the Regulation. The purpose of the Regulation is to provide that projects of a size and scope that are likely to cause significant adverse environmental effects are subject to an environmental assessment. The Regulation accomplishes this by establishing thresholds in relation to critical aspects of certain classes of project. The Regulation defines the threshold for Sand and Gravel Pits by reference to the amount of "excavated sand or gravel or both sand and gravel". This accords with the object of the Regulation. Put simply, the excavation sand and gravel causes adverse environmental effects. The greater the volume of sand and gravel excavated, the greater the effects. The fact that a proponent may have little use for excavated gravel has little or no impact on the environmental impact of the excavation and therefore does not affect the issue of whether the project is a reviewable project.

The only rationale offered for the EAO's position does not withstand scrutiny. The EAO notes that it may be difficult to ascertain at the outset of a proposed sand and gravel pit project the quantity of extraneous material such as "overburden, silts, and clays". No one is suggesting that the proponent need measure these materials. The Regulations require and depend upon an estimate of the volume of sand and gravel to be excavated. There is no evidence that it would be difficult for the Proponent to ascertain the quantity of gravel in the Komie North parcel. On the contrary, the Proponent has done so.

The EAO's interpretation of the Regulation as excluding the volume of excavated gravel is unreasonable. This interpretation is contrary to the express language of the Regulation and at odds with the scheme and object of the *Environmental Assessment Act* and the Regulation. The Regulation is clear that a Sand and Gravel Pit is a reviewable project if the volume of excavated sand and gravel exceeds the stated threshold. The Proponent proposes to excavate an amount of sand and gravel from the Komie North parcel that exceeds the threshold in the Regulation. Accordingly, this project

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is a reviewable project, which must be subject to an environmental assessment before any further provincial approvals can be issued.

FNFN requests that the EAO communicate to the provincial permitting authorities that the Proponent's proposal for the Komie North parcel is a reviewable project and, as such, section 9 of the *Environmental Assessment Act* prevents the issuance of the Licence to Cut and Notice of Work permit until an environmental assessment certificate has been issued in respect of this project.

[73] On January 14, 2014, Mr. Peterson replied to Ms. Lowe's correspondence reiterating the correctness of the Decision, and in so doing referred to the decision of the Court of Appeal in *Friends of Davie Bay v. Province of British Columbia*, 2012 BCCA 293 [*Friends of Davie Bay*] to which I will later refer in detail.

[74] In his letter of January 14, 2014 Mr. Peterson advised the FNFN as to why the EAO maintained that the Decision was correct and reasonable. In summary, the reasons given were:

- 1) The EAO's view is that extracted sand and gravel only counts for the purposes of the numeric thresholds [in Table 6 of the *Regulation*] if it is part of the Proponent (CSI)'s production capacity, that being, "the amount of sand and gravel that the Proponent will produce for sale or use" based on several factors stated to be:

First, "production capacity" generally means the amount of "product" or "output" of something that has value added as compared to inputs. It would be contrary to the ordinary meaning of production capacity to measure it by including "waste material". Canadian Silica has confirmed, by their letter of July 19, 2013, that the amount of product sold and used, including both sand and gravel, will be less than the above thresholds.

Second, interpreting item 3 of Table 6 in this manner is consistent with the scheme of the *Environmental Assessment Act* and an interpretation of the *Reviewable Projects Regulation* that avoids requiring proponents that have an intended production level below the numeric thresholds to engage in an extensive analysis of the amount of sand and gravel in waste materials, and avoids the Environmental Assessment Office (EAO) having to review such studies for the purposes of forming a view as to whether a project is a reviewable project.

In support of those positions and the following ones the EAO relied upon the Court of Appeal's decision in *Friends of Davie Bay*.

2) The EAO's view is that:

...Consistent with the reasoning in *Friends of Davie Bay v. British Columbia*, our view is that in situations where the application of thresholds in Table 6 are ambiguous, it is generally preferable to apply an interpretation that is relatively easily applied by proponents based on intended production levels not estimates that are speculative or not easily identified.

If the thresholds set by item 3 included waste gravel and waste sand the result in our view would be that proponents would be required to apply a threshold that is difficult to ascertain and is more speculative and would require oversight by EAO. Sand and gravel pits are developed for an intended production capacity of material that will be sold or used.

3) If that was not the case:

Pit operators may estimate the amount of waste material that will need to be dug up in order to remove sand and gravel that meets their production specifications but this waste material is typically treated as an undifferentiated mix of materials that may potentially include boulders, clay, silt sand and gravel. It is theoretically possible to estimate the amount of sand and gravel that will be included in this waste material, by digging multiple bore holes, estimating the amount of different components in each bore hole, applying a statistical analysis to the bore holes situated in any area that will be mined in a single year or four year period, and then estimating the total amount of sand and gravel that will be dug up during any year or four year period. For the estimates to have any statistical significance, i.e. for them to be something other than speculative, pit proponents would need to dig more bore holes than are usually required for the purposes of assessing the suitability of a resource for mining. To form a position on whether a project is captured or not, EAO would need to review estimates to ensure that that core samples are representative and analysis properly carried out.

Our view is that interpreting the Table 6 threshold for sand and gravel pits as being based on amounts of sand and gravel produced, i.e. excavated for sale or use, is consistent with the scheme of the Act because it is easily applied by proponents without additional analysis, it is less speculative and does not require EAO to review determinations made by proponents. It is consistent with the wording of item 6 which refers to "production capacity".

[Emphasis added.]

4) Accordingly:

... While the total of waste gravel, waste sand, produced gravel and produced sand may exceed the regulatory thresholds, for the reasons discussed above it is not appropriate to include either waste gravel or waste sand in production capacity. Thus, our view is that it is not

necessary for the Proponent to differentiate between waste gravel, waste sand and other waste material because only product gravel and sand is included in production capacity. The amount of product sand and gravel proposed to be excavated is below the thresholds set out in the *Reviewable Projects Regulation*.

[75] Those assertions continue to be the primary bases upon which the EAO supports the correctness and reasonableness of the Decision.

[76] The EAO has also continued to take the position that no consultation with the FNFN in addition to that which had occurred before the Decision was made was necessary because its interpretation of the threshold criteria for new Sand and Gravel Pits in Table 6 of the *Regulation* concerns interpretation of criteria of general application in the Province and thus does not attract the specific duty to consult alleged by the FNFN.

[77] As far as I am aware, as of the dates of the hearing of this petition the Mines Ministry had not yet decided whether to approve CSI's Notice of Work application for the Komie North Mine.

[78] Also, Jeffrey Bond has deposed that although CSI has applied for the five Licenses of Occupation necessary for the potential development of the three other mines in the vicinity of Komie Creek and the two in the Dazo Creek region none of those licences have been approved.

[79] Mr. Bond has further deposed that CSI has "no present plans to develop multiple mines".

### **ANALYSIS AND DISCUSSION**

[80] Aside from the issue of the alleged breach of the Province's duty to consult with the FNFN concerning the interpretation and application of the Table 6 threshold criteria of the *Regulation* to the Komie North Mine, the fundamental issue in dispute between the parties is whether EAO's decision to accept CSI's limitation of its production capacity to the sale of frac sand and the use of some of the extracted for site purposes is reasonable.

[81] I will accordingly first address the issues arising from the Decision concerning the interpretation of the threshold criteria for new Sand and Gravel Pits under Table 6 of the *Regulation* and the EAO's application of that interpretation to the proposed Komie North Mine and then address the duty to consult arguments made by the FNFN.

**A. The EAO's Interpretation and Application of Table 6 of the *Regulation***

[82] Before proceeding to my determination of the substantive issues raised by the parties with respect to the EAO's interpretation of the threshold criteria for Sand and Gravel Pits under Table 6 of the *Regulation* and application of that interpretation to the proposed Komie North Mine Project, I will first discuss the standard of judicial review to be applied to the Decision.

**1. The applicable Standard of Judicial Review**

[83] In *Friends of Davie Bay*, the Court of Appeal held that the standard of review of the EAO's interpretation and application of the thresholds in Table 6 of the *Regulation* (in that case the threshold criteria for "Construction Stone and Industrial Mineral Quarries") is that of reasonableness.

[84] In doing so Bennett J.A. stated for the Court at paras. 29 to 30:

[29] The statutory interpretation question in issue bears upon whether the Quarry is deemed reviewable by the combined effect of the *Act* and the *Regulation*. It has no bearing on the source of the EAO's authority to interpret its home statute or otherwise apply the provisions of the *Act* and *Regulation* to the facts of this case.

[30] The question in issue is one that involves the interpretation of an enactment closely connected to the EAO's function and so, in one sense, involves the determination of whether the EAO has authority or jurisdiction to determine whether the Quarry is reviewable. However, it is not one of the "narrow or exceptional" questions that concern true jurisdiction or *vires*. Accordingly, I conclude that the standard of review applicable to the EAO's determination in the case at bar is reasonableness.

[85] In reaching that conclusion, Bennett J.A. relied upon *Alberta (Information and Privacy Commissioners) v. Alberta Teachers' Association*, 2011 SCC 61, for the proposition that "for questions involving an administrative body's interpretation of its

home statute should presumptively be reasonableness, and the party propounding correctness should bear the burden of identifying a true question of jurisdiction raised by the decision in issue.”

[86] As in *Friends of Davie Bay*, no question of the jurisdiction of the EAO to interpret or apply the threshold criteria of Table 6 of the *Regulation* arises in this case.

[87] The standard of judicial review of the Decision is accordingly that of reasonableness.

[88] Concerning the reasonableness standard of review of administrative decisions the Supreme Court of Canada said in *Dunsmuir v. New Brunswick*, 2008 SCC 9 [*“Dunsmuir”*], at para. 47:

[47] Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[89] Following upon *Dunsmuir*, in *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, at para. 59, the Supreme Court of Canada also observed:

[59] Reasonableness is a single standard that takes its colour from the context. One of the objectives of *Dunsmuir* was to liberate judicial review courts from what came to be seen as undue complexity and formalism. Where the reasonableness standard applies, it requires deference. Reviewing courts cannot substitute their own appreciation of the appropriate solution, but must rather determine if the outcome falls within “a range of possible, acceptable outcomes which are defensible in respect of the facts and law” (*Dunsmuir*, at para. 47). There might be more than one reasonable outcome. However, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome.

**2. Is the EAO's interpretation and application of the threshold criteria in Table 6 of the Regulation reasonable?**

[90] Determination of this issue engages principles of statutory interpretation. It also requires examination of the threshold criteria in Table 6 of the *Regulation* in the context of other relevant legislative provisions.

[91] Table 6 of the *Regulation* is reproduced below:

**Table 6  
 Mine Project**

<b>Column 1</b>	<b>Column 2</b>	<b>Column 3</b>
Project Category	New Project	Modification of Existing Project
1 Coal mines - SIC code 063	<b>Criteria:</b> (1) A new mine facility that, during operation, will have a production capacity of $\geq 250\ 000$ tonnes/year of clean coal or raw coal or a combination of both clean coal and raw coal.	<b>Criteria:</b> (1) Modification of an existing mine facility that meets Threshold E.
2 Mineral Mines	<b>Criteria:</b> (1) A new mine facility that, during operations, will have a production capacity of $\geq 75\ 000$ tonnes/year of mineral ore.	<b>Criteria:</b> (1) Modification of an existing mine facility that meets Threshold E.
3 Sand and Gravel Pits — SIC code 082	<b>Criteria:</b> (1) A new pit facility that will have a production capacity of (a) $\geq 500\ 000$ tonnes/year of sand or gravel or both sand and gravel during at least one year of its operation or (b) over a period of $\leq 4$ years of operations, $\geq 1\ 000\ 000$ tonnes of excavated sand or gravel or both sand	<b>Criteria:</b> (1) Modification of an existing pit facility that meet Threshold F.

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	and gravel.	
4 Placer Mineral Mines	<b>Criteria:</b> (1) A new mine facility that, during operations, will have a production capacity of $\geq 500\ 000$ tonnes/year of pay-dirt.	<b>Criteria:</b> (1) Modification of an existing pit facility that meets Threshold F.
5 Construction Stone and Industrial Mineral Quarries	<b>Criteria:</b> (1) A new quarry facility or other operation that: (a) involved the removal construction stone or industrial minerals or both, (b) is regulated as a mine under the <i>Mines Act</i> , and (c) during operations, will have a production capacity of $\geq 250\ 000$ tonnes/year of quarried product.	<b>Criteria:</b> (1) Modification of an existing mine facility that meets Threshold E.
6 Off-shore Mines	<b>Criteria:</b> (1) A new off-shore mine facility.	<b>Criteria:</b> (1) Modification of an existing facility that meets Threshold G.

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[92] As noted many times in the correspondence amongst the parties which I have recorded, the applicable threshold criteria of Table 6 in issue is Item 3 of Column 1 of Table 6 for “Sand and Gravel Pits”.

[93] More specifically, since the Komie North Mine is a “New Project” at issue are the criteria set out in Column 2.

[94] It is immediately apparent that given that CSI’s proposed “production capacity” is 240,000 tonnes/year of frac sand per year over more than four years of operations, what is in controversy is Criteria 1(b) and more specifically, whether CSI’s designated “production capacity” for frac sand alone modifies substantially

downward the more inclusive phrase “excavated sand and gravel or both” when almost all of the gravel is deemed by the proponent to be waste material.

[95] The primary focus of the arguments of the parties with respect to the Decision as it relates to the interpretation of the Sand and Gravel thresholds in Table 6 is upon principles of statutory interpretation in the context of the scheme and purpose of the *Act* and the *Regulation* as a whole, and the extent to which, if at all, other statutory provisions should inform that interpretation.

**a) *Applicable Principles of Statutory Interpretation***

[96] Although the parties disagree with respect to the reasonableness of the EAO's interpretation of the threshold criteria for new Sand and Gravel Pits established by Table 6 they agree that the approach that should be taken in interpreting the *Act* and *Regulation* is the “modern approach to statutory interpretation” enunciated by the Supreme Court of Canada in *Re: Rizzo and Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 [*Rizzo Shoes*].

[97] In *Rizzo Shoes*, at para. 21, Iacobucci, J (for the Court) wrote:

... Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:

Today 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.

[98] While the parties all acknowledge that the formulation of the modern approach to statutory interpretation adopted by the Supreme Court of Canada in *Rizzo Shoes* governs my analysis in this case they also each rely upon other more recent authority to emphasize and support the positions they advance.

[99] In that regard I note at the outset that although the EAO and CSI each made separate submissions they were generally wholly supportive of the submissions advanced by the other.

[100] The FNFN relies on the Supreme Court of Canada's decision in *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, 2005 SCC 26 in which, Binnie J. (for the majority) after discussing the modern approach to statutory interpretation of statutes adopted in *Rizzo Shoes* went on to say (at para. 38) with respect to the interpretation of regulations:

38 The same edition of Driedger adds that in the case of regulations, attention must be paid to the terms of the enabling statute:

It is not enough to ascertain the meaning of a regulation when read in light of its own object and the facts surrounding its making; it is also necessary to read the words conferring the power in the whole context of the authorizing statute. The intent of the statute transcends and governs the intent of the regulation.

(Elmer A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 247)

This point is significant. The scope of the regulation is constrained by its enabling legislation. Thus, one cannot simply interpret a regulation the same way one would a statutory provision.

[101] The FNFN emphasizes that in *Friends of Davie Bay* (at para. 34) the Court of Appeal held that the object of the *Act* is environmental protection.

[102] The FNFN also relies upon *Pharmascience Inc. v. Binet*, 2006 SCC 48 and the majority's explaining "ordinary meaning" at para. 30 where LeBel J. wrote:

30 Although the weight to be given to the ordinary meaning of words varies enormously depending on their context, in the instant case, a textual interpretation supports a comprehensive analysis based on the purpose of the Act. Most often, "ordinary meaning" refers "to the reader's first impression meaning, the understanding that spontaneously emerges when words are read in their immediate context" (R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at p. 21; *Marche v. Halifax Insurance Co.*, [2005] 1 S.C.R. 47, 2005 SCC 6, at para. 59). In *Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Assn.*, [1993] 3 S.C.R. 724, at p. 735, Gonthier J. spoke of the "natural meaning which appears when the provision is simply read through".

[Emphasis added.]

[103] In addition, the FNFN relies upon *Chieu v. Canada (Minister of Citizenship and Immigration)* 2002 SCC 3 for the proposition that while the modern approach to interpretation may begin with the ordinary meaning of a provision that is not the end

of the necessary analysis because the provision must be read in its entire context. In that case Iacobucci J. stated at para. 34 that the contextual inquiry:

... involves examining the history of the provision at issue, its place in the overall scheme of the Act, the object of the Act itself, and Parliament's intent both in enacting the Act as a whole, and in enacting the particular provision at issue.

[104] The FNFN submits that examination of the history of the prior wording of the threshold provisions for Sand and Gravel Pits are now found in Table 6 of the *Regulation* requires an interpretation that precludes the interpretation placed upon the present criteria in the Decision by the EAO.

[105] In support of its argument that its interpretation of the Sand and Gravel threshold in Table 6 of the *Regulation* is not only reasonable but correct the EAO relies upon the decision of the Supreme Court of Canada in *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54 (at para. 10) which held that the interpretation of legislative provisions requires a “textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole”, and that:

... where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.

[106] Relying upon that principle of interpretation the EAO submits that the Sand and Gravel threshold must be read harmoniously with not only the *Act* and *Regulation*, including all of the other criteria enumerated in Table 6 for other Mine Projects, but also with other statutory provisions related to the regulation of mining in British Columbia and most specifically the *Mines Act* and its treatment of “production capacity” by proponents such as CSI.

[107] While the principles of statutory interpretation enunciated by the Supreme Court of Canada to be considered when undertaking interpretation of a legislative provision upon which the parties rely are all entirely valid and potentially applicable, the authorities also establish that the significance of any one consideration or

combination of considerations relating to competing interpretations must also be assessed in the context of the factual circumstances under inquiry.

[108] To that end I will now examine the parties' positions in relation to the interpretation of the Sand and Gravel threshold criteria they advance by reference to the principles of interpretation they each rely upon.

***b) "Grammatical and Ordinary Sense"***

[109] The contest between the EAO and CSI on the one hand and the FNFN on the other centers upon the juxtaposition of the phrases "production capacity" and "excavated sand and gravel or both sand and gravel" in the wording of the Sand and Gravel threshold in Table 6.

[110] The FNFN asserts that "production capacity" is a generic term that is modified and given meaning by the phrase "excavated sand and gravel or both sand and gravel". On that interpretation the phrase that establishes the criteria for reviewability is "excavated sand and gravel or both" with the emphasis on "excavated" because what is at issue with a new pit facility is the volume and area of land disturbed by extracting the product mined.

[111] The FNFN thus asserts that on a plain and simple reading in its grammatical sense the Sand and Gravel threshold is concerned with the amount of material that is excavated or removed from the ground and is not concerned with the purpose for which it is removed.

[112] In support of the argument that the Sand and Gravel threshold should be read as it suggests the FNFN also relies upon the "first impression" interpretation placed upon the threshold by CSI when it first applied for a License of Occupation of the Komie North Mine in May of 2010.

[113] With that application CSI included a Development Plan which referenced an "Annual estimate of production" as follows:

Based upon the current market conditions, 240,000 tonnes of resource will be mined yielding about a 46-year mine life. This translates into an annual

amount of 134,000 tonnes of marketable proppant sand. This may be expanded on a yearly throughput as market conditions require. If expansion occurs beyond 250,000 tonnes for more than 4 years the proponents are prepared to enter the BCEAA review process.

[Emphasis added.]

[114] The FNFN submits that that estimate of production of 240,000 tonnes of resource (comprised of both sand and gravel) per year of which only 134,000 tonnes is “marketable proppant sand” informs the ordinary and grammatical interpretation that should be placed upon the threshold production limit for new Sand and Gravel Pits in Table 6 of the *Regulation* as evidenced by the spontaneous understanding that emerged from CSI’s “first impression” of its meaning. See: *Pharamascience* at para. 30 as quoted above.

[115] CSI and the EAO both submit that the FNFN’s emphasis on the amount of sand and gravel or both excavated from a proposed new mine facility fails to recognize the import and meaning of the phrase “production capacity”.

[116] CSI and the EAO point to dictionary meanings of “production” encompassing such concepts as the creation or generation of goods or commodities to be available for use.

[117] In its written argument (at paras. 107 to 109) CSI asserts:

107. The “production capacity” is determined in reference to the rest of the provision. The amount of “excavated sand or gravel or both sand and gravel”. The provision provides an option in the amount to consider in determining the production capacity. This is due to the fact that many sand or gravel pits do not produce both sand and gravel for sale. According to this wording, a sand mine would only be required to include in its production capacity the sand that it produces for sale, instead of the total of both sand and gravel. The option directly contemplates the business of the proponent and the only rational interpretation of production capacity in relation to the option of sand or gravel or both would be for production capacity to mean the amount of product for sale or use, whether sand or gravel. An interpretation where both sand and gravel in the entire disturbed area is contrary to the option that the provision provides.

108. The term “excavate”, defined in relation to the removal of something, is used in this provision to clarify that only the product that is removed for sale is to be included in the production capacity calculation. Any waste materials are not included in the term production capacity.

109. The provision is not concerned with the amount of disruption to land of a sand or gravel pit. This is obvious because the second part of the Sand and Gravel Threshold dealing with the threshold for modifications to sand and gravel pits, includes “modification will result in the disturbance of an area of land that was not previously permitted for disturbance”, as well as the production capacity. It was open to the Lieutenant Governor in Council to have included disturbance to land in the new pit Sand and Gravel Threshold; however, that choice was not made.

[Emphasis in original.]

[118] Similarly, the EAO asserts that the words used in establishing the threshold criteria for reviewability for new Sand and Gravel Pits did not isolate “production capacity” from “excavation of sand and gravel or both” without reference to a proponent’s intended sale or use of that product that is extracted.

[119] The EAO submits that the intention of the Lieutenant Governor in Council was to assess the production capacity for the project, not the potential amount of materials to be excavated “regardless of whether or not they form part of the production of the facility”.

[120] In support of that argument the EAO points to the modifying phrase “during operations” as being indicative that production from the actual operation should be considered, not the “maximum potential of the resource being excavated”.

[121] The EAO also submits that the FNFN’s reliance on CSI’s May 2010 “first impression” reading of the threshold should be given little consideration because of later more detailed considerations and the Notice of Work evidenced by CSI’s application for the Komie North Project under the *Mines Act*.

[122] The EAO also postulates that primary consideration should be given to the phrase “production capacity” because of its assertion at para. 116 of its written argument that:

116. Within the framework of the *EA Act*, the initial determination of whether a project is reviewable is to be made by the proponent, with reference to the applicable table in the *RPR*. There is no obligation for proponents to make an inquiry with EAO about the application of the *RPR* to their proposed project and no discretionary function is extended to the EAO under the statutory

scheme in determining whether a proposed project is reviewable under s. 5 of the *EA Act* and the *RPR*.

[123] Section 5 of the *Act* to which that submission refers provides:

**Reviewable projects established by regulation**

5 (1) The Lieutenant Governor in Council may make regulations prescribing what constitutes a reviewable project for the purposes of this Act.

(2) For the purpose of a regulation under subsection (1), the Lieutenant Governor in Council by regulation may

(a) categorize projects according to size, production or storage capacity, timing, geographical location, potential for adverse effects, type of industry to which the projects are related, type of proponent or on any other basis that the Lieutenant Governor in Council considers appropriate, and

(b) provide differently for the different categories of projects.

[124] In making that “proponent driven” and “no discretion” submission the EAO relies upon the trial level decision of Justice Voith in *Friends of Davie Bay*, 2011 BCSC 572, concerning his interpretation of Item 5 (Construction Stone and Industrial Mineral Quarries) of Table 6 of the *Regulation* that was upheld by the Court of Appeal.

[125] I will address those “proponent driven” submissions in more detail in these reasons when next addressing the interpretation of the Sand and Gravel threshold when read in their entire context and considering the scheme and object of the *Act*.

**c) “In its entire Context”**

[126] The FNFN submits that the Sand and Gravel threshold should be interpreted not only harmoniously within its place in the overall scheme and object of the *Act* and *Regulation* (as I will later discuss) but also having regard to its legislative history that also reflects the intention of the Legislature.

[127] When the first *Environmental Assessment Act*, R.S.B.C. 1996, c. 238 took effect in 1995 the Lt. Governor in Council promulgated a *Reviewable Projects Regulation* dated July 28, 1995 which established thresholds for many of the same

categories that are now the subject of Table 6 of the present *Regulation* that were enacted in 2002.

[128] In 1995 the threshold for the environmental reviewability of new “Sand and gravel operations” under s. 21(1) of the original *Regulation* provided :

21. (1) The construction of a new facility constitutes a reviewable project for the purposes of the Act if
- (a) the facility is within SIC code 082 - Sand and Gravel Pits, and
  - (b) the facility has, or when the construction phase is completed will have, a production capacity of
    - (i) 500 000 tonnes or more of sand or gravel or both sand and gravel per year, or
    - (ii) 1 000 000 tonnes or more of sand or gravel or both sand and gravel over a period not exceeding 4 years.

[129] Absent from that formulation of the threshold criteria was the word “excavated” that was included in the 2002 iteration of the criteria and is now at the centre of the disputes amongst the parties.

[130] The FNFN submits that the interpretation of the present threshold must account for the inclusion of the word “excavated” as intending the inclusion of the entire amount of sand or gravel or both to be excavated from a proposed new mine, not only the amount of the particularized product the proponent CSI intends to sell or use.

[131] The FNFN thus submits that the EAO erred in failing to consider that significant substantive change in wording in the new threshold by giving the word “excavated” no meaning when relying upon CSI’s self-declared “production capacity” based upon what it intend to use or sell. The FNFN say that is especially so when there is no inclusion of the concepts of either usage or sale within the prescribed threshold criteria.

[132] The FNFN further submits that the new wording that includes “excavation” emphasizes the physical impact of a proposed mine on the environment rather than the commercial intention of the proponent when that commercial intention is in

obvious conflict with environmental protection when so much useful gravel product is classified as “waste” notwithstanding the size of the pit needed to extract and produce the more desirable product.

[133] The EAO and CSI each submit that the FNFN's submissions concerning the evolution of the wording of the threshold fail to sufficiently account for the fact that other changes to the original thresholds in the *Regulation* concerning other types of mining operations included increases in thresholds and that in some cases the word “physical” was added to limit what they refer to as “direct disturbance” or “direct physical disturbance”. They say that if the Lieutenant Governor in Council had intended to limit the physical impact of new sand and gravel operations in the way suggested by the FNFN it was open to explicitly do so.

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**d) *Entire Context: The Scheme and Object of the Act***

[134] The FNFN submits that the ordinary grammatical meaning of the threshold criteria and inclusion of the modifier “excavated” with the concept of “production capacity” is in harmony with the scheme and object of the *Act* as environmental protection legislation.

[135] It says further that to interpret the threshold criteria for new Sand and Gravel Pits in Table 6 of the *Regulation* as allowing proponent declared “production capacity” limits based upon sale and use considerations to over-ride environmental considerations distorts the balancing of commercial interests and the protection of the environment contrary to the scheme and object of the *Act*.

[136] In making that submission the FNFN relies upon the Court of Appeal's decision in *Friends of Davie Bay* at paras. 34 and 35 in which Bennett J.A. stated:

[34] Here, the object of the legislation is environmental protection. This important object must not be lost in the minutia. In *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 at 71, La Forest J., for the majority, cited with approval the fundamental purposes of environmental impact assessment identified by R. Cotton and D.P. Emond in “Environmental Impact Assessment” in J. Swaigen, ed., *Environmental Rights in Canada* (Toronto: Butterworths, 1981) 245 at 247:

(1) early identification and evaluation of all potential environmental consequences of a proposed undertaking; (2) decision making that both guarantees the adequacy of this process and reconciles, to the greatest extent possible, the proponent's development desires with environmental protection and preservation.

[35] I adopt, as a correct approach to the interpretation of environmental legislation, the following passages from *Labrador Inuit Association v. Newfoundland (Minister of Environment and Labour)* (1997), 152 D.L.R. (4th) 50 (N.L.C.A.) at paras. 11-12, to which the chambers judge also referred at para. 72:

[11] Both the Parliament of Canada and the Newfoundland Legislature have enacted environmental assessment legislation: *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 (CEAA); *Environmental Assessment Act*, R.S.N. 1990, c. E-13 (NEAA). The regimes created by these statutes represent a public attempt to develop an appropriate response that takes account of the forces which threaten the existence of the environment. If the rights of future generations to the protection of the present integrity of the natural world are to be taken seriously, and not to be regarded as mere empty rhetoric, care must be taken in the interpretation and application of the legislation. Environmental laws must be construed against their commitment to future generations and against a recognition that, in addressing environmental issues, we often have imperfect knowledge as to the potential impact of activities on the environment. One must also be alert to the fact that governments themselves, even strongly pro-environment ones, are subject to many countervailing social and economic forces, sometimes legitimate and sometimes not. Their agendas are often influenced by non-environmental considerations.

[12] The legislation, if it is to do its job, must therefore be applied in a manner that will counteract the ability of immediate collective economic and social forces to set their own environmental agendas. It must be regarded as something more than a mere statement of lofty intent. It must be a blueprint for protective action.

[137] In short, the FNFN asserts that the EAO's approval of CSI's proponent driven setting of "production capacity" limits which preclude the Komie North Mine from being subject to environmental assessment abandons environmental considerations in favor of commercial agendas.

[138] In making that assertion the FNFN submits that if the Sand and Gravel threshold included only sand and gravel "intended for sale or use" proponents could excavate an unlimited amount of sand and gravel from a new mine without triggering

an environmental assessment, provided they planned to sell or use less than 250,000 tonnes of that excavated sand and gravel each year over a four year period.

[139] The FNFN further submits that under the EAO's approval of a proponent driven limit on production capacity that is based upon intended sale or use, the statutory threshold would no longer serve to identify sand and gravel mines for review based upon environmental impact.

[140] By way of example the FNFN posits two scenarios:

- 1) A proponent targeting a narrow market niche could excavate a million tons of sand and gravel per year to obtain 249,000 tonnes of a specific type of sand for sale without exceeding the statutory threshold as interpreted by the EAO.
- 2) On the other hand, a proponent that planned to excavate 250,000 tonnes of sand and gravel per year over a period of four years from that same deposit but intended to sell or use all of the excavated product would exceed the threshold and the project would be reviewable.

[141] The FNFN thus submits that the EAO's interpretation of the threshold creates a situation where the marketing intentions of the proponent are divorced from the physical and environmental impacts of the same mining project.

[142] The FNFN submits that, in result, the EAO's interpretation of the threshold will allow operators of frack sand mines to cause environmental harm without the oversight of an environmental assessment.

[143] Counsel for the FNFN characterizes such a result as creating a "loophole" through which proponents can avoid environmental assessment by stating an intention to use or sell less than 250,000 tonnes of specialized product each year over a four year period no matter how much sand and gravel would have to be excavated or how much harm the project might cause to the environment.

[144] The EAO and CSI submit that the Court of Appeal's assessment of the overall scheme of the legislation in *Friends of Davie Bay* as well as the conclusion reached in upholding the proponent driven determination of "production capacity" in respect of a "Construction Stone and Mineral Quarry" project under Item 5 of Table 6 of the *Regulation* is a complete answer to the FNFN's submissions on statutory interpretation.

[145] I agree that since what was at issue in *Friends of Davie Bay* was the reasonableness of the EAO's interpretation of threshold criteria for one type of project in Table 6 of the *Regulation* particular attention must be paid to that case. That is so not only because interpretation of another threshold in Table 6 is now at issue but also because of principles of *stare decisis* that are engaged.

[146] Before turning to my consideration of the extent to which the Court of Appeal's decision in *Friends of Davie Bay* may be dispositive of the statutory interpretation issues in this case, I must first address the issue of two expert reports filed by the FNFN in support of its submissions on both the statutory interpretation and duty to consult issues in this case.

[147] That discussion is necessary because the EAO submits that the two reports are not admissible on the judicial review of the Decision.

***e) Admissibility of expert reports on the Judicial Review of the Decision***

[148] The two reports in issue are those of Mr. Michael Hitch and Mr. John Clague.

[149] Mr. Hitch is an Associate Professor at the University of British Columbia in its Department of Mining Engineering, Faculty of Applied Science. He has a Ph. D. in Environmental and Resource Studies obtained from the University of Waterloo in 2006 and is licensed in British Columbia as a Professional Geoscientist and Geological Engineer.

[150] Mr. Clague is a Professor at Simon Fraser University in its Department of earth Sciences. He has a Ph. D. in geology from the University of British Columbia

obtained in 1973 and is a Professional Geoscientist with 40 years of experience in British Columbia and the Yukon Territory.

[151] Both Mr. Hitch and Mr. Clague appended their reports to affidavits filed in this proceeding concerning explanations given by the EAO in its letters of September 30, 2013 and January 15, 2014 as to why it had concluded that CSI's estimate of production capacity of 240,000 tonnes of fracking sand per annum from the Komie North Mine over a period of four years fell below the threshold which would trigger an environmental assessment.

[152] Both reports are highly technical and are critical of the Decision and the information provided by CSI in determining its estimated production capacity for fracking sand from the Komie North Mine.

[153] In his report Mr. Hitch concluded:

Examination of the documentation provided informs the opinion of the author that there are several discontinuities that may lead to less prudent decisions by the regulatory authorities and the project proponent.

Firstly, the most concerning finding is the lack of consideration about the aggregate resource in its entirety. The geology itself has been effectively described concerning its gravel and sand potential with an emphasis on the former. Material (i.e. sand and gravel) sampling has been carried out in a way that is expected and suitable. Aggregate quantity was calculated in a very simplistic and general manner. Volumes have been calculated in a very general sense and for most purposes such as overall inventory or regional evaluation that would be sufficient. In the case of a potential quarrying operation, it is expected that much more quantitative or semi quantitative work would have been completed. Considering the amount of production capital required for such an operation, risk management through proper engineering, by an appropriate Qualified Person (as defined by NI 43-101) is expected. This appears not to have been done.

Any technical data provided by the proponent is based on gravel first and foremost and the sand component is secondary. This is odd considering the proponent intends to produce a highly processed and high value-added frac sand. Any data on the sand is secondary and it is unclear how much raw material produces one unit of final frac sand product. This brings into question the reliability of production volume estimates.

It borders on irresponsible to consider that other secondary saleable products produced during the process of washing, and classifying the primary frac sand as waste. Washed gravels and off-spec sand products are highly desirable and certainly would have a market in the local area. The proponent

intends to waste this material and backfill the pit with it. Although the final product is high value, the consumption is limited and these other marketable products make the operation more sustainable and complete utilization of the resource is achieved.

The project as conceived lacks consideration of the key elements that go into developing a mining operation. Setting production levels such that they fall below regulatory hurdles to the detriment of all involved is troubling.

[Emphasis added.]

[154] In his report, Mr. Clague concluded that:

The definitions of 'product' and 'waste', as used in the EAO letters, are unclear. The amount of marketable frac sand at the proposed North Komie Sand Quarry cannot be reliably determined based on data presented in AMEC File 11103 or the proponent's Development Plan. An unknown, but large amount of silt will be backfilled, but silt is not explicitly included in waste material. Based on the available data and other information, I do not understand how the proponent arrived at its precise estimates of product sand and non-product waste for its proposed North Komie Sand Quarry.

[Emphasis added.]

[155] The EAO submits that both reports are inadmissible in relation to the FNFN's application for judicial review of the Decision.

[156] In making that submission counsel for the EAO wrote at para. 68 of its written submissions:

68. The general rule is that evidence going beyond the record is not admissible in judicial review proceedings. The court must examine the lawfulness of the decision under review based on the record that was before the decision-maker or tribunal, and not decide the matter anew. As noted by this Court in *Friends of Cypress Provincial Park Society* (2000):

...the court is to determine whether the Minister followed a lawful process in coming to her decision rather than determining if she would have come to the same conclusion on either the evidence before her or such further evidence as may have been put before the court.

[157] After making that submission the EAO did acknowledge the existence of exceptions to that general rule, including that:

- 1) extrinsic evidence may be admitted if it is relevant to demonstrating an allegation of procedural fairness or jurisdictional error. See: *Ktunaxa*

*Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2014 BSCS 568 [*Ktunaxa*] at para. 131; and

- 2) affidavit evidence be admitted in relation to a factual error in circumstances where there is no evidence to support a material finding made by the decision-maker but not to invite the court to re-evaluate or re-weigh the evidence heard by the decision maker. See: *Kinexus Bioinformatics Corporation v. Asad*, 2010 BSCS 33 [*Kinexus*] at paras. 17-20.

[158] The EAO submits that neither of those exceptions is available to the FNFN to allow the opinions of Mr. Hitch or Mr. Clague into evidence concerning the judicial review of the Decision.

[159] In making that submission the EAO also relies upon the decision of this Court in *Society of the Friends of Strathcona Park v. British Columbia (Environment)*, 2013 BCSC 1105 at para. 105 in which Sigurdson J. wrote:

Judicial review is not a rehearing of the application on its merits. It is an assessment of whether the decision on the record was reasonable. To the extent that the petitioners seek to add factual matters that were not before the committee for consideration or provide opinions on the merits of the decision or what the decision ought to have been, or provide argument, they go beyond background and are not admissible.

[160] I agree with the submissions of the EAO that it is only in rare cases and for limited purposes that extrinsic evidence is admissible in applications for the judicial review of decision makers.

[161] I am, however, also satisfied that the general prohibition against the admissibility of extrinsic evidence is most applicable to those situations in which an administrative tribunal has reached a decision in which the party seeking judicial review of that decision has had the opportunity to participate.

[162] In this case the FNFN did not directly participate in the decision making process engaged in by the EAO that resulted in the August 8, 2013 Decision that is now the subject of judicial review.

[163] The Decision was reached by the EAO after consideration of only the information provided by CSI in support of its application for the development of the Komie North Mine. The only involvement of the FNFN in the decision making process prior to August 8, 2013 was its continued attempts to have concerns it had addressed by the EAO and other government agencies commencing in June of 2012.

[164] It thus cannot be said that the FNFN had an opportunity to provide the EAO with the information contained in the evidence available from Mr. Hitch or Mr. Clague before the Decision was made by the EAO.

[165] I am satisfied that the Decision would have been better informed had the EAO had the opportunity to consider information, evidence and criticism available from Mr. Hitch and Mr. Clague.

[166] I am, however, not satisfied that the extrinsic evidence now sought to be admitted by the FNFN falls within the strictly construed exceptions identified by counsel for the EAO, and I have thus concluded that it is not admissible in respect of the judicial review of the Decision.

[167] The extrinsic evidence is, however, admissible on the issue of the alleged failure of the EAO to consult with the FNFN with respect to the making of the Decision.

***f) Is Friends of Davie Bay Dispositive of the statutory interpretation issues concerning the threshold criteria for environmental assessment of Sand and Gravel Pits under Table 6 of the Regulations?***

[168] Principles of judicial comity and *stare decisis* in British Columbia mandate that the Supreme Court of British Columbia is bound to follow the reasoned decisions of

the British Columbia Court of Appeal and the Supreme Court of Canada which have decided a question of law.

[169] Only if the underlying factual circumstances of the matter under consideration are sufficiently distinguishable from those upon which the question of law was decided is this Court not bound to decide the case before it in the same way.

[170] In *Friends of Davie Bay*, at para. 32 Bennett J.A. defined the issue on appeal to be:

[32] The question to be answered here is whether the EAO, through the executive director's delegate, came to a reasonable conclusion in interpreting "production capacity" as that phrase appears in the *Regulation* to mean the actual rate of a project's production during operation, rather than the maximum production rate the infrastructure and equipment of a project could potentially sustain.

[171] Specifically at issue was a project on Texada Island intended by the proponent, Lehigh Hanson Materials Ltd (Lehigh), to quarry aggregate from two locations using drill and blast methods and subsequent shipping by barge to locations away from Texada Island. The intended infrastructure for the project included a haulage road allowing for two-way passage of 100 tonne trucks and a conveyor system capable of moving 2500 tonnes of material per hour.

[172] The Table 6 threshold criteria for new "Construction Stone and Mineral Quarries" are stated to be:

- (1) A new gravity facility or other operation that:
  - (a) involves the removal of construction stone or industrial minerals or both;
  - (b) is regulated as a mine under the *Mines Act*, and
  - (c) during operations will have a production capacity of  $\geq 250\,000$  tonnes/year of quarried product.

[173] The EAO interpreted the term "production capacity" for Lehigh's intended project as the proponent's estimated and permitted annual extraction rate.

[174] The petitioner (a not for profit society formed for the purpose of conserving and protecting the environment of the Davie Bay area of Texada Island) argued that the EAO erred in interpreting “production capacity” to mean the proponent’s estimate of annual throughput rather than the production potential of the project based upon an objective evaluation of all aspects of the project’s environmental footprint.

[175] In Chambers in ruling against that argument (reported at 2011 BCSC 572) Voith J. stated at paras. 65 to 70:

[65] Table 6 relies on three interwoven concepts: i) production capacity, ii) during operations, and iii)  $\geq 250,000$  tonnes / year. It is these three elements, in combination, that inform the meaning of the threshold or benchmark that is established in Table 6.

[66] Both respondents argue that the words “during operations will” precede and, accordingly, inform the words “production capacity”. They say that the proper question which emanates from the *Regulation* is “what will the annual production capacity of the operation be once it is operating?”

[67] In my view, the meaning of the words “during operations will have a production capacity”, without reference to additional considerations, remains ambiguous. The modifier “during operations” can just as easily be asking the question “once the quarry is operating what does it have the capacity to produce?”

[68] The words “production capacity” are, however, further modified or book-ended by the figure of “ $\geq 250,000$  tonnes”. This latter consideration is important. It is a precise figure. If one were to adopt the petitioner’s submission this would be the quarry’s theoretical production capacity after taking into account its operation plan, equipment and infrastructure. How would this theoretical capacity be determined? Would it be based on the assumption that equipment would be used for one shift per day, or for two shifts, or for three shifts? If similar pieces of equipment had different capacities would those capacities be averaged? If the train of production equipment had a single linchpin with a low production capacity, would this set the ceiling for the production capacity of the quarry?

[69] The exercise the petitioner advocates would engage a great many such considerations. No framework for any such assessment is established in the *Regulation* or otherwise and yet such a framework would be central to determining the production capacity of a project and to comparing that production capacity to the threshold established in Table 6.

[70] On the other hand, comparing the Table 6 production capacity figure to the capacity of a quarry as established in its Notice of Work [under the *Act*] and in the permits it receives is straightforward. This yields an easily ascertained and objective factor which sets a ceiling on permitted production capacity. The structure of the various Table 6 criteria in combination strongly suggests that the intention of the words in question was to assess a

proponent's intended production from a project, as limited by its plans and permits, rather than the theoretical or notional maximum production capacity of its infrastructure and equipment.

[176] In upholding the proponent driven interpretation placed upon the threshold criteria there in issue Voith J. also discussed the provisions of Table 6 more generally at paras. 80 to 85 in which he wrote:

[80] The relevant context for Table 6, however, goes beyond the language in the Table that is specific to quarries. Of significant relevance is the fact that the initial question of whether a project is "reviewable" does not fall to the EAO. Neither the *Act* nor the *Regulation* contemplate that proponents apply to the EAO for a determination of whether or not the criteria in the *Regulation* are met and the project in question is "reviewable". There is then no process by which proponents of industrial or other projects make application to the EAO, regardless of how modest or ambitious that project may be, for a determination of whether the project falls within the ambit of the *Act*. Instead, the affidavit of Ms. Christie confirms at Exhibits "F" and "I", that Lehigh did not initially contact the EAO about the Project and was "not required to do so because the proposed quarry is below the RPR threshold".

[81] Having said this, it is clear that a party may, as in this case, contact the EAO and ask it to consider whether a proposed project is reviewable.

[82] The fact that it is a proponent who, in the first instance, determines whether a project is reviewable is relevant in several respects. First, it explains why the criteria in Table 6, for each of the various types of projects described, are expressed in clear and unambiguous terms. Overwhelmingly Table 6 stipulates or establishes particular numerical thresholds or confirms that projects "regardless of size" are reviewable. A new asbestos manufacturing facility would be an example of this latter category of project. Thus, project proponents are dealing with bright line figures that are easily understood and readily identified.

[83] Second, because the initial determination falls to the project proponent, the criteria in Table 6 do not admit of any discretion. The determination made by a proponent does not require any judgment, nor for obvious reasons, could it be otherwise.

[84] Once one recognizes this essential attribute of Table 6 it also becomes clear that Table 6 does not extend any discretionary function to the EAO. It cannot be that the application or interpretation of Table 6 would, absent some explicit authority, engage different judgments or processes for a proponent and the EAO respectively. Instead, both are required to consider the specific criteria that pertain to specific categories of project in Table 6.

[85] The foregoing reality militates strongly against the petitioner who argues that the determination of "production capacity" must be made based on a full review and consideration of a project's land base, facilities and equipment. No such assessment arises from the plain language of Table 6. Certainly no such exercise could be entrusted to a proponent in its sole discretion. Still further, the interpretation advanced by the petitioner would necessarily have

the EAO undertake such reviews for all projects regardless of their permitted and intended production levels. Such a detailed review would be necessary in order to ensure that the environmental footprint of a project was consonant with its stated and intended production levels - even if those stated production levels were modest.

