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23 July 2009

Ms. Erica M. Hamilton
Commission Secretary
British Columbia Utilities Commission
Sixth Floor – 900 Howe Street
Vancouver, BC V6Z 2N3

Dear Ms. Hamilton:

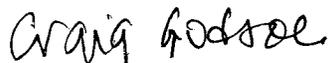
Re: Project No. 3698545
British Columbia Utilities Commission (BCUC)
British Columbia Hydro and Power Authority (BC Hydro)
BCUC Inquiry into British Columbia's Long-Term Transmission
Infrastructure

Written Submissions of BC Hydro

Pursuant to the BCUC's letter of 30 June 2009 (Exhibit A-16), BC Hydro attaches its Written Submissions.

If there are any questions regarding the attached, please contact the undersigned.

Yours truly,



Craig Godsoe
Solicitor and Counsel

c. BCUC Project No. 3698545 Registered Participant Distribution List.

BC HYDRO

**2008 LONG-TERM ELECTRICITY TRANSMISSION
INFRASTRUCTURE INQUIRY**

WRITTEN SUBMISSIONS

STATUTORY INSTRUMENTS

AND

BOOK OF AUTHORITIES

23 July 2009

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1 **Written Submissions on the Role of BC Hydro and the Commission Inquiry Panel in**
 2 **Respect of the Duty to Consult**

3 **Part 1 Introduction and Overview of Written Submissions**

4 British Columbia Hydro and Power Authority (**BC Hydro**) files these written submissions with
 5 the British Columbia Utilities Commission (**Commission**) pursuant to the Commission Inquiry
 6 Panel's (**Panel**) letter of 30 June 2009.¹ The Panel asked participants in the British Columbia
 7 Long-Term Transmission Infrastructure Inquiry (**Section 5 Inquiry**) proceeding to address two
 8 questions. In summary, BC Hydro responds to the two questions posed by the Panel as follows:

9 **1. What, if any, is the duty to consult with First Nations and accommodate with**
 10 **respect to determinations of the Section 5 Inquiry?**

11 BC Hydro submits that the Crown's duty to consult is likely triggered as a result of the nature of
 12 some of the determinations to be made by the Commission pursuant to section 5 of the *Utilities*
 13 *Commission Act*² (**UCA**) and the Terms of Reference (**ToR**).³ Given the nature of the Section 5
 14 Inquiry and the nature of the Commission determinations presently anticipated, BC Hydro
 15 submits that, for most if not all of the determinations that likely trigger the duty to consult, the
 16 scope and content of the duty to consult is at the low end of the spectrum. Refer to Part 2 of
 17 these written submissions for further details.

18 **2. If there is a duty to consult, how would that duty be fulfilled and how can it best be**
 19 **fulfilled such that the Panel can also fulfil its legal requirements to hold an inquiry and**
 20 **complete its draft report by 30 June 2010?**

21 In response to the second question, BC Hydro submits that, even in circumstances where the
 22 duty is triggered, the Panel is a quasi-judicial body and does not have an independent duty to
 23 consult in the "traditional" sense of direct, bilateral engagement with First Nations (in the
 24 absence of other intervenors or parties). Rather, it is the entirety of the Section 5 Inquiry
 25 consultation and regulatory process, viewed as a whole, that can be employed to fulfil any duty
 26 to consult that may arise from the Section 5 Inquiry. The consultation and regulatory process

¹ Exhibit A-16.

² R.S.B.C. 1996, c.473; a copy of the *UCA* is found at **Tab 1** of the BC Hydro Book of Authorities.

³ A copy of the *ToR* is found at **Tab 2** of the BC Hydro Book of Authorities.

1 combines (1) the BC Hydro parallel First Nations consultation process and (2) the Commission's
2 regulatory process. It is these two elements, in combination, that can maintain the honour of the
3 Crown and provide meaningful consultation appropriate to the circumstances. Refer to Part 3 of
4 these written submissions for further details.

5 **Part 2** **Panel Question 1: What, if any, is the duty to consult with First Nations and**
6 **accommodate with respect to determinations of the Section 5 Inquiry?**

7 BC Hydro submits that there is no bright line identifying where the duty to consult arises in the
8 process of planning for, selecting, obtaining approval of or committing to a particular action or
9 project. The Supreme Court of Canada (SCC) determined that the Crown's legal "duty to
10 consult" with First Nations arises when the Crown (1) has knowledge, real or constructive, of the
11 potential existence of the Aboriginal right or title and (2) contemplates conduct that has the
12 potential to adversely affect it: *Haida Nation v. British Columbia (Minister of Forests)*⁴ (*Haida*).
13 Consultation may also be required if the Crown contemplates conduct that might adversely
14 affect a treaty right: *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*.⁵

15 The question to be addressed is whether the determinations the Commission is called on to
16 make in the Section 5 Inquiry have the potential to adversely affect (asserted or established)
17 Aboriginal rights or title. In addressing this question, the remainder of Part 2 examines the
18 nature of the Section 5 Inquiry and the determinations to be made by the Commission (section
19 2.1), whether the duty to consult is triggered by such determinations (Section 2.2) and, if
20 triggered, the scope of the duty to consult (section 2.3).

⁴ [2004] 3 S.C.R. 511, paragraph 35; copy at **Tab 4** of the BC Hydro Book of Authorities.

⁵ *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69; copy at **Tab 5** of the BC Hydro Book of Authorities.

1 **2.1 The Nature of the Section 5 Inquiry**

2 The Section 5 Inquiry was established under a new provision of the *UCA* enacted on 1 May
 3 2008.⁶ The Section 5 Inquiry is to be conducted under the ToR issued by the British Columbia
 4 (B.C.) Minister of Energy, Mines and Petroleum Resources (**Minister**) on 11 December 2008.
 5 The ToR is legally binding on the Commission pursuant to subsection 5(6) of the *UCA*.

6 Pursuant to section 5 of the *UCA*

7 5(4) The commission ... must conduct an inquiry to make **determinations** with
 8 respect to British Columbia's infrastructure and capacity needs for electricity
 9 transmission for the period ending 20 years after the day the inquiry begins ...
 10 [Emphasis added].

11 The Commission has not previously been called on to make "determinations" under section 5 of
 12 the *UCA*. Prior to the 1 May 2008 amendments, the Commission's role under section 5 was
 13 limited to providing "advice" to the B.C. Government; see, for example, subsection 5(1) of the
 14 *UCA*.