[Emphasis added.]

[177] On appeal the Court of Appeal also approved the proponent entered interpretation of the threshold criteria applied by the EAO but also adverted to “loophole” concerns raised by the Friends of Davie Bay that are also now raised by the FNFN.

[178] At paras. 36 to 38 Bennett J.A. wrote, followed by:

[36] The *Act* contemplates that it is usually the proponent of a project who, by setting its intended “production capacity”, dictates whether an environmental assessment is required. If the proponent of a project featuring a new quarry facility accepts a production capacity less than 250,000 tons of quarried product per year, then the provisions requiring an assessment are not triggered. An assessment can be otherwise ordered, as noted above.

[37] This proponent-centred, self-monitoring approach to environmental regulatory compliance creates an apparent frailty or loophole in the legislation, as noted by Friends of Davie Bay and accepted by the chambers judge. A proponent can (and Lehigh did) overbuild its infrastructure and equipment which would allow for future increases to levels of production well beyond the initial declared production capacity. The proponent could, at some time in the future, “modify the existing project” and produce well in excess of 250,000 tonnes of quarried product per year, increasing the detrimental impact on the environment without subjecting the project to an environmental assessment performed under the *Act*. The gap is found in s. 8(1)(b) of the *Regulation*, which is cross-referenced to Table 6 above:

**Criteria for proposed modifications of mine projects**

**8 (1)** In this part, threshold E is met for a proposed modification of an existing facility if

...

(b) the modification will result in the disturbance of

(i) at least 750 hectares of land that was not previously permitted for disturbance, or

(ii) an area of land that was not previously permitted for disturbance and it is at least 50% of the area of land that was previously permitted for disturbance at the existing facility.

[38] As the chambers judge pointed out at para. 76, a project with an initial production capacity below the regulatory threshold for a new mining project

could avoid a mandatory environmental assessment if the area of disturbed land at the outset subsequently proved large enough to accommodate future increases to production capacity the proponent might implement. The trial judge found there to be no suggestion that this is Lehigh's plan. Lehigh explained that its selection of equipment stemmed from the advantages using standardized equipment in all of its operations provided, including easier and more cost-effective repairs and transferability. It had a number of other reasons for its proposed specifications of the infrastructure, none of which was aimed at increased production.

[179] Those potential "loophole" and "overbuilding" concerns were then addressed at para. 39 in which Bennett J.A. stated:

[39] An interpretation of legislation that creates a loophole through which the object of the legislation can be thwarted is rarely reasonable. However, I agree with the analysis of the chambers judge, which showed that when the *Act* and *Regulation* are viewed in their entirety, and in light of other legislation applicable to the Project, the loophole is sufficiently addressed and the overall scheme is practical.

[180] She then went on to observe (at para. 41) that there are:

...a number of safeguards in place preventing environmentally damaging projects from slipping through an environmental assessment at all.

[181] Thereafter she considered the provisions of s. 6 of the *Act* and the potentially curative provisions available thereunder which could act as such a safeguard.

[182] Section 6 of the *Act* provides:

**Minister's power to designate a project as reviewable**

**6** (1) Even though a project does not constitute a reviewable project under the regulations, the minister by order may designate the project as a reviewable project if

(a) the minister is satisfied that the project may have a significant adverse environmental, economic, social, heritage or health effect, and that the designation is in the public interest, and

(b) the minister believes on reasonable grounds that the project is not substantially started at the time of the designation.

(2) A project designated as a reviewable project under subsection (1) is one for which an environmental assessment certificate is required.

[183] In *Friends of Davie Bay* the petitioner had first unsuccessfully applied to the Minister under s. 6 of the *Act* to have the proposed quarry project designated as

reviewable, prior to then bringing of a petition for review of the EAO's interpretation of the threshold criteria in Table 6.

[184] Although that application to the Minister was not successful, the "safeguard" role attributed by Bennett J.A. to s. 6 of the *Act* is borne out by the comprehensive analysis of the Texada project carried out by the EAO in addressing the environmental concerns raised by the opponents in its report to the Minister including the reasons for its recommendations that the Minister not designate the project as reviewable.

[185] Bennett J.A. also considered a second "safeguard" to over-building concerns at para. 44 in *Friends of Davie Bay* in which she said:

[44] There are other safeguards as well. As pointed out by the Province, Lehigh cannot legally exceed the capacity in the Quarry Permit Approving Work System and Reclamation Program under the *Mines Act*, R.S.B.C. 1996, c. 293. The levels of production are monitored by the Ministry of Energy and Mines and Responsible for Housing to ensure that they do not exceed the stipulated production capacity. If Lehigh's annual production exceeded 240,000 tonnes of quarried product, it would be subjected to sanctions under the *Mines Act*.

[186] In upholding Voith J.'s decision the Court of Appeal concluded by saying at paras. 45 to 48:

[45] In my respectful view, when the legislative scheme is considered as a whole, along with the other relevant legislation, the EAO's interpretation of "production capacity" as the phrase appears in the *Regulation* is not rendered unreasonable by legislative frailty or a loophole.

[46] In addition, one cannot simply look at the words "production capacity in excess of 250,000 tonnes/year" as the appellant's interpretation would require. The provision in Table 6-5 reads "A new quarry facility or other operation that ... during operations, will have a production capacity of  $\geq$  250 000 tonnes/year of quarried product". On a plain reading, the section sets out in what context and time frame (during operations) the production capacity is to be determined and how much (250,000 tonnes) it may produce in that time frame.

[47] In my respectful view, to read into this legislation a requirement for an assessment of every project to determine the potential maximum production capacity the proposed infrastructure, equipment, and operation could facilitate is impractical and inconsistent with the means through which the legislation contemplates achieving its object. By designing a proponent-driven assessment at the front end of the environmental regulatory process, the

Legislature balanced the need to conduct environmental assessments in warranted circumstances against the existence of other safeguards, the impracticality of assessing every project as a matter of course, and the interests of economic development in British Columbia.

[48] In my view, the chambers judge committed no error. The EAO came to a reasonable conclusion in interpreting “production capacity” to mean a proponent’s intended operational production capacity, rather than the theoretical maximum production capacity a project’s proposed infrastructure, equipment, and operation could allow.

[187] The EAO and CSI submit that the Court of Appeal’s conclusion that “by designing a proponent driven assessment at the front end of the environmental regulatory process, the Legislature balanced the need to conduct environmental assessments” precludes any determination in this case that the EAO’s approval of the proponent-driven assessment of the production capacity intended by CSI for the Komie North Mine is unreasonable.

[188] I have concluded that the *ratio decidendi* of the Court of Appeal’s decision in *Friends of Davie Bay* is that the EAO’s interpretation of the threshold criteria for new Construction Stone and Industrial Mineral Quarries under Table 6 of the *Regulation* and the *Act* based upon the proponent’s intended operational production rather than the potential maximum production capacity based upon a project’s proposed infrastructure, equipment and operations could allow is not unreasonable. See: *Friends of Davie Bay* at paras. 46 to 48 quoted above.

[189] Important also to that decision is the Court of Appeal’s conclusion that the EAO’s interpretation of “production capacity” as that phrase appears in the threshold criteria for Construction Stone and Industrial Mineral Quarries in Table 6 was not unreasonable by reason of legislative frailty or a loophole arising from a “proponent driven” assessment of production capacity at the front end of the environmental regulatory process because of the existence of regulatory “safeguards”. See: *Friends of Davie Bay* at para. 45 also quoted above.

[190] Of significance also are the two “safeguards” which the Court of Appeal concluded were effective to prevent a finding of unreasonableness due to legislative frailty or a loophole in relation to the EAO’s interpretation of the threshold criteria for

Construction Stone and Industrial Mineral Quarries. In summary, those effective safeguards in that case were:

- 1) the remedial discretion of the Minister under s. 6 of the *Act* to designate a project as a reviewable project if satisfied that conditions in that section are met and that the project has not been substantially started at the time of the designation; and
- 2) the monitoring of production levels by the Mines Ministry to ensure they do not exceed the stipulated production capacity with potential sanctions under the *Mines Act* for so doing.

[191] In determining whether the decision of the Court of Appeal in *Friends of Davie Bay* is dispositive of the statutory interpretation issues in this case I will first assess the distinguishing factual and legal differences between the two cases.

[192] Those factual and legal differences between the two cases are that:

- 1) The Decision is concerned with the interpretation of the threshold criteria for a different category of mining project in Table 6 of the *Regulation* than was the subject of the quarry in *Friends of Davie Bay*.
- 2) The threshold criteria under the two categories are stated in materially different terms.
- 3) For Sand and Gravel Pits the criteria are:

3 Sand and Gravel Pits __ SIC code 082	<b>Criteria:</b> (1) A new pit facility that will have a production capacity of (a) $\geq$ 500 000 tonnes/year of sand or gravel or both sand and gravel during at least one year of its operation or (b) over a period of $\leq$ 4 years of operations,	<b>Criteria:</b> (1) Modification of an existing pit facility that meet Threshold F.
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	≥ 1 000 000 tonnes of excavated sand or gravel or both sand and gravel.	
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4) For Construction Stone and Mineral Quarries Sand and Gravel Pits the criteria are:

5 Construction Stone and Industrial Mineral Quarries	<p><b>Criteria:</b>                  (1) A new quarry facility or other operation that:                  (a) involved the removal construction stone or industrial minerals or both,                  (b) is regulated as a mine under the <i>Mines Act</i>, and                  (c) during operations, will have a production capacity of ≥ 250 000 tonnes/year of quarried product.</p>	<p><b>Criteria:</b>                  (1) Modification of an existing mine facility that meets Threshold E.</p>
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5) Although the criteria for both include reference to production capacity, one in terms of tonnage either per year “during operations” or “over a period of four years during operations” only the criteria for new Construction Stone and Industrial Mineral Quarries includes specific reference to regulation as a mine under the *Mines Act*.

6) Although the criteria for both categories include two types of potential product, those being “construction stone or industrial mineral or both” on the one hand,

and “sand or gravel or both” on the other, in the case of new Construction Stone and Mineral Quarries the criteria refers to the production capacity of undifferentiated “quarried product” as opposed to “excavated sand or gravel or both”.

- 7) Accordingly, no issue arose in *Friends of Davie Bay* with respect to whether the proponent could have elected to sell or use only “construction stone” or “industrial mineral” and discard the other as “waste” to fall below the threshold criteria for annual production, which is the primary issue of statutory interpretation now raised by CSI’s assessment of production capacity for the Komie North Mine. .
- 8) In *Friends of Davie Bay* the narrow factual issue determined by Voith J. and upheld by the Court of Appeal was whether “potential maximum production capacity” had to be assessed by considering criteria not included in Table 6 such as land base, facilities and equipment in respect of which Voith J. held at para. 84 (quoted above) that no such assessment arose from the wording of the statutory criteria.
- 9) In this case the FNFN does not seek to require the application of assessment criteria other than the estimated volume of tonnage of both sand and gravel to be excavated in each year of operations from the Komie North Mine as assessed by CSI and known to the EAO. The issue engaged is not the proponent’s ability to measure potential maximum production capacity by reference to non-statutory criteria but rather whether production capacity from a known amount of excavated sand or gravel or both can be commercially limited by classifying excavated gravel as “waste” because the proponent has opted not to sell or use the known amount of excavated gravel that would otherwise trigger an environmental assessment.
- 10) The threshold criteria for the reviewability for Construction Stone and Industrial Mineral Quarries was not changed by the present *Regulation* from

those in existence in 1995 except by the addition of “is regulated as a mine under the *Mines Act*.”

- 11) No such criteria became part of the 2002 criteria for new Sand and Gravel Pits.
- 12) The criteria under the present *Regulation* for new Sand and Gravel Pits were, however, changed in 2002 to include the word “excavated” as I have previously discussed.
- 13) In *Friends of Davie Bay*, Voith J. found that there was no suggestion that the proponent’s plan was to set production below the regulatory threshold for a new mining project to avoid a mandatory assessment if the area of disturbed land increased production capacity beyond its intended allowable annual tonnage in order to prevent environmental assessment.
- 14) Although CSI now asserts that it “has no present plans to develop multiple mines” that statement must be considered in light of all of the background facts that have led to this petition, including prior assertions of intention and CSI’s applications for Five Licenses of Occupation in the FNFN’s traditional territory, three of which are in the vicinity of the Komie North Mine. While this is in some respects an issue specifically related to allegations concerning the breach of the Province’s duty to consult it is also of factual significance when assessing the extent to which the decision in *Friends of Davie Bay* was based upon the existence of adequate safeguards to prevent the need for environmental assessment where warranted.
- 15) In *Friends of Davie Bay* the petitioner had made a specific request of the Minister to designate the Texada quarry as a reviewable project under s. 6 of the *Act*. That request was refused and was not the subject of an application for judicial review. The Court of Appeal considered the substance of that review and concluded that although it had not resulted in the designation requested it had acted as an adequate safeguard to the potential loophole

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afforded by “a proponent driven assessment at the front end of the environmental regulatory process.”

16) In this case, although the FNFN also (on June 13, 2012) made a request under s. 6 of the *Act* (for the Minister to designate all of the Sand and Gravel mines, proposed by CSI in the FNFN’s traditional territory) that request did not receive the same detailed analysis undertaken by the EAO that was the subject of the similar *Friends of Davie Bay* request. The response to the s. 6 request by the FNFN in this case, by the same EAO Executive Project Director who undertook the analysis of the *Friends of Davie Bay* request, was not delivered until February 18, 2013 and only stated that the Minister had concluded that the request was “premature” because the proposals were “preliminary and not yet sufficiently defined to be considered project proposals”.

17) Significantly, as I noted in recording the background facts in this judgment, by the time that denial of the FNFN’s s. 6 request for Ministerial designation was delivered, CSI had already, more than three months earlier, submitted a Notice of Work for the Komie North Mine project to the Mines Ministry. While again the denial of the FNFN’s request for designation by the Minister may be of more import with respect to the duty to consult issues raised by the FNFN, the nature of the response given by the EAO does not give me the same confidence in the adequacy of s. 6 of the *Act* as a safeguard against avoidance of an environmental assessment of a project where warranted that Voith J. and the Court of Appeal found existed in *Friends of Davie Bay*.

18) The second available safeguard against exploitation of the “loophole” potentially created by a proponent driven assessment of production capacity at the front end of the environmental regulatory process to which the Court of Appeal referred in determining that the EAO’s interpretation of the threshold criteria for Construction Stone and Industrial Mineral Quarries under Table 6 of the *Regulation*, is the regulatory role played by the Mines Ministry under

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the *Mines Act* in monitoring the proponent's level of production with the power to apply sanctions for exceeding the limits in its Notice of Work.

19) While I do not disagree that the potential for application of sanctions may be a disincentive to over-mining or over-production I am not satisfied that the potential for after the fact sanctions directly addresses whether an environmental assessment may be required in first instance. I say that because if the object of the *Act* is, as the Court of Appeal stated (at para. 34 of *Friends of Davie Bay*), environmental protection including "early identification and evaluation of all potential environmental consequences of a proposed undertaking" reliance on the availability after the fact consequence can defeat those objects.

20) I am accordingly satisfied that while the Court of Appeal referenced such sanctions as a potential safeguard that reference must be read in the context of para. 34 and does not form part of the ratio in *Friends of Davie Bay*.

[193] The foregoing points of distinction between *Friends of Davie Bay* and this case convince me that I am not strictly bound by *stare decisis* to reach the conclusion that the EAO's interpretation of the threshold criteria for Sand and Gravel Pits in Table 6 embodied in the Decision concerning the Komie North Mine is reasonable.

[194] I am, however, also satisfied that I must accept the Court of Appeal's conclusions, expressed at para. 47 in *Friends of Davie Bay*, that the scheme of the *Act* and *Regulation* as designed by the Legislature provides for a proponent-driven assessment at the front end of the environmental process, which balances the need to conduct environmental assessments in warranted circumstances against the impracticality of assessing every project as a matter of course, and the interests of economic development in British Columbia.

[195] I do not, however, take that conclusion to mean that every proponent driven assessment will achieve that required balancing or that it will be reasonable in any

given case for the EAO to accept a proponent's assessment that falls below the threshold criteria and leave it to other potential available safeguards to provide environmental oversight.

[196] I say that because the EAO has an obligation to critically evaluate a proponent driven assessment as was done with the quarry that was the subject of the *Friends of Davie Bay* decisions to ensure compliance with the statutory threshold criteria in Table 6 of the *Regulation*.

**g) Conclusion**

[197] I have concluded that the EAO's interpretation and application of the threshold criteria for new Sand and Gravel Pits in Table 6 of the *Regulation* as set out in the Decision is unreasonable.

[198] I have reached that conclusion for the following reasons:

- 1) CSI's own initial interpretation of the threshold criteria in its Development Plan for the Komie North Mine project included with its application for a License of Occupation (quoted in paragraph 113 of this judgment) is compelling evidence that on first reading or impression the meaning that spontaneously emerges is that in its ordinary and grammatical sense the threshold criteria includes all excavated sand and gravel from the proposed pit - not the differentiated reading allowing classification of some of the gravel as "waste" now asserted by CSI and accepted by the EAO in the Decision.
- 2) The words "production capacity" in the threshold criteria for new Sand and Gravel Pits does not include the words "that the Proponent will produce for sale or use" relied upon by the EAO in the Decision.
- 3) Similarly, there is no support found within the threshold criteria for the EAO's exclusory conclusion in the Decision that in assessing production capacity for excavated sand or gravel or both such capacity "does not

include that part portion of the excavated material that would not be sold or used in the operation”.

- 4) I accordingly reject the position of CSI accepted by the EAO in making the Decision that the threshold criteria for new Sand and Gravel Pits should be read as providing a proponent with an option to include only the sand component of the total amount of sand or gravel excavated from the new pit to obtain that sand component to accord with the business intentions of the proponent. The phraseology “excavated sand or gravel or both” precludes the interpretation asserted by CSI and accepted by the EAO.
- 5) I am also of the opinion that interpretation of the new Sand and Gravel threshold criteria must recognize and give meaning to the historical evolution of those statutory criteria which formerly did not but now does include the word “excavated” when identifying a production capacity of “sand or gravel or both”. In the Decision not only does the EAO not give “excavated” any meaning in accepting CSI’s differentiated production capacity as comprising only sand for sale or use but by doing so relegates the gravel component of the stipulated excavated material to waste.
- 6) I agree with the submission of the FNFN that the interpretation placed upon the threshold criteria for new Sand and Gravel Pits is unreasonable to the extent it is divorced from the potential physical impact of the project on the environment. As posited by the FNFN a proponent who intends to sell or use only a niche product of the sand or gravel from a new mine that uses only a fraction of the total excavated sand or gravel or both would not be subject to environmental review while a proponent who intends to sell or use all of the usable excavated sand and gravel would be subject to review notwithstanding the same physical impact of the new pit on the environment.

[199] In result, I find that whether expressed in the positive or the negative the limiting or modification of the ordinary meaning of the threshold criteria for new Sand

and Gravel Pits in Table 6 of the *Regulation* to include only that portion of all excavated sand or gravel or both that the proponent “intends to sell or use” so undercuts the environmental protection objects of the *Act* in favor of purely commercial interests that it distorts the balancing sought to be achieved by the Legislature as identified by the Court of Appeal in *Friends of Davie Bay*.

[200] I accordingly find that to the extent the Decision accepts that the production capacity of the proposed Komie North Mine is limited to that excavated sand or gravel or both that CSI intends to sell or use in its operation is not defensible in respect of the facts and law and is thus unreasonable within the meaning of *Dunsmuir* and must be set aside.

[201] I must also note that I have reached that conclusion after also considering the evidence adduced by the EAO about other determinations made by it with respect to the reviewability of other sand and gravel pit projects and the submissions of the parties with respect to those projects which I requested at the end of the initial hearing of the petition.

[202] I will address the appropriate remedies that arise from my conclusions after I have addressed the submissions of the FNFN that in making the Decision the Province breached its constitutional duty to consult.

**B. Did the Province breach the constitutional duty to consult with the FNFN in making the Decision?**

[203] Given the findings I have and conclusions I have reached concerning the unreasonableness of the Decision it may not be strictly necessary to determine the FNFN's breach of duty to consult allegations.

[204] I have, however, concluded that I should do so for two reasons:

- 1) The question of whether a duty to consult arose with respect to the making of the Decision is a matter of general importance with respect to the interpretation and application of the threshold criteria under Table 6 of the *Regulation* by the EAO that was fully argued by the parties; and

- 2) If I am wrong in my conclusion that the Decision must be set aside because it is unreasonable, determination of the FNFN's alternative breach of duty to consult argument will be of significant substantive importance to the disputes amongst the parties.

[205] The FNFN alleges that in reaching the Decision the EAO and the Province breached the constitutional obligations of the Crown to consult with the FNFN and, if necessary accommodate its interests when making a decision that could adversely affect the FNFN's treaty rights.

[206] In response, while the Province does not dispute that the Province had a duty to consult with the FNFN with respect to the Komie North Mine generally concerning the potential impact of the project on the FNFN's rights under Treaty 8 it also submits that additional consultation by the EAO specifically with respect to its interpretation of the threshold criteria for new Sand and Gravel Pits in Table 6 of the *Regulation* and the application of that interpretation to the Komie North Mine was not required.

[207] In the alternative the Province submits that any duty to consult that may exist was satisfied by the EAO.

[208] In *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69 [*Mikisew*] at paras. 33 and 34 Binnie J. wrote:

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.

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[209] Also, in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43 [*Rio Tinto*], McLachlin, C.J at para. 31 answered the question "When does the Duty to Consult Arise" by writing:

[31] The Court in *Haida Nation* answered this question as follows: 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" (para. 35). This test can be broken down into three elements: (1) the Crown's knowledge, actual or constructive, of a potential Aboriginal claim or right; (2) contemplated Crown conduct; and (3) the potential that the contemplated conduct may adversely affect an Aboriginal claim or right. I will discuss each of these elements in greater detail. First, some general comments on the source and nature of the duty to consult are in order.

[Emphasis in original.]

[210] In *Rio Tinto* at paras. 36 and 37 the Chief Justice also affirmed that the content of the necessary consultation and potential remedies for a breach of that duty are both situational. She wrote:

[36] The nature of the duty varies with the situation. The richness of the required consultation increases with the strength of the *prima facie* Aboriginal claim and the seriousness of the impact on the underlying Aboriginal or treaty right: *Haida Nation*, at paras. 43-45, and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC74, [2004] 3 S.C.R. 550, at para. 32.

[37] The remedy for a breach of the duty to consult also varies with the situation. The Crown's failure to consult can lead to a number of remedies ranging from injunctive relief against the threatening activity altogether, to

damages, to an order to carry out the consultation prior to proceeding further with the proposed government conduct: *Haida Nation*, at paras. 13-14.

[211] The Province's general response to the FNFN's breach of a duty to consult allegations is stated as follows in its written submission at para. 148:

148. There is no dispute that the Province has knowledge of FNFN's treaty rights and that the Project is located within the traditional territory of the FNFN. Furthermore the Province acknowledges it has a duty to consult with the FNFN concerning the potential impacts of the Project upon their Treaty 8 rights. Consultation between FLNRO and the FNFN is presently ongoing in respect of the CSI Respondents' application for a permit under the *Mines Act* and under the *Forest Act* for the Project. However, the Provincial Respondent submits that EAO's interpretation of the *RPR* is not in itself Crown conduct that triggers the duty to consult, as the EAO's determination have any potential adverse effect on the Petitioners' treaty rights.

[212] More specifically at paras. 149 and 150 the Province has submitted that:

149. The Provincial Respondent submits that the EAO had no duty to consult with FNFN in the application of the thresholds for determining reviewable projects under the *RPR*. The interpretation and application of legislation is not Crown conduct triggering the duty to consult as there is no discretionary decision-making by the EAO in relation to the thresholds prescribed by the Lieutenant Governor in Council. To the extent that the determination of whether an environmental assessment will be required for a project or not, turns on interpretation of its "home" statute and the associated regulations, the EAO is best placed to determine how the goals of the legislation can be most effectively achieved.

150. The determination of whether a quantified threshold for review is met is not a process that can properly be the subject of First Nations' consultation. The proponent drives the process of whether an environmental assessment is required to the extent that they determine the intended production for the project. This is an appropriate approach to achieve the goals of the *EA Act* given the additional safeguards within the legislative scheme including the discretion provided to the Minister under s. 6, as well as monitoring, compliance and enforcement.

[213] In support of those submissions the Province relies upon the decisions of this Court and the Court of Appeal in *Friends of Davie Bay*.

[214] The Province further asserts that goals of statutory interpretation promoting predictability are "antithetical" to the Crown's duty to consult which, as stated in *Taku*

*River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004  
SCC 74 [*Taku River*] at para. 29:

...always requires meaningful good faith willingness on the part of the Crown  
to make changes bases on information that emerges during the process.

[215] In addition, the Province relies upon the proposition that since the EAO's  
interpretation of the criteria in Table 6 of the *Regulation* to determine whether a  
project is reviewable is not discretionary, there is no need for consultation. It says  
also that any duty of consultation only arises in respect of ministerial discretion  
arises under s. 6 of the *Act* that allows the Minster to designate an otherwise  
unreviewable project as reviewable an issue which is not before the court.

[216] In the alternative, the Province submits that any duty to consult which may be  
found to exist is at the "low end of the consultation spectrum" and was satisfied by  
the EAO.

### **1. Standard of Judicial Review**

[217] Determination of the question of what standard of judicial review will exist in  
any case concerning an alleged breach of the Crown's duty to consult can be a  
complex inquiry.

[218] In *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73  
[*Haida*] Chief Justice McLachlin wrote (at paras. 61 to 63):

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.]

[219] Thus in any given case the standard of review may range from correctness to reasonableness depending upon whether what is at issue is the decision as to whether a duty to consult exists and if so its extent (primarily legal questions attracting the correctness standard) or, whether the decision concerns the process engaged in by the government in fulfilling its duty which will likely attract a reasonableness standard. See: *Ahousht Indian Band v. Canada (Minister of Fisheries and Oceans)*, 2008 FCA 212 at para. 34.

[220] In this case, notwithstanding the Province’s assertion that since the EAO was interpreting its “home” statute a reasonableness standard should be applied in assessing whether a duty consult with the FNFN concerning the Decision existed should be assessed on a deferential reasonableness standard, I am satisfied that the standard to be applied to the EAO’s determination that no consultation was necessary is that of correctness.

**2. Did the EAO have a duty to consult regarding the Decision?**

[221] In *Rio Tinto* after determining how a duty to consult arises when the Crown has knowledge of a potential claim or right Chief Justice McLachlin stated at para. 41:

[41] The claim or right must be one which actually exists and stands to be affected by the proposed government action. This flows from the fact that the purpose of consultation is to protect unproven or established rights from irreversible harm as the settlement negotiations proceed: Newman, at p. 30, citing *Haida Nation*, at paras. 27 and 33.

[222] She then went on to say at paras. 42 to 44:

[42] Second, for a duty to consult to arise, there must be Crown conduct or a Crown decision that engages a potential Aboriginal right. What is required is conduct that may adversely impact on the claim or right in question.

[43] This raises the question of what government action engages the duty to consult. It has been held that such action is not confined to government exercise of statutory powers: *Huu-Ay-Aht First Nation v. British Columbia (Minister of Forests)*, 2005 BCSC 697, [2005] 3 C.N.L.R. 74, at paras. 94 and 104; *Wii'litswx v. British Columbia (Minister of Forests)*, 2008 BCSC 1139, [2008] 4 C.N.L.R. 315, at paras. 11-15. This accords with the generous, purposive approach that must be brought to the duty to consult.

[44] Further, government action is not confined to decisions or conduct which have an immediate impact on lands and resources. A potential for adverse impact suffices. Thus, the duty to consult extends to "strategic, higher level decisions" that may have an impact on Aboriginal claims and rights (Woodward, at p. 5-41 (emphasis omitted)). Examples include the transfer of tree licences which would have permitted the cutting of old-growth forest (*Haida Nation*); the approval of a multi-year forest management plan for a large geographic area (*Klahoose First Nation v. Sunshine Coast Forest District (District Manager)*, 2008 BCSC 1642, [2009] 1 C.N.L.R. 110); the establishment of a review process for a major gas pipeline (*Dene Tha' First Nation v. Canada (Minister of Environment)*, 2006 FC 1354, [2007] 1 C.N.L.R. 1, aff'd 2008 FCA 20, 35 C.E.L.R. (3d) 1); and the conduct of a comprehensive inquiry to determine a province's infrastructure and capacity needs for electricity transmission (*An Inquiry into British Columbia's Electricity Transmission Infrastructure & Capacity Needs for the Next 30 Years, Re*, 2009 CarswellBC 3637 (B.C.U.C.)). We leave for another day the question of whether government conduct includes legislative action: see *R. v. Lefthand*, 2007 ABCA 206, 77 Alta. L.R. (4th) 203, at paras. 37-40.

[Emphasis added.]

**a) Crown conduct: Is the Decision a “strategic high level decision” that triggered a duty to consult?**

[223] The Province submits that the EAO had no duty to consult with the FNFN concerning the making of the Decision other than by way of those processes engaged in before it was made because the Decision involved only interpretation of Table 6 of the *Regulation* as a matter of general application in the Province and was thus not a “strategic high level decision” triggering a duty to consult with the FNFN.

[224] In my view that assertion conflates issues of general statutory interpretation with issues that are more fundamental to the process engaged in by CSI through the action or inaction of the Province in “taking up” of lands over which the FNFN has, (by virtue of Treaty 8) rights to hunt, fish or trap, without any consultation concerning the environmental impact that taking up for the purpose of mining could have on those treaty rights.

[225] In making the Decision the EAO did more than merely interpret the provisions of the Sand and Gravel criteria in a way that accepted a proponent driven assessment of production capacity excluding excavated gravel that was not intended for sale or use. The EAO also accepted without apparent critical evaluation the calculations of CSI upon which that limited production capacity falling slightly below the threshold for environmental review was based.

[226] The evidence of the two Professional Geoscientists adduced on this petition calls into question the legitimacy of the data used by CSI and accepted by the EAO in determining that even the production capacity asserted by CSI is warranted. Had there been meaningful, good faith consultation and critical examination concerning the methodology and data used by CSI, the EAO may have reached a different conclusion than it did with respect to the site specific “taking up” of lands from the FNFN’s traditional territory without requiring an environmental assessment of the impact on its Treaty 8 rights.

[227] Further, by making the Decision that the Komie North Mine project could proceed without environmental assessment because a proponent can exclude

excavated gravel as “waste” the EAO set the stage for the development of more frac sand mines in the FNFN’s traditional territory that could also proceed on the same proponent driven analysis that would not require environmental assessment.

[228] The fact that further development in the Komie North area might attract environmental assessment as a “modification” or by way of designation by the Minister under s. 6 of the *Act* does not address the fact that before any such environmental assessment might become required the development of the Komie North Mine without environmental assessment would have already proceeded without consultation with the FNFN.

[229] Also, the possibility of eventually requiring environmental assessment of the Komie North Mine after it is in operation, or of other mining projects because of modification or subsequent designation are not matters in respect of which the EAO or the Minister have assured the FNFN there would be consultation.

[230] Accordingly, the Decision not only potentially directly adversely affects the FNFN’s Treaty 8 rights to the use of its traditional land in the area comprising the Komie North Mine project but also indirectly affects all other areas of its traditional lands over which frac sand mining development may be sought.

[231] The fact that such concerns are not speculative is, in my view, more than adequately evidenced by the five other Licenses of Occupation applied for by CSI notwithstanding its present assertion that it has no present plans to develop mines on those additional sites.

[232] For all of those reasons I am satisfied that the Decision must be treated as being more akin to a strategic high level decision triggering the Province’s duty to consult with the FNFN in relation to the potential adverse impact of the Komie North Mine on its treaty rights as opposed to either a decision requiring no consultation or, alternatively, one made at the “low end of the consultation spectrum” as postulated by the EAO.

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[233] In my opinion, that duty to consult is not abrogated by the fact that the interpretation of the Table 6 criteria accepted by the EAO may be of general application for other new Sand and Gravel Pits in the Province which are not subject to treaty rights.

***b) The potential for Adverse Effects arising from the Decision***

[234] In *Rio Tinto*, after discussing what Crown conduct that will give rise to a duty to consult the Chief Justice next addressed the need to show the possibility that the impugned Crown conduct (in this case the Decision) will adversely affect the Aboriginal claim or right asserted.

[235] In doing so, Chief Justice McLachlin said at paras. 45 to 48:

[45] The third element of a duty to consult is the possibility that the Crown conduct may affect the Aboriginal claim or right. The claimant must show a causal relationship between the proposed government conduct or decision and a potential for adverse impacts on pending Aboriginal claims or rights. Past wrongs, including previous breaches of the duty to consult, do not suffice.

[46] Again, a generous, purposive approach to this element is in order, given that the doctrine's purpose, as stated by Newman, is "to recognize that actions affecting unproven Aboriginal title or rights or treaty rights can have irreversible effects that are not in keeping with the honour of the Crown" (p. 30, citing *Haida Nation*, at paras. 27 and 33). Mere speculative impacts, however, will not suffice. As stated in *R. v. Douglas*, 2007 BCCA 265, 278 D.L.R. (4th) 653, at para. 44, there must be an "appreciable adverse effect on the First Nations' ability to exercise their aboriginal right". The adverse effect must be on the future exercise of the right itself; an adverse effect on a First Nation's future negotiating position does not suffice.

[47] Adverse impacts extend to any effect that may prejudice a pending Aboriginal claim or right. Often the adverse effects are physical in nature. However, as discussed in connection with what constitutes Crown conduct, high-level management decisions or structural changes to the resource's management may also adversely affect Aboriginal claims or rights even if these decisions have no "immediate impact on lands and resources": Woodward, at p. 5-41. This is because such structural changes to the resources management may set the stage for further decisions that will have a *direct* adverse impact on land and resources. For example, a contract that transfers power over a resource from the Crown to a private party may remove or reduce the Crown's power to ensure that the resource is developed in a way that respects Aboriginal interests in accordance with the honour of the Crown. The Aboriginal people would thus effectively lose or find diminished their constitutional right to have their interests considered in

development decisions. This is an adverse impact: see *Haida Nation*, at paras. 72-73.

[48] An underlying or continuing breach, while remediable in other ways, is not an adverse impact for the purposes of determining whether a particular government decision gives rise to a duty to consult. The duty to consult is designed to prevent damage to Aboriginal claims and rights while claim negotiations are underway: *Haida Nation*, at para. 33. The duty arises when the Crown has *knowledge*, real or constructive, of the potential or actual existence of the Aboriginal right or title “and contemplates conduct that might adversely affect it”: *Haida Nation*, at para. 35 (emphasis added). This test was confirmed by the Court in *Mikisew Cree* in the context of treaty rights, at paras. 33-34.

[236] The Province has submitted that the EAO's interpretation of the threshold criteria for new Sand and Gravel Pits in Table 6 of the *Regulations* is not in and of itself Crown action which has an adverse impact on the FNFN's Treaty 8 rights. It submits that the fact that the Komie North Mine project is not reviewable under the *Regulation* does not affect the Crown's obligation to adequately consult with the FNFN on decisions and activities which may infringe on those treaty rights.

[237] The Province argues that environmental assessments are a process by which the environmental impacts of a project are examined and recommendations made to the Minister and as such do not diminish treaty rights.

[238] While the Province acknowledges that when an environmental assessment is required it will include First Nation's consultation within the course of the process; it also says that such consultation is not the purpose of the *Act* and is specifically not required when determining reviewability at first instance which is only a matter of statutory interpretation and application of the requisite threshold criteria.

[239] That argument is premised upon the proposition that whether an environmental assessment is required or not the project under consideration will be the same because the nature of the proposed activity will not change. That results in the conclusion that there can thus be no impact on treaty rights arising from any failure of the EAO to require an environmental assessment of the Komie North Mine.

[240] In response the FNFN submits that the Decision has potential adverse effects upon its treaty rights in two specific respects.

[241] Firstly the FNFN submits that there is the very real potential for the Komie North Mine project, without any consultation with the FNFN with respect to requirement for an environmental assessment, being approved for operation exposing those lands in its traditional territory to negative impacts upon protected treaty rights.

[242] In support of that submission the FNFN relies on the decision of this Court in *Taku River Tlingit First Nation v. British Columbia (Minister of Environment)*, 2014 BCSC 1278 in which Macintosh J. considered the effect of the failure of the Crown to consult with the claimant before determining that the project in question had been “substantially started”.

[243] If, as determined by the EAO in that case, the project had been substantially started by application of s. 18(5) of the *Act* an environmental certificate issued five years earlier under s. 18 would continue for the life of the project. However, if the project had not been “substantially started” the certificate would have expired.

[244] In finding that a duty to consult arose with respect to the determination of whether the project had been substantially started Macintosh J. held that the failure to consult had the adverse effect upon First Nation rights because the decision of the EAO had allowed the project to proceed when it otherwise could not have done so.

[245] The FNFN submits that the finding of adverse effect in that case is similar to what has occurred in this case in the EAO’s determination without consultation that the Komie North Mine project is not a reviewable project under the *Regulation* because it clears the way for the approval of the project by other Crown ministries including the issuance of permits under the *Mines Act* that will result in the existence of the mine in the FNFN’s traditional territory without consultation.

[246] The second adverse effect of the Decision upon its treaty rights asserted by the FNFN is that it allows other large Sand and Gravel Pit mining operations to be approved without environmental assessment or oversight so long as in assessing “production capacity” the proponents postulate limits less than 250,000 tonnes per year over more than four years of operations by including only that portion of all of the excavated sand and gravel from a new pit that which the proponent intends to sell or use thereby allowing new mines in the FNFN’s traditional territory affecting its treaty rights to hunt, fish and trap.

[247] In that regard I note the observations of the Chief Justice in *Rio Tinto* in para. 47 (quoted in full above) that:

...as discussed in connection with what constitutes Crown conduct, high level management decisions or structural changes to the resource’s management may also adversely affect Aboriginal claims or rights even if these decisions have “no immediate impact on the lands and resources”... This is because such structural changes to the resources management may set the stage for further decisions that will have a direct adverse impact on land and resources.

[248] In my opinion the EAO’s adoption of and strict adherence to the proponent-driven approach to the environmental regulatory process in this case as evidenced by the Decision as well as the EAO’s September 30, 2013 and January 14, 2014 assertions of its correctness is equivalent to a high level management decision concerning resource management that can have both immediate as well as future direct adverse impacts upon the FNFN’s treaty rights.

[249] After considering the evidence adduced on this petition and the submissions of all counsel, I have concluded that the FNFN has established the potential for adverse effects arising from the conduct of the EAO in the making of the Decision.

[250] In doing so I accept the FNFN’s submission about potential adverse effects arising from both the direct (the Komie North Mine project) and indirect (prospective future new Sand and Gravel pit projects in its traditional territory) arising as consequences of the EAO’s failure to consult with the FNFN about the threshold criteria to be applied for the Komie North Mine.

[251] I also reach those conclusions with respect to the EAO's acceptance of a proponent-driven approach to environmental assessment in the face of known treaty rights and the potential for adverse effects of that process upon those rights.

[252] I say that because that uncritical acceptance of a proponent-driven assessment at the front end of the environmental regulatory process has the very real potential to defeat existing treaty rights by allowing projects to proceed without environmental assessment with any relief to the FNFN being left to sanctions which may be of no or little benefit once those rights have been abrogated.

[253] While the protection against the "loopholes" that can arise in a proponent-driven approach as identified in *Friends of Davie Bay* may be sufficient to meet the goals of the *Act* in cases not involving aboriginal treaty rights, in my opinion they are insufficient to do so when the project has the potential to both immediately and in future directly and indirectly adversely affect treaty rights.

[254] It is, in my opinion, also no answer to the duty of the Crown to consult when treaty rights may be adversely affected to say that if the proponent-driven assessment is flawed that flaw can be addressed by the possibility that ministerial discretion may be engaged to correct the flaw or that sanctions may be applicable.

[255] As stated by Chief Justice McLachlin in *Rio Tinto* at para. 48:

The duty to consult is designed to prevent damage to Aboriginal claims and title while claim negotiations are underway.

[256] While that observation was made in the context of as yet to be determined Aboriginal claims, I am satisfied that it is equally applicable to a situation such as this where the Decision is a fundamental part of the process that may lead to the taking up of land which is subject to treaty rights for purposes which have the obvious potential to infringe those rights.

[257] In result I find that the Province had a duty to consult with the FNFN before making the Decision on August 8, 2013.

**3. Has the EAO satisfied the duty to consult?**

[258] In the alternative to its argument that the EAO had no duty to consult with the FNFN in the making of the Decision and without acknowledging any legal duty to consult on the interpretation and application of the thresholds in Table 6 of the *Regulation*, the Province submits that any such consultation would be at the “low end of the consultation spectrum” (per *Haida* at para. 43) because the Decision only establishes a process for environmental assessment review, any adverse impact would be minimal.

[259] The Province accordingly submits that because of that minimal potential adverse impact on the FNFN's Treaty 8 rights occasioned by the EAO's interpretation of the *Regulation* that makes the Komie North Mine unreviewable, to maintain the honour of the Crown the only duty of the Crown would be to engage with the FNFN by giving notice, disclosing information and discussing any issues raised in response to the notice, as suggested by the Supreme Court of Canada in *Haida*, when low end consultation is required.

[260] The Province submits that the evidence establishes that the EAO did appropriately engage with the FNFN to at least the low level extent required by *Haida* concerning the interpretation of the Sand and Gravel threshold in the *Regulation*.

[261] In making that submission the Province references:

- 1) The June 18, 2013 letter from the FNFN to the EAO requesting that the Komie North Mine project be considered reviewable under the *Regulation* and setting out the FNFN's own views on interpretation of the Sand and Gravel threshold;
- 2) The EAO's response the following day advising the FNFN that it would consider whether the *Regulation* applied;

- 3) The EAO's advice to the FNFN on September 30, 2013 providing its views regarding the interpretation of the Sand and Gravel threshold;
- 4) The FNFN's letter of October 22, 2013, in which the FNFN made further submissions to the EAO in support of its interpretation of the threshold;  
and
- 5) The EAO's response dated January 15, 2014 with its further explanations of the rationale for its interpretation of the *Regulation*.

[262] In its written submissions the Province asserts that the referenced correspondence "demonstrates that the FNFN made submissions to the EAO and that their submissions were substantively considered by the EAO and a response and rationale provided". The Province thus submits that if there was a duty to consult with the FNFN, the EAO "adequately discharged any duty of consultation on the facts before this Court".

[263] The Province further submits that based upon the Court of Appeal's decision in *Friends of Davie Bay*, the EAO did not in any event, have a duty to respond to the FNFN's inquiries about the application of the *Regulation* to proposed projects because the function undertaken by the EAO does not involve an exercise of discretion.

[264] In addition, the Province asserts that both the Decision and the September 30, 2013 explanation of it to the FNFN only provided the "views" of the EAO on the interpretation of the *Regulation* and that "under the statutory scheme, responsibility for determining whether a project is a reviewable project rests with the proponent".

[265] Finally, the Province asserts in its written submissions that the FNFN's submissions concerning the EAO's failure to provide the FNFN with an opportunity to present their view in advance of the making of the August 8, 2013 Decision was "not pled and they have made no attempt to amend their Petition in this regard".

[266] Before turning to the determination of the substantive issue of whether the Province adequately consulted with the FNFN concerning the making of the Decision, I will first address that pleading issue raised by the Province in its written submissions.

[267] In the petition first filed on August 11, 2014 the FNFN sought, in addition to other specified relief:

2) A declaration that the Crown in right of the Province of British Columbia (the Crown) owes a duty to consult and accommodate the Fort Nelson First Nation with respect to the subject matter of the Decision, prior to making the Decision.

[Emphasis added.]

[268] To the extent that the Province seeks to rely upon a lack of a more specific pleading of the failure of the EAO to allow the FNFN to present their views in advance of the making the Decision, I am satisfied that any such lack of specificity of the FNFN's allegations of the EAO's failure to consult before the making of the Decision was more than remedied by the voluminous affidavit evidence filed.

[269] The issue was also fully canvassed in argument by all counsel with the alleged failure of the EAO to provide the FNFN with a meaningful opportunity to make submissions before the Decision was made being a central focus of the duty to consult arguments.

[270] In all of the circumstances I am satisfied that if there was any failure of the FNFN's pleadings to sufficiently particularize its complaints about the making of the Decision, any such lack of specificity did not cause surprise and did not in any way prejudice the Province in the hearing of the petition.

[271] As to the merits of the Province's submissions in support of its substantive arguments that there was a sufficiently adequate exchange of information and consideration of the FNFN's point of view to satisfy the duty of the Crown to consult in the circumstances of this case I make the following observations and have reached the following conclusions :

- 1) I do not agree that the duty to consult in this case is at the “low end of the consultation spectrum”. I have found in determining that there was a duty to consult in the making of the Decision which is more akin to a “strategic high level decision”.
- 2) I have also determined that the potential adverse effects of the Decision not only with respect to the Komie North Mine project but also other potential new Sand and Gravel Pits in the FNFN’s traditional territory is not “minimal”.
- 3) For those reasons alone I do not accept the Province’s suggestion that any duty to consult has been satisfied by “giving notice, disclosing information and discussing any issues raised in response to the notice”.
- 4) More specifically, however, I do not agree that the exchange of correspondence between the EAO and the FNFN is capable of supporting the proposition advanced by the Province that the correspondence to which it refers demonstrates that the submissions made by the FNFN to the EAO “adequately discharged any duty of consultation on the facts before this Court”.
- 5) To the contrary, the correspondence relied upon by the Province and other communications that are not referenced satisfies me that there was no meaningful consultation with the FNFN at all with respect to the subject matter of the Decision.
- 6) I conclude that what in reality transpired was that the FNFN sought to engage in meaningful consultation and the EAO either failed to respond in a timely way or deflected the FNFN’s concerns and then made the Decision without any input from the FNFN. The EAO then asserted and continues to assert that the process did not require consultation because it took the positions that the EAO’s interpretation of the Sand and Gravel is proponent-driven and that application of the threshold is not discretionary.

- 7) In making that observation I specifically note that:
- a. The correspondence relied upon by the Province does not include reference to the June 13, 2012 correspondence from the FNFN to the Minister requesting designation of all of CSI's proposed Sand and Gravel Pits in the FNFN's traditional territory as reviewable projects. In that letter concerns with "Project splitting" to avoid environmental assessment by setting production limits for each separate but related project was specifically raised by the FNFN.
  - b. The letter of June 13, 2012, was not responded to by the EAO until February 13, 2013, when the Executive Director of the EAO advised that the Minister had decided not to designate the Komie North Mine project or the other projects as reviewable projects "because the projects are preliminary, and as yet not sufficiently defined to be considered proposed projects".
  - c. That response letter also stated that in the opinion of the EAO the CSI projects "may when further advanced in terms of design constitute a single project that requires environmental assessment" but ended by saying that the EAO had requested that CSI contact the EAO prior to initiating the development stage of any of the six Licenses of Occupation "in order to determine whether an EA will be required".
  - d. However, more than two months before that letter was sent to the FNFN, CSI had already submitted a Notice of Work application to the Mines Ministry for a permit under the *Mines Act* for the development of the Komie North Mine.
  - e. The FNFN was not informed of that application until May 2, 2013, five months after the application was made.
  - f. When the FNFN was finally informed, it complained to the Ministry of FLNRO on June 3, 2013, about an inadequate review period as well as

incomplete, inadequate and inaccurate materials provided by CSI. In that same letter the FNFN again raised environmental assessment concerns and more specifically about what it suggested was an apparent attempt by CSI to “circumvent the threshold” by counting only sand in the production estimate and characterizing the gravel as waste.

- g. Similar concerns were raised in the FNFN’s letter of June 18, 2013, to the EAO which also enclosed a copy of its June 3, 2013 letter to the Ministry of FLNRO.
- h. In the EAO’s response to the June 18, 2013 letter the following day which the Province says advised the FNFN “that it would consider whether the *Regulations* applied”, the actual wording of the response was that:

EAO is aware of the proponent’s application to move to the development stage of its License of Occupation for the Komie North parcel.

Mike Peterson is the Project Assessment Manager working on this file, and is discussing the application with the project proponent, MEM and FNLR. Mike will respond to Fort Nelson First Nation once he has the required information.

[Emphasis added]

- i. Notwithstanding that advice to the FNFN, when CSI sent a letter to Mr. Peterson on July 19, 2013 requesting “confirmation that the Komie North Project is not reviewable” when the letter was received by the EAO no copy or information about it was provided to the FNFN.
- j. The EAO then made the Decision on August 8, without notification and without seeking any input from the FNFN.
- k. The Decision was copied to the Mines Ministry as well as the Ministry of FLNRO, but was not made known to the FNFN until September 30, 2013. Even then it was only made known after:

- i. the FNFN had sent an email to the Ministry of FLNRO (with a copy to the EAO) advising that it had not received a full response to its letter of June 19, 2013 in which it had stated that the Ministry of FLNRO should not “process further or approve the [Komie North Mine Project] until full responses to its outstanding correspondence had been given “by both the Ministry of FLNRO and the EAO (concerning the FNFN’s June 18 letter)””; and “a full consultation with the FNFN has been conducted and concluded by the crown on this application””; and
  - ii. the FNFN had also sent a letter to the EAO on September 26, 2013 (quoted at full in para. 68 of this judgment) advising that it had still not received a response to its June 2013 correspondence and in which it stated it looked forward to receiving responses to that correspondence and to “our further discussions of these Applications as they effect the FNFN’s rights and interests”.
- I. The EAO’s letter of September 30, 2013 and subsequent letter of January 14, 2014, cannot fairly be read as being part of a consultation process. Those letters seek only to justify the Decision. They do not substantively respond to the FNFN’s repeated concerns of which the EAO had been aware since June of 2012 that had not been addressed with the FNFN before the EAO made the Decision,
- m. As stated by Binnie J. in *Mikisew* at para. 54:
- ... 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...
- 8) I also do not accept the Province’s assertion that based upon the Court of Appeal’s decision in *Friends of Davie Bay*, the EAO had no duty to respond to the FNFN’s inquiries about the application of the *Regulation* to the Komie North Mine project or other proposed projects because the

function undertaken by the EAO does not include an exercise of discretion. For reasons I have already given, I am not persuaded that to the extent the decision in *Friends of Davie Bay* approves a proponent-driven approach to the interpretation and application of the thresholds in Table 6 of the *Regulation*, it also applies when a proponent-driven assessment at the front end of the environmental regulatory process has the very real potential to defeat existing treaty rights by allowing projects to proceed without environmental assessment with any relief being left to sanctions which may be of little or no benefit to a First Nation whose rights have been abrogated.

- 9) It follows that I do not accept the Province's further assertion that the Decision and the September 30, 2013 explanation of it to the FNFN only provided the "views" of the EAO on the interpretation of the *Regulation* and that "under the statutory scheme, responsibility for determining whether a project is a reviewable project rests with the proponent".
- 10) In my opinion, that assertion is, at best surprising, given the important environmental protection and oversight role afforded to the EAO by the Legislature in its attempt to balance environmental protection with other legitimate societal concerns. At worst it is an attempt to avoid responsibility.

[272] After considering all of the submissions of counsel and the totality of the evidence I find that the EAO did not engage in the required consultation with the FNFN with respect to the subject matter of the Decision in a meaningful way sufficient to satisfy the Province's constitutional obligations.

## **SUMMARY**

[273] I have concluded that:

- 1) The EAO's interpretation and application of the threshold criteria for new Sand and Gravel Pits in Table 6 of the *Regulation* as set out in the Decision is unreasonable.
- 2) The Province had a duty to consult with the FNFN with respect to the Decision.
- 3) The Province failed to meaningfully consult with FNFN in good faith and seek to accommodate the FNFN's aboriginal rights under Treaty 8 with respect to the subject matter of the Decision in a way sufficient to satisfy the Province's constitutional obligations.

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## **REMEDIES**

[274] As a consequence of those conclusions and the findings I have made in reaching them the FNFN is entitled to the following remedies:

- 1) An order setting aside the Decision.
- 2) An order remitting the determination of whether the Komie North Mine project meets the thresholds set out for new Sand and Gravel Pits in Table 6 of the *Regulation* to the EAO for reconsideration pursuant to s. 5 of the *Judicial Review Procedure Act* having regard to the findings I have made and the conclusions I have reached.
- 3) A Declaration that the Crown in the right of the Province of British Columbia owed a legal duty to meaningfully consult with the FNFN in good faith and seek to accommodate the FNFN's aboriginal rights under Treaty 8 with respect to the subject matter of the Decision prior to making the Decision.

- 4) A Declaration that the Crown in the right of the Province of British Columbia failed to fulfil its duty to meaningfully consult with the FNFN in good faith and seek to accommodate the FNFN's aboriginal rights under Treaty 8 with respect to the subject matter of the Decision.

“Davies J.”

2015 BCSC 1180 (CanLII)

## IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Fort Nelson First Nation v. British  
Columbia (Environmental Assessment  
Office)*,  
2015 BCSC 1180

Date: 20150917  
Docket: S146183  
Registry: Vancouver

Between:

**Chief Liz Logan in her own right on behalf of  
the Members of the Fort Nelson First Nation**

Petitioners

And

**Executive Director of the British Columbia Environmental  
Assessment Office, Canadian Silica Industries Inc. and Jeffrey Bond**

Respondents

Before: The Honourable Mr. Justice Davies

### **Corrigendum to Reasons for Judgment**

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Place and Date of Trial/Hearing:

Vancouver, B.C.  
January 21 - 23 and  
April 1, 2015

Place and Date of Judgment:

Vancouver, B.C.  
July 7, 2015

Place and Date of Corrigendum:

Vancouver, B.C.  
September 17, 2015

2015 BCSC 1180 (CanLII)

[275] In paragraph 28 of my reasons for judgment released July 7, 2015 (2015 BCSC 1180), the reference to the respondent James Bond is corrected to read “Jeffrey Bond”.

[276] In paragraph 114, the reference to “marketable proponent sand” is corrected to “marketable proppant sand”.

[277] In paragraph 119, the quote “regardless of whether or not they form part of the production facility” is corrected to read “regardless of whether or not they form part of the production of the facility”.

[278] In paragraphs 151, 153, 158, 164 and 165, the reference to Mr. Hicks is corrected to read “Mr. Hitch”.

[279] In paragraph 274, subpara. 4, the end of the sentence “with respect to the subject matter or the Decision” is corrected to read “with respect to the subject matter of the Decision”.

“Davies J.”

## IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Gwininitxw v. British Columbia (Attorney  
General)*,  
2013 BCSC 1972

Date: 20131030  
Docket: S085825  
Registry: Vancouver

2013 BCSC 1972 (CanLII)

Between:

**Gwininitxw (also known as Yvonne Lattie, on behalf of  
all members of Gwininitxw House)**

Plaintiffs

And

**Attorney-General of British Columbia (Ministry of Energy, Mines and  
Petroleum Resources) and Roxgold Inc.**

Defendants

Before: The Honourable Mr. Justice Voith

### Reasons for Judgment

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Place and Date of Trial/Hearing:

Vancouver, B.C.  
June 17 and 19, 2013

Place and Date of Judgment:

Vancouver, B.C.  
October 30, 2013

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2013 BCSC 1972 (CanLII)

**Overview**

[1] The plaintiffs seek:

- i) an order, under Rule 6-2(7), adding Alan Raven and ARR Mineral Exploration LTD ("ARR") as defendants to this action; and
- ii) an order, under Rule 6-2(8), granting the plaintiffs leave to file an Amended Notice of Civil Claim in the form attached as Annexure "A" to its Notice of Application (the "Amended Claim") reflecting revisions made June 16, 2013.

[2] Both applications are opposed by each of Mr. Raven and ARR as well by the Provincial Crown on disparate grounds. The plaintiffs did not pursue the application for an interlocutory injunction that they had initially included in their Notice of Application.

**General Background**

[3] I have case managed this matter since July 2009.

[4] The Plaintiff, Yvonne Lattie, is Chief of the Gwininitxw, and carries the Chief name, Gwininitxw. Gwininitxw is a House Group of the Gitksan Nation. Gwininitxw brings this claim on behalf of the Gwininitxw House.

[5] The plaintiffs' early pleadings advanced a claim for aboriginal title over areas that are described more fully in those pleadings. They also advanced various causes of action in relation to a number of mineral permits and tenures that were initially issued to Roxgold Inc. ("Roxgold") and were more recently assigned to ARR. The present application only relates, directly, to this second group of actions and the matters that arise from them.

[6] The following chronology, which has been taken in part from ARR's Application Response, is relevant to the events which underlie this application. I have developed further specific aspects of this chronology where I have addressed particular issues raised by the parties.

- (a) On May 30, 2007, the Ministry of Energy, Mines, and Petroleum Resources (“MEM”) issued *Mines Act* permit MX-1-729 (the “MX Permit”) to Roxgold for exploration and reclamation activities on the Gosico property (also known as “TJ Ridge”), as set out in the Notice of Work and Reclamation under the permit. Roxgold is a publicly held British Columbia company. Mr. Raven was president and a director of Roxgold from about 2006 until October 2010.
- (b) On July 30, 2008, MEM approved a further Notice of Work for Roxgold (completion date December 31, 2008) under the MX Permit.
- (c) On August 15, 2008, the plaintiffs filed a Writ and Statement of Claim against Roxgold and MEM seeking to quash MEM authorizations, a declaration of aboriginal title, and damages.
- (d) On November 10, 2008, the plaintiffs filed an Amended Statement of Claim.
- (e) On June 8, 2009, MEM approved a further Notice of Work for Roxgold (completion date September 15, 2009) under the MX Permit.
- (f) On October 27, 2010, Mr. Raven resigned from the Board of Directors of Roxgold.
- (g) In January 2011, ARR was incorporated. ARR is a privately held British Columbia company. Mr. Raven is a director and the president of ARR.
- (h) On April 8, 2011, the plaintiffs filed a Notice of Civil Claim.
- (i) On June 1, 2011, the plaintiffs signed a Release (the “Release”) in favour of Roxgold.
- (j) On July 21, 2011, a Settlement Conference Order (the “Settlement Order”) was entered, in which the plaintiffs agreed to dismiss the existing proceeding against Roxgold.

- (k) On October 4, 2011 mineral tenures belonging to Roxgold for the TJ Ridge property were transferred to ARR.
- (l) On March 20, 2012, MEM wrote to Chief Gwininitxw/Yvonne Lattie to advise that MEM had received a request to assign the MX Permit from Roxgold to ARR, and to extend the timeframe for completion of work that was previously approved on June 8, 2009.
- (m) On March 28, 2012, MEM amended the permittee of the MX Permit from Roxgold to ARR, and authorized exploration activities detailed in the Notice of Work and Reclamation program dated May 5, 2009 (completion date extended to March 31, 2013).

2013 BCSC 1972 (CanLII)

**The Matters raised by the Amended Claim and the Position of the Plaintiffs in Relation to Such Matters**

- [7] The plaintiffs' Amended Claim purports to raise several causes of action against each of Roxgold, Mr. Raven, ARR, as well as against the Provincial Crown.
- [8] Broadly stated the Amended Claim alleges:
- i) Roxgold and Mr. Raven breached various obligations contained in the permits and authorizations that Roxgold received. Many of these breaches are alleged to have occurred before the Release was signed. The breaches, the plaintiffs say, ground actions in trespass, public and private nuisance, and negligence. The plaintiffs accept that if Roxgold (and Mr. Raven) had complied with the terms of the permits it received there would be no basis for these actions. The plaintiffs allege, however, that Roxgold exceeded the terms of such permits at different times and in different ways. The plaintiffs accept that there is no precedent for a First Nation suing a third party in either trespass, or in private or public nuisance, or in negligence for harm to its aboriginal lands when its claim for aboriginal title has not yet been established. As a result of the conclusions I have come to, I have not addressed whether such causes of action, in the circumstances of this case,

are available to the plaintiffs. I do observe, however, that the plaintiffs accept that such claims would potentially be of remarkable breadth. A claim in trespass, for example, would, it was argued, extend to any member of the public who crossed Crown land that is subject to a claim for aboriginal title.

ii) Roxgold and Mr. Raven engaged in a conspiracy, together with members of the Gwininitxw House and the MEM, to injure the plaintiffs' aboriginal title claim and its traditional government structure. The events which are alleged to ground this cause of action again appear to predate the signing of the Release.

iii) ARR and Mr. Raven have engaged in various forms of conduct, subsequent to the signing of the Release, which again underlie and support an action in each of trespass, private and public nuisance, and negligence.

iv) The Provincial Crown, as represented by MEM, failed to consult adequately with the plaintiffs in each of 2007, 2008, 2009 and 2012, with respect to the various permits it issued to Roxgold and with respect to the transfer of these permits to ARR.

### **The Positions of the Proposed Defendants**

[9] Mr. Raven and ARR argue that the plaintiffs cannot meet either requirement under Rule 6-2(7) in that:

- i) there is no live question or issue between the plaintiffs and the proposed defendants;
- ii) it would be unjust or an abuse to add the proposed defendants and to allow the plaintiffs to relitigate their settled claims against Roxgold;
- iii) it would be unjust and inconvenient to add the proposed defendants to an action that includes a claim for aboriginal title against the Provincial Crown; and

iv) various of the claims advanced by the plaintiffs are inappropriate in the context of the present action and are more properly brought by way of judicial review.

[10] Mr. Raven and ARR are supported, as I have said, in several of their positions by the Province.

**Issues**

[11] The present application raises the following distinct issues:

- i) What impact do the Release or the Settlement Order have on the causes of action raised in the Amended Claim?
- ii) Whether the claim of an alleged failure to consult, by the Crown, at different points in time, constitutes an impermissible collateral attack on the various permits that MEM granted or assigned?
- iii) Whether there exists any basis for adding ARR to this action?
- iv) Whether the Amended Claim advances any basis for adding Mr. Raven to this action?

**The Law Relating to the Addition of Parties**

[12] Rule 6-2(7) establishes the necessary requirements to add a party to an action. A plaintiff must establish:

- (a) there is a question or issue between the plaintiff and the proposed defendants that relates to the relief, remedy, or subject matter of the proceeding, and
- (b) it would be just and convenient to decide the issue between the plaintiff and the proposed defendants in this proceeding; *Strata Plan No. VIS3578 v. Canan Investment Group Ltd*, 2010 BCCA 329, paras. 45-46.

[13] The decision to add parties under this Rule is subject to the court's discretion:

*Strata Plan No. VIS3578*, para. 41.

[14] The threshold for the first part of the test is low and has been described as whether there is a real issue between the plaintiff and the proposed defendants that is not frivolous, or that the plaintiff has a possible cause of action against the proposed defendants: *Strata Plan No. VIS3578*, para. 45.

**The Release, the Settlement Order and their Import**

[15] The Release was signed by the plaintiffs with access to legal advice and, I understand, following an examination of discovery of a representative of Roxgold.

The salient portions of the Release provide:

NOW THEREFORE, IN CONSIDERATION OF the Settlement Amount above set out and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, Gwininitxw, for herself and her successors, heirs, executors and assigns, and on behalf of all members of the Gwininitxw House, does hereby RELEASE, REMISE, AND FOREVER DISCHARGE Roxgold and its respective administrators, officers, directors, employees, servants, agents, associated, related, successor and predecessor companies, successors, heirs, executors and assigns, and each of them, from any and all liabilities, causes of action, rights, demands, damages, indemnities, costs, interest, fees, expenses, and claims of any nature or kind whatsoever or wheresoever, whether at law or at equity and whether known or unknown, suspected or unsuspected, that they now have, have had in the past, or shall ever have with respect to all issues arising directly or indirectly from or relating to or connected with of (sic) the Action.

[16] The pertinent portions of the Settlement Order, signed by counsel for the plaintiffs, state:

2. The within proceedings be dismissed against Roxgold Inc., without costs.
3. Claims against Roxgold Inc. will be removed from paragraph 58 (d), (e) and (h) of the Plaintiff's Notice of Civil Claim.
4. Such dismissal shall be for all purposes of the same force and effect as if judgment had been pronounced at the trial of the proceeding upon its merits.
- ...
6. The Plaintiff shall execute a Release in a standard form without a confidentiality clause in favour of Roxgold Inc.

[17] The plaintiffs argue that the Release has no application because:

- a) they did not, when they signed the Release, understand the full scope of Roxgold's earlier activities;
  - b) the Release does not extend to ARR or Mr. Raven;
  - c) the requirements of the permits that were assigned to ARR and which imposed various reclamation obligations on ARR for the work done earlier by Roxgold somehow "refreshed" or "revived" these obligations in a manner that would allow the plaintiffs to sue for those earlier breaches; and
  - d) some of ARR's activities post-date the Release;
- a) The Plaintiffs did not Appreciate the Scope of Roxgold's Activities when they Signed the Release**

[18] This particular thesis is misconceived in several ways. First, if it were sound in principle, and subject to the Settlement Order, one would have thought that the plaintiffs would continue to sue Roxgold for those wrongful acts that Roxgold had participated in and the plaintiffs now say they were unaware of prior to signing of the Release. The plaintiffs, however, concede they have no cause of action against Roxgold available to them.

[19] Thus, Roxgold is no longer a named defendant in the style of cause of the Amended Claim. Roxgold is, however, referred to throughout the Amended Claim. In addition, the Amended Claim at subparagraphs 58(d) and (e) expressly seeks declaratory and injunctive relief against Roxgold. Further, paragraph 62 of the Amended Claim, under "Part 3: Legal Basis", advances a claim against, *inter alia*, Roxgold for "interfering with the ... political integrity of Gwininitxw House". Thus the position of the plaintiffs, simply on the face of the Amended Claim, is not coherent.

[20] More importantly, the express language of the Release is inconsistent with the plaintiffs' ability to continue to advance a claim for activity which predated the Release and of which, they now say, they were unaware.

[21] In Fred D. Cass, *The Law of Releases in Canada* (Aurora, Ont.: Canada Law Book, 2006) at 180, the author states:

As a general proposition, “[w]hile a settlement extends only to subjects that the parties have in contemplation, a settlement cannot be avoided because the damages arising under one of the headings contemplated is greater than expected” [citing *Athabasca Realty Co. v. Foster* (1982), 132 D.L.R. (3d) 556 at 565 (Alta. C.A.)]. ... Thus, Canadian courts have on many occasions refused to re-open settlements on the sole ground that the releasor underestimated his or her injuries or damages [citing *Hoyer v. Toronto Transit Commission*, [1952] O W N. 261].

[22] The foregoing comments appear to be apposite. The assertion of the plaintiffs seems to be that there was more harm to their lands than they had understood. Paragraph 36.4 of the Amended Claim states, in part: “... the participants observed that the scope and extent of adverse effects and damage to Gwininitxw land due to mineral exploration activities was more extensive than previously believed.”

[23] Such assertions do not avail the plaintiffs or curtail the efficacy of the Release.

[24] The situation may be somewhat altered if a releasor subsequently sues on a claim of which it was unaware or which was not in the contemplation of the parties at the time of the release (*Bank of Credit and Commerce International SA (in Liquidation) v. Ali and Others*, [2001] 1 All E.R. 961 (H.L.) at paras. 19-21, 28-29, and *Bank of Montreal v. Irwin* (1995), 124 D.L.R. (4th) 73, [1995] B.C.J. No. 788 (C.A.) at paras. 25-29.

[25] In such circumstances, the central question is whether the parties intended for unknown claims to be released. As with any contract, the parties’ intentions are assessed objectively. In order to release a party from unknown claims the language in a release must be unequivocal. It must be clear that the parties intended the release to cover unknown claims. If the language of the release is considered to extend to or cover unknown claims, the further question becomes: is the claim part of the *subject matter* of the release? If so, the releasor cannot sue on that claim, even if it was unknown at the time the release was made.

[26] In the instant case, the language used in the Release is unequivocal with respect to whether it covers unknown claims. The Release states that the Gwininitxw:

does hereby RELEASE ... Roxgold and its ... agents ... and assigns ... from any and all ... claims of any nature or kind ... whether at law or at equity and whether known or unknown, suspected or unsuspected, that they now have, have had in the past, or shall ever have with respect to all issues arising directly or indirectly from or relating to or connected with ... the Action.

[27] This language mirrors the language of the release addressed in *Bank of Montreal* at para. 23:

... the undersigned, BANK OF MONTREAL ... RELEASES AND FOREVER DISCHARGES MAUREEN IRWIN, and her ... assigns ... from any and all manner of action ... whether in law or in equity or by statute, or otherwise, and whether known or unknown, suspected or unsuspected, which the Releasor ever had or now has for any reason against the Releasee ...

[28] The release in *Bank of Montreal* was deemed sufficient to cover unknown claims; indeed, it covered claims which *did not exist* at the time the release was made. In reaching this conclusion, Justice Donald relied on the phrase “whether known or unknown, suspected or unsuspected” (para. 28), a phrase which is reproduced part-and-parcel in the Release.

[29] Since the language in the Release evinces an intention to cover unknown claims, the remaining question is whether the claim now asserted is part of the subject matter of the Release. The Release states that it covers “all issues arising directly or indirectly from or relating to or connected with ... the Action”. Moreover, a review of the Amended Claim reveals that the pleading, in numerous paragraphs, simply adds Alan Raven and/or ARR to the paragraph as a party in addition to Roxgold without any other addition or modification to the text of the paragraph. Simply put, the Amended Claim purports, in many instances, to pertain to exactly the same conduct that the plaintiffs originally complained of and attributed to Roxgold before the Release was signed.

[30] Based on *Bank of Montreal* and a review of the Amended Claim, I do not consider that it matters whether the plaintiffs’ claim against Roxgold, ARR and

Mr. Raven is classified as (1) an attempt to bypass the Release because the damages are now alleged to be more extensive than anticipated or (2) whether they pertain to a claim that was unknown at the time of the Release. The Release is a full answer in either case.

[31] Furthermore, any claim that has been advanced against Roxgold for conduct that the plaintiff complained of in their earlier pleadings would also be *res judicata* under the terms of the Settlement Order.

**b) Does the Release Extend to ARR?**

[32] ARR is the current holder of the MX Permit formerly held by Roxgold, and as such ARR is the assign of Roxgold. This is consistent with the statutory scheme under which the MX Permit was transferred from ARR to Roxgold and with the correspondence, sent by the Ministry to Mr. Raven on March 28, 2012, enclosing "... your Amended Mines Act permit assigning ARR Mineral Exploration Ltd. as the new permittee".

[33] It is also consistent with the materials filed by the Province. Thus, for example, the Affidavit of Ms. De Hoog, an operations coordinator with MEM, refers to the "*Mines Act* permit assigned to ARR Mineral Explorations Ltd. on March 28, 2012". Furthermore, a comparison of the permit formerly held by Roxgold and the permit that was transferred/assigned to ARR confirms the consistency in the terms of the two permits.

[34] Still further, the letter sent by MEM to Chief Gwininitxw on March 20, 2012 gave notice that MEM had received a request to amend the MX Permit to "[a]ssign ARR Mineral Exploration Ltd. as permittee ...". The letter also advised that ARR had confirmed it "will take over existing and proposed reclamation liabilities on site". The response to MEM's notice, authored by counsel for the plaintiffs, throughout deals with the matter as "an assignment" to ARR. Finally, para. 36.2.1 of the Amended Claim pleads that "MEMNG provided to Alan Raven and ARR Minerals an amended Mines Act permit assigning the Tenures to ARR Minerals".

[35] In this case the language of the Release expressly released “Roxgold and its ... assigns” from all claims that arose directly or indirectly from the then action. In *Montreal Trust Company of Canada v. Birmingham Lodge Limited* (1995), 24 O.R. (3d) 97, [1995] O.J. No. 1609 (C.A.) at 104, citing *National Trust Co. v. Mead*, [1990] 2 S.C.R. 410 at 423, the court said:

The word “assign” has, of course, a broader meaning [than “successor”]. An “assign” is anyone to whom an assignment is made and presumably, but for the specific reference to “successors”, would include both individuals and corporations. As between mortgagors, an assignment would be an agreement between the original mortgagor and his purchaser by which the latter would assume the mortgage debt in exchange for valuable consideration.

[36] The plaintiffs’ claims are barred by the Release and ARR, as Roxgold’s assign, cannot, therefore, be added as a party to the Action for any of the conduct of Roxgold that preceded the execution of the Release.

**c) Does the Release Extend to Mr. Raven?**

[37] Counsel for Mr. Raven argued that he was a director and officer of Roxgold at the time of the alleged conduct that is the subject of this Action, which is the relevant time period. Although not an officer or director at the time the Release was signed, the plaintiffs’ claims were based, it was argued, on the actions of Mr. Raven at the time he held those positions. He was thus covered by the Release. I do not consider that I need address this particular submission as there is a more precise basis upon which to determine whether the Release extends to Mr. Raven.

[38] Mr. Raven’s affidavit of June 14, 2012 described his relationship and role with Roxgold as “registered agent” of its tenures with the Mineral Titles Branch:

11. After I resigned as president and director from Roxgold in October 2010, I continued to manage the Mineral Tenures for Roxgold. I was Roxgold’s registered agent with the Mineral Titles Branch (MTO) with access to MTO’S online registry, run through the BCeID system. I was the only person who had the authority and the password to manage the Mineral Tenures on MTO’s online registry on behalf of Roxgold.

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[39] No part of the foregoing description is contested by the plaintiffs. Further, parts of the plaintiffs' Amended Claim accept that Mr. Raven's conduct, or at least aspects of it, were undertaken "on behalf" of Roxgold (see for example para. 27 ). Other parts of the Amended Claim identify Mr. Raven as the "registered agent" of the tenures with the Mineral Titles Branch (see for example paras. 15 and 36.1.3). Therefore, the scope of the term "agent" in the context of the Release will determine whether the Release extends to Mr. Raven as Roxgold's agent at the time the Release was signed.

[40] The proper interpretation of contracts was recently addressed by the Supreme Court of Canada in the case of *Tercon Contractors v. B.C. (Transportation and Highways)*, 2010 SCC 3. Mr. Justice Cromwell, writing for the majority, held that the key principle of contractual interpretation "is that the words of one provision must not be read in isolation but should be considered in harmony with the rest of the contract and in light of its purposes and commercial context" (at para. 64).

[41] The need to interpret a release contextually was addressed by LaForest J.A., as he then was, in *White et al. v. Central Trust Co. et al.*, (1984), 7 D.L.R. (4<sup>th</sup>) 236, [1984] N.B.J. No. 147 (C.A.) at 248:

What the statement quoted means is that in determining what was contemplated by the parties, the words used in a document need not be looked at in a vacuum. The specific context in which a document was executed may well assist in understanding the words used. It is perfectly proper, and indeed may be necessary, to look at the surrounding circumstances in order to ascertain what the parties were really contracting about.

[42] The principles of interpretation outlined by LaForest J.A. in *White* have been applied and cited with approval by the Supreme Court of Canada in *Hill v. Nova Scotia (AG)*, [1997] 1 S.C.R. 69, as well as by the Court of Appeal of this province in *Hannan v. Methanex Corp.*, [1987] 7 W.W.R. 619 at para. 39, and recently by this court in *Dawson v. Tolko Industries Ltd.*, 2010 BCSC 346 at para. 21, and *Beck Estate v. Johnston, Meier Insurance Agencies Ltd.*, 2010 BCSC 719 at para. 95, aff'd 2011 BCCA 250. Each of the foregoing decisions deals with the interpretation of a release.

[43] The recent case of *Dawson* is particularly pertinent in that it discusses the intended scope of a release through examination of the term “agent”. In that case, a release was signed following the termination of employment contracts, and the issue before the court was whether the term “agent” extended the benefit of the release to the defendants as actuaries and pension consultants to the employer. Mr. Justice Butler identified two distinct definitions of agency that emerge from the jurisprudence, a broad definition where “anyone who does something for another is for that very limited purpose an “agent”” (at para. 31, citing Southin J.A. in *Penderville Apts. Development Partnership v. Cressey Development Corp.* (1990) 43 B.C.L.R. (2d) 57 (C.A)), and the legal concept of agency as described in G.H.L. Fridman, *Canadian Agency Law*, 2d ed. (Markham: LexisNexis Canada Inc., 2012) at para. 34 (emphasis in original):

Agency is the relationship that exists between two persons when one, called the *agent*, is considered in law to represent the other, called the *principal*, in such a way as to be able to affect the principal's legal position in respect of strangers to the relationship by the making of contracts or the disposition of property.

[44] In the context of the contractual relationship between the parties in *Dawson*, Butler J. determined that the broad definition of agent cited above was beyond the reasonable contemplation of the parties, as this definition would necessarily and unreasonably include an indemnity for negligent acts done by anyone hired by the employer that could possibly harm the plaintiffs, including reckless couriers and plumbers. This reasoning was cited with approval by this court in *Beck Estate*, where Griffin J. wrote, “if you interpret the concept of the releasee’s agent so widely that it covers all claims against anyone who in some capacity acts as agent for the releasor, it would have absurd effects” (at para. 109).

[45] Butler J. concluded that the definition intended by the parties was necessarily limited to agents who represented the employer and were able to affect the employer’s legal position in respect of strangers to the relationship (at para. 36). This definition was consistent with the employer’s intention to be released from activities undertaken on its own behalf through employees and legal representatives, as well

as the employees' intention to grant a full release to the employer without limiting its right to sue unintended actors (*ibid*). The case of *Sheriff v. Apps*, 2012 ONSC 565, relied on by counsel for Mr. Raven, engages in a similar interpretative exercise. There the court concluded that the parties to the release reasonably expected that the term "agent" would apply to the defendant as at the relevant time he was acting in his capacity as agent for the releasee.

[46] With the foregoing framework in mind, the question becomes whether, at the time the Release was signed, Mr. Raven fell within the definition of agent intended by the parties, such that he had the authority to change Roxgold's legal position and should therefore be covered by the Release.

[47] I have referred to the portion of Mr. Raven's affidavit of June 14, 2013 which states that, though he was no longer employed as a director or officer of Roxgold at the time the Release was signed, he was throughout registered as Roxgold's authorized representative through the Mineral Titles Branch's online registry, an online administrative system for mineral titles which facilitates the acquisition and maintenance of mineral titles. The online registry can only be accessed with a BCeID. Mr. Raven deposes that at the relevant time he was the only person with access to Roxgold's BCeID, and therefore the only representative of Roxgold that could sign on to the online registry and manage or transfer the mineral tenures owned by Roxgold.

[48] Mr. Raven has further deposed that he was asked by Barry Girling, Roxgold's director, to transfer Roxgold's Mineral Tenures to ARR, which Mr. Raven accomplished in October 2011 because of his position as Roxgold's authorized representative on the Mineral Titles Branch's online registry. This transfer and the authority given to Mr. Raven in respect of it, places Mr. Raven continually within the definition of agent examined above, as someone able to affect the legal position of Roxgold through the disposition of Roxgold's property. Accordingly, I consider that Mr. Raven fell within the intended scope of the term "agent" when the Release was

executed. Accordingly, any claim against Mr. Raven for conduct that preceded the signing of the Release cannot be advanced.

**d) Does the Release Act to Release Claims Against Alan Raven as a joint tortfeasor?**

[49] Counsel for Mr. Raven argued that the plaintiffs' claims against Mr. Raven personally are also not sustainable by virtue of the common law doctrine that a release extinguishes claim against joint tortfeasors. Counsel for Mr. Raven argues that this doctrine extends to officers and directors acting on behalf of a corporation and further argues that s. 53 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253, which modifies this doctrine to some extent, does not apply.

[50] I do not accept the foregoing submission and certainly not as broadly as it was expressed.

[51] In the case *ScotiaMcLeod v. Peoples Jewellers Ltd.*, 129 D.L.R. (4<sup>th</sup>) 711, [1995] O.J. No. 3556 (C.A.), claims were raised against the directors of the defendant corporation as joint tortfeasors for negligent misrepresentations made by the corporation. The Ontario Court of Appeal held that the attempt to hold directors vicariously liable for the negligence of a corporation for their conduct as "directors simpliciter" (at para. 18), without any allegation of tortious conduct made against them personally, was founded on a theory of liability which does not exist in law" (at para. 37). The conclusions of the court in *Peoples* in relation to the liability of corporate directors were cited with approval by the British Columbia Court of Appeal in the case *XY, LLC v. Zhu*, 2013 BCCA 352 at para. 60. In that case the court concluded that in order for a director to be held liable for tortious conduct committed in the course of his/her employment, the tortious conduct of the director must be "properly pleaded and proven as an "independent" tort" committed by the director (at para. 73).

**Claims arising out of activities that postdate the Release**

[52] The Amended Claim discloses two distinct sets of events or circumstances that postdate the Release and that are said to ground the various claims advanced by the plaintiffs.

**a) Inadequate Consultation or Accommodation Relating to the Amendment/Assignment of the MX Permit**

[53] ARR received the relevant mineral tenures from Roxgold on October 4, 2011. That transfer was effected electronically. On March 20, 2012, as I have said, MEM wrote to Gwininitxw House advising it had received a request to assign the MX Permit and other authorizations to ARR. The Amended Claim (at para. 36.2.1) alleges that on March 28, 2012, ARR was provided the amended MX Permit and that the government's purported consultation was both inadequate and conducted in bad faith. Paragraph 16 of the Amended Claim states:

MEMNG has not adequately consulted with the Gwininitxw House or accommodated the interests of Gwininitxw House with respect to the use of Maxhla Didaat by Alan Raven or companies controlled and operated by Alan Raven, including the defendant ARR Minerals. Work Plans for development and exploration of the Exploration Site were submitted pursuant to s. 10 of the *Mines Act* by Roxgold and approved by MEMNG in 2006, 2007, 2008, and 2012.

[54] Both the Province and ARR argued that this pleading and the relief sought as a result of it, which I will come to, constitutes an impermissible collateral attack on the exercise of a statutory power. Both argue that this misuse of the court's procedure also constitutes an abuse of process.

[55] In *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, at para. 37, the court commented that an "abuse of process" is the "misuse of [the Court's] procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute" (see also para. 35).

[56] More recently, in *Behn v. Moulton Contracting Ltd.*, 2013 SCC 26 [*Behn* SCC], Justice LeBel, writing for the Court, observed at para. 40, that "[t]he doctrine of abuse of process is characterized by its flexibility" (see also para. 41). *Behn* is a

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case where the plaintiff was issued various logging permits or licenses. The defendants did not initially seek to challenge those licenses. Instead they blockaded the plaintiff's access to its camp. The plaintiff sued the defendants at which point the defendants argued, in their defense, that the licenses were void because they had been issued in breach of the duty to consult and in violation of their treaty rights. In such circumstances Justice LeBel held that allowing the defendants to raise these issues "would be tantamount to condoning self-help remedies and would bring the administration of justice into disrepute" and that "the doctrine of abuse of process applies" (at para.42).

[57] In *Canadian Forest Products Ltd. v. Sam*, 2013 BCCA 58, leave to appeal ref'd [2013] S.C.C.A. No. 146, the court addressed two actions. One was brought by the forest company and the other by the respondent First Nations group. Each sought injunctive relief. The First Nations group advanced claims of aboriginal rights and title to various areas including those covered by the cutting permits the company had received. It also challenged the right of the forest company, or its agent, to conduct logging operations under the permit it had received and argued that the permit was invalid. Both the logging company and the Province argued that the First Nation group's challenge to the validity of the cutting permit, under the rubric of the action it had brought, constituted an impermissible collateral attack on the process leading to the issuance of the permit and the permit itself.

[58] Though Hall J.A., for the court, considered that the action commenced by the First Nations group "savours of abuse of process based on the reasoning in cases such as *Moulton Contracting*" (at para. 28), his analysis, as well as the analysis in the cases he referred to, focuses on the doctrine of collateral attack.

[59] In addressing the "process by which differing legal issues ought most properly be addressed by courts" (at para.17), Hall J.A. referred to *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62. In that case, the defendant Crown had argued that the plaintiff should seek judicial review of the decision that it said had caused it harm. The Supreme Court, per Binnie J., said at para. 19:

If a claimant seeks to set aside the order of a federal decision maker, it will have to proceed by judicial review, as the *Grenier* court held. However, if the claimant is content to let the order stand and instead seeks compensation for alleged losses (as here), there is no principled reason why it should be forced to detour to the Federal Court for the extra step of a judicial review application (itself sometimes a costly undertaking) when that is not the relief it seeks. Access to justice requires that the claimant be permitted to pursue its chosen remedy directly and, to the greatest extent possible, without procedural detours.

[60] Hall J.A. considered, at para. 18, that the *Canadian Forest Products* case is rather the obverse of that extant in *TeleZone*. In *TeleZone*, the plaintiff had no interest in challenging the government decision to refuse a license to it, but rather sought damages under various heads. Here, quite the opposite is the case, because the Kelah respondents are challenging the right of Canfor or its agent to conduct logging operations in a specific area under CP324.

[61] Hall J.A. concluded at para. 30, that "the form of action commenced by the Kelah respondents as it relates to activities authorized by CP324 constitutes an impermissible collateral attack on the issuance of this permit...". He further said at para. 28:

There is no reason why the claims for relief in the action commenced by the Kelah respondents relating to Aboriginal rights and title cannot stand and proceed, but it is inappropriate to seek to combine such claims with litigation concerning the validity of CP324. That sort of matter can be and should be dealt with under the judicial review process. Such a process does not foreclose an application for injunctive relief if thought necessary.

[62] The foregoing comments are directly relevant to the instant case. The plaintiffs are challenging the validity of the tenures and permits that had been issued to Roxgold and that have now been assigned to ARR. Paragraph 58(d) of the Amended Claim, under "Part 2: Relief Sought" seeks:

a declaration that no authorization or permit to allow Roxgold, Alan Raven, ARR Minerals or any other company owned or controlled by Alan Raven engage in development or exploration activities on or to in any other manner interfere with Maxhla Didaat is of force and effect, and an order in the nature of certiorari quashing the transfer of the Tenures to ARR Minerals;  
[Underlined portions reflect proposed amendments in the Amended Claim.]

[63] In this case the proper mechanism or "process" to achieve the object that the plaintiffs advance is by way of judicial review. The attempt to marry these various

issues into a claim for aboriginal title is unsound both as a matter of concept and as a matter of practice. In *Canadian Forest Products*, Hall J.A., addressed the pragmatic concerns that would arise from the “process” relied on by the First Nations group in that case and said:

[24] I consider those comments have application to the situation disclosed in the case at bar. The essence of this dispute is about the lawfulness of Canfor's actions under CP324. To seek to amalgamate this closely focussed issue with litigation seeking declarations of Aboriginal rights and title in the area in question is not a process to be encouraged. Such amalgamation is a recipe for delay and gridlock.

[64] Once again, the foregoing concerns have direct relevance to this case. Accordingly, I consider that those portions of the Amended Claim that seek to challenge the assignment of the MX Permit, or the tenures referred to within it, to ARR have been improperly advanced.

**b) Failure of ARR to perform the work Required Under the MX Permit and the Doctrine of Collateral Attack**

[65] In March 2012, MEM amended the MX Permit by assigning it to ARR and by requiring ARR to post \$45,000 as a security bond for reclamation.

[66] MEM also amended an earlier June 8, 2009 Notice of Work Permit by transferring it to ARR and by extending the timeframe to complete certain approved work to March 31, 2013.

[67] In paragraph 36.2.2 of the Amended Claim the plaintiffs allege that ARR breached the various reclamation and other obligations contained in the MX permit and the 2009 Notice of Work Permit. In paragraph 38 the plaintiffs allege that ARR's failure to meet these obligations "caused harm to the plaintiff's territory".

[68] It is important to realize that the harm complained of in these allegations is harm that of necessity was first caused by Roxgold before the Release was executed. It is then conduct or harm to which the Release, in the first instance, pertained.

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[69] Counsel for the plaintiffs, in his submissions, argued that the contractual and/or statutory obligations that MEM imposed on ARR after March 2012 somehow "refreshed" or "revived" the plaintiffs' right to claim for the earlier harm that Roxgold had caused. These submissions were not developed any further and they find no support or basis in the Amended Claim.

[70] A second way of analyzing this particular subset of allegations is to consider that any failure on the part of ARR to satisfy the obligations in the MX Permit and in the 2009 Notice of Work Permit was a failure that arose under these documents and, of necessity, post-dated the Release. There would, in concept, be nothing to prevent the plaintiffs from advancing a claim which challenged either some act or omission on the part of ARR subsequent to the execution of the Release. The question is whether the civil causes of action advanced by the plaintiffs in the Amended Claim are the correct "process" by which to achieve this object.

[71] I do not consider that they are. Instead, I consider that these various claims again constitute impermissible collateral attacks on a series of statutory decisions or exercises of statutory power.

[72] The backdrop that pertains to this aspect of the plaintiffs' claim is somewhat different from that which pertained to their allegations that the Crown had failed to properly consult with Gwininitxw House prior to either issuing various permits or assigning various permits to ARR. This latter issue, that of adequate consultation or accommodation, engages the question of constitutionally acceptable resource management pending resolution of aboriginal claims. It seeks, as its object, to provide a mechanism by which the Crown and First Nations can engage in respectful and ongoing dialogue: *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43 at paras. 34 and 38; *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 at para. 38.

[73] Having said this it is clear the doctrine of collateral attack, and of abuse of process, are broad in scope and are not confined to questions of constitutional accommodation. The Supreme Court of Canada has described a collateral attack as

"an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment": *Wilson v. The Queen*, [1983] 2 S.C.R. 594 at 599.

[74] Furthermore, the ambit of the doctrine is not limited to instances where an applicant seeks nullification of an order or decision. Instead it extends, as the foregoing quote from *Wilson* confirms, to circumstances where a party seeks to vary an order or decision. In *TeleZone* the court described the relevant question as being whether the claimant "is content to let the order stand"; at para. 19.

[75] The doctrine is designed to maintain the fairness and integrity of the justice system by preventing a party from challenging a decision outside of the proper forum for review of that decision: *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52 at para. 30.