15 **2.1.1 Definition of "Determination"**

16 BC Hydro submits that a "determination" under section 5 of the *UCA* is equivalent to a final
 17 decision by the Commission.

18 There is no definition of the term "determination" in the *UCA*. However, section 1 of the
 19 *Administrative Tribunals Act*⁷ (**ATA**) defines the term "decision" to include "a determination".
 20 (Section 1 of the *ATA*, together with certain other *ATA* provisions described below in section 3.1
 21 of these written submissions, applies to the Commission pursuant to subsection 2(4) of the
 22 *UCA*). This definition in the *ATA* equates a "determination" (as in section 5 of the *UCA*) with a
 23 final decision. Dictionary definitions similarly suggest that a "determination" (without further

⁶ *Utilities Commission Amendment Act, 2008*, S.B.C. 2008, c.13, in force by Royal Assent on 1 May 2008.

⁷ S.B.C. 2004, c. 45; copy at **Tab 3** of the BC Hydro Book of Authorities. Administrative tribunals are established by legislation, with each tribunal governed by its own specific statute, referred to as the tribunals' "enabling legislation", which in the case of the Commission is the *UCA*. However, certain provisions of the *ATA* also apply to the Commission. The purpose of the *ATA* is to provide procedures for fair, efficient and publicly accountable tribunal processes.

1 qualification) is a “final decision by a court or administrative agency”; See, for example, *Black’s*
 2 *Law Dictionary*.⁸

3 The language in section 79 of the *UCA* may suggest that there is a distinction between: (1) a
 4 determination in the nature of a final decision; and (2) a “determination ... on a question of fact”.
 5 Section 79 of the *UCA* provides:

6 s.79 The **determination** of the commission **on a question of fact** in its
 7 jurisdiction ... is binding and conclusive on all persons and all courts. [Emphasis
 8 added].

9 Certain sections of the *UCA* appear to use determination as meaning either a determination on
 10 a question of fact or the formulation of an opinion as distinct from a final decision (such as an
 11 “order”). See, for example, sections 25 (“Commission may set standards”), 30 (“Commission
 12 may order extension of existing service”); and subsections 71(1)(b), 71(2) and 71(3) (“Energy
 13 supply contracts”). However, other sections of the *UCA* use determination more in the sense of
 14 a final decision. See, for example, subsections 4(11) (“Sittings and divisions”) and 72(1)
 15 (“Jurisdiction of commission to deal with applications”).

16 Subsections 5(7) and (8), read in conjunction with section 75 of the *UCA*, equate a subsection
 17 5(4) determination with a decision under section 75:

18 5(8) Despite section 75, if a regulation is made for the purposes of subsection (7)
 19 of this section with respect to a determination, the commission is bound by that
 20 **determination** in any hearing or proceeding held during the period specified in
 21 the regulation. [Emphasis added].

22 75 The commission must make its **decision** on the merits and justice of the
 23 case, and is not bound to follow its own **decisions**. [Emphasis added].

24 In BC Hydro’s submission, subsection 5(4) of the *UCA* uses “determination” as signifying a final
 25 decision.

⁸ (8th ed.; St. Paul, Minn.: West Publishing Co., 2004); copy at **Tab 17** of the BC Hydro Book of Authorities.

1 **2.1.2 Determination(s) of Need**

2 The ToR reinforces this interpretation. Paragraph 2 of the ToR states:

3 2. The general purpose of this inquiry is for the Commission to make
4 **determinations** with respect to British Columbia's electricity transmission
5 infrastructure and capacity needs for a 30-year period, commencing from the
6 date this inquiry begins [Emphasis added].

7 Paragraph 4(b) of the ToR provides that the Commission is to make determinations respecting
8 the need for and timing of additional transmission infrastructure that would allow for the supply
9 and delivery of electricity and improved electricity transmission intertie capacity between B.C.
10 and the United States or Alberta.

11 Clearly, the Section 5 Inquiry will contemplate the need for transmission facilities. As counsel for
12 British Columbia Transmission Corporation (BCTC) stated at the Second Procedural
13 Conference of 24 June 2009, "[t]he determinations of need will obviously be used and relied on
14 in future project definition phases".⁹

15 In BC Hydro's submission, the potential Commission determination(s) concerning the need for
16 and timing of transmission infrastructure should be thought of as a potential substitute for the
17 first phase of a Certificate of Public Convenience and Necessity (CPCN) application or of
18 BCTC's Capital Plan process.¹⁰ Normally, under sections 45 and 46 of the *UCA*, the
19 Commission has a statutory obligation to examine the "need" for any proposed transmission line
20 during the CPCN application process. The Commission's *Certificate of Public Convenience and*
21 *Necessity Application Guidelines*¹¹ provide at paragraph 3 that an applicant is to demonstrate
22 "project justification", including "studies or summary statements identifying the need for the
23 project ...".

⁹ Transcript, Volume 2, page 126, lines 9-11.

¹⁰ In BC Hydro's view, determinations made as part of the Section 5 Inquiry will not be a substitute for other, existing planning processes. Paragraph 7 of the ToR provides that, in making determinations, the Commission must have regard for: "(a) the load-serving utilities' long-term resource plan filed under section 44.1 of the [*UCA*], including their most recently filed and relevant contingency resource plans as accepted by the Commission; (b) any long-term plans of the transmission providers filed and reviewed under section 44.1 of the [*UCA*], and any expenditure schedules of the transmission service providers filed under section 44.2 of the [*UCA*], and any decisions with respect to these plans issued by the Commission in the course of this inquiry ...".

¹¹ Letter No. L-18-04, dated March 2004; copy at **Tab 18** of the BC Hydro Book of Authorities.

1 **2.2 Is the Duty to Consult Triggered?**

2 It is clear from section 5 of the *UCA* and the ToR, and in particular paragraph 4, that the Section
 3 5 Inquiry is a strategic planning exercise designed to determine the need for additional
 4 transmission infrastructure in B.C. Subsection 5(9) of the *UCA* makes it clear that
 5 determinations made as part of the Section 5 Inquiry will not be a substitute for a CPCN (or
 6 other relevant applications); subsection 5(9) provides that the Commission “may order a public
 7 utility to submit an application under section 46” for a CPCN. Paragraph 4(b) of the ToR
 8 provides that the Commission may not:

9 make determinations with respect to the specific routing or technological
 10 specifications of electricity transmission projects.