[76] Judicial review is the means by which superior courts supervise those who exercise statutory powers to ensure that they act within their legal and constitutional authority. In *TeleZone* the Court, at para. 24 said, "Judicial review is directed at the legality, reasonableness, and fairness of the procedures employed and actions taken by government decision makers. It is designed to enforce the rule of law and adherence to the Constitution. Its overall objective is good governance."

[77] In *TeleZone*, the Court rejected a rigid approach to determining whether a pleading constitutes an impermissible collateral attack. Instead the Court adopted a pragmatic approach that focuses on the essential character of the claim and the nature of the relief sought; at paras. 18-19, 78.

[78] The Court concluded, at para. 80, that TeleZone's claim was "dominated by private law considerations". At para. 78 the court addressed the question of how to determine whether an application for judicial review had been masked as a claim for damages with this guidance:

There is always a residual discretion in the inherent jurisdiction of the provincial superior court ..., to stay the damages claim because in its essential character, it is a claim for judicial review with only a thin pretense to

a private wrong. Generally speaking the fundamental issue will always be whether the claimant has pleaded a reasonable private cause of action for damages.

[79] In applying this guidance I start with the observation that the plaintiffs accept that the various causes of action they wish to bring in respect of ARR's conduct or omissions have not yet, to this point in time and in such circumstances, been advanced in any court. Furthermore, they are causes of action which the plaintiffs accept must await the determination of their title claim.

[80] More importantly, an analysis of the Amended Claim and the material filed by the plaintiffs on this application confirms that the focus of their concerns lies with a series of decisions made and positions taken by MEM.

[81] Paragraph 36.2.2 describes various alleged breaches of the MX Permit, the 2009 Notice of Work Permit, and the *Health, Safety and Reclamation Code for Mines in British Columbia*, 2008 (the "Code") by Mr. Raven and ARR.

[82] Paragraph 36.4.1 of the Amended Claim states:

After the overflight of August 12, 2012. MEMNG directed or asked Alan Raven and ARR Minerals to remediate the work site. In late August of 2012, Alan Raven attended the work site and engaged in a superficial clean-up of the work site and felled several trees across the access trail, but the work he performed did not comply with the requirements of the Health, Safety and Reclamation Code for Mines in British Columbia, and the trees felled across the access trail are inadequate to prevent ingress to the plaintiff's territory by motor vehicle. Alan Raven and ARR Minerals did not submit a report of reclamation or remediation activities for 2012-2013 to MEMNG. MEMNG did not request that Alan Raven or ARR Minerals submit a report of reclamation or remediation activities for 2012-2013. MEMNG did not conduct a site inspection after August 12, 2012 to verify whether the remediation conducted in late August of 2012 complied with the Health, Safety and Reclamation Code for Mines in British Columbia.

[83] Paragraph 36.5 to paragraph 36.8 of the Amended Claim state:

36.5 The authorization to work set out in March 28, 2012 Mines Act permit and the amended 2009 Notice of Work and Reclamation expired on March 31, 2013. As of April 1, 2013, the reclamation work required by the March 28, 2012 Mines Act permit and the reclamation required by the amended 2009 Notice of Work and Reclamation has not been completed. In particular, Alan Raven and Roxgold did not install water control structures or pull back woody

debris to block access to the Tenure area, Alan Raven and ARR Minerals did not replant the 4.08 ha of timber felled without a permit, Alan Raven and ARR Minerals did not reclaim the portions of the road network that they were required to reclaim as a condition of the amended 2009 permit, Alan Raven and ARR Minerals did not refurbish the work site and the remediation activities conducted by Alan Raven and ARR Minerals did not comply with the *Mines Act* or the Health, Safety and Reclamation Code for Mines in British Columbia.

36.6 MEMNG was aware of the damage caused by Alan Raven and companies controlled by Alan Raven to Gwininitxw territory and Gwininitxw political structures, but transferred the Tenures to ARR Minerals, knowing it to be a company controlled by Alan Raven, and knowing of the foreseeable risk that Alan Raven and ARR Minerals would continue to cause further damage to Gwininitxw territory and Gwininitxw political structures.

36.7 MEMNG transferred the Tenures to ARR Minerals without requiring the damage to Gwininitxw territory to be remedied, without requiring the remediation work ordered by MEMNG in 2007 and by MFR in 2008 to first be conducted and without requiring ARR Minerals to post an adequate performance bond or requiring ARR Minerals to be placed under the supervision of a third party observer. Furthermore, aside from requiring Alan Raven and ARR Minerals to clean up the work camp after August 12, 2012, MEMNG took no action before or after August of 2012 to require ARR Minerals or Alan Raven to remediate the damage caused by Roxgold and Alan Raven to Gwininitxw territory, including remediation of the network of wide roads on Gwininitxw territory.

36.8 Since 2007, MEMNG has failed to remediate the damage caused to Gwininitxw territory by its tenure holder, failed to impose conditions on the Tenures that will ensure remediation of Gwininitxw territory and failed to redeem the reclamation bond and use the funds to remediate the damage caused to Gwininitxw territory.

[84] In Part 2 of the Amended Claim, at paragraph 58(e) the plaintiffs seek the following relief:

(e) permanent, interlocutory and interim injunctions preventing Roxgold, Alan Raven, ARR Minerals or any other company owned or controlled by Alan Raven from engaging in development or exploration activities on or in any other manner interfere with Maxhla Didaat, or, in the alternative, that any permit issued to Alan Raven, ARR Minerals or any other company owned or controlled by Alan Raven be issued on the condition that (a) all specified damage to Gwininitxw territory be remediated prior to the commencement of any work; (b) an adequate reclamation bond be posted prior to the commencement of any work; and (c) all work be supervised by an independent environmental officer who reports to the plaintiff;

[85] The various affidavits filed by the plaintiff in support of its motion to amend and for an injunction all included the following language or language similar to it:

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This Affidavit is made in support of an application to add ARR and Alan Raven as a defendant to these proceedings and for an injunction requiring the completion of site remediation and posting of an appropriate reclamation bond prior to any further development and construction on Gwininitxw traditional territory.

[86] I have earlier, at paragraph 62 of these reasons for judgment, identified that the plaintiffs also seek a declaration that the authorizations and permits given to ARR are of no force and effect.

[87] The Amended Claim does, at paragraph 58(g), seek damages for "physical harm to and loss of use of" the lands claimed by the plaintiffs.

[88] It is also important to note that the formal position of the Province, as expressed in the Affidavit of Mr. D. Flynn, Senior Inspector of Mines, is that "[t]he progress of the reclamation work at TJ Ridge is satisfactory to MEM, given the current stage of the project" (at para. 5).

[89] Properly analyzed the plaintiffs seek to contest:

- i) the initial assignment of the MX Permit and the 2009 Notice of Work Permit to ARR. This is based not only on an allegation of inadequate consultation but also on the inadequacy of the requirements imposed on ARR. The plaintiffs seek to set aside the MX Permit and Notice of Work Permit on this basis;
- ii) the ongoing adequacy of the terms, including the adequacy of the reclamation security bond, that were included in the MX Permit. The plaintiffs thus also seek to vary the terms of the MX Permit; and
- iii) MEM's conclusion that ARR's remediation work to date is "satisfactory".

They also advance, as I have said, a claim for damages against both MEM and ARR.

[90] The first two of these issues can be viewed through a constitutional lens and be described and analyzed as a failure to accommodate. As such the comments and analysis in *Behn SCC* and in *Canadian Forest Products* would be directly apposite. So too would be the conclusions I arrived at with respect to the failure to consult on the assignment of the MX Permit and other tenure documents to ARR.

[91] Alternatively the first two of these decisions can be analyzed and addressed in conventional administrative law terms. These first two issues flow directly from the exercise of a “statutory power of decision”; *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 (“JRPA”), s.1. They deal with the validity or sufficiency of a formal decision that MEM has made where that decision is readily apparent.

[92] Section 12 of the *Mineral Tenure Act Regulation*, B.C. Reg. 529/2004 deals with transferring ownership of mineral titles.

[93] The *Mines Act*, R.S.B.C. 1996, c. 293 s. 10 deals with the issuance of permits. The following subsections of section 10 are particularly salient:

- (1) Before starting any work in, on or about a mine, the owner, agent, manager or any other person must hold a permit issued by the chief inspector and, as part of the application for the permit, there must be filed with an inspector a plan outlining the details of the proposed work and a program for the conservation of cultural heritage resources and for the protection and reclamation of the land, watercourses and cultural heritage resources affected by the mine, including the information, particulars and maps established by the regulations or the code.
- ...
- (3) If the chief inspector considers the application for a permit is satisfactory the chief inspector may issue the permit, and the permit may contain conditions that the chief inspector considers necessary.
- (4) The chief inspector may, as a condition of issuing a permit under subsection (3), require that the owner, agent, manager or permittee give security in the amount and form, and subject to conditions, specified by the chief inspector
  - (a) for mine reclamation, and
  - (b) to provide for protection of, and mitigation of damage to, watercourses and cultural heritage resources affected by the mine.

- (5) If required by the chief inspector, the owner, agent, manager or permittee, in each year, must deposit security in an amount and form satisfactory to the chief inspector so that, together with the deposit under subsection (4) and calculated over the estimated life of the mine, there will be money necessary to perform and carry out properly
- (a) all the conditions of the permit relating to the matters referred to in subsection (4) at the proper time, and
  - (b) all the orders and directions of the chief inspector or an inspector respecting the fulfillment of the conditions relating to the matters referred to in subsection (4).
- ...
- (8) If the owner, agent, manager or permittee fails to perform and complete the program for reclamation or comply with the conditions of the permit to the satisfaction of the chief inspector, the chief inspector, after giving notice to remedy the failure, may do one or more of the following:
- (a) order the owner, agent, manager or permittee to stop the mining operation;
  - (b) apply all or part of the security toward payment of the cost of the work required to be performed or completed;
  - (c) close the mine;
  - (d) cancel the permit.
- (9) An owner, agent, manager or permittee must
- (a) hold and maintain a permit for the mine,
  - (b) ensure that no work takes place in, on or about the mine, except under and in accordance with a permit, and
  - (c) comply with all the conditions of the permit.

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I note that under the *Mines Act*, the term “mine” is given a broad definition and relates to a variety of activities including “exploratory drilling, excavation, processing, concentrating, waste disposal and site reclamation” (s. 1 of the *Mines Act*).

[94] It seems clear that many of the concerns raised by the plaintiffs, in relation to the first two categories of issue I have identified, arise directly from the validity or appropriateness of the decisions made by MEM under section 10.

[95] The third issue, whether ARR has properly complied with the obligations required of it or, more specifically, MEM’s conclusion that ARR’s performance is satisfactory, involves the exercise of a “statutory power” but that exercise did not

give rise to any formal order or decision. A “statutory power” is defined in s. 1 of the *JRPA* to include, *inter alia*, the following:

**"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,

...

[96] Under the *Mines Act*, inspectors have the power to inspect a mine at any time to ensure compliance with, *inter alia*, the *Mines Act* and the Code (s. 15(1)(a)), and can order remedial action if a contravention exists (s. 15(4.1)). Neither the *Mines Act* nor the Code mandate regular inspections by inspectors, though the *Mines Regulation*, B.C. Reg. 126/94 provides that an inspector may investigate, during the exploration, development, operation, closure, or abandonment of a mine, any matter relating to the health and safety of any person or the public, including investigations with respect to complaints or allegations relating to health or safety (s. 1(d)).

[97] Section 35 of the *Mines Act* addresses enforcement of the *Mines Act* and any of its ancillary enactments or orders. Pursuant to s. 35(1), if an inspector finds that a mine is not being operated in accordance with the *Mines Act*, any regulations, the Code, a permit, or an order made pursuant to an inspection, the inspector can order compliance. If an inspector's order under s. 35(1) is not complied with, s. 35(2) gives an inspector the power to apply directly to the Supreme Court for an order directing compliance.

[98] Section 33(1) of the *Mines Act* provides that “any person adversely affected” by a decision, order, or ruling of an inspector may make an appeal in writing to the Chief Inspector of Mines within 30 days. The term “person” is not defined in the *Act*, and therefore the broad definition of “person” set out in s. 29 of the *Interpretation Act*, R.S.B.C. 1996, c. 238, applies.

[99] Formal orders under s. 35(1) of the *Mines Act* are only made in cases of non-compliance. It is not clear, on the record before me, when or on what basis MEM determined that ARR's performance was "satisfactory". Nevertheless, that conclusion is one that is subject to judicial review.

[100] The basis of that review would depend on the theory advanced by the plaintiffs. Before me it was argued that representatives of MEM and ARR were somehow involved improperly with each other. The Amended Claim (at paras. 52-56) makes allegations of serious wrongdoing against MEM representatives. In para. 56, those allegations are extended to Mr. Flynn. Such allegations, if supported, can underlie a claim of bias which, in turn, can be advanced by way of judicial review.

[101] If the allegation is that the appropriate MEM representatives failed to properly exercise the statutory powers which arise under s. 15 or s. 35(1) of the *Mines Act*, it may be open to the plaintiffs to seek mandamus. Mandamus lies to compel the performance of a public duty. That public duty must arise from statute or common law or in some other manner. Mandamus does not permit interference with a properly exercised discretion. Instead, the *JRPA* and the remedy are intended to secure the proper, honest and good faith exercise of a discretion: *Sunshine Valley Co-op Soc. v. Grand Forks (1948)*, [1949] 2 D.L.R. 51 at 54, [1948] B.C.J. No. 103 (C.A.).

[102] The fact that it is the plaintiffs' concerns with the sufficiency of the Crown's activities that dominate these claims is also apparent if one examines the plaintiffs' theory of its case.

[103] The plaintiffs accept that if ARR adhered to the terms of the authorizations provided to it as well as to the relevant regulatory regime, no cause of action in trespass, nuisance or negligence would lie against it. The Crown or its agents, charged under the *Mines Act* with overseeing such compliance, is satisfied with ARR's performance. It is that conclusion, at bottom, which the plaintiffs challenge.

[104] The fact that no formal order has been made directly against the plaintiffs does not detract from the foregoing conclusions. The Court of Appeal in *Moulton Contracting Ltd. v. Behn*, 2011 BCCA 311, rejected the appellant's arguments that collateral attack principles did not apply to them because they were not parties to, or bound by, the statutory decision they challenged. Madam Justice Saunders accepted at para. 57, that "normally it is the party against whom the order is made that is said to be engaging in a collateral attack" (emphasis in original). She concluded, however, that the appellants were part of a collective who "could have challenged the decision, but did not" (at para. 57). The same conclusions pertain in this case.

[105] Furthermore, no issue of standing exists. I say this partly because it was the Crown, before me, that argued that these matters should be advanced by judicial review. It would not be open to the Crown to thereafter argue that the plaintiffs lacked the standing to seek judicial review. More importantly, and on a principled basis, there are numerous cases which confirm that a party not formally named in an order or a decision, but nevertheless whose personal rights are at stake or who were specially affected by that order or decision, may have the standing to bring a judicial review proceeding; see for example (*Canada (AG) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 at para. 1; *Finlay v. Canada*, [1986] 2 S.C.R. 607 at paras. 18-19; *Dragonwood Enterprises Ltd. v. Burnaby (City)*, 2009 BCSC 1236, where this court found that the petitioners had standing to seek judicial review of the business license applications of third parties; *Woodman v. Capital (Regional District)*, [1999] B.C.J. No. 2262 where the petitioner was granted standing to challenge the use of residential land as its immediate neighbour.

[106] Finally, I consider that the various salutary objectives that are advanced by the doctrine of collateral attack, some of which are identified in each of *Behn* and *Canadian Forest Products*, have application in this case:

- i) Judicial review provides a relatively speedy and less expensive means for the determination of issues;
- ii) Judicial review prevents the “gridlock” inherent in merging what are truly administrative law issues and remedies with aboriginal title claims;
- iii) The fact that applications for judicial review are normally brought promptly advances the administration of justice as it prompts the crystallization of a dispute at any early stage and reduces the period during which the impugned decision of a public body is of uncertain validity. Here the plaintiffs seek to challenge decisions made by the Crown as far back as 2006 and this action, for all practical purposes, is in its infancy;
- iv) Importantly, the dispute rests where it should. If the MX Permit, for example, ought not to have been assigned or ought to have included additional requirements or safeguards, this is a matter between the plaintiffs and the MEM. Similarly, if ARR’s compliance is in fact inadequate, in circumstances where ARR is being advised by the regulator under the *Mines Act* that its performance is satisfactory, that too is a matter between the plaintiffs and the Crown. Judicial review places the onus of defending a decision where it belongs - on the decision maker.

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[107] There is no benefit to the public interest in having either the validity or adequacy of a Crown authorization or the adequacy of ARR’s compliance under that authorization and the relevant regulatory regime determined as the plaintiffs propose. Instead, the public interest lies in having the plaintiffs’ concerns adjudicated efficiently and reasonably promptly in proceedings between the Crown and the plaintiffs that call on the Crown to account directly for its decisions and actions.

**Has ARR Undertaken Further Work Without Authorization?**

[108] The Amended Claim alleges that following September 11, 2011, Mr. Raven and ARR, without any formal authorization, entered the plaintiffs' lands, activated access to roads and caused damage to water control structures (see for example, Amended Claim at paras. 36.1.1 and 36.1.2). The Release would have no relevance to these activities. Nor would they engage the *JRPA*.

[109] The genesis of these claims is relevant and bears on my decision.

[110] Counsel for Mr. Raven and ARR filed his clients' materials for this application on June 14, 2013. The 4<sup>th</sup> Affidavit of Mr. Raven, dated June 14, 2013, stated:

12. In September 2011, with Roxgold's consent, ARR funded a geochemical survey on the TJ Ridge property that was carried out between September 11-20, 2011. ARR hired High Range Exploration Ltd., a service company that I own, to conduct the survey. High Range contracted with CJL Enterprises who provided a field crew to gather about 600 soil samples in the region. This type of soil survey does not require a Notice of Work permit from the Ministry of Mines, Energy, and Petroleum Resources as the level of ground disturbance is below the threshold that triggers the requirements for a permit. As a courtesy, I informed Doug Flynn, Inspector of Mines, of the work planned before the soil survey was conducted.

[111] It was this assertion that prompted the plaintiffs to further amend their pleadings. This is clear from the fact that the plaintiffs filed the Amended Claim on June 16, 2013 and included a new set of allegations that related to ARR's conduct on and after September 11, 2011. It is also clear from paragraph 36.4(b) of the Amended Claim which states, "The plaintiff learned on June 14, 2013, that Alan Raven and ARR Minerals or their agents or contractors had likely opened the road in September of 2011." These and other amendments on the eve of the application before me caused the hearing of the application to be briefly adjourned so that the defendants/respondents could revise their submissions.

[112] It seems equally clear that the plaintiffs' amendments, relating to the September 2011 events, were premised on an erroneous assumption. That factual error was identified in the submissions of counsel for Mr. Raven and ARR and it was

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confirmed in a further Affidavit of Mr. Raven dated June 18, 2013, that was filed at my insistence:

2. In September 2011, ARR hired High Range Exploration Ltd. who contracted with CJL Enterprises to conduct a geochemical survey in the region covered by mineral tenure #514407. CJL provided a field crew to gather soil samples. In order to do this work, the field crew flew in and out of the region by helicopter. None of the access trails in the region were used or disturbed.

[113] Before me it was common ground that such geochemical surveys do not require any special permit or authority. They do not, for example, fall within the definition of “exploration activities” in the Code. Moreover, counsel for the plaintiffs did not, in any way, suggest their clients had any information that was inconsistent with the sworn evidence of Mr. Raven.

[114] In *Strata Plan VIS3578*, the court, in a portion of the judgment I referred to earlier, said:

45. Subrule 15(5)(a)(iii) thus establishes two requirements that an applicant must prove to succeed in joining a new defendant. First, it must show that there is a question or issue between the plaintiff and the proposed defendant that relates to the relief, remedy, or subject matter of the proceeding. The threshold is low. It has been expressed as establishing simply that there is a real issue between them that is not frivolous, or that the plaintiff has a possible cause of action against the proposed party. This requirement may be met solely on the basis of proposed amendments to the statement of claim, or the parties may provide affidavit evidence addressing it. If evidence is provided, the court is not to weigh it and assess whether the plaintiff could prove the allegations. It is limited to examining the evidence only to the extent necessary to determine if the required issue between the parties exists: *Strata Plan LMS 1816 v. Acastina Investments Ltd.*, 2004 BCCA 578, 33 B.C.L.R. (4<sup>th</sup>) 69; *MacMillan Bloedel Ltd. v. Binstead et al.* (1981), 58 B.C.L.R. 173 (C.A.).

[115] The former Rule 15(5)(a)(iii) and the current Rule 6-2(7)(c)(ii) both contemplate the addition of a party where “in the opinion of the court, it would be just and convenient ...”. Whether that determination actually requires evidence is not clear.

[116] In *Michaels v. Dube*, 2007 BCSC 747, Barrows J, in dealing with the application of the former Rule 15(5)(a)(iii), said at para. 14:

The second legal principle of importance is the nature of the evidence that must be adduced to engage either aspect of the rule. It is not enough for the applicant to simply suggest that there is a cause of action or issue between him or her and the party sought to be joined. There must be facts deposed to which support the possible existence of a question or issue, the resolution of which it would be just and convenient to determine as between the existing parties and the person sought to be joined.

[See also paras. 15 and 16.]

[117] Conversely, in *Traff v. Evancic*, [1995] B.C.J. No. 1192, MacDonald J. was satisfied that the discretion under the former Rule 15(5)(a)(iii) could be exercised without affidavit evidence.

[118] Each of *Strata Plan VIS3578*, *Michaels* and *Traff* refer to *MacMillan Bloedel v. Binstead* (1981), 58 B.C.L.R. 173 (C.A.) where the court, at 175, said:

... one of the functions of the chambers judge ... under this rule [15(5)(a)(iii)] must be to decide ..., through whatever means, and not necessarily affidavits, that the question or issue is a real one in the sense that it is not entirely frivolous ... It is not the function ... to decide whether on any kind of a balance it is likely that the plaintiff would be able to prove its allegations ... [Emphasis added.]

[119] The plaintiffs have filed nothing in response to the blunt denial contained in Mr. Raven's Affidavit of June 18, 2012. There is then no concern about my weighing competing evidence. Instead, the allegations of wrongdoing by ARR (and Mr. Raven) on and after September 11, 2011 are based on an apparent misapprehension of Mr. Raven's Affidavit of June 14, 2012. In such circumstances I do consider those allegations to be "frivolous". I do not consider that any "real" issue exists between the parties on the basis advanced by the plaintiffs and I do not consider that it would be just and convenient to add ARR to the instant action on this particular aspect of the Amended Claim.

#### **Is it Just and Convenient to Add ARR?**

[120] Though I do not consider, for the reasons I have described that the requirements of Rule 6-2(7) has been satisfied, I wish to make clear that I would not have considered it just and convenient to add ARR and/or Mr. Raven to this action.

[121] The Amended Claim advances a claim for aboriginal title. In *Haida Nation*, Chief Justice McLachlin observed that, “Aboriginal claims litigation can be very complex and require years and even decades to resolve in the courts” (at para. 14).

[122] The plaintiffs’ claims against ARR have relatively little to do with their claim for aboriginal title. There are some allegations that the wrongdoing of ARR has interfered with their ability to make out their title claim. These and other areas of intersection are relatively modest and would not, in my view warrant adding ARR to the present action.

[123] Each of *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2008 BCCA 107, *Attorney-General of Canada et al. v. Aluminum Co. of Canada et al.* (1987), 35 D.L.R. (4<sup>th</sup>) 495, [1987] 3 W.W.R. 193 (B.C.C.A.), *Wilson, et al v. British Columbia, et al*, 2006 BCSC 1436 and *Ahousaht Indian Band and Nation v. Canada (Attorney General)*, 2009 BCSC 1494 is relevant. These cases arise in very different circumstances. Yet they reveal a consistent effort by courts to pare down complex title cases and to prevent those cases from becoming more complex through the addition of either further issues or further parties. Such considerations are directly relevant in this case.

### **Claims Against Mr. Raven Personally**

[124] I can deal with this issue succinctly because counsel for the plaintiff accepted that the Amended Claim fails to identify any material facts which would ground a cause of action against Mr. Raven personally. This deficiency exists quite apart from the issue of the extent to which the Release pertains to Mr. Raven.

[125] In *Strata Plan No. VIS3578*, the court said:

71 ... It is not enough to plead undifferentiated allegations against the corporation and its directors and employees.

72 Here, the chambers judge properly found the owners’ allegations of negligence against Messrs. Popham, Morris, Tearle, and Sterling are inadequate to support their joinder as defendants. The further amended statement of claim does not set out material facts to support commission of an independent tort. The proposed amendments simply introduce the individuals as directors or employees of their corporate entities and then

allege that they owed the same duties, committed the same breaches, and caused the same damages as their companies. Nothing in the pleading indicates why the corporate veil should be pierced to find liability on the part of these four individuals.

[126] These comments are apposite. The plaintiffs have, as in *Strata Plan No. VIS3578*, simply added Mr. Raven in an “undifferentiated manner” to all paragraphs that formerly referred to Roxgold and that now may also include ARR. The mere existence of the relationship between a director and corporation does not in itself create personal liability; *Blacklaws v. Morrow*, 2000 ABCA 175 at para. 48, appeal ref'd [2000] SCCA No 442. Further, though directors and officers of a corporation can be personally liable for tortious conduct committed in the course of their corporate duties, personal liability requires a finding that the actions undertaken were themselves tortious, or that the director or officer exhibited a separate identity or interest from that of the company thereby making the act or conduct their own: *ADGA Systems International Inc. v. Valcom Ltd.* (1999), 168 D.L.R. (4<sup>th</sup>) 351 at paras. 38-39, [1999] O.J. No. 27 (C.A.); *Blacklaws, supra* at para. 41; see also the cases referred to in para. 51 of these reasons for judgment. None of these requirements are addressed in the Amended Claim.

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### **Further Issues**

[127] There are a few further discrete issues that arise.

i) The plaintiffs have advanced a claim in conspiracy. Paragraph 28 of the Amended Claim suggests that a conspiracy was entered into by Roxgold and members of Gwininitxw House. Paragraph 55 suggests this conspiracy extended to MEM employees. Paragraph 68, in Part 3, confirms that the conspiracy extends to MEM. The conspiracy claim advanced in these paragraphs clearly pre-date the signing of the Release and the Settlement Order. As such my earlier conclusions pertain. It is not open to the plaintiffs to advance this claim against Roxgold or Mr. Raven.

ii) The parties did not address what influence, if any, the passage of time might have on the plaintiffs' ability to now seek judicial review for activities or

decisions that go back in time a number of years. If the parties cannot agree on this issue they can apply to address the matter before me.

iii) The parties agreed to defer the issue of costs pending receipt of these Reasons. If they cannot agree on the matter they can apply to address the matter before me.

iv) Throughout the course of the defendants' submissions there were concerns expressed about the plaintiffs' pleadings. These concerns extended beyond the substantive matters I have addressed. The concerns pertained instead, for example, to a failure to plead material facts in support of certain actions. There is some validity to these concerns. I would add that the plaintiffs' pleadings are prolix. They plead evidence. Having read the Amended Claim numerous times I continue to find it confusing and difficult to work with. These reasons will require the Amended Claim to be fundamentally reworked. I have raised the foregoing matters only because I consider it to be in the interests of the parties and the court that further pleadings properly comport with Rule 3-1(2) and Rule 3-7.

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### **Summary**

i) The Release and the Settlement Order prevent any further action against Roxgold for the activities of Roxgold prior to the execution of the Release.

ii) The Release prevents any further action against ARR or Mr. Raven for the activities of Roxgold prior to the execution of the Release.

iii) Those portions of the Amended Claim that advance assertions of inadequate consultation or accommodation in relation to the assignment of the MX Permit to ARR, constitute improper collateral attacks and are claims that should have been advanced by judicial review.

- iv) Those portions of the Amended Claim that challenge either the adequacy or validity of ARR's MX Permit and other authorizations or ARR's compliance with the MX Permit and Code constitute improper collateral attacks and are claims that should have been advanced by judicial review.
- v) The unsupported allegation that ARR engaged in improper and unauthorized activities on the lands claimed by the plaintiffs, in or around September 11, 2011, do not provide a basis for adding ARR to this action.
- vi) The Amended Claim, in any event, advances no material facts which would support a cause of action against Mr. Raven.

"Voith J."

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

*Halfway River First Nation v. B.C.*

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**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.

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[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.

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## 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 Tuzdzu. It is an area that the petitioners and their ancestors have used for hunting, fishing, trapping and the

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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 Tusdzuh 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 Metecheah wrote to the Minister of Forests on 20 January, 1992 requesting a meeting to discuss the development of lands

in the Tuzdzu. 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.

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### 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

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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).

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[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)).

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[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 Metcheah 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.

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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 Metecheah 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 Tuzdzah 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 Tuzdzah 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 Tuzdzu 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.

## VI

**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  
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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.

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[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.

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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.

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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*.

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[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 Tusdzuh (mining and oil and gas exploration) before the granting of C.P.212.

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[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.

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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.

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[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.

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[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.

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[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.).

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[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.

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[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.

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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  
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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

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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 Tuzdzuh 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".

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[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

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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.

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[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.

**XIII**

**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.

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[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.

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[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.

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[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.

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[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.

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[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.

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[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.

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[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.

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"The Honourable Madam Justice Huddart"

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**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.

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[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.

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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.]

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[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**.

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[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.

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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

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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"

1999 BCCA 470 (CanLII)

## COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Kwikwetlem 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 Kwikwetlem 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

**Kwikwetlem First Nation v. British Columbia (Utilities Commission) Page 2**

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 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*.

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[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.

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### **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": *Kwkwetlem 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).)

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## **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.

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...

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,

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“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*.

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[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.

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[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*.

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[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. (4<sup>th</sup>) 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.

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[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.

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[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.”

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[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

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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.

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[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”

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Counsel's Written Reply Submission on behalf of  
British Columbia Hydro and Power Authority  
Book of Authorities

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R. c. BADGER

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Wayne Clarence Badger *Appellant*

v.

Her Majesty The Queen *Respondent*

and between

Leroy Steven Kiyawasew *Appellant*

v.

Her Majesty The Queen *Respondent*

and between

Ernest Clarence Ominayak *Appellant*

v.

Her Majesty The Queen *Respondent*

and

The Attorney General of Canada, the Attorney General of Manitoba, the Attorney General for Saskatchewan, the Federation of Saskatchewan Indian Nations, the Lesser Slave Lake Indian Regional Council, the Treaty 7 Tribal Council, the Confederacy of Treaty Six First Nations, the Assembly of First Nations and the Assembly of Manitoba Chiefs *Intervenants*

INDEXED AS: R. v. BADGER

File No.: 23603.

1995: May 1, 2; 1996: April 3.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory and Iacobucci JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

*Indians — Treaty rights — Hunting on privately owned land in tract ceded by treaty — Violations of Wildlife Act — Whether status Indians have right to hunt*

Wayne Clarence Badger *Appellant*

c.

Sa Majesté la Reine *Intimée*

et entre

Leroy Steven Kiyawasew *Appellant*

c.

Sa Majesté la Reine *Intimée*

et entre

Ernest Clarence Ominayak *Appellant*

c.

Sa Majesté la Reine *Intimée*

et

Le procureur général du Canada, le procureur général du Manitoba, le procureur général de la Saskatchewan, la Federation of Saskatchewan Indian Nations, le Lesser Slave Lake Indian Regional Council, le Treaty 7 Tribal Council, la Confederacy of Treaty Six First Nations, l'Assemblée des Premières Nations et l'Assemblée of Manitoba Chiefs *Intervenants*

RÉPERTORIÉ: R. c. BADGER

N° du greffe: 23603.

1995: 1<sup>er</sup> et 2 mai; 1996: 3 avril.

Présents: Le juge en chef Lamer et les juges La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory et Iacobucci.

EN APPEL DE LA COUR D'APPEL DE L'ALBERTA

*Indiens — Droits issus de traités — Chasse sur des terres privées situées dans le territoire cédé aux termes d'un traité — Violations de la Wildlife Act — Les*

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*for food on privately owned land lying within tract ceded by treaty — Whether hunting rights extinguished or modified by Natural Resources Transfer Agreement — Whether licensing and game limitations apply to status Indians — Constitution Act, 1982, s. 35(1) — Treaty No. 8 (1899) — Natural Resources Transfer Agreement, 1930 (Constitution Act, 1930, Schedule 2), para. 12 — Alta. Reg. 50/87, ss. 2(2), 25 — Alta. Reg. 95/87, s. 7.*

The appellants were status Indians (under Treaty No. 8) who had been hunting for food on privately owned lands falling within the tracts surrendered by the Treaty. Each was charged with an offence under the *Wildlife Act* (the Act). Their trials and appeals proceeded together. The appellant Badger, who was hunting on scrub land near a run-down but occupied house, was charged with shooting a moose outside the permitted hunting season contrary to s. 27(1) of the Act. The appellant Kiyawasew, who had been hunting on a posted, snow-covered field that had been harvested that fall, and the appellant Ominayak, who had been hunting on uncleared muskeg, both had shot moose and were charged, under s. 26(1) of the Act, with hunting without a licence. All were all convicted in the Provincial Court. They unsuccessfully appealed their summary convictions, first to the Court of Queen's Bench and then to the Court of Appeal, challenging the constitutionality of the Act in so far as it might affect them as Crees with status under Treaty No. 8. The constitutional question raised: (1) whether status Indians under Treaty No. 8 have the right to hunt for food on privately owned land which lies within the territory surrendered under that Treaty; (2) whether the hunting rights set out in Treaty No. 8 have been extinguished or modified by para. 12 of the *Natural Resources Transfer Agreement, 1930 (NRTA)*; and, (3) the extent, if any, ss. 26(1) (requiring a hunting licence) and 27(1) (establishing hunting seasons) of the Act applied to the appellants.

*Held:* The appeals of Wayne Clarence Badger and Leroy Steven Kiyawasew should be dismissed. The appeal of Ernest Clarence Ominayak should be allowed and a new trial directed so that the issue of the justification of the infringement created by s. 26(1) of the *Wildlife Act* and any regulations passed pursuant to that section may be addressed.

*Indiens inscrits ont-ils le droit de chasser pour se nourrir sur des terres privées situées dans le territoire cédé aux termes d'un traité? — Les droits de chasse ont-ils été éteints ou modifiés par la Convention sur le transfert des ressources naturelles? — Le régime de délivrance des permis et les restrictions applicables à la chasse au gibier s'appliquent-ils aux Indiens inscrits? — Loi constitutionnelle de 1982, art. 35(1) — Traité n° 8 (1899) — Convention sur le transfert des ressources naturelles de 1930 (Loi constitutionnelle de 1930, annexe 2), par. 12 — Règlement de l'Alberta 50/87, art. 2(2), 25 — Règlement de l'Alberta 95/87, art. 7.*

Les appellants sont des Indiens inscrits (aux termes du Traité n° 8) qui chassaient pour se nourrir sur des terres privées situées dans le territoire cédé aux termes du Traité. Chacun des appellants a été accusé d'une infraction à la *Wildlife Act* (la Loi). Ils ont été jugés ensemble, tant en première instance qu'en appel. L'appelant Badger, qui chassait dans des taillis près d'une maison délabrée mais occupée, a été accusé d'avoir, contrairement au par. 27(1) de la Loi, abattu un orignal en dehors de la saison de chasse. L'appelant Kiyawasew, qui chassait dans un champ couvert de neige où se trouvaient des écriteaux et où on avait fait la récolte à l'automne, ainsi que l'appelant Ominayak, qui chassait dans une savane non déboisée, ont eux aussi abattu des orignaux, et ils ont été accusés, en vertu du par. 26(1) de la Loi, d'avoir chassé sans permis. Ils ont tous été déclarés coupables en Cour provinciale. Ils ont sans succès interjeté appel de leur déclaration de culpabilité par procédure sommaire, d'abord à la Cour du Banc de la Reine puis à la Cour d'appel, contestant la constitutionnalité de la Loi dans la mesure où elle pourrait porter atteinte à leurs droits en tant que Cris visés par le Traité n° 8. La question constitutionnelle comporte trois volets: (1) Les Indiens inscrits aux termes du Traité n° 8 ont-ils le droit de chasser pour se nourrir sur des terres privées situées dans le territoire cédé aux termes de ce traité? (2) Les droits de chasse énoncés dans le Traité n° 8 ont-ils été éteints ou modifiés par les dispositions du par. 12 de la *Convention sur le transfert des ressources naturelles de 1930 (la Convention)*? (3) Dans quelle mesure, le cas échéant, les par. 26(1) (obligation de détenir un permis de chasse) et 27(1) (établissement des saisons de chasse) de la Loi s'appliquaient-ils aux appellants?

*Arrêt:* Les pourvois de Wayne Clarence Badger et de Leroy Steven Kiyawasew sont rejetés. Le pourvoi d'Ernest Clarence Ominayak est accueilli et un nouveau procès est ordonné afin que soit examinée la question de la justification de l'atteinte créée par le par. 26(1) de la *Wildlife Act* et les règlements pris en application de cette disposition.

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*Per La Forest, L'Heureux-Dubé, Gonthier, Cory and Iacobucci JJ.:* Treaty No. 8 guaranteed the Indians the "right to pursue their usual vocations of hunting, trapping and fishing" subject to two limitations, a geographic limitation and the right of government to make regulations for conservation purposes.

Certain principles apply in interpreting a treaty. First, a treaty represents an exchange of solemn promises between the Crown and the various Indian nations. Second, the honour of the Crown is always at stake; the Crown must be assumed to intend to fulfil its promises. No appearance of "sharp dealing" will be sanctioned. Third, any ambiguities or doubtful expressions must be resolved in favour of the Indians and any limitations restricting the rights of Indians under treaties must be narrowly construed. Finally, the onus of establishing strict proof of extinguishment of a treaty or aboriginal right lies upon the Crown.

The *NRTA* did not extinguish and replace the Treaty No. 8 right to hunt for food. Paragraph 12 of the *NRTA* clearly intended to extinguish the treaty protection of the right to hunt commercially but the right to hunt for food continued to be protected and, indeed, was expanded. Treaty rights, absent direct conflict with the *NRTA*, were not modified. The Treaty right to hunt for food accordingly continues in force and effect.

Three preliminary observations were made regarding the *NRTA*. First, the "right of access" in the *NRTA* does not refer to a general right of access but, rather, is limited to a right of access for the purposes of hunting. Second, the extent of the treaty right to hunt on privately owned land may well differ from one treaty to another, given differences in wording. Finally, the applicable interpretative principles must be applied. The words must be interpreted as they would naturally have been understood by the Indians at the time of signing.

The geographical limitation on the existing hunting right should be based upon a concept of visible, incompatible land use. This approach is consistent with the oral promises made to the Indians at the time the Treaty was signed, with the oral history of the Treaty No. 8 Indians, with earlier case law and with the provisions of the Act itself. It is neither unduly vague nor unworkable.

*Les juges La Forest, L'Heureux-Dubé, Gonthier, Cory et Iacobucci:* Le Traité n° 8 garantissait aux Indiens le «droit de se livrer à leurs occupations ordinaires de la chasse au fusil, de la chasse au piège et de la pêche», sous réserve de deux restrictions: l'application d'une limitation territoriale et le droit pour le gouvernement de prendre des règlements en matière de conservation.

Certains principes régissent l'interprétation d'un traité. Premièrement, un traité est un échange de promesses solennelles entre la Couronne et les diverses nations indiennes concernées. Deuxièmement, l'honneur de la Couronne est toujours en jeu; il faut présumer que cette dernière entend respecter ses promesses. Aucune apparence de «manœuvres malhonnêtes» ne doit être tolérée. Troisièmement, toute ambiguïté doit profiter aux Indiens et toute limitation ayant pour effet de restreindre les droits qu'ont les Indiens en vertu des traités doit être interprétée de façon restrictive. Finalement, il appartient à la Couronne de prouver qu'un droit ancestral ou issu de traité a été éteint.

La *Convention* n'a pas éteint et remplacé le droit de chasser pour se nourrir prévu au Traité n° 8. Le paragraphe 12 de la *Convention* démontrait l'existence d'une intention claire d'éteindre la protection par le traité du droit de faire la chasse commerciale. Toutefois, le droit de chasser pour se nourrir a continué d'être protégé et, de fait, a été élargi. En l'absence de conflit direct avec la *Convention*, les droits issus de traités n'ont pas été modifiés. Le droit de chasser pour se nourrir — issu du Traité — continue d'être en vigueur et de produire ses effets.

Trois remarques préliminaires ont été faites relativement à la *Convention*. Premièrement, le «droit d'accès» prévu par la *Convention* n'est pas un droit d'accès général, mais plutôt un droit d'accès limité pour chasser. Deuxièmement, étant donné que les traités sont libellés de façon différente, la portée du droit issu de traités de chasser sur des terres privées peut très bien varier d'un traité à l'autre. Enfin, les principes d'interprétation applicables doivent être suivis. Il faut donner au texte le sens que lui auraient naturellement donné les Indiens à l'époque de sa signature.

La limitation territoriale du droit existant de chasser devrait s'appuyer sur le critère de l'utilisation visible et incompatible des terres en cause. Cette solution est conforme aux promesses verbales faites aux Indiens au moment de la signature du Traité, à l'histoire orale des Indiens visés par le Traité n° 8, aux premières décisions des tribunaux sur la question et aux dispositions mêmes

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Land use must be considered on a case-by-case basis, however, because the approach focuses upon the use being made of the land.

The appeals of Messrs. Badger and Kiyawasew must be dismissed. The land was being visibly used. Since they did not have a right of access to these particular tracts of land, their treaty right to hunt for food did not extend there. The limitations on hunting set out in the Act accordingly did not infringe upon their existing right and were properly applied. The geographical limitations upon the Treaty right to hunt for food did not affect Mr. Ominayak who was hunting on land not being put to any visible use.

The Indians would have understood that, by the terms of the Treaty, the government would be permitted to pass regulations with respect to conservation given the existence of conservation laws existing prior to signing the Treaty. The provincial government's regulatory authority under the Treaty and the *NRTA* (which transferred regulatory authority for conservation purposes to the provincial authorities) did not extend beyond the realm of conservation. The constitutional provisions of s. 12 of *NRTA* authorizing provincial regulations made it unnecessary to consider s. 88 of the *Indian Act* which provided that provincial laws of general application applied to Indians provided that those laws were not in conflict with aboriginal or treaty rights.

The public safety regulations, which formed the first step of a two-step licensing scheme, did not infringe any aboriginal or treaty rights. These regulations required all hunters to take gun safety courses and pass hunting competency tests and accordingly protected all hunters, including Indians. Reasonable regulations aimed at ensuring safety do not infringe aboriginal or treaty rights to hunt for food.

The second step of the licensing scheme, the conservation component, constituted a *prima facie* infringement. Under the Treaty, no limitation as to method, timing and extent of Indian hunting can be imposed. The present licensing scheme, however, imposes conditions on the face of the licence as to hunting method, the kind and numbers of game, the season and the permissible hunting area. These limitations are in direct conflict

de la Loi. Elle n'est ni excessivement vague, ni inapplicable. Toutefois, comme cette solution met l'accent sur l'utilisation qui est faite des terres en cause, l'examen de cette question doit se faire au cas par cas.

Les pourvois de MM. Badger et de Kiyawasew doivent être rejetés. Les terres étaient visiblement utilisées. Comme les appelants n'avaient pas de droit d'accès à ces terres, leur droit — issu du traité — de chasser pour se nourrir ne s'étendait pas à ces terres. En conséquence, les limites applicables au droit de chasse énoncées dans la Loi ne portent pas atteinte au droit existant de ces deux appelants, et elles leur ont à juste titre été appliquées. La limitation territoriale du droit — issu du Traité — de chasser pour se nourrir ne visait pas M. Ominayak, qui chassait sur des terres ne faisant pas l'objet d'une utilisation visible.

Les Indiens auraient compris que, suivant les termes du Traité, le gouvernement pourrait prendre des règlements relatifs à la conservation, étant donné que ces textes de loi existaient avant la signature du Traité. Le gouvernement provincial n'avait pas, en vertu du Traité et de la *Convention* (qui a transféré le pouvoir de réglementation en matière de conservation aux autorités provinciales), le pouvoir de réglementer autre chose que la conservation. Les dispositions constitutionnelles du par. 12 de la *Convention* autorisant l'application des règlements provinciaux font en sorte qu'il est inutile d'examiner l'art. 88 de la *Loi sur les Indiens* qui prévoyait que les Indiens étaient assujettis aux lois provinciales d'application générale, sauf si ces lois entraient en conflit avec des droits ancestraux ou issus de traités.

Les règlements relatifs à la sécurité du public, qui forment le premier des deux volets du régime de délivrance de permis, ne portent pas atteinte aux droits ancestraux ou issus de traités. Ces règlements obligent tous les chasseurs à suivre des cours de sécurité dans le manement des armes à feu et à réussir des tests d'aptitude à chasser. En conséquence, ils protègent la sécurité de tous les chasseurs, y compris des Indiens. Un règlement raisonnable, destiné à assurer la sécurité des individus, ne porte pas atteinte aux droits — ancestraux ou issus de traités — de chasser pour se nourrir.