11 The preamble to the ToR confirms that:

12 ... following the determinations made in the inquiry, applications for Certificates
 13 of Public Convenience and Necessity or other regulatory filings to be filed with
 14 the Commission under the *Act*, will be brought forward to pursue specific
 15 transmission projects

16 Thus section 5 of the *UCA* and the ToR confirm that a subsequent CPCN application is required
 17 with respect to route selection, among other things.

18 The Section 5 Inquiry determinations may be diffuse, while a small number may be made for a
 19 predetermined geographic region. For example, pursuant to paragraph 6(b)(viii) of the ToR, the
 20 Commission “must ... recognize and take into account” the fact that the B.C. Government “has
 21 committed to transmission capacity north of Skeena substation extending at least to Bob Quinn
 22 Lake” (commonly referred to as the “Northwest Transmission Line”).¹²

23 This type of strategic planning has an important difference from the type of strategic planning
 24 under consideration in *Haida*. In *Haida*, the Supreme Court described the process by which a
 25 Tree Farm Licence (T.F.L.) is issued at paragraph 75:

¹² The First Nations consultation process and the environmental assessment process are already underway with respect to the Northwest Transmission Line. Initial contact was made with First Nations in February 2009. A Project Description was filed with the B.C. Environmental Assessment Office (commencing the pre-Application phase) on 31 May 2007. A Draft Terms of Reference was released 16 March 2009. See: http://a100.gov.bc.ca/appsdata/epic/html/deploy/epic_project_home_299.html.

1 75 The next question is when does the duty to consult arise? Does it arise at
2 the stage of granting a Tree Farm Licence, or only at the stage of granting cutting
3 permits? The T.F.L. replacement does not itself authorize timber harvesting,
4 which occurs only pursuant to cutting permits. T.F.L. replacements occur
5 periodically, and a particular T.F.L. replacement decision may not result in the
6 substance of the asserted right being destroyed. The Province argues that,
7 although it did not consult the Haida prior to replacing the T.F.L., it “has
8 consulted, and continues to consult with the Haida prior to authorizing any cutting
9 permits or other operational plans” (Crown’s factum, at ¶ 64).

10 The Court rejected the Province’s argument described in this paragraph and concluded that
11 because the T.F.L. identified the specific overall area from which an annual allowable cut could
12 be taken, it had an adverse effect on First Nations asserting a claim to that area.

13 Determinations made as part of this Inquiry may be quite different from the T.F.L. decision in
14 *Haida*. The Commission’s determinations may be so diffuse and “high level” that it will be
15 challenging to identify which, if any, specific First Nations or aboriginal rights may be affected by
16 the determination. For example, to the extent that the need for and timing of transmission
17 infrastructure are contemplated in a general way such that it is not possible to identify with any
18 particularity the geographic area (i.e. which First Nations’ traditional territory) in which the
19 facilities may ultimately fall, the Crown’s duty to consult may not be triggered. In contrast, to the
20 extent that determinations are contemplated or made in respect of potential facilities that would
21 fall within a predetermined geographical region (such that it is possible to identify which First
22 Nations’ traditional territories the facilities would be located in), the section 5 determinations
23 begin to more closely resemble the strategic planning at issue in *Haida*.¹³

24 In considering whether the duty to consult is triggered (and, if triggered, the scope and content
25 of consultation), the Panel is responsible for considering only what is necessary up to the point
26 of the Panel’s decision. The Panel should not be influenced by the power the Minister has under
27 subsection 5(7) of the *UCA* to issue a regulation declaring that the Commission may not, during
28 the period specified in the regulation, reconsider, vary or rescind a determination made under
29 subsection 5(4) of the *UCA*. The subsequent decision of the Minister is not within the purview of
30 the Commission, but the Minister. As stated in the letter filed as Exhibit B2-4:

¹³ Although even in these circumstances, the analogy is not complete (as discussed further in section 2.3 on the scope of consultation).

1 The Minister will consider whether First Nations interests and concerns related to
2 the transmission inquiry and the potential impacts of the BCUC's determination
3 will require further consultation before making a decision to order a regulation
4 under Section 5(7) of the UC Act. The MEMPR is not requesting BC Hydro to
5 undertake consultation on the impact of the BCUC's determination at this time.
6 However, I request BC Hydro undertake these consultations should they be
7 required for the purposes of any decision the Minister may make regarding a
8 regulation.

9 In summary, BC Hydro submits that the Crown's duty to consult is likely triggered as a result of
10 the nature of some of the determinations to be made by the Commission. In particular, the
11 Commission's determinations on need in the context of the Section 5 Inquiry (especially when
12 made for a predetermined geographic region) may provide the necessary justification for future
13 projects and as such, trigger the Crown's duty to consult with First Nations. We emphasize that
14 the fact that there may be no clear legal duty to consult in respect of some Section 5
15 determinations does not mean that no consultation will or ought to take place. Indeed (as
16 discussed further below in Part 3), first, BC Hydro is committed to undertaking a broad
17 consultation process with First Nations and, second, the Section 5 Inquiry regulatory process
18 itself will provide significant and meaningful opportunities for First Nations to obtain, elicit or
19 present information, bring forward concerns directly to the Panel and have those concerns be
20 given full, fair and serious consideration.

21 **2.3 The Scope of Consultation**

22 Given the nature of the Section 5 Inquiry and the nature of the Commission determinations
23 presently anticipated, BC Hydro submits that, for most if not all of the determinations that may
24 trigger the duty to consult, the scope and content of the duty to consult is at the low end of the
25 spectrum.

26 The scope and content of the duty is determined on a spectrum and will be "proportionate to a
27 preliminary assessment of the strength of the case supporting the existence of the right or title,
28 and to the seriousness of the potentially adverse effect upon the right or title claimed."¹⁴ A weak
29 claim and minimal potential infringement or adverse effect may only require a consultation
30 process involving notification of the proposed Crown action or decision, disclosure of any

¹⁴ *Haida, supra*, note 4 at paragraph 39ff.

1 relevant information and the opportunity for the Aboriginal group to discuss any issues arising in
2 response to the notification.

3 ...the honour of the Crown requires that the Crown act with good faith to provide
4 meaningful consultation **appropriate to the circumstances**. In discharging this
5 duty, regard may be had to the procedural safeguards of natural justice
6 mandated by administrative law. (*Haida*, paragraph 41). [Emphasis added].

7 In addition, the SCC indicated that each case must be approached in a flexible manner:

8 Every case must be approached individually. Each must also be approached
9 flexibly, since the level of consultation required may change as the process goes
10 on and new information comes to light. The controlling question in all situations is
11 what is required to maintain the honour of the Crown and to effect reconciliation
12 between the Crown and the Aboriginal peoples with respect to the interests at
13 stake. (*Haida*, paragraph 45).

14 Obviously, this question cannot be determined in the abstract, but must be guided by the
15 strength of claim and the seriousness of the potentially adverse effect in the particular
16 circumstances.

17 In identifying the consultation obligations associated with the transmission planning issues
18 central to the Section 5 Inquiry, the diversity of potential determinations provides a particular
19 challenge. In particular, the geographic scope of some determinations at issue in the Section 5
20 Inquiry may be very broad—encompassing the entire Province. Given the nature of the
21 determinations currently anticipated to be made by the Commission, in many cases the identity
22 of the First Nations or extent of any potential adverse effect may be indiscernible. In all cases
23 (even where the geographic scope is more limited or defined), there is no certainty that any
24 particular project will proceed—but there is certainty that there will be other regulatory
25 process(es) required before any particular project could proceed.¹⁵ In light of these factors, BC
26 Hydro submits that any duty to consult with respect to the Section 5 determination will likely be
27 at the low end of the spectrum.

¹⁵ While both can be considered strategic planning exercises, even where Commission determinations are focused on a defined geographic region, the analogy with the T.F.L. considered in *Haida* is not complete. When a T.F.L. is issued, it follows that cutting permits **will** be issued. Conversely (as discussed further below), there is no certainty that a CPCN will be issued following a Section 5 determination (or even if a CPCN is issued that the project will proceed). Cutting permits follow a T.F.L. automatically as a matter of law. This is not the case with other authorizations following a Section 5 determination.

1 Having said this, BC Hydro submits that it is unnecessary to make an early, preliminary and
2 abstract determination on the scope of the duty to consult required. The scope and content of
3 the duty (and whether it has been or will be fulfilled) should be considered in respect of the
4 determinations under consideration by the Commission during the course of the Inquiry and
5 may be the subject of final argument in respect of specific determinations. And, for the reasons
6 set out in Part 3, BC Hydro believes that the BC Hydro parallel First Nations consultation
7 process and the Commission hearing process will be sufficient to satisfy any consultation
8 obligations and to maintain the honour of the Crown at this stage, regardless where on the
9 spectrum the consultation obligations may lie in the circumstances of the determinations to be
10 made in the Inquiry.

11 **Part 3** **Panel Question 2: If there is a duty to consult, how would that duty be**
12 **fulfilled and how can it best be fulfilled such that the Panel can also fulfil its legal**
13 **requirements to hold an inquiry and complete its draft report by 30 June 2010?**

14 In this Part 3 BC Hydro addresses two sub-categories to Panel Question 2. In Section 3.1, BC
15 Hydro sets out its reasons why it submits that the Panel does not and cannot have an
16 independent duty to consult. Section 3.2 responds to the question of “what” is required to
17 maintain the honour of the Crown and “how” the Crown’s duties will be fulfilled in the context of
18 the Section 5 Inquiry.

19 **3.1 The Commission does not have a Duty to Consult Directly**

20 **3.1.1 Quasi-judicial Tribunals Do Not Have a Duty to Consult**

21 A quasi-judicial administrative tribunal must adhere to and apply the principles of natural justice.
22 Fundamental to natural justice is that proceedings must be conducted so that they are fair to all
23 parties, and that the tribunal making the decision should be unbiased and act in good faith. For
24 example, a quasi-judicial tribunal cannot treat one of the parties before it in a preferential
25 manner.

1 It is well settled law that a “quasi-judicial” administrative tribunal does not, and cannot, have an
 2 independent duty to consult. In *Quebec (Attorney General) v. Canada (National Energy Board)*¹⁶
 3 (***National Energy Board***), the SCC concluded that, while there is a fiduciary relationship
 4 between the federal Crown and the aboriginal peoples of Canada, the function of the National
 5 Energy Board (NEB) is quasi-judicial and this duty of the Crown did not impose a corresponding
 6 duty on the NEB. The Court concluded that “the fiduciary relationship between the Crown and the
 7 appellants does not impose a duty on the NEB to make its decisions in the best interests of the
 8 appellants, or to change its hearing process...” and that the NEB’s function is analogous to that of
 9 a court.

10 Subsequent to the decision in *National Energy Board*, the SCC clarified in *Haida* that the duty to
 11 consult in regard to asserted aboriginal rights does not mandate that the Crown act in the
 12 Aboriginal group’s best interests as a fiduciary. However, depending on the circumstances, the
 13 honour of the Crown may require it to consult with and, if appropriate, accommodate Aboriginal
 14 interests pending resolution of their claims. Such a duty, as in the *National Energy Board*
 15 decision, is inherently inconsistent with the imposition of a relationship of utmost good faith
 16 between a quasi-judicial decision maker and all the parties appearing before it. As discussed
 17 below, this clarification regarding the source of the duty does not affect the SCC’s finding in
 18 *National Energy Board* that the Crown’s duty to consult can not be imposed on a quasi-judicial
 19 body.

20 **3.1.2 The Commission is a Quasi-judicial Tribunal**

21 The B.C. Court of Appeal accepted that the SCC authority is applicable in respect of the duty to
 22 consult. In *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)*¹⁷ (***Carrier***
 23 ***Sekani***), the Court stated:

24 [56] No one suggests the Commission has a duty itself to consult: *Quebec*
 25 (*Attorney General*) *v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159 at
 26 183.

27 Recently, the Commission applied this to its own proceedings in respect of a planning process:

¹⁶ [1994] 1 S.C.R. 159, [1994] S.C.J. No. 13 (QL), at paragraphs 35-37; copy at **Tab 6** of the BC Hydro Book of Authorities.

¹⁷ 2009 BCCA 67; copy at **Tab 7** of the BC Hydro Book of Authorities.