Le second aspect du régime de délivrance des permis, le volet touchant la conservation, crée une atteinte *prima facie*. Aux termes du Traité, on ne peut limiter l'ampleur des activités de chasse exercées par les Indiens, ni les méthodes qu'ils utilisent à cette fin ou les périodes durant lesquelles ils s'y adonnent. Or, le régime actuel de délivrance de permis impose des restrictions, lesquelles sont inscrites sur le permis, relativement aux

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with the treaty right. Moreover, no provisions currently exist for "hunting for food" licences.

Any infringement of the rights guaranteed under the Treaty or the *NRTA* must be justified using the *Sparrow* test. This analysis provides a reasonable, flexible and current method of assessing the justifiability of conservation regulations and enactments. It must first be asked if there was a valid legislative objective, and if so, the analysis proceeds to a consideration of the special trust relationship and the responsibility of the government *vis-à-vis* the aboriginal people. Further questions might deal with whether the infringement was as little as was necessary to effect the objective, whether compensation was fair, and whether the aboriginal group was consulted with respect to the conservation measures.

The government led no evidence with respect to justification. The Court could not find justification in the absence of such evidence.

*Per* Lamer C.J. and Sopinka J.: The treaty rights were restated, merged and consolidated in the *NRTA* and so their preservation was assured by being placed in a constitutional instrument. The sole source for a claim involving the right to hunt for food is, therefore, the *NRTA*. The Treaty may be relied on for the purpose of assisting in the interpretation of the *NRTA* but it has no other legal significance.

Two key interpretative principles apply to treaties. First, any ambiguity in the treaty will be resolved in favour of the Indians. Second, treaties should be interpreted in a manner that maintains the integrity of the Crown, particularly the Crown's fiduciary obligation toward aboriginal peoples. These interpretative principles apply equally to the rights protected by the *NRTA*.

The rights of Indians pursuant to either the Treaty or the *NRTA* would, at the time either was agreed to, be understood to be subject to governmental regulation for conservation purposes. The rights protected by the *NRTA* are not constitutional rights of an absolute nature precluding any governmental regulation.

méthodes de chasse, au type de gibier, au nombre de prises ainsi qu'aux périodes de chasse et aux zones où celle-ci est autorisée. Ces restrictions sont en contradiction directe avec le droit prévu au Traité. Qui plus est, il n'existe à l'heure actuelle aucune disposition concernant la délivrance de permis de «chasse pour se nourrir».

Toute atteinte aux droits garantis par le Traité ou la *Convention* doit être justifiée à l'aide du critère énoncé dans *Sparrow*. Cette analyse constitue une méthode raisonnable, souple et admise d'évaluation des lois et règlements relatifs à la conservation. En premier lieu, il faut se demander s'il existe un objectif législatif régulier; dans l'affirmative, on passe à l'examen des rapports spéciaux de fiduciaire et de la responsabilité du gouvernement envers les autochtones. D'autres questions peuvent également se poser, savoir si, en tentant d'obtenir le résultat souhaité, on a porté le moins possible atteinte à des droits, si une juste indemnisation était prévue et si le groupe d'autochtones en question a été consulté au sujet des mesures de conservation.

Le gouvernement n'a pas présenté de preuve relative-ment à la justification. En l'absence d'une telle preuve, la Cour ne pouvait conclure à l'existence d'une justification.

Le juge en chef Lamer et le juge Sopinka: La *Convention* a réitéré, unifié et codifié les droits prévus au Traité, et leur maintien a donc été assuré par leur inscription dans un texte constitutionnel. L'unique source permettant d'invoquer le droit de chasser pour se nourrir est par conséquent la *Convention*. Le Traité peut être invoqué pour aider à l'interprétation de la *Convention*, mais il n'a aucune autre importance sur le plan juridique.

Deux principes d'interprétation clés s'appliquent aux traités. Premièrement, toute ambiguïté dans le traité doit profiter aux Indiens. Deuxièmement, les traités doivent être interprétés de manière à préserver l'intégrité de la Couronne, en particulier son obligation de fiduciaire envers les peuples autochtones. Ces principes d'interprétation s'appliquent également aux droits protégés par la *Convention*.

Au moment de la conclusion du Traité et de la *Convention*, il aurait été entendu que les droits des Indiens en vertu de l'un ou l'autre de ces documents étaient assujettis à la réglementation gouvernementale en matière de conservation. Les droits protégés par la *Convention* ne sont pas des droits constitutionnels de nature absolue, à l'égard desquels toute réglementation gouvernementale est interdite.

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Section 35(1) of the *Constitution Act, 1982* should not be the standard against which governmental regulation permitted by the *NRTA*, and the extent of the protection of the appellants' rights in the face of such regulation, should be assessed. Section 35(1) cannot provide constitutional protection to rights already constitutionally protected; nor does it apply to another constitutional provision.

In the absence of a mechanism in the *NRTA*, the Court must develop a test through which the province's right to legislate with respect to conservation can be balanced against the Indians' right to hunt for food. The *Sparrow* test, developed in the context of s. 35(1), protects aboriginal rights while also permitting governments to legislate for legitimate purposes where the legislation is a justifiable infringement on those protected rights. This test applies equally well to the regulatory authority granted to the provinces under para. 12 of the *NRTA*. In applying the *Sparrow* criteria here, it is important to bear in mind that what is being justified is the exercise of a power granted to the provinces which is made subject to the right to hunt for food.

#### Cases Cited

By Cory J.

**Applied:** *R. v. Sparrow*, [1990] 1 S.C.R. 1075; **considered:** *R. v. Horse*, [1988] 1 S.C.R. 187; *Myran v. The Queen*, [1976] 2 S.C.R. 137; *R. v. Mousseau*, [1980] 2 S.C.R. 89; *R. v. Bartleman* (1984), 55 B.C.L.R. 78; **referred to:** *R. v. Horseman*, [1990] 1 S.C.R. 901; *R. v. Cardinal* (1977), 36 C.C.C. (2d) 369; *R. v. Ominayak* (1990), 108 A.R. 239; *R. v. Sioui*, [1990] 1 S.C.R. 1025; *Simon v. The Queen*, [1985] 2 S.C.R. 387; *R. v. Taylor* (1981), 34 O.R. (2d) 360; *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29; *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85; *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313; *Frank v. The Queen*, [1978] 1 S.C.R. 95; *R. v. Wesley*, [1932] 2 W.W.R. 337; *Prince v. The Queen*, [1964] S.C.R. 81; *Cardinal v. Attorney General of Alberta*, [1974] S.C.R. 695; *R. v. Sutherland*, [1980] 2 S.C.R. 451; *R. v. Smith*, [1935] 2 W.W.R. 433; *R. v. Mirasty*, [1942] 1 W.W.R. 343; *R. v. Strongquill*, [1953] 8 W.W.R. (N.S.) 247; *Moosehunter v. The Queen*, [1981] 1 S.C.R. 282; *Kruger v. The Queen*, [1978] 1 S.C.R. 104; *R. v. Sikyea*, [1964] 2 C.C.C. 325, aff'd [1964] S.C.R. 642; *Guerin v. The Queen*, [1984] 2 S.C.R. 335; *R. v. Eninew* (1984), 12 C.C.C. (3d) 365; *R. v. Agawa* (1988), 65 O.R. (2d) 505;

Le paragraphe 35(1) de la *Loi constitutionnelle de 1982* ne devrait pas être la norme appliquée pour apprécier la réglementation gouvernementale permise par la *Convention* et l'étendue de la protection dont bénéficient les droits des appelants au regard de cette réglementation. Le paragraphe 35(1) ne peut accorder la protection de la Constitution à des droits qui en jouissent déjà, ni s'appliquer à d'autres dispositions constitutionnelles.

Vu l'absence de mécanisme à cette fin dans la *Convention*, la Cour doit élaborer un critère permettant de mettre en équilibre le droit de la province de légiférer en matière de conservation et le droit des Indiens de chasser pour se nourrir. Le critère énoncé dans *Sparrow*, qui a été élaboré dans le contexte du par. 35(1), protège les droits ancestraux, tout en permettant aux gouvernements de légiférer à des fins légitimes, dans la mesure où la loi est une atteinte justifiable aux droits protégés. Ce critère s'applique également au pouvoir de réglementation accordé aux provinces par le par. 12 de la *Convention*. En appliquant les critères énoncés dans *Sparrow* en l'espèce, il est important de garder à l'esprit que ce que l'on justifie, c'est l'exercice d'un pouvoir conféré aux provinces, pouvoir qui est assujéti au droit de chasser pour se nourrir.

#### Jurisprudence

Citée par le juge Cory

**Arrêt appliqué:** *R. c. Sparrow*, [1990] 1 R.C.S. 1075; **arrêts examinés:** *R. c. Horse*, [1988] 1 R.C.S. 187; *Myran c. La Reine*, [1976] 2 R.C.S. 137; *R. c. Mousseau*, [1980] 2 R.C.S. 89; *R. c. Bartleman* (1984), 55 B.C.L.R. 78; **arrêts mentionnés:** *R. c. Horseman*, [1990] 1 R.C.S. 901; *R. c. Cardinal* (1977), 36 C.C.C. (2d) 369; *R. c. Ominayak* (1990), 108 A.R. 239; *R. c. Sioui*, [1990] 1 R.C.S. 1025; *Simon c. La Reine*, [1985] 2 R.C.S. 387; *R. c. Taylor* (1981), 34 O.R. (2d) 360; *Nowegijick c. La Reine*, [1983] 1 R.C.S. 29; *Mitchell c. Bande indienne Peguis*, [1990] 2 R.C.S. 85; *Calder c. Procureur général de la Colombie-Britannique*, [1973] R.C.S. 313; *Frank c. La Reine*, [1978] 1 R.C.S. 95; *R. c. Wesley*, [1932] 2 W.W.R. 337; *Prince c. The Queen*, [1964] R.C.S. 81; *Cardinal c. Procureur général de l'Alberta*, [1974] R.C.S. 695; *R. c. Sutherland*, [1980] 2 R.C.S. 451; *R. c. Smith*, [1935] 2 W.W.R. 433; *R. c. Mirasty*, [1942] 1 W.W.R. 343; *R. c. Strongquill*, [1953] 8 W.W.R. (N.S.) 247; *Moosehunter c. La Reine*, [1981] 1 R.C.S. 282; *Kruger c. La Reine*, [1978] 1 R.C.S. 104; *R. c. Sikyea*, [1964] 2 C.C.C. 325, conf. par [1964] R.C.S. 642; *Guerin c. La Reine*, [1984] 2 R.C.S. 335; *R. c. Eninew* (1984), 12 C.C.C. (3d) 365; *R. c. Agawa*

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*R. v. Napoleon*, [1986] 1 C.N.L.R. 86; *R. v. Fox*, [1994] 3 C.N.L.R. 132.

By Sopinka J.

**Applied:** *R. v. Sparrow*, [1990] 1 S.C.R. 1075; **followed:** *Frank v. The Queen*, [1978] 1 S.C.R. 95; **referred to:** *R. v. Sutherland*, [1980] 2 S.C.R. 451; *Moosehunter v. The Queen*, [1981] 1 S.C.R. 282; *R. v. Horseman*, [1990] 1 S.C.R. 901; *Reference Re Bill 30, An Act to Amend the Education Act (Ont.)*, [1987] 1 S.C.R. 1148.

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*Canadian Charter of Rights and Freedoms*, s. 15.  
*Constitution Act, 1867*, s. 93.  
*Constitution Act, 1930*, s. 1.  
*Constitution Act, 1982*, s. 35(1).  
*Natural Resources Transfer Agreement, 1930 (Constitution Act, 1930, Schedule 2)*, para. 12.  
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(1988), 65 O.R. (2d) 505; *R. c. Napoleon*, [1986] 1 C.N.L.R. 86; *R. c. Fox*, [1994] 3 C.N.L.R. 132.

Citée par le juge Sopinka

**Arrêt appliqué:** *R. c. Sparrow*, [1990] 1 R.C.S. 1075; **arrêt suivi:** *Frank c. La Reine*, [1978] 1 R.C.S. 95; **arrêts mentionnés:** *R. c. Sutherland*, [1980] 2 R.C.S. 451; *Moosehunter c. La Reine*, [1981] 1 R.C.S. 282; *R. c. Horseman*, [1990] 1 R.C.S. 901; *Renvoi relatif au projet de loi 30, An Act to Amend the Education Act (Ont.)*, [1987] 1 R.C.S. 1148.

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*Charte canadienne des droits et libertés*, art. 15.  
*Convention sur le transfert des ressources naturelles de 1930 (Loi constitutionnelle de 1930, annexe 2)*, par. 12.  
*Loi constitutionnelle de 1867*, art. 93.  
*Loi constitutionnelle de 1930*, art. 1.  
*Loi constitutionnelle de 1982*, art. 35(1).  
Règlement de l'Alberta 50/87, art. 2(2), 25.  
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R. v. BADGER *Sopinka J.*

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[1993] 3 C.N.L.R. 143, affirming a judgment of the Court of Queen's Bench affirming the appellants' convictions for offences under the *Wildlife Act*. Appeals of Wayne Clarence Badger and Leroy Steven Kiyawasew dismissed; appeal of Ernest Clarence Ominayak allowed and a new trial directed.

*Leonard Mandamin and Alan D. Hunter, Q.C.*, for the appellants.

*Robert J. Normey and Margaret Unsworth*, for the respondent.

*I. G. Whitehall, Q.C.*, and *R. Stevenson*, for the intervener the Attorney General of Canada.

*Kenneth J. Tyler*, for the intervener the Attorney General of Manitoba.

*P. Mitch McAdam*, for the intervener the Attorney General for Saskatchewan.

*Mary Ellen Turpel, Donald E. Worme and Gerry Morin*, for the intervener the Federation of Saskatchewan Indian Nations.

*Priscilla Kennedy*, for the intervener the Lesser Slave Lake Indian Regional Council.

*Gerard M. Meagher, Q.C.*, and *Eugene J. Creighton*, for the intervener the Treaty 7 Tribal Council.

*Edward H. Molstad, Q.C.*, *James A. O'Reilly* and *Wilton Littlechild*, for the intervener the Confederacy of Treaty Six First Nations.

*Peter K. Doody and John E. S. Briggs*, for the intervener the Assembly of First Nations.

*Jack R. London, Q.C.*, and *Martin S. Minuk*, for the intervener the Assembly of Manitoba Chiefs.

The reasons of Lamer C.J. and Sopinka J. were delivered by

SOPINKA J. — I have had the benefit of reading the reasons for judgment prepared in this appeal by

[1993] 3 C.N.L.R. 143, confirmant le jugement de la Cour du Banc de la Reine qui avait maintenu les déclarations de culpabilité prononcées contre les appelants pour des infractions à la *Wildlife Act*. Les pourvois de Wayne Clarence Badger et de Leroy Steven Kiyawasew sont rejetés; le pourvoi de Ernest Clarence Ominayak est accueilli et un nouveau procès est ordonné.

*Leonard Mandamin et Alan D. Hunter, c.r.*, pour les appelants.

*Robert J. Normey et Margaret Unsworth*, pour l'intimée.

*I. G. Whitehall, c.r.*, et *R. Stevenson*, pour l'intervenant le procureur général du Canada.

*Kenneth J. Tyler*, pour l'intervenant le procureur général du Manitoba.

*P. Mitch McAdam*, pour l'intervenant le procureur général de la Saskatchewan.

*Mary Ellen Turpel, Donald E. Worme et Gerry Morin*, pour l'intervenante la Federation of Saskatchewan Indian Nations.

*Priscilla Kennedy*, pour l'intervenant le Lesser Slave Lake Indian Regional Council.

*Gerard M. Meagher, c.r.*, et *Eugene J. Creighton*, pour l'intervenant le Treaty 7 Tribal Council.

*Edward H. Molstad, c.r.*, *James A. O'Reilly* et *Wilton Littlechild*, pour l'intervenante la Confederacy of Treaty Six First Nations.

*Peter K. Doody et John E. S. Briggs*, pour l'intervenante l'Assemblée des Premières Nations.

*Jack R. London, c.r.*, et *Martin S. Minuk*, pour l'intervenante l'Assemblée of Manitoba Chiefs.

Version française des motifs du juge en chef Lamer et du juge Sopinka rendus par

LE JUGE SOPINKA — J'ai eu l'avantage de lire les motifs de jugement qu'a rédigés mon collègue

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my colleague, Justice Cory, and I am in agreement with his disposition of the appeal and with his reasons with the exception of his exposition of the relationship between Treaty No. 8, the *Natural Resources Transfer Agreement, 1930 (Constitution Act, 1930, Schedule 2) (NRTA)*, and s. 35 of the *Constitution Act, 1982*.

In my view, the rights of Indians to hunt for food provided in Treaty No. 8 were merged in the *NRTA* which is the sole source of those rights. While I agree that the impugned provision of the *Wildlife Act*, S.A. 1984, c. W-9.1, infringes the constitutional right of Indians to hunt for food, I disagree that this constitutional right is one covered by s. 35(1) of the *Constitution Act, 1982*. I agree, however, that the constitutional right to hunt for food must be balanced against the right of the province to pass laws for the purpose of conservation and that this balancing may be carried out on the basis of the principles set out in *R. v. Sparrow*, [1990] 1 S.C.R. 1075.

There is no disagreement that the *NRTA*:

- (a) duplicated the right of Indians to hunt for food which was contained in Treaty No. 8;
- (b) widely extended the geographical area to include the whole of the province rather than being limited to the tract of land surrendered;
- (c) shifted responsibility for passing game laws from the federal government to the provinces;
- (d) eliminated the right to hunt for commercial purposes;
- (e) is a constitutional document and the Treaty is not, although the Treaty receives constitutional protection by virtue of s. 35(1) of the *Constitution Act, 1982*.

In these circumstances, I am of the view that it was clearly the intention of the framers to merge the rights in the Treaty in the *NRTA*. To characterize the *NRTA* as modifying the Treaty is to treat it as an amending document to the Treaty. This

le juge Cory en l'espèce, et je souscris à sa décision et à ses motifs, sauf en ce qui concerne l'exposé qu'il fait des rapports entre le Traité n° 8, la *Convention sur le transfert des ressources naturelles de 1930 (Loi constitutionnelle de 1930, annexe 2) (la Convention)* et l'art. 35 de la *Loi constitutionnelle de 1982*.

À mon avis, les droits des Indiens de chasser pour se nourrir que prévoit le Traité n° 8 ont été unifiés dans la *Convention*, qui est l'unique source des droits en question. Même si je conviens que la disposition contestée de la *Wildlife Act*, S.A. 1984, ch. W-9.1, porte atteinte au droit constitutionnel des Indiens de chasser pour se nourrir, je ne suis pas d'accord pour affirmer que ce droit est visé au par. 35(1) de la *Loi constitutionnelle de 1982*. Toutefois, je reconnais, d'une part, qu'il faut rechercher l'équilibre entre le droit constitutionnel de chasser pour se nourrir et le droit de la province d'édicter des lois en matière de conservation, et, d'autre part, que cet équilibre peut être établi sur le fondement des principes énoncés dans l'arrêt *R. c. Sparrow*, [1990] 1 R.C.S. 1075.

Tous s'entendent sur les points suivants en ce qui concerne la *Convention*:

- a) elle a repris le droit des Indiens de chasser pour se nourrir qui figurait dans le Traité n° 8;
- b) elle a considérablement élargi le territoire visé, qui comprend maintenant toute la province plutôt que la seule zone cédée;
- c) elle a transféré aux provinces la responsabilité d'adopter des lois relatives au gibier, qui incombait jusque-là au gouvernement fédéral;
- d) elle a éliminé le droit de chasser à des fins commerciales;
- e) elle est un document constitutionnel, contrairement au Traité, bien que celui-ci jouisse de la protection de la Constitution en vertu du par. 35(1) de la *Loi constitutionnelle de 1982*.

Dans ces circonstances, je suis d'avis que les rédacteurs avaient clairement l'intention d'unifier dans la *Convention* les droits prévus par le Traité. Dire de la *Convention* qu'elle change le Traité revient à la considérer comme un document por-

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clearly was not the intent of the *NRTA*. In enlarging the area in which hunting for food was permitted to extend to the whole of the province, it could not be suggested that the *NRTA* extended the Treaty to all of the province. Rather, the right to hunt for food was extended by the *NRTA* to the whole of the province, including the area covered by the Treaty. An Indian hunting on land outside the Treaty lands could not claim to be covered by the Treaty. If the *NRTA* merely modified the Treaty, an Indian hunting on Treaty lands could claim the right under the Treaty while an Indian hunting in other parts of the province could claim only under the *NRTA*. This would invite bifurcation of the rights of Indians hunting for food in the province.

5 Similarly, the provisions which transferred to the province the power to pass gaming laws for the purpose of conservation could not have been intended simply to amend the Treaty. As an amendment to the Treaty, this provision would have no constitutional force and could not alter the constitutionally entrenched division of powers. It might be suggested that the *NRTA* both amended the Treaty and, as an independent constitutional document, amended the Constitution. If this were the intent, it is difficult to understand why all the terms of the Treaty relating to the right to hunt for food were replicated in *NRTA*. It must have been the intention to merge these rights in the *NRTA* so that they could be balanced with the power of the provinces to legislate for conservation purposes. In order to achieve a reasonable balance between them, it was important that they both appear in one document having constitutional status.

6 I can suggest no reason why the framers of the *NRTA* would have wanted to maintain any aspects of the Treaty except as an interpretative tool. They surely did not do so in order to allow these rights to be recognized under s. 35(1) of the *Constitution*

tant modification du Traité. Ce n'était certainement pas là l'objet de la *Convention*. Il est impossible d'affirmer que, en élargissant à l'ensemble de la province le territoire où il était permis de chasser pour se nourrir, la *Convention* a étendu la portée du Traité à toute la province. C'est plutôt le droit de chasser pour se nourrir qui a été élargi par la *Convention* à l'ensemble de la province, y compris le territoire visé par le Traité. L'Indien qui chasse à l'extérieur des terres visées par le Traité ne pourrait se réclamer du Traité. Si la *Convention* avait simplement modifié le Traité, l'Indien chassant sur des terres visées par celui-ci pourrait invoquer le droit prévu par le Traité alors que l'Indien chassant dans d'autres parties de la province ne pourrait qu'invoquer la *Convention*. Cela pourrait entraîner un dédoublement des droits des Indiens qui chassent pour se nourrir dans la province.

De même, la disposition qui a transféré à la province le pouvoir d'édicter, à des fins de conservation, des lois relatives au gibier ne pouvait avoir uniquement pour objet de modifier le Traité. En tant que modification du Traité, cette disposition n'aurait aucune valeur constitutionnelle et ne pourrait pas changer le partage des pouvoirs inscrit dans la Constitution. D'aucuns pourraient prétendre que la *Convention* a eu pour effet, d'une part, de modifier le Traité, et, d'autre part, en tant que document constitutionnel indépendant, de modifier également la Constitution. Si c'était là l'objet visé, on s'explique difficilement pourquoi tous les termes du Traité relatifs au droit de chasser pour se nourrir ont été repris dans la *Convention*. Les rédacteurs devaient avoir l'intention d'unifier ces droits dans la *Convention* de façon qu'ils puissent être mis en équilibre avec le pouvoir des provinces de légiférer en matière de conservation. Afin d'établir un juste équilibre entre le droit et le pouvoir en question, il était important qu'ils figurent tous deux dans un document ayant valeur constitutionnelle.

Je ne peux donner aucune raison pour laquelle les rédacteurs de la *Convention* auraient pu vouloir maintenir quelque aspect du Traité, si ce n'est à titre d'outil d'interprétation. Ils ne l'ont sûrement pas fait pour permettre la reconnaissance de ces

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*Act, 1982* which appears to be the sole present justification for preserving the Treaty. However, even that justification loses any force when considered in light of the fact that the *NRTA* is itself a constitutional document and recognition under s. 35(1) is unnecessary for the protection of these important Indian rights.

From the foregoing, I conclude that it was the intention of the framers of para. 12 of the *NRTA* to effectuate a merger and consolidation of the Treaty rights. This was the view of Dickson J. (as he then was), speaking for the Court, in *Frank v. The Queen*, [1978] 1 S.C.R. 95, at p. 100:

It would appear that the overall purpose of para. 12 of the Natural Resources Transfer Agreement was to effect a merger and consolidation of the treaty rights theretofore enjoyed by the Indians but of equal importance was the desire to re-state and reassure to the treaty Indians the continued enjoyment of the right to hunt and fish for food.

As pointed out, these rights were restated in the *NRTA* and their preservation was assured by being placed in a constitutional instrument.

If this was the intention, and I conclude that it was, then the proper characterization of the relationship between the *NRTA* and the Treaty rights is that the sole source for a claim involving the right to hunt for food is the *NRTA*. The Treaty rights have been subsumed in a document of a higher order. The Treaty may be relied on for the purpose of assisting in the interpretation of the *NRTA*, but it has no other legal significance.

The fact that the source of the appellants' rights to hunt and fish for sustenance is found within the provisions of the *NRTA* does not alter the analysis that has previously been employed in the interpretation of treaty rights. The key interpretative principles which apply to treaties are first, that any ambiguity in the treaty will be resolved in favour of the Indians and, second, that treaties should be interpreted in a manner that maintains the integrity of the Crown, particularly the Crown's fiduciary obligation toward aboriginal peoples. These princi-

droits en vertu du par. 35(1) de la *Loi constitutionnelle de 1982*, qui paraît être actuellement l'unique raison justifiant le maintien du Traité. Or, même cette justification perd toute valeur en regard du fait que la *Convention* est elle-même un document constitutionnel, et que leur reconnaissance en vertu du par. 35(1) est inutile pour protéger ces importants droits des Indiens.

Je conclus de ce qui précède que les rédacteurs du par. 12 de la *Convention* avaient l'intention d'unifier et de codifier les droits prévus au Traité. C'est l'opinion qu'a exprimée le juge Dickson (plus tard juge en chef) pour la Cour dans l'arrêt *Frank c. La Reine*, [1978] 1 R.C.S. 95, à la p. 100:

Il semble que le but essentiel de l'art. 12 de la *Convention* sur les ressources naturelles était d'unifier et de codifier les droits reconnus aux Indiens dans les traités, mais également de réaffirmer et de garantir aux Indiens visés par les traités le droit de chasser et de pêcher pour leur subsistance.

Ainsi qu'il a été signalé, ces droits ont été réitérés dans la *Convention*, et leur maintien assuré par leur inscription dans un texte constitutionnel.

Si telle était l'intention, et je conclus que c'était le cas, alors la bonne façon de décrire les rapports entre les droits issus du Traité et la *Convention* est de dire que cette dernière est l'unique source permettant d'invoquer le droit de chasser pour se nourrir. Les droits issus du Traité ont été subsumés dans un document de rang supérieur. Le Traité peut être invoqué pour aider à l'interprétation de la *Convention*, mais il n'a aucune autre importance sur le plan juridique.

Le fait que la source des droits des appelants de chasser et de pêcher à des fins de subsistance se trouve dans les dispositions de la *Convention* ne change rien à l'analyse appliquée auparavant pour interpréter les droits issus de traités. Les principes d'interprétation clés applicables aux traités sont de deux ordres: premièrement, toute ambiguïté dans le traité doit profiter aux Indiens, et, deuxièmement, les traités doivent être interprétés de manière à préserver l'intégrité de la Couronne, en particulier son obligation de fiduciaire envers les peuples

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ples apply equally to the rights protected by the *NRTA*; the principles arise out of the nature of the relationship between the Crown and aboriginal peoples with the result that, whatever the document in which that relationship has been articulated, the principles should apply to the interpretation of that document. I find support for this reasoning in the prior decisions of this Court concerning the interpretation of the *NRTA*. In *R. v. Sutherland*, [1980] 2 S.C.R. 451, for example, this Court specifically stated, at p. 461, that the *NRTA* should be given a "broad and liberal construction", and, at p. 464, that any ambiguity should be "interpreted so as to resolve any doubts in favour of the Indians". Moreover, this position is compatible with the concept that the *NRTA* constitutes a merger and consolidation of treaty rights, and with the view that it was through the enactment of the *NRTA* that the "federal government attempted to fulfil their treaty obligations" (see *Moosehunter v. The Queen*, [1981] 1 S.C.R. 282, at p. 293).

Validity of the provisions of the *Wildlife Act*

10 In light of my conclusion that the right of Indian persons to hunt for food is constitutional in nature, the issue remaining for determination is whether the provisions of the *Wildlife Act* under which the appellants were convicted are constitutionally permissible. On the bare wording of para. 12 of the *NRTA*, it appears as though such an issue could never arise. The *NRTA* grants legislative power over "gaming" subject to the Indians' right to hunt for food, apparently suggesting that the province has no jurisdiction to legislate in relation to those rights. This interpretation arises out of the mandatory language used in para. 12, wherein the legislative power is granted to the province, but qualified by the statement that the power exists "provided, however, that the said Indians shall have the right. . . ."

11 The reasoning in *R. v. Horseman*, [1990] 1 S.C.R. 901, informs us that such a formalistic interpretation of the language of the *NRTA* is incorrect. At the time the treaties that preceded the *NRTA* were signed, there was already in place legislation enacted for conservation purposes which

autochtones. Ces principes, qui s'appliquent également aux droits protégés par la *Convention*, découlent de la nature des rapports qui existent entre la Couronne et les peuples autochtones, de sorte que, quel que soit le document énonçant ces rapports, ces principes devraient servir à son interprétation. Mon raisonnement trouve appui dans les arrêts antérieurs de notre Cour concernant l'interprétation de la *Convention*. Ainsi, dans *R. c. Sutherland*, [1980] 2 R.C.S. 451, notre Cour a expressément déclaré, à la p. 461, qu'il faut donner à la *Convention* une «interprétation large et libérale», et, à la p. 464, qu'il faut interpréter toute ambiguïté «de façon à résoudre tout doute en faveur des Indiens». De plus, cette position est compatible avec le principe que la *Convention* unifie et codifie les droits issus de traités, et avec l'opinion que, par l'adoption de la *Convention*, le «gouvernement fédéral a tenté de s'acquitter de ses obligations découlant des traités» (voir l'arrêt *Moosehunter c. La Reine*, [1981] 1 R.C.S. 282, à la p. 293).

Validité des dispositions de la *Wildlife Act*

Puisque j'ai conclu que le droit des Indiens de chasser pour se nourrir est de nature constitutionnelle, la question qui reste à trancher est de savoir si les dispositions de la *Wildlife Act* en vertu desquelles les appelants ont été déclarés coupables sont permises par la Constitution. Toutefois, il semble impossible, aux termes mêmes du par. 12 de la *Convention*, qu'une telle question se pose jamais. En effet, la *Convention* confère le pouvoir de faire des lois relatives au gibier, sous réserve du droit des Indiens de chasser pour se nourrir, ce qui tend apparemment à indiquer que la province n'a aucune compétence pour légiférer à l'égard de ce droit. Cette interprétation découle du langage impératif du par. 12 qui, tout en conférant à la province le pouvoir législatif en question, limite cependant ce pouvoir en précisant que: «toutefois, lesdits Indiens auront le droit . . .»

Le raisonnement appliqué dans l'arrêt *R. c. Horseman*, [1990] 1 R.C.S. 901, nous indique que pareille interprétation formaliste du libellé de la *Convention* est incorrecte. À l'époque où les traités antérieurs à la *Convention* ont été signés, il existait déjà des lois en matière de conservation qui

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affected the Indians' rights. Indeed, there existed total bans on the hunting of certain species. As a result, at the time the treaties were signed and, even more so, at the time that the *NRTA* was agreed to by the provinces and the federal government, it would have been clearly understood that the rights of Indians pursuant to either document would be subject to governmental regulation for conservation purposes. The rights protected by the *NRTA* thus cannot be viewed as being constitutional rights of an absolute nature for which governmental regulation is prohibited.

How, then, is the governmental regulation permitted by the *NRTA*, and the extent of the protection of the appellants' rights in the face of such regulation, to be assessed? Cory J. has taken the position that the standard against which the validity of the *Wildlife Act* is to be assessed is s. 35(1) of the *Constitution Act, 1982*, and the test set out in *Sparrow, supra*. I am unable to agree with my colleague on this point. Section 35(1) was intended to provide constitutional protection for aboriginal rights and treaty rights that did not enjoy such protection. It cannot have been intended to be redundant and provide constitutional protection for rights that already enjoyed constitutional protection. Moreover, para. 12 of the *NRTA* is a constitutional provision and, as such, s. 35(1) has no direct application to it. Infringements of constitutional rights cannot be remedied by the application of a different constitutional provision. As Estey J. stated in *Reference Re Bill 30, An Act to Amend the Education Act (Ont.)*, [1987] 1 S.C.R. 1148, at p. 1207, the *Canadian Charter of Rights and Freedoms* "cannot be interpreted as rendering unconstitutional distinctions that are expressly permitted by the *Constitution Act, 1867*". That case concerned the application of s. 15 of the *Charter* to s. 93 of the *Constitution Act, 1867*. Although the case is not directly on point with the issues arising in this appeal, in my view, Estey J.'s comment provides support for the position that constitutional provisions enacted later in time are not to be read as impliedly amending the earlier enacted provisions. (See Peter W. Hogg, *Constitutional Law of*

avaient une incidence sur les droits des Indiens. De fait, la chasse de certaines espèces était même absolument interdite. Par conséquent, au moment où les traités ont été signés et, même plus encore au moment où les provinces et le gouvernement fédéral ont conclu la *Convention*, il aurait été clairement entendu que les droits des Indiens en vertu de l'un ou l'autre de ces documents étaient assujettis à la réglementation gouvernementale en matière de conservation. Les droits protégés par la *Convention* ne peuvent donc être considérés comme des droits constitutionnels de nature absolue, à l'égard desquels toute réglementation gouvernementale est interdite.

Comment alors doit-on apprécier la réglementation gouvernementale permise par la *Convention* et l'étendue de la protection dont bénéficient les droits des appelants au regard de cette réglementation? Le juge Cory a dit être d'avis que c'est au regard du par. 35(1) de la *Loi constitutionnelle de 1982* et du critère énoncé dans l'arrêt *Sparrow*, précité, qu'il faut apprécier la validité de la *Wildlife Act*. Je ne peux me rallier à l'opinion de mon collègue sur ce point. Le paragraphe 35(1) a pour objet d'accorder la protection de la Constitution aux droits ancestraux et issus de traités qui ne jouissaient pas de cette protection. Il n'est pas possible qu'on ait voulu qu'il produise un effet redondant et accorde la protection de la Constitution à des droits qui en jouissaient déjà. En outre, le par. 12 de la *Convention* est une disposition constitutionnelle et, de ce fait, le par. 35(1) ne s'y applique pas directement. On ne peut remédier aux atteintes à des droits constitutionnels par l'application d'une autre disposition constitutionnelle. Ainsi que le juge Estey l'a déclaré dans le *Renvoi relatif au projet de loi 30, An Act to Amend the Education Act (Ont.)*, [1987] 1 R.C.S. 1148, à la p. 1207, la *Charte canadienne des droits et libertés* «ne saurait être interprétée comme rendant *ipso facto* inconstitutionnelles les distinctions expressément autorisées par la *Loi constitutionnelle de 1867*». Cette affaire concernait l'application de l'art. 15 de la *Charte* à l'art. 93 de la *Loi constitutionnelle de 1867*. Bien que cette affaire ne portait pas directement sur les questions soulevées par le présent pourvoi, je suis d'avis que les remarques du juge

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*Canada* (3rd ed. 1992), at p. 1183.) Nor are later provisions of the constitution applicable in terms of the interpretation of earlier provisions. On that reasoning, s. 35(1) is inapplicable to the provision of the *NRTA* that protects the right of aboriginal persons to hunt for food.

Estey appuie la thèse que des dispositions constitutionnelles adoptées postérieurement à d'autres dispositions ne doivent pas être considérées comme ayant pour effet de modifier celles-ci implicitement. (Voir Peter W. Hogg, *Constitutional Law of Canada* (3<sup>e</sup> éd. 1992), à la p. 1183.) Pas plus que des dispositions plus récentes de la Constitution ne s'appliquent pour interpréter des dispositions qui leur sont antérieures. Conformément à ce raisonnement, le par. 35(1) ne s'applique pas à la disposition de la *Convention* qui protège le droit des autochtones de chasser pour se nourrir.

13 That is not to say, however, that the principles underlying the interpretation of s. 35(1) have no relevance to the determination of whether a particular legislative enactment has an acceptable purpose and whether it constitutes an acceptable limitation on the rights granted by the *NRTA*. There is no method provided in the *NRTA* whereby government measures that may impinge upon the rights the same document grants to Indians can be scrutinized. It is clear, however, that the *NRTA* does require a balancing of rights. The right of the province to legislate with respect to conservation must be balanced against the right granted to the Indians to hunt for food. Thus, it falls to the Court to develop a test through which this task can be accomplished. In *Sparrow*, this Court developed principles for balancing the constitutionally protected right to fish for food against the federal government's power to pass laws for conservation. Although the *Sparrow* test was developed in the context of s. 35(1), the basic thrust of the test, to protect aboriginal rights but also to permit governments to legislate for legitimate purposes where the legislation is a justifiable infringement on those protected rights, applies equally well to the regulatory authority granted to the provinces under para. 12 of the *NRTA* as to federal power to legislate in respect of Indians.

Toutefois, cela ne signifie pas que les principes qui sous-tendent l'interprétation du par. 35(1) n'ont aucune pertinence pour déterminer si un texte législatif donné vise un objet acceptable et s'il constitue une limitation acceptable des droits accordés par la *Convention*. Ce texte ne prévoit en effet aucune méthode d'examen des mesures gouvernementales susceptibles de porter atteinte aux droits qu'il confère aux Indiens. Il est évident cependant que la *Convention* requiert effectivement la mise en équilibre des droits en cause, en l'occurrence le droit de la province de légiférer en matière de conservation et le droit de chasser pour se nourrir qui est accordé aux Indiens. Il appartient donc à la Cour d'élaborer un critère permettant d'accomplir cette tâche. Dans *Sparrow*, notre Cour a dégagé des principes en vue d'équilibrer le droit protégé par la Constitution de pêcher pour se nourrir et le pouvoir du gouvernement fédéral d'adopter des lois en matière de conservation. Bien que le critère établi dans *Sparrow* ait été élaboré dans le contexte du par. 35(1), sa raison d'être fondamentale — qui est de protéger les droits ancestraux mais également de permettre aux gouvernements de légiférer à des fins légitimes dans la mesure où la loi est une atteinte justifiable aux droits protégés — s'applique tout autant au pouvoir de réglementation accordé aux provinces par le par. 12 de la *Convention* qu'au pouvoir du fédéral d'adopter des lois concernant les Indiens.

14 In this way, the *Sparrow* test is applied to the *NRTA* by analogy, with the result that the Court will have a means by which to ensure that the rights in the *NRTA* are protected, but that provin-

De cette manière, le critère établi dans *Sparrow* est appliqué à la *Convention* par analogie, donnant ainsi à la Cour un moyen de s'assurer non seulement que les droits prévus par la *Convention* sont

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cial governments are also provided with some flexibility in terms of their ability to affect those rights for the purpose of legislating in relation to conservation. As Cory J. points out, the criteria set out in *Sparrow* do not purport to be exhaustive and are to be applied flexibly. In applying them in this context, it is important to bear in mind that what is being justified is the exercise of a power granted to the provinces, which power is made subject to the right to hunt for food. Both are contained in a constitutional document. The application of the *Sparrow* criteria should be consonant with the intention of the framers as to the reconciliation of these competing provisions.

I agree with Cory J. that, in the absence of evidence with respect to justification, there must be a new trial and I would dispose of the appeal as suggested by him.

The constitutional question and answers are as follows:

If Treaty 8 confirmed to the Indians of the Treaty 8 Territory the right to hunt throughout the tract surrendered, does the right continue to exist or was it extinguished and replaced by para. 12 of the *Natural Resources Transfer Agreement, 1930 (Constitution Act, 1930, 20-21 George V, c. 26 (U.K.))*, and if the right continues to exist, could that right be exercised on the lands in question and, if so, was the right impermissibly infringed upon by s. 26(1) or s. 27(1) of the *Wildlife Act, S.A. 1984, c. W-9.1, given Treaty 8 and s. 35(1) of the Constitution Act, 1982?*

The right to hunt for food referred to in Treaty No. 8 was merged in the *NRTA* which is the sole source of the right.

Sections 26(1) and 27(1) of the *Wildlife Act* did not infringe the constitutional rights of Mr. Badger or Mr. Kiyawasew to hunt for food.

Mr. Ominayak was exercising his constitutional right to hunt for food. Section 26(1) of the *Wildlife Act* is a *prima facie* infringement of his right to

protégés, mais aussi que les gouvernements provinciaux jouissent d'une certaine latitude leur permettant de toucher à ces droits en légiférant à des fins de conservation. Comme le souligne le juge Cory, les critères énoncés dans *Sparrow* ne se veulent pas exhaustifs et doivent être appliqués de façon souple. Dans ce contexte, il est important de garder à l'esprit que ce que l'on justifie, c'est l'exercice d'un pouvoir conféré aux provinces, pouvoir qui est assujéti au droit de chasser pour se nourrir. Tant le pouvoir que le droit en question sont inscrits dans un document constitutionnel. Les critères énoncés dans *Sparrow* doivent être appliqués d'une manière conforme à l'intention des rédacteurs pour ce qui est de la conciliation de ces deux dispositions concurrentes.

Je conviens avec le juge Cory que, en l'absence de preuve concernant la justification, il faut tenir un nouveau procès, et je trancherais le pourvoi de la manière qu'il propose.

Voici la question constitutionnelle et les réponses qui y sont apportées:

Si le Traité n° 8 confirmait aux Indiens du territoire de ce traité le droit de chasser dans l'ensemble de la zone cédée, le droit existe-t-il toujours ou a-t-il été éteint et remplacé par le par. 12 de la *Convention sur le transfert des ressources naturelles de 1930 (Loi constitutionnelle de 1930, 20-21 George V, ch. 26 (R.-U.))* et, si le droit existe toujours, pouvait-il être exercé sur les terres en question. Dans l'affirmative, les par. 26(1) ou 27(1) de la *Wildlife Act, S.A. 1984, ch. W-9.1*, portent-ils atteinte à ce droit, compte tenu du Traité n° 8 et du par. 35(1) de la *Loi constitutionnelle de 1982?*

Les droits de chasser pour se nourrir visés par le Traité n° 8 ont été unifiés dans la *Convention*, qui est l'unique source de ces droits.

Les paragraphes 26(1) et 27(1) de la *Wildlife Act* n'ont pas porté atteinte au droit constitutionnel de M. Badger et de M. Kiyawasew de chasser pour se nourrir.

Monsieur Ominayak exerçait son droit constitutionnel de chasser pour se nourrir. Le paragraphe 26(1) de la *Wildlife Act* porte atteinte *prima facie*

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hunt for food under *NRTA* and is invalid unless justified.

The judgment of La Forest, L'Heureux-Dubé, Gonthier, Cory and Iacobucci JJ. was delivered by

20 CORY J. — Three questions must be answered on this appeal. First, do Indians who have status under Treaty No. 8 have the right to hunt for food on privately owned land which lies within the territory surrendered under that Treaty? Secondly, have the hunting rights set out in Treaty No. 8 been extinguished or modified as a result of the provisions of para. 12 of the *Natural Resources Transfer Agreement, 1930 (Constitution Act, 1930, Schedule 2)*? Thirdly, to what extent, if any, do s. 26(1) and s. 27(1) of the *Wildlife Act*, S.A. 1984, c. W-9.1, apply to the appellants?

Factual Background

21 Each of the three appellants was charged with an offence under the *Wildlife Act*. Their trials and appeals have proceeded together.

22 The facts are straightforward and undisputed. The appellant Wayne Clarence Badger was charged with shooting a moose outside the permitted hunting season contrary to s. 27(1) of the *Wildlife Act*. The appellants Leroy Steven Kiyawasew and Ernest Clarence Ominayak, who had also shot moose, were charged, under s. 26(1) of the same statute, with hunting without a licence. All three appellants, Cree Indians with status under Treaty No. 8, were hunting for food upon lands falling within the tracts surrendered to Canada by the Treaty.

23 The lands in question were all privately owned. Mr. Badger shot a moose on brush land with willow regrowth and scrub. There were no fences or signs posted on the land, but a farm house was located a quarter mile from the place where the moose was shot. Mr. Kiyawasew was hunting on a snow-covered field. There was no fence, but Mr. Kiyawasew testified that he had passed old run-

au droit de ce dernier de chasser pour se nourrir en vertu de la *Convention*, et il sera invalide à moins qu'on ne justifie cette atteinte.

Version française du jugement des juges La Forest, L'Heureux-Dubé, Gonthier, Cory et Iacobucci rendu par

LE JUGE CORY — Le pourvoi soulève trois questions. Premièrement, les Indiens visés par le *Traité n° 8* ont-ils le droit de chasser pour se nourrir sur des terres privées situées dans le territoire cédé aux termes de ce traité? Deuxièmement, les droits de chasse énoncés dans le *Traité n° 8* ont-ils été éteints ou modifiés par les dispositions du par. 12 de la *Convention sur le transfert des ressources naturelles de 1930 (Loi constitutionnelle de 1930, annexe 2)*? Troisièmement, dans quelle mesure, le cas échéant, les par. 26(1) et 27(1) de la *Wildlife Act*, S.A. 1984, ch. W-9.1, s'appliquent-ils aux appelants?