1 The Commission, as a quasi-judicial tribunal, does not itself have a duty to
 2 consult (*Carrier Sekani*, para. 56). Rather, it is the Crown who has a legal duty to
 3 consult with aboriginal people when making decisions that may affect aboriginal
 4 rights.¹⁸

5 At the Second Procedural Conference, no party contended that the Commission in its role of
 6 reviewing CPCN applications or Electricity Purchase Agreement filings is not engaged in a
 7 quasi-judicial function. However, several First Nation participants asserted that because the
 8 Section 5 Inquiry is an inquiry with no applicant, somehow the Commission is not engaged in a
 9 quasi-judicial function¹⁹. This makes it necessary and important to carefully consider the
 10 definition of quasi-judicial and whether it applies to the Commission in the Section 5 Inquiry.

11 3.1.2.1 The Legal Definition of Quasi-judicial

12 Quasi-judicial is a term applied to the action, discretion, etc. of an administrative tribunal
 13 required to investigate facts, or ascertain the existence of facts, hold hearings, weigh evidence
 14 and draw conclusions from them, as the basis for its official action, and to exercise discretion of
 15 a judicial nature.²⁰

16 In *Canada (Minister of National Revenue) v. Coopers & Lybrand*,²¹ the SCC articulated that the
 17 key to determining the nature of the decision being made is to concentrate on the legislative
 18 intent:

19 Whether an administrative decision or order is one required by law to be made
 20 on a judicial or non-judicial basis will depend in large measure upon the
 21 legislative intention. If Parliament has made it clear that the person or body is
 22 required to act judicially, in the sense of being required to afford an opportunity to
 23 be heard, the courts must give effect to that intention.

24 The SCC went on to provide the following non-exhaustive criteria for determining whether a
 25 decision or order is one required by law to be made on a judicial or quasi-judicial basis:

- 26 (1) Is there anything in the language in which the function is conferred or in
 27 the general context in which it is exercised which suggests that a hearing
 28 is contemplated before a decision is reached?

¹⁸ *In the matter of British Columbia Transmission Corporation and an Application for Approval of a Transmission System Capital Plan F2010 and F2011*, Decision, 13 July 2009, page 3; extract at **Tab 8** of the BC Hydro Book of Authorities.

¹⁹ See, for example, Transcript, volume 2, page 237, lines 15-17; page 242, lines 24-26 to page 243, line 1

²⁰ Blacks Law Dictionary, *supra*, note 8.

²¹ [1979] 1 S.C.R. 495 at pages 504-5; Copy at **Tab 9** of the BC Hydro Book of Authorities.

1 *B. The Effect of the Commission's Decisions*

2 It is equally clear that the Commission's decisions (determinations) will directly or indirectly
 3 affect the rights and obligations of persons. BC Hydro, BCTC and FortisBC Inc. (**FortisBC**) will
 4 be affected by the determination(s) of need as such determinations will impact development of
 5 future generation and transmission. BC Hydro references and relies in this regard on its
 6 submission in Part 2 above (regarding the meaning and effect of the "determinations" to be
 7 made by the Commission). As set out above in sections 2.1 and 2.2 of these written
 8 submissions, the Commission is charged with making determinations concerning the need for
 9 and timing of additional transmission infrastructure.

10 *C.1. The Adversarial Process—Adjudicating Need and Timing of Transmission Infrastructure*

11 The hearing to be conducted by the Panel is an adversarial process. In advance of the oral
 12 hearing, parties will present written evidence on which they seek to rely. Other parties will seek
 13 to test that evidence through Information Requests (which are a form of written cross
 14 examination). At the oral hearing process, parties will present formal witness panels that will
 15 speak to and defend that party's written evidence and written responses to Information
 16 Requests. Witnesses will be formally sworn or affirmed. Opposing parties will attempt to refute
 17 other parties' evidence by way of cross examination. Parties have an opportunity to make
 18 submissions and, at the end of the process, the Panel will make its decision.

19 BC Hydro submits that it is significant that the B.C. Government chose the Commission to hear
 20 and decide the Section 5 Inquiry. The Commission is an independent administrative tribunal.
 21 The Commission is composed of commissioners vested with the authority of the *UCA*. As set
 22 out above in sections 2.1 and 2.2 of these written submissions, the B.C. Government charged
 23 the Commission with making determinations concerning the need for and timing of additional
 24 transmission infrastructure. How is the Commission to make such determinations? The answer
 25 is found in paragraphs 7 to 10 of the ToR.

26 Paragraphs 7 to 10 of the ToR contain numerous references to the evidence the Commission
 27 must consider as part of the Section 5 Inquiry:

- 28 • Paragraph 7 sets out the **evidence** that the "**Commission must have regard for**",
 29 including the load-serving utilities' most recently filed and approved long-term resource

1 plans (paragraph 7(a)). Paragraph 7(c) refers to “**evidence** regarding the load-serving
 2 utilities’ energy and capacity requirements under scenarios that in the Commission’s
 3 opinion are reasonable”. Load serving utilities are defined in paragraph 1 of the ToR to
 4 mean BC Hydro and FortisBC.

- 5 • Paragraph 8 states that “[i]n addition to any other **evidence** and submissions relevant to
 6 the inquiry that the load-serving utilities may wish to provide, if not adequately addressed
 7 in their most recently approved long-term resource plans, the **Commission must allow**
 8 the load-serving utilities to provide **evidence** and submissions regarding ... their
 9 electrical energy and capacity requirements during the Determination period”; “the
 10 facilities they intend to construct, extend or expand, and the volume of purchases of
 11 electricity from other persons they would intend to make, in order to meet these
 12 requirements in the Determination Period”; and “the most cost-effective sequence and
 13 most probable sequence of development, by geographic area, of the facilities and
 14 energy sources allowing for purchases referred to in paragraph (8)(b)”.
- 15 • Paragraph 9 provides that “the Commission **must invite and have regard for evidence**
 16 and submissions from the transmission service providers with respect to the specific
 17 determinations the Commission should make regarding the need for, and timing of,
 18 additional transmission infrastructure and capacity within the Determination Period, and
 19 **must allow the transmission service providers to provide evidence** and
 20 submissions on any other matter that is relevant to this inquiry”. Paragraph 1 of the ToR
 21 defines the term “transmission service providers” to mean BCTC and FortisBC.
- 22 • Pursuant to paragraph 10(a) of the ToR, the Commission “**must invite and consider**
 23 submissions, **evidence** and presentations from any interested persons, including,
 24 without limitation, First Nations, communities, municipal and regional governments, other
 25 utilities, power producers, ratepayer groups and environmental non-governmental
 26 organizations”. [Emphasis added].

27 In BC Hydro’s respectful submission, it is clear that the ToR mandates that the Commission is to
 28 adjudicate the issue of whether there is a need for additional transmission during the 30 year
 29 Determination Period. BC Hydro uses the term “adjudicate” to mean the legal process of
 30 resolving a dispute. The ToR mandates that the Commission hear and make findings of fact to

1 resolve the case before it. Pursuant to paragraphs 7 to 10 of the ToR, the Commission is tasked
2 with taking and evaluating evidence, and making findings based on the evidence.
3 Determinations are to be issued on the basis of these findings; for example, paragraph 11 of the
4 ToR provides that the Commission “must prepare a report containing the determinations and
5 **reasons for the determinations**”. The Panel is in a judge’s role of an impartial arbiter weighing
6 the evidence and hearing argument presented by participants and determining the applicable
7 decision. It is therefore clear that the Panel is exercising powers of a judicial nature in the
8 Section 5 Inquiry.

9 This conclusion is not altered by the fact that there is no applicant in the context of an Inquiry.
10 The Court in *British Columbia (Attorney General) v. British Columbia (Information and Privacy*
11 *Commissioner)*,²³ noted that a quasi-judicial body is one “from which the law will require some
12 measure of judicial procedural conduct”. That case concerned a Commission of Inquiry. The
13 Commission of Inquiry held 87 days of hearings where witnesses testified under oath; there was
14 provision for the calling of rebuttal evidence and the cross-examination of witnesses. The Court
15 noted that some of the procedures and rulings made by the Commissioner were “similar to
16 those in court proceedings, including various rulings of law”. After considering and applying the
17 factors set out in *Coopers & Lybrand*, the Court found that the Commissioner was acting in a
18 quasi-judicial capacity.

19 C.2. *The Adversarial Process—Examination Powers*

20 This conclusion is further strengthened when one canvasses the examination powers the Panel
21 has at its disposal for purposes of the Section 5 Inquiry. Paragraph 10(b) of the ToR provides
22 that:

23 For purposes of conducting this inquiry, the Commission ... **may use all of the**
24 **powers provided to it under the [UCA]**. [Emphasis added].

25 Subsection 82(2) of the *UCA*, which enumerates the Commission’s powers to inquire without an
26 application, also provides that the Commission “has the same powers as are vested in it by the
27 Act in respect of an application or complaint”.

²³ 2004 BCSC 1597 at paragraph 49; copy at **Tab 10** of the BC Hydro Book of Authorities.

1 These powers, which resemble procedures used in litigation before courts, include the following:

- 2 • As stated above in section 2.1 of these written submissions, subsection 2(4) of
3 the *UCA* provides that sections 1 to 13, 15, 18 to 21, 28 to 30, 32, 34(3) and (4),
4 35 to 42, 44, 46.3, 48, 49, 54, 60(a) and (b) and 61 of the *ATA* apply to the
5 Commission.
- 6 ○ **Power to compel witnesses:** Subsection 34(3) of the *ATA* provides that
7 the Commission can “at any time before or during a hearing, but before a
8 decision ... make an order requiring a person to (a) attend an oral or
9 electronic hearing to give evidence on oath or affirmation or in any other
10 matter that is admissible and relevant to an issue ...”. In other words, the
11 Panel can subpoena witnesses to appear before the Panel as part of the
12 Section 5 Inquiry process.
- 13 ○ **Contempt for uncooperative witnesses:** Subsection 49(2) of the *ATA*
14 empowers the Commission, on application to the Court, to find witnesses
15 liable for contempt “as if in breach of an order or judgment of the court”.
- 16 ○ **Examination of witnesses:** Section 38 of the *ATA* sets out the
17 Commission’s power with respect to the calling of witnesses, cross
18 examination of witnesses, etc.
- 19 ○ **Failure to comply with tribunal orders and rules:** Section 18 of the
20 *ATA* sets out the powers of the Commission if a participant fails to comply
21 with a Commission order, or with the Commission’s rules of practice and
22 procedure.
- 23 • In addition to the *ATA*, the *UCA* provides the Panel with the following powers:
- 24 ○ **Information Disclosure:** Section 43 of the *UCA* provides that a public
25 utility such as BC Hydro must “answer specifically all questions of the
26 commission” and “provide the commission the information the
27 commission requires”. (Subsection 34(3) of the *ATA* also provides the

1 Panel with the power to order disclosure of documents and other
2 information the Panel finds relevant to the Section 5 Inquiry).

- 3 ○ **Taking of Depositions:** Subsection 74(b) of the *UCA* permits the
4 Commission to “require the taking of depositions inside or outside British
5 Columbia”. A deposition is witness testimony recorded under oath.
- 6 ○ **Mandatory and Restraining Orders:** Pursuant to Section 73 of the *UCA*
7 the Commission may order or require “any person to do immediately or by
8 a specified time and in the way ordered ... anything that the person is or
9 may be required or authorized to do under the [*UCA*] or any other general
10 or special Act and to which the commission’s jurisdiction extends”.
- 11 ○ **Offenses and Penalties:** Section 106 of the *UCA* specifies when a
12 person commits an offence; for example, a person commits an offense if
13 the person “fails or refuses to obey an order of the commission made
14 under the [*UCA*]”.

15 BC Hydro submits that these powers are the hallmark of the judicial function, and thus the
16 procedural requirements of natural justice apply in their strongest form.

17 D. *Not a Policy Making Function*

18 With respect, the Commission is not charged with a policy-making function as part of the
19 Section 5 Inquiry. The Panel is not offering policy advice or recommendations to the B.C.
20 Government. The B.C. Government sets energy policy. An example of this is with respect to
21 export opportunities for B.C.-based clean, renewable sources of electricity. The B.C.
22 Government may decide whether an export policy ought to be adopted. The ToR reflects this:

23 WHEREAS the 2007 Speech from the Throne stated that the Government will
24 pursue British Columbia’s potential as a net exporter of clean, renewable energy.