Les faits

Chacun des appelants a été accusé d'une infraction à la *Wildlife Act*. Ils ont été jugés ensemble, tant en première instance qu'en appel.

Les faits sont simples et non contestés. L'appellant Wayne Clarence Badger a été accusé d'avoir, contrairement au par. 27(1) de la *Wildlife Act*, abattu un orignal en dehors de la saison de chasse. Les appelants Leroy Steven Kiyawasew et Ernest Clarence Ominayak, qui ont eux aussi abattu des orignaux, ont été accusés, en vertu du par. 26(1) de la même loi, d'avoir chassé sans permis. Les trois appelants, des Indiens cris visés par le *Traité n° 8*, chassaient pour se nourrir sur des terres situées dans les territoires cédés au Canada en vertu du *Traité*.

Les terres en question étaient des propriétés privées. Monsieur Badger a abattu un orignal dans des taillis couverts de jeunes saules et de broussailles. Il n'y avait ni clôture ni écriteau sur les terres en question, mais une maison de ferme se trouvait à un quart de mille de l'endroit où l'orignal a été abattu. Pour sa part, M. Kiyawasew chassait dans un champ couvert de neige. Le champ n'était pas

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down barns shortly before he stopped to shoot the moose. He had seen signs which were posted on the land but he was unable to read them from the road. Mr. Ominayak was hunting on uncleared muskeg. There were no fences, signs or buildings in the vicinity.

The appellants were all convicted in the Provincial Court of Alberta. They appealed their summary convictions to the Court of Queen's Bench, challenging the constitutionality of the *Wildlife Act* in so far as it might affect them as Crees with status under Treaty No. 8. The Court of Queen's Bench affirmed the convictions. The appellants' appeals to the Alberta Court of Appeal were also dismissed.

Judgments Below

*Alberta Court of Queen's Bench*

Foster J., in brief reasons, held that *R. v. Horseman*, [1990] 1 S.C.R. 901, decided that Treaty No. 8 had been modified by the *Natural Resources Transfer Agreement, 1930* (hereinafter "NRTA"). Accordingly, an individual who comes within the ambit of Treaty No. 8 may hunt in order to obtain food on unoccupied Crown lands or on other lands to which he or she may have a right of access. This is the existing hunting right which is protected by s. 35(1) of the *Constitution Act, 1982*. Foster J. also relied upon *R. v. Cardinal* (1977), 36 C.C.C. (2d) 369 (Alta. C.A.), and *R. v. Ominayak* (1990), 108 A.R. 239 (Alta. C.A.), to hold that an individual does not, without more, have a right of access to private lands. As a result, hunting on those lands was not protected under s. 35(1). Accordingly, she dismissed the appeals.

*Court of Appeal* (1993), 135 A.R. 286

Although all three judges of the Court of Appeal agreed that the appellants' appeals should be dis-

clôturé, mais M. Kiyawasew a témoigné qu'il avait croisé de vieilles granges délabrées peu avant de s'arrêter pour abattre l'orignal. Il avait vu des écriteaux sur le terrain, mais avait été incapable de les lire depuis la route. Enfin, M. Ominayak chassait dans une savane non déboisée. Il n'y avait pas de clôtures, d'écriteaux ou de bâtiments aux alentours.

Les appelants ont tous été déclarés coupables en Cour provinciale de l'Alberta. Ils ont interjeté appel à la Cour du Banc de la Reine de leur déclaration de culpabilité par procédure sommaire et contesté la constitutionnalité de la *Wildlife Act* dans la mesure où elle pourrait porter atteinte à leurs droits en tant que Cris visés par le Traité n° 8. La Cour du Banc de la Reine a confirmé les déclarations de culpabilité, et la Cour d'appel de l'Alberta a rejeté les appels.

Décisions des juridictions inférieures

*La Cour du Banc de la Reine de l'Alberta*

Dans des motifs succincts, Madame le juge Foster a conclu que, dans l'arrêt *R. c. Horseman*, [1990] 1 R.C.S. 901, il a été décidé que la *Convention sur le transfert des ressources naturelles de 1930* (ci-après la «*Convention*») avait eu pour effet de modifier le Traité n° 8. Par conséquent, les personnes visées par ce traité peuvent chasser pour se nourrir sur les terres inoccupées de la Couronne ou sur d'autres terres auxquelles elles peuvent avoir un droit d'accès. C'est ce droit de chasse existant qui est protégé par le par. 35(1) de la *Loi constitutionnelle de 1982*. Le juge Foster s'est également appuyé sur les arrêts *R. c. Cardinal* (1977), 36 C.C.C. (2d) 369 (C.A. Alb.) et *R. c. Ominayak* (1990), 108 A.R. 239 (C.A. Alb.), pour statuer qu'une personne ne jouit pas de ce seul fait d'un droit d'accès à des terres privées. En conséquence, la chasse sur de telles terres n'était pas protégée par le par. 35(1). Elle a donc rejeté les appels.

*La Cour d'appel* (1993), 135 A.R. 286

Bien que les trois juges de la Cour d'appel aient convenu que les appels devaient être rejetés, ils ont

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missed, they travelled by different routes to reach that conclusion.

Per Kerans J.A.

27 Kerans J.A. concluded that it was not necessary to decide either if the hunting in question was protected under Treaty No. 8 or if Alberta could make laws that derogated from treaty rights. Rather, he held that pursuant to *Horseman*, *supra*, any treaty right to hunt other than on Crown lands had been extinguished by the *NRTA*. The “merger and consolidation” theory applied in *Horseman*, was effectively a theory of “extinguishment and replacement”. Because the Treaty No. 8 hunting right had been extinguished by the *NRTA*, reference could not be made to the Treaty to determine the scope of the “right of access” to hunt on the “other lands” referred to in the *NRTA*. As a result of this finding, he dismissed the appeals.

Per Lieberman J.A.

28 Lieberman J.A. held that *Horseman*, *supra*, defeated the appellants’ position in this case. He determined, at p. 357, that the “entrenchment of treaty rights in s. 35(1) of the [*Constitution Act*], 1982 has no application to the hunting rights conferred by Treaty No. 8” which he found had been extinguished by the *NRTA*. Thus, he concluded that the terms of the *Wildlife Act* prevailed and the appeals must be dismissed.

Per Conrad J.A.

29 Conrad J.A. held that since *Horseman*, *supra*, dealt with the right to hunt commercially on Crown lands, it was not binding on the issue as to whether a treaty right to hunt on private lands had been extinguished. Conrad J.A. observed that the question of whether Treaty No. 8 gave the appellants the right to hunt on privately owned lands required that consideration be given to the meaning of “unoccupied” Crown lands in the *NRTA* and

emprunté des voies différentes pour arriver à cette conclusion.

Le juge Kerans

Le juge Kerans a conclu qu’il n’était pas nécessaire de décider si les activités de chasse en question étaient protégées par le Traité n° 8 ou si le législateur albertain pouvait adopter des lois dérogeant à des droits issus de traités. Il a plutôt statué que, suivant l’arrêt *Horseman*, précité, la *Convention* avait eu pour effet d’éteindre tout droit de chasser — issu de traité — ailleurs que sur des terres appartenant à la Couronne, et que la théorie de l’[TRADUCTION] «unification et de la codification» appliquée dans l’arrêt *Horseman* était, dans les faits, une théorie d’«extinction et de substitution». Comme la *Convention* avait éteint le droit de chasser prévu par le Traité n° 8, il était impossible de se référer au Traité pour déterminer la portée du «droit d’accès» aux «autres terres» pour y chasser dont il est fait mention dans la *Convention*. En raison de cette conclusion, il a rejeté les appels.

Le juge Lieberman

Le juge Lieberman a conclu que l’arrêt *Horseman*, précité, réfutait la thèse avancée par les appelants en l’espèce. Il a statué que la [TRADUCTION] «constitutionnalisation des droits issus de traités dans le par. 35(1) de la [*Loi constitutionnelle*] de 1982 ne s’applique pas aux droits de chasse accordés par le Traité n° 8», droits qui, de conclure le juge, avaient été éteints par la *Convention*. En conséquence, il a décidé que les dispositions de la *Wildlife Act* prévalaient et que les appels devaient être rejetés.

Le juge Conrad

Madame le juge Conrad a conclu que, comme l’arrêt *Horseman*, précité, concernait le droit de chasser à des fins commerciales sur les terres de la Couronne, il n’avait pas de caractère obligatoire quant à la question de savoir si le droit — issu de traité — de chasser sur des terres privées avait été éteint. Le juge Conrad a signalé que, pour répondre à la question de savoir si le Traité n° 8 conférait aux appelants le droit de chasser sur des terres pri-

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of “such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes” in Treaty No. 8. Conrad J.A. concluded that Crown lands would not be “unoccupied” merely because they were not put to some visible use. She found that the words “required or taken up” for “other purposes” were critical. She held that if the Crown’s interest was alienated or transferred to a private owner, the Crown had “required or taken up” the land under the Treaty and the land was no longer “unoccupied” under the *NRTA*. She concluded that even if “occupied” as defined in *R. v. Horse*, [1988] 1 S.C.R. 187, refers only to private lands visibly in use, she would extend the ratio of *Horse*, *supra*, and find that there is no treaty right to hunt on private land, regardless of whether or not it is in visible use. Therefore, she concluded that Treaty No. 8 did not reserve to the appellants the right to hunt on the privately owned lands in question and that the *Wildlife Act* did not infringe the right protected under s. 35(1).

In the event that she was wrong on that issue, Conrad J.A. went on to hold that if the Treaty did give the appellants the right to hunt on private lands, those rights had not been extinguished by the *NRTA*. The *NRTA* did not contain a clear intention to extinguish all treaty hunting rights, but only to extinguish commercial hunting rights on Crown lands. However, the hunting rights granted by the Treaty were not unlimited. They were subject to regulation and it would be necessary to determine if the regulations enacted in the *Alberta Wildlife Act* were a justifiable infringement on s. 35(1). Ultimately, she found that it was unnecessary to undertake an analysis of the justification in light of the fact that she had concluded that the treaty did

vées, il fallait analyser le sens du terme terres «inoccupées» de la Couronne figurant dans la *Convention*, ainsi que le sens du passage suivant du Traité n° 8: [TRADUCTION] «tels terrains qui de temps à autre pourront être requis ou pris pour des fins d’établissements, de mine, de commerce de bois, ou autres objets». Le juge Conrad a statué que les terres de la Couronne n’étaient pas «inoccupées» du seul fait qu’elles ne font pas l’objet de quelque utilisation visible. Elle a jugé que les mots «requis ou pris» pour d’«autres objets» avaient une importance fondamentale. Elle a conclu que si la Couronne aliène ou transfère son droit à des intérêts privés, elle a alors «requis ou pris» les terres en cause au sens du Traité, qui cessent d’être «inoccupées» au sens de la *Convention*. Elle a statué que même si, au sens de l’arrêt *R. c. Horse*, [1988] 1 R.C.S. 187, le mot «occupé» vise uniquement des terres privées utilisées d’une manière visible, elle entendait élargir la portée des motifs déterminants de l’arrêt *Horse*, précité, et conclure qu’il n’existe pas de droit — issu de traité — permettant de chasser sur des terres privées, que ces terres fassent ou non l’objet d’une utilisation visible. Par conséquent, elle a jugé que le Traité n° 8 ne réservait pas aux appelants le droit de chasser sur les terres privées en question, et que la *Wildlife Act* ne portait pas atteinte au droit protégé par le par. 35(1).

Au cas où elle aurait tort sur cette question, le juge Conrad a ensuite conclu que si le Traité conférait effectivement aux appelants le droit de chasser sur des terres privées ce droit n’avait pas été éteint par la *Convention*. En effet, ce texte n’exprime pas clairement l’intention d’éteindre tous les droits de chasse issus de traités, mais seulement l’intention de mettre fin au droit de chasser à des fins commerciales sur les terres de la Couronne. Cependant, les droits de chasse conférés par le Traité n’étaient pas illimités. Ils étaient subordonnés à la réglementation, et, en conséquence, il était nécessaire de décider si les règlements pris en application de la *Wildlife Act* de l’Alberta constituaient une violation justifiable du par. 35(1). En dernière analyse, le juge Conrad a conclu qu’il n’était pas nécessaire de se lancer dans une analyse de la question de la justification, puisqu’elle avait

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not confer a right to hunt on private lands. She dismissed the appeals.

conclu que le Traité ne conférerait pas le droit de chasser sur des terres privées. Elle a rejeté les appels.

Relevant Treaty and Statutory Provisions

Dispositions pertinentes des lois et du Traité

31 The relevant part of *Treaty No. 8*, made 21 June 1899, provides:

Le passage pertinent du *Traité n° 8*, conclu le 21 juin 1899, est le suivant:

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 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.

[TRADUCTION] Et Sa Majesté la Reine CONVIENT PAR LES PRÉSENTES avec les dits sauvages qu'ils auront le droit de se livrer à leurs occupations ordinaires de la chasse au fusil, de la chasse au piège et de la pêche dans l'étendue de pays cédée telle que ci-dessus décrite, subordonnées à tels règlements qui pourront être faits de temps à autre par le gouvernement du pays agissant au nom de Sa Majesté et sauf et excepté tels terrains qui de temps à autre pourront être requis ou pris pour des fins d'établissements, de mine, de commerce de bois, ou autres objets.

32 The *Constitution Act, 1930*, s. 1 provides:

L'article premier de la *Loi constitutionnelle de 1930* est ainsi rédigé:

1. The agreements set out in the Schedule to this Act are hereby confirmed and shall have the force of law notwithstanding anything in the Constitution Act, 1867, or any Act amending the same, or any Act of the Parliament of Canada, or in any Order in Council or terms or conditions of union made or approved under any such Act as aforesaid.

1. Les conventions comprises dans l'annexe de la présente loi, sont par les présentes confirmées et auront force de loi nonobstant tout ce qui est contenu dans la Loi constitutionnelle de 1867, ou dans toute loi la modifiant, ou dans toute loi du Parlement du Canada ou dans tout arrêté du Conseil ou termes ou conditions d'Union faits ou approuvés sous l'empire d'aucune de ces lois.

33 The *Natural Resources Transfer Agreement, 1930* is the Schedule referred to in s. 1. Paragraph 12 of the *NRTA* provides:

Voici le texte du par. 12 de la *Convention sur le transfert des ressources naturelles de 1930*, qui forme l'annexe mentionnée à l'article premier:

12. In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.

12. Pour assurer aux Indiens de la province la continuation de l'approvisionnement de gibier et de poisson destinés à leurs support et subsistance, le Canada consent à ce que les lois relatives au gibier et qui sont en vigueur de temps à autre dans la province, s'appliquent aux Indiens dans les limites de la province; toutefois, lesdits Indiens auront le droit que la province leur assure par les présentes de chasser et de prendre le gibier au piège et de pêcher le poisson, pour se nourrir en toute saison de l'année sur toutes les terres inoccupées de la Couronne et sur toutes les autres terres auxquelles lesdits Indiens peuvent avoir un droit d'accès.

34 Section 35(1) of the *Constitution Act, 1982* provides:

Quant au par. 35(1) de la *Loi constitutionnelle de 1982*, il prévoit ceci:

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

Sections 26(1) and 27(1) of the *Wildlife Act* provide:

26(1) A person shall not hunt wildlife unless he holds a licence authorizing him, or is authorized by or under a licence, to hunt wildlife of that kind.

27(1) A person shall not hunt wildlife outside an open season or if there is no open season for that wildlife.

#### Constitutional Question

The constitutional question stated by this Court on May 2, 1994 is as follows:

If Treaty 8 confirmed to the Indians of the Treaty 8 Territory the right to hunt throughout the tract surrendered, does the right continue to exist or was it extinguished and replaced by para. 12 of the *Natural Resources Transfer Agreement, 1930 (Constitution Act, 1930, 20-21 George V, c. 26 (U.K.))*, and if the right continues to exist, could that right be exercised on the lands in question and, if so, was the right impermissibly infringed upon by s. 26(1) or s. 27(1) of the *Wildlife Act, S.A. 1984, c. W-9.1*, given Treaty 8 and s. 35(1) of the *Constitution Act, 1982*?

#### Analysis

On this appeal, the extent of the existing right to hunt for food possessed by Indians who are members of bands which were parties to Treaty No. 8 must be determined. The analysis should proceed through three stages. First, it is necessary to decide what effect para. 12 of the *NRTA* had upon the rights enunciated in Treaty No. 8. After resolving which instrument sets out the right to hunt for food, it is necessary to examine the limitations which are inherent in that right. It must be remembered 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. Second, consideration must then be given to the question of whether the existing right to hunt for food can be exercised on privately owned land. Third, it is necessary to determine whether the impugned

35. (1) Les droits existants — ancestraux ou issus de traités — des peuples autochtones du Canada sont reconnus et confirmés.

Enfin, les par. 26(1) et 27(1) de la *Wildlife Act*, sont ainsi rédigés:

[TRADUCTION] 26(1) Nul ne peut chasser sans détenir le permis requis ou sans y être autorisé en vertu d'un permis.

27(1) Nul ne peut chasser un animal sauvage dont la chasse est interdite ou encore chasser un animal sauvage en dehors de la période fixée à cette fin.

#### Question constitutionnelle

Le 2 mai 1994, notre Cour a énoncé la question constitutionnelle suivante:

Si le Traité n° 8 confirmait aux Indiens du territoire de ce traité le droit de chasser dans l'ensemble de la zone cédée, le droit existe-t-il toujours ou a-t-il été éteint et remplacé par le par. 12 de la *Convention sur le transfert des ressources naturelles de 1930 (Loi constitutionnelle de 1930, 20-21 George V, ch. 26 (R.-U.))* et, si le droit existe toujours, pouvait-il être exercé sur les terres en question. Dans l'affirmative, les par. 26(1) ou 27(1) de la *Wildlife Act, S.A. 1984, ch. W-9.1*, portent-ils atteinte à ce droit, compte tenu du Traité n° 8 et du par. 35(1) de la *Loi constitutionnelle de 1982*?

#### Analyse

Dans le présent pourvoi, il s'agit de déterminer l'étendue du droit existant de chasser pour se nourrir des Indiens membres des bandes qui étaient parties au Traité n° 8. L'analyse se fera en trois étapes. Premièrement, il est nécessaire de déterminer les effets du par. 12 de la *Convention* sur les droits énoncés au Traité n° 8. Après avoir établi quel texte énonce le droit de chasser pour se nourrir, il est nécessaire d'examiner les restrictions inhérentes à ce droit. Il faut se rappeler que, même suivant les termes du Traité n° 8, le droit des Indiens de chasser pour se nourrir était circonscrit par des limites géographiques et des mesures spécifiques de réglementation gouvernementale. Deuxièmement, il faut se demander si le droit existant de chasser pour se nourrir peut être exercé sur des terres privées. Troisièmement, il est nécessaire de déterminer si les dispositions contestées de la

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sections of the provincial *Wildlife Act* come within the specific types of regulation which have, since 1899, limited and defined the scope of the right to hunt for food. If they do, those sections do not infringe upon an existing treaty right and will be constitutional. If not, the sections may constitute an infringement of the Treaty rights guaranteed by Treaty No. 8, as modified by the *NRTA*. In this case the impugned provisions should be considered in accordance with the principles set out in *R. v. Sparrow*, [1990] 1 S.C.R. 1075, to determine whether they constitute a *prima facie* infringement of the Treaty rights as modified, and if so, whether the infringement can be justified.

38 It is now appropriate to consider the source of the existing right to hunt for food.

*The Existing Right to Hunt for Food*

The Hunting Right Provided by Treaty No. 8

39 Treaty No. 8 is one of eleven numbered treaties concluded between the federal government and various Indian bands between 1871 and 1923. Their objective was to facilitate the settlement of the West. Treaty No. 8, made on June 21, 1899, involved the surrender of vast tracts of land in what is now northern Alberta, northeastern British Columbia, northwestern Saskatchewan and part of the Northwest Territories. In exchange for the land, the Crown made a number of commitments, for example, to provide the bands with reserves, education, annuities, farm equipment, ammunition, and relief in times of famine or pestilence. However, it is clear that for the Indians the guarantee that hunting, fishing and trapping rights would continue was the essential element which led to their signing the treaties. The report of the Commissioners who negotiated Treaty No. 8 on behalf of the government underscored the importance to the Indians of the right to hunt, fish and trap. The Commissioners wrote:

*Wildlife Act* provinciale participent des mesures spécifiques de réglementation qui, depuis 1899, définissent et limitent l'étendue du droit en question. Dans l'affirmative, ces dispositions ne portent pas atteinte à un droit existant issu de traité et elles seront jugées constitutionnelles. Dans le cas contraire, toutefois, ces dispositions peuvent constituer une atteinte aux droits garantis par le Traité n° 8, qui ont été modifiés par la *Convention*. En l'espèce, il y a lieu d'examiner les dispositions contestées à la lumière des principes énoncés dans l'arrêt *R. c. Sparrow*, [1990] 1 R.C.S. 1075, en vue de déterminer si elles constituent une atteinte *prima facie* aux droits modifiés issus du Traité et, dans l'affirmative, si cette atteinte peut être justifiée.

Il convient maintenant de s'interroger sur la source du droit existant de chasser pour se nourrir.

*Le droit existant de chasser pour se nourrir*

Le droit de chasser prévu au Traité n° 8

Le Traité n° 8 est l'un des onze traités numérotés qui ont été conclus par le gouvernement fédéral et diverses bandes indiennes entre 1871 et 1923. Ces traités visaient à faciliter la colonisation de l'Ouest. Le Traité n° 8, signé le 21 juin 1899, prévoyait la cession de vastes territoires dans ce qui constitue aujourd'hui le nord de l'Alberta, le nord-est de la Colombie-Britannique, le nord-ouest de la Saskatchewan et une partie des Territoires du Nord-Ouest. En contrepartie de ces territoires, la Couronne a pris un certain nombre d'engagements envers les bandes: par exemple l'engagement de créer des réserves pour les bandes, de pourvoir à l'instruction de leurs membres, de leur verser des annuités, de leur fournir de l'équipement agricole et des munitions, et de leur porter secours en cas de famine et d'épidémie de peste. Cependant, il est clair que pour les Indiens la garantie que leur droit de chasser, de piéger et de pêcher continuerait d'être respecté a été le facteur essentiel qui les a amenés à signer les traités. Dans leur rapport, les commissaires qui ont négocié le Traité n° 8 pour le compte du gouvernement ont souligné l'importance qu'avait pour les Indiens le droit de chasser, de piéger et de pêcher. Les commissaires ont écrit ceci:

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There was expressed at every point the fear that the making of the treaty would be followed by the curtailment of the hunting and fishing privileges. . . .

We pointed out . . . that the same means of earning a livelihood would continue after the treaty as existed before it, and that the Indians would be expected to make use of them. . . .

Our chief difficulty was the apprehension that the hunting and fishing privileges were to be curtailed. The provision in the treaty under which ammunition and twine is to be furnished went far in the direction of quieting the fears of the Indians, for they admitted that it would be unreasonable to furnish the means of hunting and fishing if laws were to be enacted which would make hunting and fishing so restricted as to render it impossible to make a livelihood by such pursuits. But over and above the provision, we had to solemnly assure them that only such laws as to hunting and fishing as were in the interest of the Indians and were found necessary in order to protect the fish and fur-bearing animals would be made, and that they would be as free to hunt and fish after the treaty as they would be if they never entered into it. [Emphasis added.]

Treaty No. 8, then, guaranteed that the Indians “shall have the right to pursue their usual vocations of hunting, trapping and fishing”. The Treaty, however, imposed two limitations on the right to hunt. First, there was a geographic limitation. The right to hunt could be exercised “throughout the tract surrendered . . . saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes”. Second, the right could be limited by government regulations passed for conservation purposes.

Impact of Paragraph 12 of the NRTA

*Principles of Interpretation*

At the outset, it may be helpful to once again set out some of the applicable principles of interpretation. First, it must be remembered that a treaty represents an exchange of solemn promises between the Crown and the various Indian nations. It is an agreement whose nature is sacred. See *R. v. Sioui*,

[TRADUCTION] Ils [les Indiens] expriment partout la crainte que la signature du traité ne fut suivie d'une restriction des privilèges de chasse et de pêche. . . .

Nous leur fîmes comprendre [. . .] qu'ils auraient après le traité les mêmes moyens qu'auparavant de gagner leur vie, et qu'on espérait que les sauvages s'en serviraient . . .

Notre principale difficulté à surmonter était la crainte qu'on restreindrait leurs privilèges de chasse et de pêche. La disposition du traité en vertu de laquelle des munitions et de la ficelle devaient être fournies contribua beaucoup à apaiser les craintes des sauvages, car ils admirent qu'il ne serait pas raisonnable de leur fournir les moyens de chasser et de pêcher si l'on devait faire une loi qui restreindrait tellement la chasse et la pêche qu'il serait presque impossible de gagner sa vie en s'y livrant. Mais en sus de cette disposition, nous avons dû leur affirmer solennellement qu'on ne ferait sur la chasse et la pêche que des lois qui seraient dans l'intérêt des sauvages et qu'on trouverait nécessaires pour protéger le poisson et les animaux à fourrure, et qu'ils seraient aussi libres de chasser et de pêcher après le traité qu'ils le seraient s'ils n'avaient jamais fait de traité. [Je souligne.]

Le Traité n° 8 garantissait donc aux Indiens [TRADUCTION] «le droit de se livrer à leurs occupations ordinaires de la chasse au fusil, de la chasse au piège et de la pêche». En revanche, le Traité imposait deux restrictions au droit de chasser. Premièrement, ce droit était assujéti à des limites territoriales. En effet, le droit de chasser pouvait être exercé [TRADUCTION] «dans l'étendue de pays cédée [. . .] sauf et excepté tels terrains qui de temps à autre pourront être requis ou pris pour des fins d'établissements, de mine, de commerce de bois, ou autres objets». Deuxièmement, ce droit pouvait être limité par des règlements pris par le gouvernement en matière de conservation.

Effets du par. 12 de la Convention

*Principes d'interprétation*

Il pourrait être utile, au départ, de rappeler certains des principes d'interprétation applicables. Premièrement, il convient de rappeler qu'un traité est un échange de promesses solennelles entre la Couronne et les diverses nations indiennes concernées, un accord dont le caractère est sacré. Voir *R.*

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[1990] 1 S.C.R. 1025, at p. 1063; *Simon v. The Queen*, [1985] 2 S.C.R. 387, at p. 401. Second, the honour of the Crown is always at stake in its dealing with Indian people. Interpretations of treaties and statutory provisions which have an impact upon treaty or aboriginal rights must be approached in a manner which maintains the integrity of the Crown. It is always assumed that the Crown intends to fulfil its promises. No appearance of "sharp dealing" will be sanctioned. See *Sparrow*, *supra*, at pp. 1107-8 and 1114; *R. v. Taylor* (1981), 34 O.R. (2d) 360 (Ont. C.A.), at p. 367. Third, any ambiguities or doubtful expressions in the wording of the treaty or document must be resolved in favour of the Indians. A corollary to this principle is that any limitations which restrict the rights of Indians under treaties must be narrowly construed. See *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, at p. 36; *Simon*, *supra*, at p. 402; *Sioui*, *supra*, at p. 1035; and *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85, at pp. 142-43. Fourth, the onus of proving that a treaty or aboriginal right has been extinguished lies upon the Crown. There must be "strict proof of the fact of extinguishment" and evidence of a clear and plain intention on the part of the government to extinguish treaty rights. See *Simon*, *supra*, at p. 406; *Sioui*, *supra*, at p. 1061; *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313, at p. 404.

*c. Sioui*, [1990] 1 R.C.S. 1025, à la p. 1063; *Simon c. La Reine*, [1985] 2 R.C.S. 387, à la p. 401. Deuxièmement, l'honneur de la Couronne est toujours en jeu lorsqu'elle transige avec les Indiens. Les traités et les dispositions législatives qui ont une incidence sur les droits ancestraux ou issus de traités doivent être interprétés de manière à préserver l'intégrité de la Couronne. Il faut toujours présumer que cette dernière entend respecter ses promesses. Aucune apparence de «manœuvres malhonnêtes» ne doit être tolérée: *Sparrow*, précité, aux pp. 1107, 1108 et 1114; *R. c. Taylor* (1981), 34 O.R. (2d) 360 (C.A. Ont.), à la p. 367. Troisièmement, toute ambiguïté dans le texte du traité ou du document en cause doit profiter aux Indiens. Ce principe a pour corollaire que toute limitation ayant pour effet de restreindre les droits qu'ont les Indiens en vertu des traités doit être interprétée de façon restrictive. Voir *Nowegijick c. La Reine*, [1983] 1 R.C.S. 29, à la p. 36; *Simon*, précité, à la p. 402; *Sioui*, précité, à la p. 1035; et *Mitchell c. Bande indienne Peguis*, [1990] 2 R.C.S. 85, aux pp. 142 et 143. Quatrièmement, il appartient à la Couronne de prouver qu'un droit ancestral ou issu de traité a été éteint. Il faut apporter la «preuve absolue du fait qu'il y a eu extinction» ainsi que la preuve de l'intention claire et expresse du gouvernement d'éteindre des droits issus de traité. Voir *Simon*, précité, à la p. 406; *Sioui*, précité, à la p. 1061; *Calder c. Procureur général de la Colombie-Britannique*, [1973] R.C.S. 313, à la p. 404.

42 These principles of interpretation must now be applied to this case.

*Interpreting the NRTA*

43 The issue at this stage is whether the *NRTA* extinguished and replaced the Treaty No. 8 right to hunt for food. It is my conclusion that it did not.

44 For ease of reference, para. 12 of the *NRTA* provides:

12. In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws

Appliquons maintenant ces principes d'interprétation à la présente affaire.

*Interprétation de la Convention*

La question qui se pose à cette étape-ci est de savoir si la *Convention* a éteint et remplacé le droit de chasser pour se nourrir prévu au Traité n° 8. Ma conclusion est qu'elle n'a pas eu cet effet.

Pour en faciliter la consultation, je reproduis de nouveau le texte du par. 12 de la *Convention*:

12. Pour assurer aux Indiens de la province la continuation de l'approvisionnement de gibier et de poisson destinés à leurs support et subsistance, le Canada con-

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respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.

It has been held that the *NRTA* had the clear intention of both limiting and expanding the treaty right to hunt. In *Frank v. The Queen*, [1978] 1 S.C.R. 95, consideration was given to the differences between Treaty No. 6 (which, for this purpose, has a hunting rights clause similar to that in Treaty No. 8) and para. 12 of the *NRTA*. Dickson J., as he then was, held at p. 100:

The essential differences, for present purposes, between the Treaty and the Agreement are (i) under the former the hunting rights were at large while under the latter the right is limited to hunting for food and (ii) under the former the rights were limited to about one-third of the Province of Alberta, while under the latter they extend to the entire province.

And at p. 101, he stated:

The Appellate Division . . . held that para. 12 of the Natural Resources Transfer Agreements of Alberta and Saskatchewan did two things: (i) it enlarged the areas in which Alberta and Saskatchewan Indians could respectively hunt and fish for food; (ii) it limited their rights to hunt and fish otherwise than for food by making those rights subject to provincial game laws. I would agree that such is the effect of para. 12.

To the same effect, see *R. v. Wesley*, [1932] 2 W.W.R. 337 (Alta. S.C. App. Div.), at p. 344, as adopted in *Prince v. The Queen*, [1964] S.C.R. 81, at p. 84.

This Court most recently considered the effect the *NRTA* had upon treaty rights in *Horseman*, *supra*. There, it was held that para. 12 of the *NRTA*

sent à ce que les lois relatives au gibier et qui sont en vigueur de temps à autre dans la province, s'appliquent aux Indiens dans les limites de la province; toutefois, lesdits Indiens auront le droit que la province leur assure par les présentes de chasser et de prendre le gibier au piège et de pêcher le poisson, pour se nourrir en toute saison de l'année sur toutes les terres inoccupées de la Couronne et sur toutes les autres terres auxquelles lesdits Indiens peuvent avoir un droit d'accès.

Il a été décidé que la *Convention* exprimait clairement l'intention tant de restreindre le droit de chasser prévu par le traité que d'élargir la portée de ce droit. Dans l'arrêt *Frank c. La Reine*, [1978] 1 R.C.S. 95, notre Cour a étudié les différences qui existent entre le Traité n° 6 (qui, en ce qui nous concerne, contient une disposition touchant les droits de chasse analogue à celle figurant au Traité n° 8) et le par. 12 de la *Convention*. Le juge Dickson, plus tard juge en chef, a tiré la conclusion suivante, à la p. 100:

Aux fins de ce litige, les différences essentielles entre le traité et la Convention se résument comme suit: (i) en vertu du traité, les droits de chasse ne sont pas définis alors qu'en vertu de la Convention, ils sont limités à la chasse de subsistance et (ii) en vertu du traité, ces droits sont limités à environ un tiers de la province de l'Alberta alors qu'en vertu de la Convention, ils s'étendent à toute la province.

Il a ajouté ceci, à la p. 101:

La Division d'appel a [. . .] conclu que l'art. 12 des Conventions sur les ressources naturelles de l'Alberta et de la Saskatchewan avait un double effet: (i) agrandir le territoire sur lequel les Indiens de l'Alberta et de la Saskatchewan pouvaient respectivement chasser et pêcher pour leur nourriture et (ii) restreindre leurs droits de chasse et de pêche dans un autre but que leur subsistance, en assujettissant l'exercice de ces droits aux lois provinciales sur la protection de la faune. Je pense que cela résume bien l'effet de l'art. 12.

Au même effet, voir la décision *R. c. Wesley*, [1932] 2 W.W.R. 337 (C.S. Alb., Div. app.), à la p. 344, à laquelle a souscrit notre Cour dans l'arrêt *Prince c. The Queen*, [1964] R.C.S. 81, à la p. 84.

Tout récemment, dans l'arrêt *Horseman*, précité, notre Cour a étudié l'effet de la *Convention* sur les droits issus de traités. Elle y a conclu que le par. 12

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evidenced a clear intention to extinguish the treaty protection of the right to hunt commercially. However, it was emphasized that the right to hunt for food continued to be protected and had in fact been expanded by the *NRTA*. At page 933, this appears:

Although the Agreement did take away the right to hunt commercially, the nature of the right to hunt for food was substantially enlarged. The geographical areas in which the Indian people could hunt was widely extended. Further, the means employed by them in hunting for their food was placed beyond the reach of provincial governments. For example, they may hunt deer with night lights and with dogs, methods which are or may be prohibited for others. Nor are the Indians subject to seasonal limitations as are all other hunters. That is to say, they can hunt ducks and geese in the spring as well as the fall, just as they may hunt deer at any time of the year. Indians are not limited with regard to the type of game they may kill. That is to say, while others may be restricted as to the species or sex of the game they may kill, the Indians may kill for food both does and bucks; cock pheasants and hen pheasants; drakes and hen ducks. [Emphasis added.]

See also *Cardinal v. Attorney General of Alberta*, [1974] S.C.R. 695, at p. 722; and *Myran v. The Queen*, [1976] 2 S.C.R. 137, at p. 141. I might add that *Horseman*, *supra*, is a recent decision which should be accepted as resolving the issues which it considered. The decisions of this Court confirm that para. 12 of the *NRTA* did, to the extent that its intent is clear, modify and alter the right to hunt for food provided in Treaty No. 8.

<sup>47</sup> Pursuant to s. 1 of the *Constitution Act, 1930*, there can be no doubt that para. 12 of the *NRTA* is binding law. It is the legal instrument which currently sets out and governs the Indian right to hunt. However, the existence of the *NRTA* has not deprived Treaty No. 8 of legal significance. Treaties are sacred promises and the Crown's honour requires the Court to assume that the Crown intended to fulfil its promises. Treaty rights can

de la *Convention* démontrait l'existence d'une intention claire d'éteindre la protection par le traité du droit de faire la chasse commerciale. Toutefois, il y a été précisé que le droit de chasser pour se nourrir continuait d'être protégé et qu'il avait, de fait, été élargi par la *Convention*. À la p. 933, on peut lire ceci:

Quoique la Convention ait bel et bien supprimé le droit de faire de la chasse commerciale, le droit de chasser pour se nourrir a été sensiblement élargi. Les territoires sur lesquels pouvaient chasser les Indiens ont été considérablement agrandis. En outre, les moyens employés par eux aux fins de la chasse pour se nourrir ont été soustraits à la compétence des gouvernements provinciaux. Il est, par exemple, permis aux Indiens de chasser le chevreuil en se servant d'un faisceau lumineux et de chiens, méthodes qui sont ou peuvent être défendues aux autres. Les Indiens ne sont pas non plus soumis aux restrictions saisonnières que se voient imposer tous les autres chasseurs. C'est-à-dire qu'ils peuvent chasser le canard et l'oie au printemps comme à l'automne, tout comme ils peuvent chasser le chevreuil à longueur d'année. Les Indiens ne sont assujettis à aucune restriction quant au type de gibier qu'ils peuvent tuer. Cela veut dire que si d'autres personnes peuvent avoir à respecter des restrictions en ce qui concerne l'espèce ou le sexe du gibier qu'elles peuvent tuer, les Indiens eux peuvent, pour se nourrir, tuer le mâle et la femelle du chevreuil, faisans et faisanes, canards et canes. [Je souligne.]

Voir également les arrêts *Cardinal c. Procureur général de l'Alberta*, [1974] R.C.S. 695, à la p. 722, et *Myran c. La Reine*, [1976] 2 R.C.S. 137, à la p. 141. Je tiens à ajouter que le récent arrêt *Horseman*, précité, doit être considéré comme ayant tranché les questions qui y étaient soulevées. Les décisions de notre Cour confirment que, dans la mesure où cette intention y est clairement exprimée, le par. 12 de la *Convention* modifie le droit de chasser pour se nourrir prévu par le Traité n° 8.

À la lumière de l'article premier de la *Loi constitutionnelle de 1930*, il ne saurait faire de doute que le par. 12 de la *Convention* est une règle de droit ayant force obligatoire. Cette disposition est le texte juridique qui, actuellement, énonce et régit le droit de chasse des Indiens. Toutefois, l'existence de la *Convention* n'a pas enlevé au Traité n° 8 toute son importance juridique. Les traités sont des promesses sacrées, et l'honneur de la

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only be amended where it is clear that effect was intended. It is helpful to recall that Dickson J. in *Frank, supra*, observed at p. 100 that, while the *NRTA* had partially amended the scope of the Treaty hunting right, “of equal importance was the desire to re-state and reassure to the treaty Indians the continued enjoyment of the right to hunt and fish for food” (emphasis added). I believe that these words support my conclusion that the Treaty No. 8 right to hunt has only been altered or modified by the *NRTA* to the extent that the *NRTA* evinces a clear intention to effect such a modification. This position has been repeatedly confirmed in the decisions referred to earlier. Unless there is a direct conflict between the *NRTA* and a treaty, the *NRTA* will not have modified the treaty rights. Therefore, the *NRTA* language which outlines the right to hunt for food must be read in light of the fact that this aspect of the treaty right continues in force and effect.

Like Treaty No. 8, the *NRTA* circumscribes the right to hunt for food with respect to both the geographical area within which this right may be exercised as well as the regulations which may properly be imposed by the government. The geographical limitations must now be considered.

Geographical Limitations on the Right to Hunt for Food

Under the *NRTA*, Indians may exercise a right to hunt for food “on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access”. In the present appeals, the hunting occurred on lands which had been included in the 1899 surrender but were now privately owned. Therefore, it must be determined whether these privately owned lands were “other

Couronne commande que la Cour présume que cette dernière entendait respecter ses promesses. Des droits issus de traités ne peuvent être modifiés que lorsque c’est clairement cet effet qui était visé. Il est utile de rappeler que, à la p. 100 de l’arrêt *Frank*, précité, le juge Dickson a souligné que même si la *Convention* avait partiellement modifié la portée du droit de chasse prévu au Traité ce texte a «également [. . .] réaffirm[é] et [. . .] garanti[. . .] aux Indiens visés par les traités le droit de chasser et de pêcher pour leur subsistance» (je souligne). À mon avis, ces propos appuient ma conclusion que le droit de chasser prévu au Traité n° 8 a été modifié par la *Convention*, mais uniquement dans la mesure où l’intention d’apporter cette modification ressort clairement de ce texte. Le bien-fondé de cette thèse a été confirmé à maintes reprises dans les décisions mentionnées précédemment. La *Convention* n’a eu pour effet de modifier des droits issus de traités que dans les cas où il y avait conflit direct entre elle et le traité en cause. Par conséquent, le texte de la *Convention* qui énonce le droit de chasser pour se nourrir doit être interprété à la lumière du fait que cet aspect du droit de chasser issu du traité continue d’être en vigueur et de produire ses effets.

À l’instar du Traité n° 8, la *Convention* circonscrit le droit de chasser pour se nourrir, et ce tant en ce qui concerne le territoire sur lequel ce droit peut être exercé qu’en ce qui concerne la réglementation dont le gouvernement peut à bon droit imposer le respect dans l’exercice du droit en question. Examinons d’abord la question des limites territoriales.

Limitation territoriale du droit de chasser pour se nourrir

Aux termes de la *Convention*, les Indiens peuvent exercer le droit de chasser pour se nourrir «sur toutes les terres inoccupées de la Couronne et sur toutes les autres terres auxquelles lesdits Indiens peuvent avoir un droit d’accès». Dans les présents pourvois, la chasse a été pratiquée sur des terres qui, bien que visées par la cession de 1899, étaient devenues des terres privées. Par consé-

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lands” to which the Indians had a “right of access” under the Treaty.

50 At this stage, three preliminary points should be made. First, the “right of access” in the *NRTA* does not refer to a general right of access but, rather, it is limited to a right of access for the purposes of hunting: *R. v. Mousseau*, [1980] 2 S.C.R. 89, at p. 97; *R. v. Sutherland*, [1980] 2 S.C.R. 451, at p. 459. For example, everyone can travel on public highways, but this general right of access cannot be read as conferring upon Indians a right to hunt on public highways.

51 Second, because the various treaties affected by the *NRTA* contain different wording, the extent of the treaty right to hunt on privately owned land may well differ from one treaty to another. While some treaties contain express provisions with respect to hunting on private land, others, such as Treaty No. 8, do not. Under Treaty No. 8, the right to hunt for food could be exercised “throughout the tract surrendered” to the Crown “saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.” Accordingly, if the privately owned land is not “required or taken up” in the manner described in Treaty No. 8, it will be land to which the Indians had a right of access to hunt for food.

52 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

quent, il faut déterminer si ces terres privées étaient d’«autres terres» auxquelles les Indiens avaient un «droit d’accès» en vertu du Traité.

À cette étape-ci, trois remarques préliminaires s’imposent. Premièrement, le «droit d’accès» prévu par la *Convention* n’est pas un droit d’accès général, mais plutôt un droit d’accès limité pour chasser: *R. c. Mousseau*, [1980] 2 R.C.S. 89, à la p. 97; *R. c. Sutherland*, [1980] 2 R.C.S. 451, à la p. 459. Par exemple, même si toute personne peut circuler sur les routes publiques, ce droit d’accès général ne peut être interprété comme ayant pour effet de conférer aux Indiens le droit de chasser sur les routes publiques.

Deuxièmement, étant donné que les divers traités touchés par la *Convention* sont libellés différemment, la portée du droit issu de traité de chasser sur des terres privées peut très bien varier d’un traité à l’autre. Alors que certains traités comportent des dispositions touchant expressément la chasse sur des terres privées, d’autres, comme le Traité n° 8, n’en ont pas. Sous le régime du Traité n° 8, le droit de chasser pour se nourrir pouvait être exercé [TRADUCTION] «dans l’étendue de pays cédée» à la Couronne, [TRADUCTION] «sauf et excepté tels terrains qui de temps à autre pourront être requis ou pris pour des fins d’établissements, de mine, de commerce de bois, ou autres objets». Par conséquent, si les terres privées ne sont pas «requisées ou prises» de la manière prévue au Traité n° 8, les Indiens y ont accès afin d’y chasser pour se nourrir.

Troisièmement, il faut garder à l’esprit les principes d’interprétation applicables. Les traités et les lois qui concernent les Indiens doivent être interprétés de façon libérale, et toute incertitude ou ambiguïté doit profiter aux Indiens. En outre, le tribunal qui examine un traité doit tenir compte du contexte dans lequel les traités ont été négociés, conclus et couchés par écrit. En tant qu’écrits, les traités constataient des accords déjà conclus verbalement, mais ils ne rapportaient pas toujours la pleine portée de ces ententes verbales: voir Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories* (1880), aux pp. 338 à 342; *Sioui*, précité, à la

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pp. 338-42; *Sioui, supra*, at p. 1068; *Report of the Aboriginal Justice Inquiry of Manitoba* (1991); Jean Friesen, *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.