25 E. *Conclusion*

26 BC Hydro respectfully submits that it is clear from a reading of section 5 of the *UCA* and the
27 ToR that the B.C. Government granted the Panel quasi-judicial powers and it is to use those

1 powers for purposes of conducting the Section 5 Inquiry. The Section 5 Inquiry is in the nature
 2 of a judicial proceeding and has a quasi-judicial character. The Panel is tasked with holding a
 3 public hearing, taking and evaluating evidence, making factual findings based on the evidence,
 4 and issuing determinations on the basis of said findings of fact. The oral hearing component of
 5 the Section 5 Inquiry in particular is adversarial in nature. The Commission is clearly a quasi-
 6 judicial tribunal carrying out an adjudicative function under section 5 of the *UCA* and *ToR*. In BC
 7 Hydro's respectful submission, for the Panel to undertake "traditional" consultation (in the sense
 8 of direct, bilateral engagement with First Nations in the absence of other intervenors or parties)
 9 would be inherently inconsistent with this function.

10 BC Hydro further respectfully submits that while it is not necessary for the Panel to make a final
 11 decision at this time with respect to the appropriate scope of consultation for the reasons set out
 12 above, it is necessary for the Panel to decide whether or not it is a quasi-judicial tribunal in the
 13 context of the Section 5 Inquiry, and if so, also conclude (as it must) that the principles of natural
 14 justice apply in their strongest form and therefore the Panel must act impartially (e.g. not
 15 meeting independently with any participant). BC Hydro respectfully requests that the Panel
 16 make a decision on the quasi-judicial issue as soon as possible after the Third Procedural
 17 Conference scheduled for 18/19 August 2009.

18 **3.2 The Proper Question**

19 BC Hydro respectfully submits that focussing narrowly on "who" is responsible for consultation is
 20 to ask the wrong question. The proper questions are "what" is required to maintain the honour of
 21 the Crown and "how" will the Crown's duties be fulfilled?

22 In *Haida*, the SCC emphasized that the "government's duty to consult with Aboriginal peoples
 23 and accommodate their interests is grounded in the honour of the Crown",²⁴ but what is required
 24 to maintain the honour of the Crown will depend on the circumstances. The Court stated.²⁵

25 The controlling question in all situations is what is required to maintain the
 26 honour of the Crown and to effect reconciliation between the Crown and the
 27 Aboriginal peoples with respect to the interests at stake.

²⁴ *Supra*, note 4, paragraph 16.

²⁵ *Supra*, note 4, paragraph 45.

1 BC Hydro submits that the proper question to ask is: What is required in the circumstances of
2 the Section 5 Inquiry to maintain the honour of the Crown and how will the Crown's duties be
3 fulfilled?

4 When viewed through this lens, there is no inconsistency between the two positions outlined by
5 BC Hydro above, namely that the Crown's duty to consult is likely triggered as a result of the
6 nature of some of the determinations to be made by the Commission, but the Panel does not
7 have an independent duty to consult in the "traditional" sense of direct, bilateral engagement
8 with First Nations (in the absence of other intervenors or parties).

9 The remainder of this Part 3 outlines why, at law, a separate process is not required (section
10 3.2.1). Instead, the duty to consult, where triggered, is able to be discharged by the combination
11 of (1) the BC Hydro parallel First Nations consultation process (section 3.2.2) and (2) the
12 Commission's Section 5 Inquiry hearing process (section 3.2.3). It is this combined consultation
13 and regulatory process viewed as a whole that is capable of maintaining the honour of the
14 Crown and fulfilling the Crown's duties at this stage.

15 **3.2.1 A Separate Process is not Required**

16 In *Haida*, the SCC stated:

17 It is open to governments to set up regulatory schemes to address the procedural
18 requirements appropriate to different problems at different stages, thereby
19 strengthening the reconciliation process and reducing recourse to the courts.²⁶

20 In the companion case, *Taku River Tlingit First Nation v. British Columbia (Project Assessment*
21 *Director)*²⁷, the SCC did not require the tribunal to consider whether the duty to consult was met
22 separately from whether the requirements under the B.C. *Environmental Assessment Act* were
23 met. The Province was not required to develop special consultation measures to address the
24 First Nation's concerns, outside of the process provided for by the existing regulatory scheme
25 set up by government to address the procedural requirements appropriate to the issues at that
26 stage.

²⁶ *Supra*, note 4, paragraph 51.

²⁷ [2004] 3 S.C.R. 550, 2004 SCC 74, paragraph 40; copy at **Tab 11** of the BC Hydro Book of Authorities.

1 Similarly, in the context of the Section 5 Inquiry, the Province and/or the Commission are not
2 required to develop special consultation measures to address the concerns of potentially
3 affected First Nations outside of the two complimentary processes already envisioned. The
4 Province has, through section 5 of the *UCA*, the ToR, and its request to BC Hydro to consult
5 directly with First Nations, set up regulatory schemes to consider and address any potential First
6 Nations' concerns relevant to the Section 5 Inquiry. In BC Hydro's respectful submission, the
7 Section 5 Inquiry process is capable of fulfilling the Crown's duty though the combination of
8 (1) direct consultation led by BC Hydro and (2) the Commission hearing process.²⁸

9 Given the quasi-judicial nature of the Commission, the consultation process necessarily
10 functions slightly differently than a "traditional" consultation process where the decision-maker
11 engages in a direct, bi-lateral engagement with the First Nation. As a quasi-judicial tribunal, the
12 Commission is bound by the principles of natural justice and therefore it must receive
13 information through its public hearing process. The Panel cannot meet individually with parties
14 appearing before it or collect information on its own as this would be "inherently inconsistent"
15 with its quasi-judicial nature and function. Nevertheless, despite these differences, the process
16 envisioned for the Section 5 Inquiry requires consultation with First Nations and provides First
17 Nations with direct access to the decision-maker. This is achieved through two mechanisms:

- 18 • First, the B.C. Government has, in this case by way of a request to BC Hydro, ensured
19 that First Nations in the province are directly consulted on the issues relevant to the
20 Section 5 Inquiry. BC Hydro has been tasked with engaging in direct consultation with
21 First Nations and information regarding the consultation activities must be put before the
22 Commission.
- 23 • Second, the Commission process itself provides First Nations with the opportunity to
24 obtain, lead or elicit information, to bring forward concerns or issues directly to the
25 decision-maker and to have those concerns or issues given full, fair and serious
26 consideration by the Commission. (Again, this does not mean the Panel has a duty to

²⁸ As noted by Donald J.A. in *Carrier Sekani, supra*, note 17, "[t]he discussion itself has intrinsic value as a tool of reconciliation ... At the very least, the First Nation will have had a chance to put its views forward". (Paragraph 65).