The evidence led at trial indicated that in 1899 the Treaty No. 8 Indians would have understood that land had been "required or taken up" when it was being put to a use which was incompatible with the exercise of the right to hunt. Historian John Foster gave expert evidence in this case. His testimony indicated that, in 1899, Treaty No. 8 Indians would not have understood the concept of private and exclusive property ownership separate from actual land use. They understood land to be required or taken up for settlement when buildings or fences were erected, land was put into crops, or farm or domestic animals were present. Enduring church missions would also be understood to constitute settlement. These physical signs shaped the Indians' understanding of settlement because they were the manifestations of exclusionary land use which the Indians had witnessed as new settlers moved into the West. The Indians' experience with the Hudson's Bay Company was also relevant.

p. 1068; *Report of the Aboriginal Justice Inquiry of Manitoba* (1991); Jean Friesen, *Grant me Wherewith to Make my Living* (1985). Les traités, qui ont été rédigés en anglais par des représentants du gouvernement canadien qui, on le présume, connaissaient les doctrines de common law, n'ont toutefois pas été traduits, par écrit, dans les diverses langues (en l'espèce le cri et le déné) des nations indiennes qui en étaient signataires. D'ailleurs, même s'ils l'avaient été, il est peu probable que les Indiens, qui communiquaient exclusivement oralement, les auraient interprétés différemment. Par conséquent, il est bien établi que le texte d'un traité ne doit pas être interprété suivant son sens strictement formaliste, ni se voir appliquer les règles rigides d'interprétation modernes. Il faut plutôt lui donner le sens que lui auraient naturellement donné les Indiens à l'époque de sa signature. Cela vaut également pour les mots d'un traité qui ont pour effet de limiter le droit accordé dans celui-ci. Voir *Nowegijick*, précité, à la p. 36; *Sioui*, précité, aux pp. 1035, 1036 et 1044; *Sparrow*, précité, à la p. 1107; et *Mitchell*, précité, où le juge La Forest a fait état de l'importante différence qui existe entre l'interprétation des traités avec les Indiens et des lois touchant ces derniers.

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La preuve produite au procès a indiqué que, en 1899, les Indiens visés par le Traité n° 8 comprenaient que des terres étaient «requisées ou prises» si elles étaient utilisées à des fins incompatibles avec l'exercice du droit de chasse. L'historien John Foster a témoigné à titre d'expert dans le cadre de la présente affaire. Il ressort de son témoignage que, en 1899, les Indiens visés par le Traité n° 8 n'auraient pas saisi le concept selon lequel un particulier peut être propriétaire exclusif de terrains, indépendamment de l'utilisation concrète qui en est faite. Pour les Indiens, des terres étaient requises ou prises pour des fins de colonisation si on y construisait des bâtiments ou des clôtures, si on les cultivait ou si on y gardait des animaux de ferme ou des animaux domestiques. L'établissement de missions religieuses permanentes aurait également été perçu comme un signe de colonisation. Ces indications matérielles ont façonné la conception qu'avaient les Indiens de la colonisation, puis-

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Although that company had title to vast tracts of land, the Indians were not excluded from and in fact continued hunting on these lands. In the course of their trading, the Hudson's Bay Company and the Northwest Company had set up numerous posts that were subsequently abandoned. The presence of abandoned buildings, then, would not necessarily signify to the Indians that land was taken up in a way which precluded hunting on them. Yet, it is dangerous to pursue this line of thinking too far. The abandonment of land may be temporary. Owners may return to reoccupy the land, to undertake maintenance, to inspect it or simply to enjoy it. How "unoccupied" the land was at the relevant time will have to be explored on a case-by-case basis.

qu'elles étaient des manifestations de l'utilisation exclusive des terres dont les Indiens avaient été témoins à l'arrivée des colons dans l'Ouest. L'expérience des Indiens dans leurs rapports avec la Compagnie de la Baie d'Hudson était également pertinente. En effet, même si la Compagnie était propriétaire de vastes étendues, il n'avait pas été interdit aux Indiens d'y chasser, et, de fait, ils avaient continué à le faire. Dans le cours de leurs activités commerciales, la Compagnie de la Baie d'Hudson et la Compagnie du Nord-Ouest avaient établi de nombreux postes de traite qui ont par la suite été abandonnés. La présence de bâtiments abandonnés n'aurait donc pas nécessairement signifié pour les Indiens que les terres en question avaient été prises d'une manière qui les empêchait d'y chasser. Il est cependant risqué de pousser trop loin ce raisonnement. L'abandon d'une terre peut n'être que temporaire. En effet, le propriétaire peut y revenir pour l'occuper de nouveau, pour l'entretenir, pour l'inspecter ou tout simplement pour en jouir. La question de savoir dans quelle mesure la terre en cause était «inoccupée» au moment concerné doit être tranchée au cas par cas.

54 An interpretation of the Treaty properly founded upon the Indians' understanding of its terms leads to the conclusion that the geographical limitation on the existing hunting right should be based upon a concept of visible, incompatible land use. This approach is consistent with the oral promises made to the Indians at the time the Treaty was signed, with the oral history of the Treaty No. 8 Indians, with earlier case law and with the provisions of the Alberta *Wildlife Act* itself.

Si on interprète les termes du Traité en se fondant, comme il se doit, sur la conception qu'en ont les Indiens, on est amené à conclure que la limitation territoriale du droit existant de chasser devrait s'appuyer sur le critère de l'utilisation visible et incompatible des terres en cause. Cette solution est conforme aux promesses verbales faites aux Indiens au moment de la signature du Traité, à l'histoire orale des Indiens visés par le Traité n° 8, aux premières décisions des tribunaux sur la question et aux dispositions mêmes de la *Wildlife Act* de l'Alberta.

55 The Indian people made their agreements orally and recorded their history orally. Thus, the verbal promises made on behalf of the federal government at the times the treaties were concluded are of great significance in their interpretation. Treaty No. 8 was initially concluded with the Indians at Lesser Slave Lake. The Commissioners then travelled to many other bands in the region and sought their adhesion to the Treaty. Oral promises were made with the Lesser Slave Lake band and with

Comme les Indiens concluaient leurs ententes verbalement et transmettaient leur histoire oralement, les promesses verbales faites pour le compte du gouvernement fédéral au moment de la conclusion des traités revêtent une importance considérable pour l'interprétation de ceux-ci. Le Traité n° 8 a été conclu en premier avec les Indiens de la région du Petit lac des Esclaves. Les commissaires se déplacèrent ensuite pour aller rencontrer de nombreuses autres bandes de la région en vue

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the other Treaty signatories and these promises have been recorded in the Treaty Commissioners' Reports and in contemporary affidavits and diaries of interpreters and other government officials who participated in the negotiations. See in particular: Richard Daniel, "The Spirit and Terms of Treaty Eight", in Richard Price, ed., *The Spirit of the Alberta Indian Treaties* (1979), at pp. 47-100; and René Fumoleau, O.M.I., *As Long as this Land Shall Last: A History of Treaty 8 and Treaty 11, 1870-1939* (1973), at pp. 73-100. The Indians' primary fear was that the treaty would curtail their ability to pursue their livelihood as hunters, trappers and fishers. Commissioner David Laird, as cited in Daniel, "The Spirit and Terms of Treaty Eight", at p. 76, told the Lesser Slave Lake Indians in 1899:

Indians have been told that if they make a treaty they will not be allowed to hunt and fish as they do now. This is not true. Indians who take treaty will be just as free to hunt and fish all over as they now are.

In return for this the Government expects that the Indians will not interfere with or molest any miner, traveller or settler. [Emphasis added.]

Since the Treaty No. 8 lands were not well suited to agriculture, the government expected little settlement in the area. The Commissioners, cited in Daniel, at p. 81, indicated that "it is safe to say that so long as the fur-bearing animals remain, the great bulk of the Indians will continue to hunt and to trap". The promise that this livelihood would not be affected was repeated to all the bands who signed the Treaty. Although it was expected that some white prospectors might stake claims in the north, this was not expected to have an impact on the Indians' hunting rights. For example, one com-

d'obtenir leur adhésion au Traité. Certaines promesses verbales ont été faites à la bande du Petit lac des Esclaves et aux autres signataires du Traité, et ces promesses ont été consignées dans les rapports des commissaires, dans des affidavits faits à la même époque et dans des journaux tenus par des interprètes et autres représentants du gouvernement ayant participé aux négociations. Voir, en particulier: Richard Daniel, «The Spirit and Terms of Treaty Eight», dans Richard Price, dir., *The Spirit of the Alberta Indian Treaties* (1979), aux pp. 47 à 100; et René Fumoleau, O.M.I., *As Long as this Land Shall Last: A History of Treaty 8 and Treaty 11, 1870-1939* (1973), aux pp. 73 à 100. La principale crainte des Indiens était que le traité restreindrait leur capacité de gagner leur vie en tant que chasseurs, de trappeurs et pêcheurs. Le commissaire David Laird a dit ceci aux Indiens du Petit lac des Esclaves en 1899, propos qui sont cités dans Daniel, «The Spirit and Terms of Treaty Eight», à la p. 76:

[TRADUCTION] Les Indiens se sont fait dire que s'ils signent un traité, ils ne pourront plus chasser et pêcher comme ils le font actuellement. Cela est faux. Les Indiens qui signeront le traité seront tout aussi libres qu'ils le sont actuellement de chasser et de pêcher partout.

En contrepartie, le gouvernement s'attend à ce que les Indiens ne nuisent pas aux mineurs, aux voyageurs ou aux colons et ne les molestent pas. [Je souligne.]

Comme les terres visées par le Traité n° 8 étaient impropres à l'agriculture, le gouvernement prévoyait peu d'activités de colonisation dans la région. Les commissaires, dont les propos sont rapportés dans Daniel, à la p. 81, ont affirmé qu'[TRADUCTION] «il est possible de dire, sans risque de se tromper, que tant et aussi longtemps qu'il y aura des animaux à fourrure, la vaste majorité des Indiens continueront à chasser et à piéger». La promesse que ce moyen de gagner leur vie ne serait pas touché a été faite à toutes les bandes qui ont signé le Traité. Même si on prévoyait que des prospecteurs blancs jalonnaient des claims dans le nord, on n'entrevoit pas que cela aurait des conséquences sur les droits de chasse des Indiens. Par exemple, voici les propos, cités dans René Fumoleau, O.M.I., *As Long as this Land Shall*

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missioner, cited in René Fumoleau, O.M.I., *As Long as this Land Shall Last*, at p. 90, stated:

We are just making peace between Whites and Indians — for them to treat each other well. And we do not want to change your hunting. If Whites should prospect, stake claims, that will not harm anyone.

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Commissioner Laird told the Indians that the promises made to them were to be similar to those made with other Indians who had agreed to a treaty. Accordingly, it is significant that the earlier promises also contemplated a limited interference with Indians' hunting and fishing practices. See, for example, Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories*, *supra*. In negotiating Treaty No. 1, the Lieutenant Governor of Manitoba, A. G. Archibald, made the following statement to the Indians, at p. 29:

When you have made your treaty you will still be free to hunt over much of the land included in the treaty. Much of it is rocky and unfit for cultivation, much of it that is wooded is beyond the places where the white man will require to go, at all events for some time to come. Till these lands are needed for use you will be free to hunt over them, and make all the use of them which you have made in the past. But when lands are needed to be tilled or occupied, you must not go on them any more. There will still be plenty of land that is neither tilled nor occupied where you can go and roam and hunt as you have always done, and, if you wish to farm, you will go to your own reserve where you will find a place ready for you to live on and cultivate. [Emphasis added.]

With respect to Treaty No. 4, Lt. Gov. Morris made the following statement to the Indians, at p. 96:

We have come through the country for many days and we have seen hills and but little wood and in many places little water, and it may be a long time before there are many white men settled upon this land, and you will have the right of hunting and fishing just as you

*Last*, à la p. 90, qu'a tenus un commissaire à cet égard:

[TRADUCTION] Nous faisons simplement la paix entre les Blancs et les Indiens — afin qu'ils se conduisent bien les uns envers les autres. Et nous ne voulons rien changer à votre chasse. Si les Blancs prospectent, jalonnent des claims, personne n'en subira de préjudice.

Le commissaire Laird a déclaré aux Indiens qu'on leur faisait des promesses analogues à celles faites aux autres Indiens ayant déjà conclu un traité. En conséquence, il est important de signaler que, dans les premières promesses faites aux Indiens, on envisageait également la possibilité d'une atteinte limitée à leurs pratiques en matière de chasse et de pêche. Voir, par exemple, Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories*, *op. cit.* Au cours de la négociation du Traité n° 1, le lieutenant-gouverneur du Manitoba, A. G. Archibald, a déclaré ce qui suit aux Indiens, à la p. 29:

[TRADUCTION] Quand vous aurez signé votre traité, vous serez encore libres de chasser sur une bonne partie des terres qu'il vise. Elles sont en grande partie rocheuses et impropres à la culture. Les terres boisées se situent dans une large mesure en dehors des régions où les Blancs devront aller et cet état de choses devrait durer encore assez longtemps. En attendant qu'on ait besoin de ces terres, vous pourrez y chasser et vous en servir comme vous l'avez fait par le passé. Mais dès qu'on en aura besoin pour la culture ou pour les occuper, vous ne devrez plus y pénétrer. Il y aura encore à ce moment-là de grandes étendues de terre qui ne seront ni cultivées ni occupées où vous pourrez circuler et chasser comme vous l'avez toujours fait et, si vous souhaitez devenir cultivateurs, vous irez sur votre propre réserve où vous trouverez un terrain sur lequel vous pourrez vous installer et que vous pourrez cultiver. [Je souligne.]

Relativement au Traité n° 4, le lieutenant-gouverneur Morris a affirmé ce qui suit aux Indiens, à la p. 96:

[TRADUCTION] Nous avons mis bien des jours à traverser le pays et nous avons vu des collines mais pas beaucoup d'arbres. À bien des endroits, il n'y a que peu d'eau. Il pourra s'écouler beaucoup de temps avant que des Blancs ne viennent s'installer en grand nombre sur ce

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have now until the land is actually taken up. [Emphasis added.]

With respect to Treaty No. 6, Lt. Gov. Morris stated at p. 218:

You want to be at liberty to hunt as before. I told you we did not want to take that means of living from you, you have it the same as before, only this, if a man, whether Indian or Half-breed, had a good field of grain, you would not destroy it with your hunt. [Emphasis added.]

The oral history of the Treaty No. 8 Indians reveals a similar understanding of the treaty promises. Dan McLean, an elder from the Sturgeon Lake Indian Reserve, gave evidence in this trial. He indicated that the understanding of the treaty promise was that Indians were allowed to hunt anytime for food to feed their families. They could hunt on unoccupied Crown land and on abandoned land. If there was no fence on the land, they could hunt, but if there was a fence, they could not hunt there. This testimony is consistent with the oral histories presented by other Treaty No. 8 elders whose stories have been recorded by historians. The 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. No doubt the Indians believed that most of the Treaty No. 8 land would remain unoccupied and so would be available to them for hunting, fishing and trapping. See *The Spirit of the Alberta Indian Treaties, supra*, at pp. 92-100.

Accordingly, 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. 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 occu-

territoire et en attendant que cela se produise, vous aurez le même droit de chasser et de pêcher que vous avez maintenant. [Je souligne.]

En ce qui concerne le Traité n° 6, le lieutenant-gouverneur Morris a dit ceci, à la p. 218:

[TRADUCTION] Vous voulez être libres de chasser comme auparavant. Je vous ai dit que nous ne voulons pas vous priver de ce moyen de subsistance; rien n'est changé sauf que, si un homme, qu'il soit Indien ou métis, possède un bon champ de grain, il vous faudra prendre garde de le ravager en chassant. [Je souligne.]

L'histoire orale des Indiens visés par le Traité n° 8 révèle une conception analogue des promesses faites dans le cadre des traités. Dan McLean, un ancien de la réserve indienne de Sturgeon Lake, a témoigné au procès tenu en l'espèce. Il a déclaré que les Indiens comprenaient qu'on leur promettait qu'ils pourraient chasser en tout temps pour nourrir leurs familles, qu'ils pouvaient chasser sur les terres inoccupées de la Couronne et sur des terres abandonnées. Que si aucune clôture n'entourait une terre, ils pouvaient y chasser, mais que si la terre était clôturée, ils ne pouvaient le faire. Ce témoignage est conforme à l'histoire orale relatée par d'autres anciens visés par le Traité n° 8 et consignée par des historiens. Les Indiens comprenaient que des terres seraient prises pour y établir des exploitations agricoles ou pour y faire de la prospection et de l'exploitation minières, et qu'ils ne seraient pas autorisés à y chasser ou à tirer sur les animaux de ferme et les bâtiments des colons. Il ne fait aucun doute que les Indiens croyaient que la majeure partie des terres visées par le Traité n° 8 resteraient inoccupées et qu'ils pourraient donc y pratiquer la chasse, le piégeage et la pêche. Voir *The Spirit of the Alberta Indian Treaties, op. cit.*, aux pp. 92 à 100.

Par conséquent, il ressort des promesses verbales faites par les représentants de la Couronne et de l'histoire orale des Indiens que ceux-ci comprenaient que des terres seraient prises et occupées d'une manière qui les empêcherait d'y chasser, lorsqu'elles feraient l'objet d'une utilisation visible et incompatible avec la pratique de la chasse. Pour ce qui est de la jurisprudence, il est évident que les tribunaux ont souscrit à cette interprétation et con-

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pied is a question of fact that must be resolved on a case-by-case basis.

clu que la question de savoir si une terre est oui ou non prise ou occupée est une question de fait, qui doit être tranchée au cas par cas.

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Most of the cases which have considered the geographical limitations on the right to hunt have been concerned with situations where the hunting took place on Crown land. In those cases, it was held that Crown lands were only "occupied" or "taken up" when they were actually put to an active use which was incompatible with hunting. For example, *R. v. Smith*, [1935] 2 W.W.R. 433 (Sask. C.A.), considered whether Indians had a right to hunt for food on a game preserve located on Crown land. There, in my view, it was correctly observed at p. 436 that "it is proper to consult th[e] treaty in order to glean from it whatever may throw some light on the meaning to be given to the words" in the *NRTA*. It was sensibly held at p. 437 that the Indians did not have a right of access to hunt on the game preserve because to do so would be incompatible with the fundamental purpose of establishing a preserve: "a game preserve would be one in name only if the Indians, or any other class of people, were entitled to shoot in it". See also *R. v. Mirasty*, [1942] 1 W.W.R. 343 (Police Ct.), in which Crown land was taken up for a forest and game preserve; and *Mousseau, supra*, in which Crown land was taken up for a public road. However, the courts have recognized an existing treaty right to hunt on Crown land taken up as a forest because hunting for food is not incompatible with that particular land use: *R. v. Strongquill*, [1953] 8 W.W.R. (N.S.) 247 (Sask. C.A.). Finally, where limited hunting by non-Indians is permitted on Crown land taken up as a wildlife management area or a fur conservation area, the courts have held that Indians continue to have an unlimited right of access for the purposes of hunting for food: *Strongquill, supra*, at pp. 267 and 271; *Sutherland, supra*, at pp. 460 and 464-65; and

Dans la plupart des affaires où la question de la limitation territoriale du droit de chasser s'est posée, les activités de chasse en cause avaient eu lieu sur des terres de la Couronne. Il a été jugé, dans ces décisions, que des terres de la Couronne n'étaient «occupées» ou «prises» que lorsqu'on y faisait concrètement une utilisation active et incompatible avec la chasse. Par exemple, dans *R. c. Smith*, [1935] 2 W.W.R. 433 (C.A. Sask.), on s'est demandé si les Indiens avaient le droit de chasser pour se nourrir dans une réserve faunique située sur des terres de la Couronne. Dans cette décision, la cour a, selon moi, signalé à juste titre qu'[TRADUCTION] «il convient de consulter le traité concerné pour voir s'il est possible d'en tirer des éléments susceptibles de jeter quelque lumière sur le sens à donner au texte» de la *Convention*. On a raisonnablement conclu à la p. 437 que les Indiens ne disposaient pas d'un droit d'accès à la réserve faunique pour y chasser, car cela serait incompatible avec l'objet fondamental de l'établissement d'une telle réserve: [TRADUCTION] «une telle réserve n'aurait de faunique que le nom si les Indiens ou tout autre groupe de personnes étaient autorisés à y chasser». Voir également l'affaire *R. c. Mirasty*, [1942] 1 W.W.R. 343 (Police Ct.), où des terres de la Couronne ont été prises pour l'établissement d'une réserve forestière et faunique; et l'arrêt *Mousseau*, précité, où des terres de la Couronne ont été prises pour la construction d'une voie publique. Les tribunaux ont cependant reconnu un droit existant — issu de traité — de chasser sur des terres de la Couronne prises pour l'établissement d'une réserve forestière, puisque la pratique de la chasse pour se nourrir n'est pas incompatible avec l'utilisation particulière qui était faite des terres en cause: *R. c. Strongquill*, [1953] 8 W.W.R. (N.S.) 247 (C.A. Sask.). Enfin, lorsque les non-Indiens disposent d'un droit limité de chasser sur des terres de la Couronne prises en tant que zone de gestion de la faune ou zone de conservation des animaux à fourrure, les tribunaux ont conclu que les Indiens continuent d'avoir un droit d'accès illimité à ces terres afin d'y chasser pour se nourrir: *Strongquill*,

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*Moosehunter v. The Queen*, [1981] 1 S.C.R. 282, at p. 292.

A second but shorter line of cases has considered whether Indians have a treaty right of access to hunt on privately owned lands. While various factual situations have been considered, the courts have not settled the question as to whether the Treaty No. 8 right to hunt for food extends to privately owned land which is not put to visible use. This Court has considered hunting on private land in two cases.

In *Myran*, *supra*, the accused were charged with hunting without due regard for the safety of others. In *obiter*, it was stated that the accused persons did not have a right of access to the lands on which they had hunted. In an earlier case, the Manitoba Court of Appeal had held that, unless privately owned lands were posted with signs explicitly prohibiting hunting, both Indians and non-Indians could hunt there. *Myran*, *supra*, overturned that line of reasoning, holding that, in and of itself, the absence of signs did not establish a right of access for hunting purposes. That position was adopted in *Horse*, *supra*, at p. 195. However, *Myran*, *supra*, did not explore in any detail the extent of the right of access. Accordingly, the full scope of the treaty right to hunt on private land remains to be considered. In addition, because the right of access is a question of fact, the particular facts arising in *Myran*, *supra*, are significant. In that case, the accused persons were hunting for food in an alfalfa field belonging to a farmer who had been awakened by the sound of the accused's rifle shots and by the accused's hunting light flashing through his bedroom window. The rifles had a range of nearly two miles and there were farm houses, highways, pastures, a town and a breeding station within their range. On those facts, there is no doubt that the

précité, aux pp. 267 et 271; *Sutherland*, précité, aux pp. 460, 464 et 465; et *Moosehunter c. La Reine*, [1981] 1 R.C.S. 282, à la p. 292.

Dans une seconde série de décisions, celles-là moins nombreuses, on s'est demandé si les Indiens avaient un droit d'accès — issu de traité — aux terres privées pour y chasser. Bien que ce point ait été examiné en regard de différentes situations factuelles, les tribunaux n'ont toutefois pas tranché la question de savoir si le droit de chasser pour se nourrir prévu au Traité n° 8 s'étend aux terres privées qui ne font pas l'objet d'une utilisation visible. Notre Cour a étudié la question de la chasse sur des terres privées dans deux arrêts.

Dans *Myran*, précité, on reprochait aux accusés d'avoir chassé sans égard pour la sécurité d'autrui. Dans une remarque incidente, la Cour a déclaré que les accusés n'avaient aucun droit d'accès aux terres où ils avaient chassé. Dans une affaire antérieure, la Cour d'appel du Manitoba avait conclu que, en l'absence d'écriteau interdisant expressément la chasse sur les terres privées en cause, tant les Indiens que les non-Indiens pouvaient y chasser. Dans *Myran*, précité, notre Cour a écarté ce raisonnement et statué que le seul fait qu'il n'y avait pas d'écriteau n'établissait pas pour autant l'existence d'un droit d'accès pour la chasse. Cette position a été adoptée dans l'arrêt *Horse*, précité, à la p. 195. Toutefois, dans *Myran*, précité, notre Cour n'a pas examiné en détail l'étendue du droit d'accès. Par conséquent, la question de la portée exacte du droit — issu de traité — de chasser sur des terres privées reste à trancher. En outre, comme le droit d'accès est une question de fait, les faits particuliers de l'arrêt *Myran*, précité, sont importants. Dans cette affaire, les accusés chassaient pour se nourrir dans le champ de luzerne d'un cultivateur qui avait été réveillé par le bruit des coups de carabine ainsi que par la lumière du projecteur des accusés, qui brillait à travers la fenêtre de sa chambre à coucher. Les carabines avaient une portée de près de deux milles et, dans ce rayon, il y avait des fermes, des routes, des pâturages, un village et un établissement d'amélioration génétique. À la lumière de ces faits, il ne fait aucun doute que les terres visées faisaient l'objet

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land was put to an active and visible use which was incompatible with hunting.

d'une utilisation active, visible et incompatible avec la pratique de la chasse.

62 In *Horse*, *supra*, the accused persons were hunting on privately owned land without the owner's permission. This Court stated repeatedly that Treaty No. 6 did not afford the accused a right of access to hunt on "occupied private lands" (see pp. 198, 204 and 209-10). In *Horse*, *supra*, the private lands were not posted, but they were sown to hay and grain and, thus, were visibly and actively used for farming. In light of these facts, there was no need to consider what was encompassed by the term "occupied private land". The use of the land was so readily apparent that it clearly fell within the category of occupied land. Similarly, in *Mousseau*, *supra*, at p. 97, this Court indicated that Indians had a right to hunt on: (a) all unoccupied Crown lands; (b) any occupied Crown land to which they had a right of access by statute, common law or otherwise; and (c) "any occupied private lands to which the Indians have a right of access by custom, usage, or consent of the owner or occupier, for the purpose of hunting, trapping, or fishing". However, that case involved hunting on a public highway which was clearly occupied Crown land. Although *Mousseau*, *supra*, summarized this Court's position on that point, the question of hunting on unoccupied private land was neither then, nor previously, before the Court. As a result, in both *Horse*, *supra*, and *Mousseau*, *supra*, the question of whether the Treaty protected a right of access to unoccupied private lands — private lands which had not been taken up for settlement or other purposes — was left unresolved.

Dans *Horse*, précité, les accusés chassaient sur des terres privées sans l'autorisation du propriétaire. Notre Cour a déclaré à plusieurs reprises que le Traité n° 6 ne conférait pas aux accusés un droit d'accès à des «terres privées occupées» pour chasser (voir les pp. 198, 204, 209 et 210). Dans l'affaire *Horse*, précité, il n'y avait aucun écriteau sur les terres privées en cause, qui étaient toutefois affectées à la culture du foin et des céréales et qui servaient donc visiblement et activement à l'agriculture. Compte tenu de ces faits, il était inutile de se demander ce que visait l'expression «terre privée occupée». L'utilisation des terres était si évidente qu'il était clair qu'elles appartenaient à la catégorie des terres occupées. De même, dans l'arrêt *Mousseau*, précité, à la p. 97, notre Cour a indiqué que les Indiens avaient le droit de chasser a) sur toutes les terres inoccupées de la Couronne; b) sur toutes les terres occupées de la Couronne auxquelles ils ont, en vertu de la loi, de la common law ou autrement, un droit d'accès, et c) sur «toutes les terres privées occupées auxquelles les Indiens ont, de par la coutume, l'usage ou du consentement du propriétaire ou de l'occupant, un droit d'accès pour chasser, piéger ou pêcher». Toutefois, dans cette affaire, il était question de chasse sur un chemin public, lieu qui constitue manifestement une terre de la Couronne occupée. Bien que l'arrêt *Mousseau*, précité, ait résumé la position de notre Cour sur ce point, la question de la chasse sur des terres privées inoccupées n'a pas été soumise à la Cour, ni dans *Mousseau* ni auparavant. En conséquence, ni *Horse* ni *Mousseau*, précités, n'ont répondu à la question de savoir si le Traité protégeait un droit d'accès à des terres privées inoccupées — terres privées qui n'avaient pas été prises pour des fins d'établissement ou pour d'autres objets.

63 One case which has specifically considered the treaty right to hunt on unoccupied private land is *R. v. Bartleman* (1984), 55 B.C.L.R. 78 (B.C.C.A.). There, the accused was charged with using ammunition which was prohibited under the provincial *Wildlife Act*. He had been hunting on

L'arrêt *R. c. Bartleman* (1984), 55 B.C.L.R. 78 (C.A.C.-B.), portait directement sur le droit — issu de traité — de chasser sur des terres privées inoccupées. Dans cette affaire, on reprochait à l'accusé d'avoir utilisé des munitions interdites par la *Wildlife Act* provinciale. Il avait chassé sur des

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uncultivated bush land. No livestock or buildings were present, no fence surrounded the land, and no signs had been posted. He claimed that, on the basis of his Treaty hunting right, the provincial legislation did not apply to him. His hunting rights were set out in the 1852 North Saanich Indian Treaty (quoted in *Bartleman*, at p. 87) which provided that the Indians “are at liberty to hunt over the unoccupied lands, and to carry on our fisheries as formerly”. The B.C. Court of Appeal held that it was necessary to interpret the right on the basis of what the Indians would have understood in 1852 by the words of the Treaty. It held that the Treaty right to hunt could be exercised where to do so would not interfere with the actual use being made of the privately owned land. At page 97 this was written:

... the hunting must take place on land that is unoccupied in the sense that the particular form of hunting that is being undertaken does not interfere with the actual use and enjoyment of the land by the owner or occupier.

The Court of Appeal found that hunting was not incompatible with the minimal level of use to which the land was being put.

The “visible, incompatible use” approach, which focuses upon the use being made of the land, is appropriate and correct. Although it requires that the particular land use be considered in each case, this standard is neither unduly vague nor unworkable.

In summary, then, the geographical limitation on the right to hunt for food is derived from the terms of the particular treaty if they have not been modified or altered by the provisions of para. 12 of the *NRTA*. In this case, the geographical limitation on the right to hunt for food provided by Treaty No. 8 has not been modified by para. 12 of the *NRTA*. 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

terres non cultivées et couvertes de broussailles. Il n’y avait ni bétail, ni bâtiment, ni écriteau sur ces terres, qui n’étaient pas non plus clôturées. L’accusé a plaidé que, en raison du droit de chasse que lui accordait le Traité, la loi provinciale ne s’appliquait pas à lui. Son droit de chasser était énoncé dans le North Saanich Indian Treaty de 1852 (cité dans *Bartleman*, à la p. 87), qui stipulait que les Indiens [TRADUCTION] «[étaient] libres de chasser sur les terres inoccupées et de poursuivre [leurs] activités de pêche comme auparavant». La Cour d’appel de la C.-B. a conclu qu’il fallait interpréter ce droit suivant la conception qu’avaient les Indiens du libellé du traité en 1852. Elle a statué que le droit de chasser — issu du traité — pouvait être exercé si cela n’entravait pas l’utilisation qui était faite concrètement des terres privées en cause. À la page 97 de la décision, on peut lire ceci:

[TRADUCTION]... la chasse doit être pratiquée sur des terres qui sont inoccupées dans le sens où le type de chasse qui y est pratiquée n’a pas pour effet d’entraver l’utilisation et la jouissance des terres en question par le propriétaire et l’occupant.

La Cour d’appel a conclu que la pratique de la chasse n’était pas incompatible avec l’utilisation minimale que l’on faisait des terres.

L’analyse fondée sur «l’utilisation visible et incompatible», qui met l’accent sur l’utilisation qui est faite des terres concernées, est appropriée et correcte. Même si elle requiert, dans chaque cas, l’examen de l’utilisation particulière qui est faite des terres visées, cette norme n’est ni excessive-ment vague, ni inapplicable.

Bref, la limitation territoriale du droit de chasser pour se nourrir découle des termes mêmes du traité en cause, s’ils n’ont pas été modifiés par les dispositions du par. 12 de la *Convention*. En l’espèce, la limitation territoriale du droit de chasser pour se nourrir qui est prévu par le Traité n° 8 n’a pas été modifiée par le par. 12 de la *Convention*. Lorsque les terres en cause sont des terres privées, il faut déterminer, au cas par cas, s’il s’agit d’«autres terres» auxquelles les Indiens avaient «accès» en vertu du Traité. Si ces terres sont occupées, c’est-à-dire si elles font l’objet d’une utilisation visible et

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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. The facts presented in each of these appeals must now be considered.

incompatible avec la pratique de la chasse, les Indiens n'y ont alors pas accès. À l'inverse, si les terres privées sont inoccupées et ne font pas l'objet d'une utilisation visible, les Indiens, conformément au Traité n° 8, y auront accès afin d'y chasser pour se nourrir. Il faut maintenant examiner les faits exposés dans chacun des présents pourvois.

67 The first is Mr. Badger. He was hunting on land covered with second growth willow and scrub. Although there were no fences or signs posted on the land, a farm house was located only one quarter of a mile from the place the moose was killed. The residence did not appear to have been abandoned. Second, Mr. Kiyawasew was hunting on a snow-covered field. Although there was no fence, there were run-down barns nearby and signs were posted on the land. Most importantly, the evidence indicated that in the fall, a crop had been harvested from the field. In the situations presented in both cases, it seems clear that the land was visibly being used. Since the appellants did not have a right of access to these particular tracts of land, their treaty right to hunt for food did not extend to hunting there. As a result, the limitations on hunting set out in the *Wildlife Act* did not infringe upon their existing right and were properly applied to these two appellants. The appeals of Mr. Badger and Mr. Kiyawasew must, therefore, be dismissed.

Commençons d'abord par M. Badger. Ce dernier chassait sur des terres couvertes de jeunes saules et de broussailles. Il n'y avait ni clôture ni écriteau sur les terres en question, mais une maison de ferme se trouvait à un quart de mille de l'endroit où l'original a été abattu. La résidence ne paraissait pas abandonnée. Quant à M. Kiyawasew, il chassait dans un champ couvert de neige. Même si le champ n'était pas clôturé, il y avait des granges délabrées près de là, et des écriteaux avaient été installés. Fait plus important encore, la preuve a révélé qu'on avait fait la récolte dans le champ à l'automne. Compte tenu des faits décrits dans ces deux cas, il semble clair que les terres en cause étaient visiblement utilisées. Comme les appelants n'avaient pas de droit d'accès à ces terres, leur droit — issu du traité — de chasser pour se nourrir ne s'étendait pas à ces terres. En conséquence, les limites applicables au droit de chasse énoncées dans la *Wildlife Act* ne portent pas atteinte au droit existant de ces deux appelants, et elles leur ont à juste titre été appliquées. Les pourvois de M. Badger et de M. Kiyawasew doivent donc être rejetés.

68 However, Mr. Ominayak's appeal presents a different situation. He was hunting on uncleared muskeg. No fences or signs were present. Nor were there any buildings located near the site of the kill. Although it was privately owned, it is apparent that this land was not being put to any visible use which would be incompatible with the Indian right to hunt for food. Accordingly, the geographical limitations upon the Treaty right to hunt for food did not preclude Mr. Ominayak from hunting upon this parcel of land. This, however, does not dispose of his appeal. It remains to be seen whether the existing right to hunt was in any other manner cir-

Toutefois, le pourvoi de M. Ominayak présente une situation différente. Ce dernier chassait dans une savane non déboisée. Il n'y avait ni clôture, ni écriteau, ni bâtiment près de l'endroit où l'animal avait été abattu. Même s'il s'agissait de terres privées, il est évident qu'elles ne faisaient pas l'objet d'une utilisation visible et incompatible avec l'exercice, par les Indiens, de leur droit de chasser pour se nourrir. En conséquence, la limitation territoriale de ce droit issu du traité n'empêchait pas M. Ominayak de chasser sur ces terres. Cette conclusion ne tranche toutefois pas son pourvoi. En effet, il reste à déterminer si le droit de chasser existant

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cumscribed by a form of government regulation which is permitted under the Treaty.

Permissible Regulatory Limitations on the Right to Hunt for Food

Pursuant to the provisions of s. 88 of the *Indian Act*, provincial laws of general application will apply to Indians. This is so except where they conflict with aboriginal or treaty rights, in which case the latter must prevail: *Kruger v. The Queen*, [1978] 1 S.C.R. 104, at pp. 114-15; *Simon, supra*, at pp. 411-14; *Sparrow, supra*, at p. 1109. In any event, the regulation of Indian hunting rights would ordinarily come within the jurisdiction of the Federal government and not the Province. However, the issue does not arise in this case since we are dealing with the right to hunt provided by Treaty No. 8 as modified by the *NRTA*. Both the Treaty and the *NRTA* specifically provided that the right would be subject to regulation pertaining to conservation.

Treaty No. 8 provided that the right to hunt would be "subject to such regulations as may from time to time be made by the Government of the country". In the West, a wide range of legislation aimed at conserving game had been enacted by the government beginning as early as the 1880s. Acts and regulations pertaining to conservation measures continued to be passed throughout the entire period during which the numbered treaties were concluded. In *Horseman, supra*, the aim and intent of the regulations was recognized. At page 935, I noted:

Before the turn of the century the federal game laws of the Unorganized Territories provided for a total ban on hunting certain species (bison and musk oxen) in order to preserve both the species and the supply of game for Indians in the future. See *The Unorganized Territories' Game Preservation Act, 1894*, S.C. 1894, c. 31, ss. 2, 4 to 8 and 26. Even then the advances in firearms and the more efficient techniques of hunting and trapping, coupled with the habitat loss and the over-exploitation of game, (undoubtedly by Europeans more than by Indians), had made it essential to impose conser-

n'était pas circonscrit d'une autre manière par quelque forme de réglementation gouvernementale permise sous le régime du Traité.

Limitations de nature réglementaire autorisées du droit de chasser pour se nourrir

Conformément à l'art. 88 de la *Loi sur les Indiens*, les Indiens sont assujettis aux lois provinciales d'application générale, sauf si ces lois entrent en conflit avec des droits ancestraux ou issus de traités, auxquels cas ces droits doivent l'emporter: *Kruger c. La Reine*, [1978] 1 R.C.S. 104, aux pp. 114 et 115; *Simon*, précité, aux pp. 411 à 414; *Sparrow*, précité, à la p. 1109. Quoi qu'il en soit, la réglementation des droits de chasse des Indiens relève normalement de la compétence du gouvernement fédéral et non de la province. Toutefois, la question ne se pose pas en l'espèce puisqu'il est question du droit de chasse prévu par le Traité n° 8 et modifié par la *Convention*. Tant le Traité que la *Convention* indiquaient expressément que le droit serait subordonné à la réglementation régissant la conservation.

Le Traité n° 8 indiquait que le droit de chasser était [TRADUCTION] «subordonné [...] à tels règlements qui pourront être faits de temps à autre par le gouvernement du pays». Dans l'Ouest, un large éventail de mesures législatives visant à protéger la faune ont, dès les années 1880, été adoptées par le gouvernement. Des lois et des règlements établissant des mesures de conservation ont continué d'être établis pendant toute la période au cours de laquelle des traités numérotés ont été conclus. Dans l'arrêt *Horseman*, précité, l'objet de cette réglementation a été reconnu. À la page 935, j'ai fait l'observation suivante:

À la fin du XIX<sup>e</sup> siècle, les lois fédérales relatives à la chasse dans les Territoires non organisés prévoyaient qu'il était absolument interdit de chasser certaines espèces animales (le bison et le bœuf musqué) afin d'assurer leur préservation et d'assurer aux Indiens un approvisionnement en gibier pour l'avenir. Voir l'*Acte de 1894 relatif à la conservation du gibier dans les Territoires non organisés*, S.C. 1894, ch. 31, art. 2, 4 à 8 et 26. Même à cette époque, l'amélioration des armes à feu et les méthodes plus efficaces de piégeage et de chasse ainsi que la disparition de l'habitat et la surexploitation

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vation measures to preserve species and to provide for hunting for future generations. Moreover, beginning in 1890, provision was made in the federal *Indian Act* for the Superintendent General to make the game laws of Manitoba and the Unorganized Territories applicable to Indians. See *An Act further to amend "The Indian Act" chapter forty-three of the Revised Statutes*, S.C. 1890, c. 29, s. 10. A similar provision was in force in 1930. See *Indian Act*, R.S.C. 1927, c. 98, s. 69.

In light of the existence of these conservation laws prior to signing the Treaty, the Indians would have understood that, by the terms of the Treaty, the government would be permitted to pass regulations with respect to conservation. This concept was explicitly incorporated into the *NRTA* in a modified form providing for Provincial regulatory authority in the field of conservation. Paragraph 12 of the *NRTA* begins by stating its purpose:

12. In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians. . . . [Emphasis added.]

It follows that by the terms of both the Treaty and the *NRTA*, provincial game laws would be applicable to Indians so long as they were aimed at conserving the supply of game. However, the provincial government's regulatory authority under the Treaty and the *NRTA* did not extend beyond the realm of conservation. It is the constitutional provisions of para. 12 of the *NRTA* authorizing provincial regulations which make it unnecessary to consider s. 88 of the *Indian Act* and the general application of provincial regulations to Indians.

<sup>71</sup> The licensing provisions contained in the *Wildlife Act* are in part, but not wholly, directed towards questions of conservation. At first blush, then, they may seem to form part of the permissi-

du gibier (sans doute davantage par les Européens que par les Indiens) avaient rendu indispensable l'imposition de mesures de conservation destinées à préserver des espèces animales et à ménager des possibilités de chasse aux générations futures. Qui plus est, à compter de 1890, l'Acte des Sauvages fédéral habilitait le surintendant général à rendre applicables aux Indiens les lois du Manitoba et des Territoires non organisés relatives à la chasse. Voir l'Acte ayant pour objet de modifier de nouveau l'Acte des Sauvages, chapitre quarante-trois des Statuts révisés, S.C. 1890, ch. 29, art. 10. Une disposition analogue était en vigueur en 1930. Voir la Loi des Indiens, S.R.C. 1927, ch. 98, art. 69.

Comme ces textes de loi relatifs à la conservation existaient avant la signature du Traité, les Indiens comprenaient que, suivant les termes de ce document, le gouvernement pourrait prendre des règlements à cet égard. Ce principe, qui a été explicitement incorporé dans la *Convention* sous une forme modifiée, pourvoyait à l'exercice d'un pouvoir de réglementation par les provinces en matière de conservation. En effet, la première phrase du par. 12 de la *Convention* énonce l'objet de cette disposition:

12. Pour assurer aux Indiens de la province la continuation de l'approvisionnement de gibier et de poisson destinés à leurs support et subsistance, le Canada consent à ce que les lois relatives au gibier et qui sont en vigueur de temps à autre dans la province, s'appliquent aux Indiens. . . . [Je souligne.]

Il s'ensuit que, suivant les termes du Traité et de la *Convention*, les lois provinciales relatives à la protection de la faune s'appliquaient aux Indiens, dans la mesure où elles visaient à assurer l'approvisionnement en gibier. Toutefois, le gouvernement provincial n'avait pas, en vertu du Traité et de la *Convention*, le pouvoir de réglementer autre chose que la conservation. Ce sont les dispositions constitutionnelles du par. 12 de la *Convention* autorisant l'application des règlements provinciaux qui font en sorte qu'il est inutile d'examiner l'art. 88 de la *Loi sur les Indiens* et l'application générale des règlements provinciaux aux Indiens.

Les dispositions de la *Wildlife Act* relatives à la délivrance de permis ne portent qu'en partie seulement sur des questions de conservation. À première vue, donc, elles peuvent sembler faire partie

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ble government regulation which can establish the boundaries of the existing right to hunt for food. However, the partial concern with conservation does not automatically lead to the conclusion that s. 26(1) is permissible regulation. It must still be determined whether the manner in which the licensing scheme is administered conflicts with the hunting right provided under Treaty No. 8 as modified by the *NRTA*.

This analysis should take into account the wording of the treaty and the *NRTA*. I believe this to be appropriate since the object will be to determine first whether there has been a *prima facie* infringement of the Treaty No. 8 right to hunt as modified by the *NRTA* and secondly if there is such an infringement whether it can be justified. In essence, we are dealing with a modified treaty right. This, I believe, follows from the principle referred to earlier that treaty rights should only be considered to be modified if a clear intention to do so has been manifested, in this case, by the *NRTA*. Further, the solemn promises made in the treaty should be altered or modified as little as possible. The *NRTA* clearly intended to modify the right to hunt. It did so by eliminating the right to hunt commercially and by preserving and extending the right to hunt for food. The Treaty right thus modified pertains to the right to hunt for food which prior to the Treaty was an aboriginal right.

For reasons that I will amplify later, it seems logical and appropriate to apply the recently formulated *Sparrow* test in these circumstances. I would add that it can properly be inferred that the concept of reasonableness forms an integral part of the *Sparrow* test. It follows that this concept should be taken into account in the consideration of the justification of an infringement. As a general rule the criteria set out in *Sparrow, supra*, should be applied. However, the reasons in *Sparrow, supra*, make it clear that the suggested criteria are neither exclusive nor exhaustive. It follows that

des mesures autorisées de réglementation gouvernementale qui peuvent délimiter le droit existant de chasser pour se nourrir. Cependant, le fait que les dispositions en cause portent partiellement sur la conservation n'amène pas automatiquement à conclure que le par. 26(1) est une mesure de réglementation autorisée. Il reste encore à se demander si la manière dont le régime de délivrance de permis est administré entre en conflit avec le droit de chasse prévu au Traité n° 8 et modifié par la *Convention*.

Cette analyse doit tenir compte du libellé du Traité et de la *Convention*. C'est à mon avis ce qu'il convient de faire puisque l'objet de l'analyse sera d'abord de déterminer s'il y a eu atteinte *prima facie* au droit de chasser prévu par le Traité n° 8 et modifié par la *Convention*, puis, dans l'affirmative, si cette atteinte peut être justifiée. Essentiellement, nous sommes en présence d'un droit — issu de traité — qui a été modifié. Cette réponse découle à mon avis du principe mentionné précédemment et selon lequel il est possible de considérer que des droits issus de traités ont été modifiés seulement si l'intention de le faire est clairement indiquée, en l'occurrence par la *Convention*. Qui plus est, les promesses solennelles faites dans le traité doivent être modifiées le moins possible. La *Convention* visait manifestement à modifier le droit de chasser. Elle l'a fait en éliminant le droit de chasser à des fins commerciales et en préservant le droit de chasser pour se nourrir et en en élargissant la portée. Ce droit issu de traité ainsi modifié ressortit au droit de chasser pour se nourrir qui, avant le Traité, était un droit ancestral.

Pour des motifs que j'expliquerai plus loin, il semble logique et approprié d'appliquer, dans les circonstances, le critère formulé récemment dans l'arrêt *Sparrow*. J'ajouterais que l'on peut à juste titre inférer que le concept de caractère raisonnable fait partie intégrante du critère énoncé dans *Sparrow*. Il s'ensuit que ce concept doit être pris en considération dans l'examen de la question de la justification d'une atteinte. De façon générale, les critères énoncés dans *Sparrow, précité*, doivent être appliqués. Cependant, il ressort clairement des motifs exprimés dans cet arrêt que les critères y

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additional criteria may be helpful and applicable in the particular situation presented.

*Conflict Between the Wildlife Act and Rights Under Treaty No. 8*

74 It has been recognized that aboriginal and treaty rights are not absolute. The reasons in *Sparrow, supra*, made it clear that aboriginal rights may be overridden if the government is able to justify the infringement.

75 In *Sparrow, supra*, certain criteria were set out pertaining to justification at pp. 1111 and following. While that case dealt with the infringement of aboriginal rights, I am of the view that these criteria should, in most cases, apply equally to the infringement of treaty rights.

76 There is no doubt that aboriginal and treaty rights differ in both origin and structure. Aboriginal rights flow from the customs and traditions of the native peoples. To paraphrase the words of Judson J. in *Calder, supra*, at p. 328, they embody the right of native people to continue living as their forefathers lived. Treaty rights, on the other hand, 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.

77 This said, there are also significant aspects of similarity between aboriginal and treaty rights. Although treaty rights are the result of mutual agreement, they, like aboriginal rights, may be unilaterally abridged. See *Horseman, supra*, at p. 936; *R. v. Sikyea*, [1964] 2 C.C.C. 325 (N.W.T.C.A.), at p. 330, aff'd [1964] S.C.R. 642; and *Moosehunter*,

proposés ne sont ni exclusifs, ni exhaustifs. Il s'ensuit donc que d'autres critères peuvent être utiles et s'appliquer dans la situation en cause.

*Conflit entre la Wildlife Act et les droits découlant du Traité n° 8*

Il a été reconnu que les droits ancestraux ou issus de traités ne sont pas absolus. Il ressort clairement des motifs formulés dans *Sparrow*, précité, qu'il est possible de porter atteinte à des droits ancestraux si le gouvernement peut justifier cette atteinte.

Dans *Sparrow*, précité, certains critères concernant la justification ont été énoncés aux pp. 1111 et suivantes. Même s'il s'agissait d'une affaire portant sur une atteinte à des droits ancestraux, je suis d'avis que, dans la plupart des cas, ces critères s'appliquent également en cas d'atteinte à des droits issus de traités.

Il ne fait pas de doute que les droits ancestraux et les droits issus de traités diffèrent, tant de par leur origine que de par leur structure. Les droits ancestraux tirent leur origine des coutumes et des traditions des peuples autochtones. Pour paraphraser les propos du juge Judson dans l'arrêt *Calder*, précité, à la p. 328, ils expriment le droit des peuples autochtones de continuer à vivre de la même façon que leurs ancêtres. Par ailleurs, les droits issus de traités sont inscrits dans des ententes officielles entre la Couronne et les peuples autochtones. Les traités sont comme des contrats, si ce n'est qu'ils ont un caractère public, très solennel et particulier. Ils créent des obligations exécutoires, fondées sur le consentement mutuel des parties. Il s'ensuit que la portée des droits issus de traités est fonction de leur libellé, lequel doit être interprété conformément aux principes énoncés par notre Cour.

Cela dit, les droits ancestraux et les droits issus de traités présentent également d'importantes similitudes. Bien que les droits issus de traités soient le fruit d'un accord entre les parties, ils peuvent néanmoins, à l'instar des droits ancestraux, être réduits unilatéralement. Voir *Horseman*, précité, à la p. 936; *R. c. Sikyea*, [1964] 2 C.C.C. 325

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*supra*, at p. 293. It follows that limitations on treaty rights, like breaches of aboriginal rights, should be justified.

In addition, both aboriginal and treaty rights possess in common a unique, *sui generis* nature. See *Guerin v. The Queen*, [1984] 2 S.C.R. 335, at p. 382; *Simon, supra*, at p. 404. In each case, the honour of the Crown is engaged through its relationship with the native people. As Dickson C.J. and La Forest J. stated at p. 1110 in *Sparrow, supra*:

By giving aboriginal rights constitutional status and priority, Parliament and the provinces have sanctioned challenges to social and economic policy objectives embodied in legislation to the extent that aboriginal rights are affected. Implicit in this constitutional scheme is the obligation of the legislature to satisfy the test of justification. The way in which a legislative objective is to be attained must uphold the honour of the Crown and must be in keeping with the unique contemporary relationship, grounded in history and policy, between the Crown and Canada's aboriginal peoples. The extent of legislative or regulatory impact on an existing aboriginal right may be scrutinized so as to ensure recognition and affirmation. [Emphasis added.]

The wording of s. 35(1) of the *Constitution Act, 1982* supports a common approach to infringements of aboriginal and treaty rights. It provides that “[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed”. In *Sparrow, supra*, Dickson C.J. and La Forest J. appeared to acknowledge the need for justification in the treaty context. They said this at pp. 1118-19 in relation to *R. v. Elniew* (1984), 12 C.C.C. (3d) 365 (Sask. C.A.), a case which considered the effect of the *Migratory Birds Convention Act* on rights guaranteed under Treaty No. 10:

(C.A.T.N.-O.), à la p. 330, conf. par [1964] R.C.S. 642; et *Moosehunter*, précité, à la p. 293. Par conséquent, les limites imposées aux droits issus de traités doivent, tout comme les atteintes aux droits ancestraux, être justifiées.

En outre, les droits ancestraux et les droits issus de traités ont en commun un caractère *sui generis* particulier. Voir *Guerin c. La Reine*, [1984] 2 R.C.S. 335, à la p. 382; *Simon*, précité, à la p. 404. Dans chaque cas, l'honneur de la Couronne est en jeu dans le cadre de ses rapports avec les peuples autochtones. Comme l'ont affirmé le juge en chef Dickson et le juge La Forest dans l'arrêt *Sparrow*, précité, à la p. 1110:

En accordant aux droits ancestraux le statut et la priorité propres aux droits constitutionnels, le Parlement et les provinces ont sanctionné les contestations d'objectifs de principe socio-économiques énoncés dans des textes législatifs, dans la mesure où ceux-ci portent atteinte à des droits ancestraux. Ce régime constitutionnel comporte implicitement une obligation de la part du législateur de satisfaire au critère de la justification. La façon de réaliser un objectif législatif doit préserver l'honneur de Sa Majesté et doit être conforme aux rapports contemporains uniques, fondés sur l'histoire et les politiques, qui existent entre la Couronne et les peuples autochtones du Canada. La mesure dans laquelle une loi ou un règlement a un effet sur un droit ancestral existant doit être examinée soigneusement de manière à assurer la reconnaissance et la confirmation de ce droit. [Je souligne.]

Le texte du par. 35(1) de la *Loi constitutionnelle de 1982* appuie l'application d'une analyse commune aux atteintes à des droits ancestraux et à des droits issus de traités. En effet, cette disposition précise que «[l]es droits existants — ancestraux ou issus de traités — des peuples autochtones du Canada sont reconnus et confirmés». Dans *Sparrow*, précité, le juge en chef Dickson et le juge La Forest ont semblé reconnaître qu'il est nécessaire de justifier une atteinte lorsqu'un traité est en cause. Voici ce qu'ils ont écrit, aux pp. 1118 et 1119, relativement à l'arrêt *R. c. Elniew* (1984), 12 C.C.C. (3d) 365 (C.A. Sask.), dans lequel on avait examiné l'effet de la *Loi sur la convention concernant les oiseaux migrateurs* sur les droits garantis par le Traité n° 10:

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As we have pointed out, management and conservation of resources is indeed an important and valid legislative objective. Yet, the fact that the objective is of a "reasonable" nature cannot suffice as constitutional recognition and affirmation of aboriginal rights. Rather, the regulations enforced pursuant to a conservation or management objective may be scrutinized according to the justificatory standard outlined above. [Emphasis added.]

Comme nous l'avons déjà fait remarquer, la gestion et la conservation de ressources constituent vraiment un objectif législatif important et régulier. Pourtant, le fait que cet objectif soit «raisonnable» ne saurait suffire comme reconnaissance et confirmation constitutionnelles de droits ancestraux. Au contraire, les règlements appliqués conformément à un objectif de conservation ou de gestion peuvent être examinés selon la norme de justification énoncée plus haut. [Je souligne.]

80 This standard of scrutiny requires that the Crown demonstrate that the legislation in question advances important general public objectives in such a manner that it ought to prevail. In *R. v. Agawa* (1988), 65 O.R. (2d) 505 (C.A.), at p. 524, Blair J.A. recognized the need for a balanced approach to limitations on treaty rights, stating:

Cette norme d'examen requiert de la Couronne qu'elle démontre que le texte de loi en question vise d'importants objectifs publics d'ordre général, et ce d'une manière telle que ce texte doit prévaloir. Dans *R. c. Agawa* (1988), 65 O.R. (2d) 505 (C.A.), à la p. 524, le juge Blair reconnaît le besoin d'une approche équilibrée en matière de limitation des droits issus de traités:

... Indian treaty rights are like all other rights recognized by our legal system. The exercise of rights by an individual or group is limited by the rights of others. Rights do not exist in a vacuum and the exercise of any right involves a balancing with the interests and values involved in the rights of others. This is recognized in s. 1 of the *Canadian Charter of Rights and Freedoms* which provides that limitation of Charter rights must be justified as reasonable in a free and democratic society.

[TRADUCTION] ... les droits issus de traités des Indiens ne diffèrent pas de tous les autres droits reconnus par notre système juridique. L'exercice d'un droit par une personne ou un groupe est restreint par les droits d'autrui. Les droits n'existent pas dans l'abstrait et, dans l'exercice de tout droit, il faut trouver un juste équilibre avec les intérêts et les valeurs qui sous-tendent les droits d'autrui. Ce fait est reconnu à l'article premier de la *Charte canadienne des droits et libertés*, qui énonce que toute restriction des droits garantis par la *Charte* doit être justifiée comme étant raisonnable dans le cadre d'une société libre et démocratique.

81 Dickson C.J. and La Forest J. arrived at a similar conclusion in *Sparrow, supra*, at pp. 1108-9.

Le juge en chef Dickson et le juge La Forest sont arrivés à une conclusion analogue dans *Sparrow*, précité, aux pp. 1108 et 1109.

82 In summary, it is clear that a statute or regulation which constitutes a *prima facie* infringement of aboriginal rights must be justified. In my view, it is equally if not more important to justify *prima facie* infringements of treaty rights. The rights granted to Indians by treaties usually form an integral part of the consideration for the surrender of their lands. For example, it is clear that the maintenance of as much of their hunting rights as possible was of paramount concern to the Indians who signed Treaty No. 8. This was, in effect, an aboriginal right recognized in a somewhat limited form by the treaty and later modified by the *NRTA*. To

Bref, il est manifeste qu'une loi ou un règlement portant atteinte *prima facie* à des droits ancestraux doit être justifié. À mon avis, il est tout aussi important, sinon plus, de justifier les atteintes *prima facie* aux droits issus de traités. Les droits accordés aux Indiens dans les traités font habituellement partie intégrante de la contrepartie qui leur a été remise pour la cession de leurs terres. Par exemple, il est évident que le maintien, et ce dans la plus large mesure possible, de leurs droits de chasse, revêtait une importance primordiale pour les Indiens qui ont signé le Traité n° 8. Il s'agissait en effet d'un droit ancestral reconnu par le traité, dans une forme quelque peu limitée, et qui a ultérieurement été modifié par la *Convention*. Aux

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the Indians, it was an essential element of this solemn agreement.

It will be remembered that the *NRTA* modified the Treaty right to hunt. It did so by eliminating the right to hunt commercially but enlarged the geographical areas in which the Indian people might hunt in all seasons. The area was to include all unoccupied Crown land in the province together with any other lands to which the Indians may have a right of access. Lastly, the province was authorized to make laws for conservation. Specifically:

12. In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.

The *NRTA* only modifies the Treaty No. 8 right. Treaty No. 8 represents a solemn promise of the Crown. For the reasons set out earlier, it can only be modified or altered to the extent that the *NRTA* clearly intended to modify or alter those rights. The Federal government, as it was empowered to do, unilaterally enacted the *NRTA*. It is unlikely that it would proceed in that manner today. The manner in which the *NRTA* was unilaterally enacted strengthens the conclusion that the right to hunt which it provides should be construed in light of the provisions of Treaty No. 8.

It follows that any *prima facie* infringement of the rights guaranteed under Treaty No. 8 or the *NRTA* must be justified. How should the infringement of a treaty right be justified? Obviously, the challenged limitation must be considered within the context of the treaty itself. Yet, the recognized principles to be considered and applied in justifica-

yeux des Indiens, ce droit était un élément essentiel de cette entente solennelle.

Il faut se rappeler que la *Convention* a modifié le droit de chasser prévu par le Traité, d'une part en éliminant le droit de chasser à des fins commerciales, et d'autre part en élargissant le territoire sur lequel les Indiens pouvaient pratiquer la chasse en toute saison. Ce territoire incluait toutes les terres inoccupées de la Couronne dans la province de même que toutes les autres terres auxquelles les Indiens pouvaient avoir un droit d'accès. Enfin, la province était autorisée à légiférer en matière de conservation. Voici ce que disait spécifiquement le texte:

12. Pour assurer aux Indiens de la province la continuation de l'approvisionnement de gibier et de poisson destinés à leurs support et subsistance, le Canada consent à ce que les lois relatives au gibier et qui sont en vigueur de temps à autre dans la province, s'appliquent aux Indiens dans les limites de la province; toutefois, lesdits Indiens auront le droit que la province leur assure par les présentes de chasser et de prendre le gibier au piège et de pêcher le poisson, pour se nourrir en toute saison de l'année sur toutes les terres inoccupées de la Couronne et sur toutes les autres terres auxquelles lesdits Indiens peuvent avoir un droit d'accès.

La *Convention* modifie uniquement le droit prévu par le Traité n° 8. Ce Traité constate une promesse solennelle de la Couronne. Pour les motifs énoncés précédemment, il ne peut être modifié que dans la mesure où la *Convention* visait clairement à modifier les droits en cause. Conformément au pouvoir qu'il avait de le faire, le gouvernement fédéral a adopté unilatéralement la *Convention*. Il n'agirait vraisemblablement pas de la sorte aujourd'hui. L'adoption unilatérale de la *Convention* renforce la conclusion que le droit de chasse prévu par celle-ci doit être interprété à la lumière des dispositions du Traité n° 8.

Il s'ensuit que toute atteinte *prima facie* aux droits garantis par le Traité n° 8 ou la *Convention* doit être justifiée. Cela dit, comment justifier une atteinte à un droit issu de traité? De toute évidence, la limitation contestée doit être examinée dans le contexte du traité lui-même. Toutefois, les principes reconnus à cet égard et qui doivent être pris

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tion should generally be those set out in *Sparrow*, *supra*. There may well be other factors that should influence the result. The *Sparrow* decision itself recognized that it was not setting a complete catalogue of factors. Nevertheless, these factors may serve as a rough guide when considering the infringement of treaty rights.

Prima Facie Infringement of the Treaty Right to hunt as modified by the NRTA

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The licensing provisions of the *Wildlife Act* address two objectives: public safety and conservation. These objectives, in and of themselves, are not unconstitutional. However, it is evident from the wording of the Act and its regulations that the manner in which the licensing scheme is set up results in a *prima facie* infringement of the Treaty No.8 right to hunt as modified by the *NRTA*. The statutory scheme establishes a two-step licensing process. The public safety component is the first one that is engaged.

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Under s. 15(1)(c) of the *Wildlife Act*, the Lieutenant Governor in Council may pass regulations which "specify training and testing qualifications required for the obtaining and holding of a licence or permit". The regulations passed pursuant to this section are found in Alta. Reg. 50/87, s. 2(2) which reads as follows:

2 . . .

(2) Subject to the *General Wildlife (Ministerial) Regulation*, a person is not eligible to obtain or hold a recreational licence unless

(a) prior to the date of his application for a recreational licence, he has

- (i) achieved a mark, as determined by the Minister, on an examination approved by the Minister,
- (ii) held a licence authorizing recreational hunting in Alberta or elsewhere, or

en considération et appliqués dans l'examen de la justification devrait généralement être ceux qui ont été énoncés dans l'arrêt *Sparrow*, précité. Il peut fort bien exister d'autres facteurs susceptibles d'influer sur le résultat. D'ailleurs, dans l'arrêt *Sparrow* lui-même, notre Cour a reconnu qu'elle n'établissait pas une liste de facteurs exhaustive. Néanmoins, ces facteurs peuvent servir de point de départ dans l'analyse d'une atteinte à des droits issus de traités.

Atteinte *prima facie* au droit de chasse prévu par le Traité et modifié par la Convention

Les dispositions de la *Wildlife Act* concernant la délivrance de permis visent deux objectifs: la sécurité du public et la conservation. En eux-mêmes, ces objectifs ne sont pas inconstitutionnels. Toutefois, il ressort clairement de la Loi et de ses règlements d'application que la manière dont le régime de délivrance de permis est conçu entraîne une atteinte *prima facie* au droit de chasser prévu par le Traité n° 8 et modifié par la *Convention*. Le régime établi par la loi fixe une procédure à deux volets en vue de la délivrance des permis. Le volet concernant la sécurité du public est le premier examiné.

Aux termes de l'al. 15(1)(c) de la *Wildlife Act*, le lieutenant-gouverneur en conseil peut, par règlement, [TRADUCTION] «préciser les exigences applicables en matière de formation et d'examen pour obtenir et détenir un permis». Les dispositions réglementaires prises en application de cet alinéa figurent au par. 2(2) du règlement de l'Alberta 50/87, qui est ainsi rédigé:

[TRADUCTION] 2 . . .

(2) Sous réserve du *General Wildlife (Ministerial) Regulation*, seules sont autorisées à obtenir ou à détenir un permis de chasse sportive les personnes qui satisfont aux conditions suivantes:

a) avant la date de leur demande de permis de chasse sportive, elles ont:

- (i) soit obtenu la note de passage fixée par le ministre à l'examen qu'il a approuvé à cet égard,
- (ii) soit déjà détenu un tel permis en Alberta ou ailleurs,

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(iii) passed a test approved by the Minister respecting hunting competency,

and

(b) if his right to hold a recreational licence has been suspended in accordance with the Act or its predecessor, he has passed the examination referred to in clause (a)(i) subsequent to the beginning of his period of suspension.

Standing on its own, the requirement that all hunters take gun safety courses and pass hunting competency tests makes eminently good sense. This protects the safety of everyone who hunts, including Indians. It has been held on a number of occasions that aboriginal or treaty rights must be exercised with due concern for public safety. *Myran, supra*, dealt with two Indians charged with hunting without due regard for the safety of others, contrary to the provisions of the *Manitoba Wildlife Act*. The accused argued that they were immune from the Act on the basis of their right to hunt for food guaranteed under the *Manitoba Natural Resources Act* (parallel to the *NRTA*). Dickson J. (as he then was) for the Court found at pp. 141-42 that:

I think it is clear from *Prince and Myron* that an Indian of the Province is free to hunt or trap game in such numbers, at such times of the year, by such means or methods and with such contrivances, as he may wish, provided he is doing so in order to obtain food for his own use and on unoccupied Crown lands or other lands to which he may have a right of access. But that is not to say that he has the right to hunt dangerously and without regard for the safety of other persons in the vicinity. [Emphasis added.]

He went on at p. 142 to state that:

In my opinion there is no irreconcilable conflict or inconsistency in principle between the right to hunt for food assured under para. 13 of the Memorandum of Agreement approved under *The Manitoba Natural Resources Act* and the requirement of s. 10(1) of *The Wildlife Act* that such right be exercised in a manner so as not to endanger the lives of others. The first is concerned with conservation of game to secure a continuing supply of food for the Indians of the Province and pro-

(iii) ou réussi le test d'aptitude à chasser approuvé par le ministre;

et

b) si leur droit de détenir un permis de chasse sportive a été suspendu conformément à la Loi ou à celle qui s'appliquait à cet égard auparavant, elles ont réussi l'examen visé au sous-alinéa a)(i) après le début de la période de suspension.

Prise isolément, l'obligation qui est faite à tous les chasseurs de suivre des cours de sécurité dans le maniement des armes à feu et de réussir des tests d'aptitude est éminemment sensée. En effet, elle protège la sécurité de tous les chasseurs, y compris des Indiens. Il a d'ailleurs à maintes reprises été jugé que les droits ancestraux ou issus de traités doivent être exercés avec égard pour la sécurité d'autrui. Dans l'arrêt *Myran*, précité, il était question de deux Indiens accusés d'avoir chassé sans égard pour la sécurité d'autrui, contrairement aux dispositions de la *Manitoba Wildlife Act*. Les accusés ont plaidé qu'ils ne pouvaient faire l'objet de poursuites fondées sur cette loi compte tenu du droit de chasser pour se nourrir que leur garantissait la *Manitoba Natural Resources Act* (texte analogue à la *Convention*). Le juge Dickson (plus tard Juge en chef) a statué ainsi pour la Cour, à la p. 141:

L'arrêt *Prince et Myron* montre bien qu'un Indien est libre de chasser ou de piéger le gibier autant qu'il le désire, quand il le désire et par les moyens qu'il choisit à condition que ce soit pour se nourrir personnellement et sur des terres inoccupées de la Couronne ou auxquelles il a un droit d'accès. Toutefois, il n'a pas le droit de chasser dangereusement au mépris de la sécurité des gens du voisinage. [Je souligne.]

Il a ajouté ceci à la p. 142:

À mon avis, il n'y a, en principe, ni conflit ni contradiction entre le droit de chasser pour se nourrir, droit assuré par la cl. 13 de la *Convention approuvée par le Manitoba Natural Resources Act*, et la prescription de l'art. 10(1) du *Wildlife Act*, en vertu duquel l'exercice de ce droit ne doit pas mettre la vie d'autrui en danger. La première disposition vise la protection du gibier pour assurer aux Indiens de la province un approvisionnement continu en vivres et protéger leur droit de chasser

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tect the right of the Indians to hunt for food at all seasons of the year; the second is concerned with risk of death or serious injury omnipresent when hunters fail to have due regard for the presence of others in the vicinity. [Emphasis added.]

89 That decision was subsequently affirmed by this Court in *Sutherland*, *supra*, and *Moosehunter*, *supra*. See to the same effect *R. v. Napoleon*, [1986] 1 C.N.L.R. 86 (B.C.C.A.) and *R. v. Fox*, [1994] 3 C.N.L.R. 132 (Ont. C.A.). Accordingly, it can be seen that reasonable regulations aimed at ensuring safety do not infringe aboriginal or treaty rights to hunt for food. Similarly these regulations do not infringe the hunting rights guaranteed by Treaty No. 8 as modified by the *NRTA*.

90 While the general safety component of the licensing provisions may not constitute a *prima facie* infringement, the conservation component appears to present just such an infringement. Provincial regulations for conservation purposes are authorized pursuant to the provisions of the *NRTA*. However, the routine imposition upon Indians of the specific limitations that appear on the face of the hunting licence may not be permissible if they erode an important aspect of the Indian hunting rights. This Court has held on numerous occasions that there can be no limitation on the method, timing and extent of Indian hunting under a Treaty. I would add that a Treaty as amended by the *NRTA* should be considered in the same manner. *Horseman*, *supra*, clearly indicated that such restrictions conflicted with the treaty right. Moreover, in *Simon*, *supra*, this appears at p. 413:

The section clearly places seasonal limitations and licensing requirements, for the purposes of wildlife conservation, on the right to possess a rifle and ammunition for the purposes of hunting. The restrictions imposed in this case conflict, therefore, with the appellant's right to possess a firearm and ammunition in order to exercise his free liberty to hunt over the lands covered by the Treaty. As noted, it is clear that under s. 88 of the *Indian*

pour se nourrir en toute saison de l'année; la seconde concerne le risque omniprésent de mort ou de blessure grave qui existe lorsque des chasseurs ne tiennent pas compte de la présence d'autres personnes dans le voisinage. [Je souligne.]

Cette décision a par la suite été confirmée par notre Cour dans les arrêts *Sutherland*, précité, et *Moosehunter*, précité. Voir, au même effet, *R. c. Napoleon*, [1986] 1 C.N.L.R. 86 (C.A.C.-B.), et *R. c. Fox*, [1994] 3 C.N.L.R. 132 (C.A. Ont.). On peut donc constater qu'un règlement raisonnable, destiné à assurer la sécurité des individus, ne porte pas atteinte aux droits — ancestraux ou issus de traités — de chasser pour se nourrir. Il ne porte pas non plus atteinte aux droits de chasse garantis par le Traité n° 8 et modifiés par la *Convention*.

Bien que l'aspect des dispositions relatives à la délivrance des permis qui concerne la sécurité en général ne constitue peut-être pas une atteinte *prima facie*, l'aspect touchant la conservation paraît toutefois créer une telle atteinte. Il est permis aux provinces, aux termes de la *Convention*, de prendre des règlements visant des objectifs de conservation. Toutefois, il se peut qu'il ne soit pas permis d'appliquer systématiquement aux Indiens les restrictions spécifiques inscrites sur les permis de chasse, si une telle mesure affaiblit un aspect important des droits de chasse des Indiens. Notre Cour a statué, en de nombreuses occasions, qu'on ne peut limiter l'ampleur des activités de chasse exercées par les Indiens en vertu d'un traité, ni les méthodes qu'ils utilisent à cette fin ou les périodes durant lesquelles ils s'y adonnent. J'ajouterais qu'un traité modifié par la *Convention* doit être considéré de la même manière. Il a été clairement indiqué dans *Horseman*, précité, que de telles restrictions entraînent en conflit avec le droit issu de traité. De plus, dans *Simon*, précité, on peut lire ce qui suit à la p. 413:

L'article impose clairement, aux fins de la conservation de la faune, des restrictions saisonnières et des exigences en matière de permis sur le droit de posséder une carabine et des munitions pour chasser. Par conséquent, les restrictions imposées en l'espèce entrent en conflit avec le droit de l'appelant de posséder une arme à feu et des munitions afin d'exercer sa liberté de chasser sur les terres visées par le traité. Comme il a été mentionné, il

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Act provincial legislation cannot restrict native treaty rights. If conflict arises, the terms of the treaty prevail.

The *Simon* case dealt with Provincial regulations which the government attempted to justify under s. 88 of the *Indian Act*. By contrast, in this case, para. 12 of the *NRTA* specifically provides that the provincial government may make regulations for conservation purposes, which affect the Treaty rights to hunt. Accordingly, Provincial regulations pertaining to conservation will be valid so long as they are not clearly unreasonable in their application to aboriginal people.

Under the present licensing scheme, an Indian who has successfully passed the approved gun safety and hunting competency courses would not be able to exercise the right to hunt without being in breach of the conservation restrictions imposed with respect to the hunting method, the kind and numbers of game, the season and the permissible hunting area, all of which appear on the face of the licence. Moreover, while the Minister may determine how many licences will be made available and what class of licence these will be, no provisions currently exist for "hunting for food" licences.

At present, only sport and commercial hunting are licensed. It is true that the regulations do provide for a subsistence hunting licence. See *Alta. Reg. 50/87*, s. 25; *Alta. Reg. 95/87*, s. 7. However, its provisions are so minimal and so restricted that it could never be considered a licence to hunt for food as that term is used in Treaty No. 8 and as it is understood by the Indians. Accordingly, there is no provision for a licence which does not contain the facial restrictions set out earlier. Finally, there is no provision which would guarantee to Indians preferential access to the limited number of licences, nor is there a provision that would exempt them from the licence fee. As a result, Indians, like all other Albertans, would have to apply for a hunting licence from the same limited

est évident qu'en vertu de l'art. 88 de la *Loi sur les Indiens*, un texte législatif provincial ne peut limiter les droits autochtones issus d'un traité. S'il survient un conflit, les termes du traité prévalent.

L'arrêt *Simon* portait sur un règlement provincial que le gouvernement concerné a tenté de justifier en invoquant l'art. 88 de la *Loi sur les Indiens*. Or, en l'espèce, le par. 12 de la *Convention* prévoit spécifiquement que le gouvernement provincial peut, à des fins de conservation, prendre des règlements ayant une incidence sur les droits de chasse prévus par le Traité. Il s'ensuit que les règlements provinciaux en matière de conservation seront valides dans la mesure où leur application aux peuples autochtones n'est pas manifestement déraisonnable.

En vertu du régime actuel de délivrance des permis, l'Indien qui réussit les cours de sécurité dans le maniement des armes à feu ainsi que les tests d'aptitude à chasser approuvés ne serait pas en mesure d'exercer le droit de chasser sans violer les restrictions en matière de conservation inscrites sur le permis et qui sont imposées relativement aux méthodes de chasse, au type de gibier, au nombre de prises ainsi qu'aux périodes de chasse et aux zones où celle-ci est autorisée. Qui plus est, bien que le ministre puisse fixer le nombre et les catégories de permis qui seront disponibles, il n'existe à l'heure actuelle aucune disposition concernant la délivrance de permis de «chasse pour se nourrir».

Pour l'instant, des permis ne sont délivrés que pour la chasse sportive et la chasse commerciale. Il est vrai que des règlements pourvoient effectivement à la délivrance de permis de chasse à des fins de subsistance. Voir le règlement de l'Alberta 50/87, art. 25, et le règlement de l'Alberta 95/87, art. 7. Toutefois, les conditions de ces permis ont une portée si minime et sont assortis de tant de restrictions qu'ils ne pourraient jamais être considérés comme des permis autorisant leur titulaire à chasser pour se nourrir au sens du Traité n° 8 et au sens où l'entendent les Indiens. Il n'existe donc aucune disposition prévoyant la délivrance d'un permis dont le texte ne comporte aucune des restrictions énoncées précédemment. Enfin, il n'existe aucune disposition garantissant aux Indiens la préférence

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pool of licences. Further, if they were fortunate enough to be issued a licence, they would have to pay a licensing fee, effectively paying for the privilege of exercising a treaty right. This is clearly in conflict with both the Treaty and *NRTA* provisions.

au moment de la délivrance du nombre limité de permis disponibles, ni de dispositions les exemptant du paiement des droits de délivrance exigibles. En conséquence, les Indiens, au même titre que les autres Albertains, sont tenus de demander la délivrance d'un permis de chasse, parmi le nombre limité de permis disponibles pour l'ensemble des chasseurs. Qui plus est, à supposer qu'un Indien soit suffisamment chanceux pour obtenir un permis, il devrait néanmoins payer les droits de délivrance requis, se trouvant ainsi, dans les faits, à payer pour avoir le privilège d'exercer un droit issu de traité. Une telle situation est manifestement incompatible avec les dispositions du Traité et celles de la *Convention*.

94 The present licensing system denies to holders of treaty rights as modified by the *NRTA* the very means of exercising those rights. Limitations of this nature are in direct conflict with the treaty right. Therefore, it must be concluded that s. 26(1) of the *Wildlife Act* conflicts with the hunting right set out in Treaty No. 8 as modified by the *NRTA*.

Le régime actuel de délivrance de permis prive les personnes qui sont titulaires de droits issus de traité modifiés par la *Convention* des moyens mêmes d'exercer ces droits. Les restrictions de cette nature sont en contradiction directe avec le droit prévu au Traité. Il faut donc conclure que le par. 26(1) de la *Wildlife Act* est incompatible avec le droit de chasser prévu par le Traité n° 8 et modifié par la *Convention*.

95 Accordingly, it is my conclusion that the appellant, Mr. Ominayak, has established the existence of a *prima facie* breach of his treaty right. It now falls to the government to justify that infringement.

Par conséquent, je conclus que l'appelant, M. Ominayak, a établi l'existence d'une atteinte *prima facie* à son droit issu de traité. Il incombe maintenant au gouvernement de justifier cette atteinte.

Justification

Justification

96 In my view justification of provincial regulations enacted pursuant to the *NRTA* should meet the same test for justification of treaty rights that was set out in *Sparrow*. The reason for this is obvious. The effect of para. 12 of the *NRTA* is to place the Provincial government in exactly the same position which the Federal Crown formerly occupied. Thus the Provincial government has the same duty not to infringe unjustifiably the hunting right provided by Treaty No. 8 as modified by the *NRTA*. Paragraph 12 of the *NRTA* provides that the province may make laws for a conservation purpose, subject to the Indian right to hunt and fish for food. Accordingly, there is a need for a means to assess which conservation laws will if they infringe that right, nevertheless be justifiable. The

À mon avis, un règlement provincial pris conformément à la *Convention* doit satisfaire, à l'égard des droits issus de traité, le même critère de justification que celui énoncé dans *Sparrow*. La raison en est évidente. Comme le par. 12 de la *Convention* a pour effet de placer le gouvernement provincial exactement dans la situation où se trouvait la Couronne fédérale auparavant, le gouvernement provincial a la même obligation de ne pas porter atteinte de manière injustifiée au droit de chasse prévu par le Traité n° 8 et modifié par la *Convention*. Le paragraphe 12 de la *Convention* prévoit que la province peut légiférer à des fins de conservation, sous réserve du droit des Indiens de chasser et de pêcher pour se nourrir. En conséquence, il est nécessaire de disposer de moyens de

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*Sparrow* analysis provides a reasonable, flexible and current method of assessing conservation regulations and enactments.

In *Sparrow*, at p. 1113, it was held that in considering whether an infringement of aboriginal or treaty rights could be justified, the following questions should be addressed sequentially:

First, is there a valid legislative objective? Here the court would inquire into whether the objective of Parliament in authorizing the department to enact regulations regarding fisheries is valid. The objective of the department in setting out the particular regulations would also be scrutinized. [Emphasis added.]

At page 1114, the next step was set out in this way:

If a valid legislative objective is found, the analysis proceeds to the second part of the justification issue. Here, we refer back to the guiding interpretive principle derived from *Taylor and Williams* and *Guerin*, *supra*. That is, the honour of the Crown is at stake in dealings with aboriginal peoples. The special trust relationship and the responsibility of the government vis-à-vis aboriginals must be the first consideration in determining whether the legislation or action in question can be justified. [Emphasis added.]

Finally, at p. 1119, it was noted that further questions might also arise depending on the circumstances of the inquiry:

These include the questions of whether there has been as little infringement as possible in order to effect 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. The aboriginal peoples, with their history of conservation-consciousness and interdependence with natural resources, would surely be expected, at the least, to be informed regarding the determination of an appropriate scheme for the regulation of the fisheries.

We would not wish to set out an exhaustive list of the factors to be considered in the assessment of justifica-

déterminer si une loi en matière de conservation qui porte atteinte à ce droit est néanmoins justifiable. L'analyse formulée dans l'arrêt *Sparrow* constitue une méthode raisonnable, souple et admise d'évaluation des lois et règlements relatifs à la conservation.

Dans l'arrêt *Sparrow*, il a été jugé, à la p. 1113, que pour déterminer s'il est possible de justifier une atteinte à des droits ancestraux ou issus de traités il faut se poser les questions suivantes, dans l'ordre indiqué:

En premier lieu, il faut se demander s'il existe un objectif législatif régulier. À ce stade, la cour se demanderait si l'objectif visé par le Parlement en autorisant le ministre à adopter des règlements en matière de pêche est régulier. Serait également examiné l'objectif poursuivi par le ministre en adoptant le règlement en cause. [Je souligne.]

À la page 1114, l'étape suivante a été décrite ainsi:

Si on conclut à l'existence d'un objectif législatif régulier, on passe au second volet de la question de la justification. Ici, nous nous référons au principe directeur d'interprétation qui découle des arrêts *Taylor and Williams* et *Guerin*, précités. C'est-à-dire, l'honneur de Sa Majesté est en jeu lorsqu'Elle transige avec les peuples autochtones. Les rapports spéciaux de fiduciaire et la responsabilité du gouvernement envers les autochtones doivent être le premier facteur à examiner en déterminant si la mesure législative ou l'action en cause est justifiable. [Je souligne.]

Enfin, à la p. 1119, on a signalé que d'autres questions peuvent également se soulever, selon les circonstances de l'enquête:

Il s'agit notamment des questions de savoir si, en tentant d'obtenir le résultat souhaité, on a porté le moins possible atteinte à des droits, si une juste indemnisation est prévue en cas d'expropriation et si le groupe d'autochtones en question a été consulté au sujet des mesures de conservation mises en œuvre. On s'attendrait certainement à ce que les peuples autochtones, traditionnellement sensibilisés à la conservation et ayant toujours vécu dans des rapports d'interdépendance avec les ressources naturelles, soient au moins informés relativement à la conception d'un régime approprié de réglementation de la pêche.

Nous ne nous proposons pas de présenter une énumération exhaustive des facteurs à considérer dans l'appré-

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tion. Suffice it to say that recognition and affirmation requires sensitivity to and respect for the rights of aboriginal peoples on behalf of the government, courts and indeed all Canadians. [Emphasis added.]

98 In the present case, the government has not led any evidence with respect to justification. In the absence of such evidence, it is not open to this Court to supply its own justification. Section 26(1) of the *Wildlife Act* constitutes a *prima facie* infringement of the appellant Mr. Ominayak's treaty right to hunt. Yet, the issue of conservation is of such importance that a new trial must be ordered so that the question of justification may be addressed.

Conclusion

99 The constitutional question posed before this Court was:

If Treaty 8 confirmed to the Indians of the Treaty 8 Territory the right to hunt throughout the tract surrendered, does the right continue to exist or was it extinguished and replaced by para. 12 of the *Natural Resources Transfer Agreement, 1930 (Constitution Act, 1930, 20-21 George V, c. 26 (U.K.))*, and if the right continues to exist, could that right be exercised on the lands in question and, if so, was the right impermissibly infringed upon by s. 26(1) or s. 27(1) of the *Wildlife Act*, S.A. 1984, c. W-9.1, given Treaty 8 and s. 35(1) of the *Constitution Act, 1982*?

100 It is evident from these reasons that the constitutional question should be answered as follows. The hunting rights confirmed by Treaty No. 8 were modified by para. 12 of the *NRTA* to the extent indicated in these reasons. Paragraph 12 of the *NRTA* provided for a continuing right to hunt for food on unoccupied land.

101 Mr. Badger and Mr. Kiyawasew were hunting on occupied land to which they had no right of access under Treaty No. 8 or the *NRTA*. Accordingly, ss. 26(1) and 27(1) of the *Wildlife Act* do not infringe their constitutional right to hunt for food.

ciation de la justification. Qu'il suffise de souligner que la reconnaissance et la confirmation exigent que le gouvernement, les tribunaux et même l'ensemble des Canadiens soient conscients des droits des peuples autochtones et qu'ils les respectent. [Je souligne.]

En l'espèce, le gouvernement n'a pas présenté de preuve relativement à la justification. En l'absence d'une telle preuve, il n'est pas loisible à notre Cour de fournir sa propre justification. Le paragraphe 26(1) de la *Wildlife Act* constitue une atteinte *prima facie* au droit de chasse issu de traité que possède l'appelant, M. Ominayak. Cela dit, la question de la conservation est d'une telle importance qu'il faut ordonner la tenue d'un nouveau procès afin de permettre l'examen de la question de la justification.

Conclusion

La question constitutionnelle qui était posée à notre Cour était la suivante:

Si le Traité n° 8 confirmait aux Indiens du territoire de ce traité le droit de chasser dans l'ensemble de la zone cédée, le droit existe-t-il toujours ou a-t-il été éteint et remplacé par le par. 12 de la *Convention sur le transfert des ressources naturelles de 1930 (Loi constitutionnelle de 1930, 20-21 George V, ch. 26 (R.-U.))* et, si le droit existe toujours, pouvait-il être exercé sur les terres en question. Dans l'affirmative, les par. 26(1) ou 27(1) de la *Wildlife Act*, S.A. 1984, ch. W-9.1, portent-ils atteinte à ce droit, compte tenu du Traité n° 8 et du par. 35(1) de la *Loi constitutionnelle de 1982*?

Il ressort clairement des motifs qui précèdent que la question constitutionnelle devrait recevoir la réponse suivante. Les droits de chasse confirmés par le Traité n° 8 ont, dans la mesure indiquée dans les présents motifs été modifiés par le par. 12 de la *Convention*. Le paragraphe 12 de la *Convention* a établi un droit constant de chasser sur des terres inoccupées pour se nourrir.

Monsieur Badger et M. Kiyawasew chassaient sur des terres occupées auxquelles ils n'avaient aucun droit d'accès en vertu du Traité n° 8 ou de la *Convention*. Par conséquent, les par. 26(1) et 27(1) de la *Wildlife Act* ne portent pas atteinte à leur droit constitutionnel de chasser pour se nourrir.

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However, Mr. Ominayak was exercising his constitutional right on land which was unoccupied for the purposes of this case. Section 26(1) of the *Wildlife Act* constitutes a *prima facie* infringement of his Treaty right to hunt for food. As a result of their conclusions, the issue of justification was not considered by the courts below. Therefore, in his case, a new trial must be ordered so that the issue of justification may be addressed.

Disposition

The appeals of Mr. Badger and Mr. Kiyawasew are dismissed.

The appeal of Mr. Ominayak is allowed and a new trial directed so that the issue of the justification of the infringement created by s. 26(1) of the *Wildlife Act* and any regulations passed pursuant to that section may be addressed.

*Appeals of Wayne Clarence Badger and Leroy Steven Kiyawasew dismissed; appeal of Ernest Clarence Ominayak allowed and a new trial directed.*

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*Solicitor for the respondent: The Attorney General for Alberta, Edmonton.*

*Solicitor for the intervener the Attorney General of Canada: The Attorney General of Canada, Ottawa.*

*Solicitor for the intervener the Attorney General of Manitoba: The Attorney General of Manitoba, Winnipeg.*

*Solicitor for the intervener the Attorney General for Saskatchewan: The Attorney General for Saskatchewan, Regina.*

*Solicitors for the intervener the Federation of Saskatchewan Indian Nations: Wardell, Worme, Piché & Missens, Saskatoon.*

Cependant, M. Ominayak exerçait son droit constitutionnel sur des terres qui étaient inoccupées pour les fins de l'espèce. Le paragraphe 26(1) de la *Wildlife Act* constitue une atteinte *prima facie* à son droit — issu du Traité — de chasser pour se nourrir. En raison de leurs conclusions, les juridictions inférieures n'ont pas examiné la question de la justification. Par conséquent, dans le cas de M. Ominayak, un nouveau procès doit être ordonné afin de permettre l'examen de cette question.

Dispositif

Les pourvois de MM. Badger et Kiyawasew sont rejetés.

Le pourvoi de M. Ominayak est accueilli et un nouveau procès est ordonné afin que soit examinée la question de la justification de l'atteinte créée par le par. 26(1) de la *Wildlife Act* et les règlements pris en application de cette disposition.

*Les pourvois de Wayne Clarence Badger et de Leroy Steven Kiyawasew sont rejetés; le pourvoi d'Ernest Clarence Ominayak est accueilli et un nouveau procès est ordonné.*

*Procureurs des appelants: Mandamin & Associates, Calgary.*

*Procureur de l'intimée: Le procureur général de l'Alberta, Edmonton.*

*Procureur de l'intervenant le procureur général du Canada: Le procureur général du Canada, Ottawa.*

*Procureur de l'intervenant le procureur général du Manitoba: Le procureur général du Manitoba, Winnipeg.*

*Procureur de l'intervenant le procureur général de la Saskatchewan: Le procureur général de la Saskatchewan, Regina.*

*Procureurs de l'intervenante la Federation of Saskatchewan Indian Nations: Wardell, Worme, Piché & Missens, Saskatoon.*

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*Solicitors for the intervener the Treaty 7 Tribal Council: Walsh, Wilkins, Calgary.*

*Solicitors for the intervener the Confederacy of Treaty Six First Nations: Molstad, Gilbert, Edmonton.*

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