1 consult, but that the Commission process has a role to play in fulfilling the Crown's
2 duties).

3 Each is discussed in turn below.

4 **3.2.2 BC Hydro's Parallel First Nations Engagement Process**

5 Through its request to BC Hydro, the B.C. Government is requiring BC Hydro to directly consult
6 with First Nations. The purpose of this parallel consultation process is to ensure that BC Hydro's
7 and BCTC's evidence filed with the Commission are informed by input from First Nations at the
8 first available opportunity. BC Hydro agreed to include in its filings to the Commission all the
9 information and concerns expressed by First Nations in the parallel consultation process. This
10 portion of the consultation process will look more like a "traditional" consultation process where
11 BC Hydro, BCTC and the First Nations engage in direct, bi-lateral discussions (in the absence
12 of other intervenors or participants) to explore issues or concerns.

13 The results of this process will be presented to the Commission and will provide the
14 Commission with the first (of two) mechanisms through which the Commission can consider
15 First Nations' concerns in rendering its report. To be clear, this is not to say that First Nations
16 are precluded from directly bringing their concerns to the Commission; however, this ensures
17 that if a First Nation chooses not to come before the Commission its concerns will nonetheless
18 be considered by the Commission.

1 In the case of the Commission's Section 5 Inquiry, there are no applicants or proponents.
 2 However, entities that are generally applicants before the Commission, such as BC Hydro,
 3 BCTC and FortisBC, will file evidence with the Commission. The BC Hydro consultation process
 4 ensures that First Nations will be consulted directly to inform such evidence.

5 The Crown is entitled to rely on consultation undertaken by others when it is aware that such
 6 consultation is taking place.²⁹ In the current circumstances, the Crown is not only aware that
 7 such consultation is taking place, but in fact requested it directly.³⁰ Moreover, the Crown is
 8 maintaining an oversight role in BC Hydro's parallel consultation process. BC Hydro is required
 9 to:

- 10 • Develop a First Nations consultation plan that must be submitted to the Minister prior to
 11 implementation;
- 12 • Submit a final First Nations consultation report to the Minister outlining First Nations
 13 interests and concerns regarding potential impacts of the generation and transmission
 14 scenarios proposed in the submissions; and
- 15 • Provide written updates to the Minister's staff every two weeks regarding the progress
 16 on the consultations and key issues.

17 In addition, "MEMPR staff will provide support and strategic guidance throughout the First
 18 Nations consultation process".

19 **3.2.3 The Role of the Commission's Hearing Process Itself**

20 In addition to BC Hydro's parallel process, the B.C. Government has also seen fit to mandate a
 21 Commission hearing process. Through section 5 of the *UCA* and the ToR, the B.C. Government
 22 created an administrative scheme to consider the province's electricity transmission
 23 infrastructure and capacity needs for the next 30 years. Paragraph 10(a) of the ToR expressly
 24 requires that the Commission "must invite and consider submissions, evidence and

²⁹ *Kelly Lake Cree Nation v. British Columbia (Ministry of Energy and Mines)*, [1999] 3 C.N.L.R. 126, [1998] B.C.J. No. 2471, paragraph 154 (S.C.) (QL), copy at **Tab 12** of the BC Hydro Book of Authorities; *Heiltsuk Tribal Council v. British Columbia (Minister of Sustainable Resource Management)* (2003), 19 B.C.L.R. (4th) 107, 2003 BCSC 1422, paragraph 102, copy at **Tab 13** of the BC Hydro Book of Authorities; and *Haida*, *supra*, note 4 at paragraph 53.

³⁰ Refer to the letter dated 25 March 2009 from the Deputy Minister of the Ministry of Energy, Mines and Petroleum Resources to BC Hydro and BCTC, a copy of which is found at Exhibit B2-4.

1 presentations from any interested person, including [...] First Nations". Clearly, the B.C.
2 Government intends that potential First Nations' concerns relevant to the Section 5 Inquiry will
3 also be considered within the Commission's hearing process.

4 The SCC previously considered the adequacy of regulatory and administrative processes for
5 seeking out and assessing potential impacts on First Nations. Notwithstanding the conclusion it
6 reached in *National Energy Board* as discussed above, the SCC continued its analysis and
7 commented on the NEB's hearing process:³¹

8 Moreover, even if this Court were to assume that the Board, in conducting its
9 review, should have taken into account the existence of the fiduciary relationship
10 between the Crown and the appellants, I am satisfied that, for the reasons set out
11 above relating to the procedure followed by the Board, its actions in this case
12 would have met the requirements of such a duty. There is no indication that the
13 appellants were given anything less than the fullest opportunity to be heard.
14 They had access to all the evidence that was before the Board, were able to
15 make submissions and argument in reply, and were entitled to cross-examine the
16 witnesses called by the respondent Hydro-Quebec... [Emphasis added].

17 Similarly, if the Commission is required to take into account the Crown's duty to consult with
18 First Nations, the hearing process mandated in the *UCA* and by the ToR, combined with BC
19 Hydro's/BCTC's parallel First Nations engagement process, is fully able to meet the
20 requirements of such a duty.

21 Other Courts have recognized that a regulatory process may be sufficient to discharge the
22 Crown's duty. In *Ka'a'Gee Tu First Nation v. Canada (Attorney General)*,³² the Federal Court
23 considered the regulatory review process under the *Mackenzie Valley Resource Management*
24 *Act* and found that, to a point, it could discharge the consultation obligation:

25 [118] The consultation process provided for under the Act is comprehensive and
26 provides the opportunity for significant consultation between the developer and
27 the affected Aboriginal groups. As noted above, the record indicates that the
28 Applicants have had many opportunities to express their concerns in writing or at
29 public meetings through submissions made by counsel on their behalf or by the
30 Applicants directly. The record also establishes the Applicants were heavily
31 involved in the process and that their involvement influenced the work and

³¹ *Supra*, note 16, paragraph 38.

³² 2007 FC 763; copy at **Tab 14** of the BC Hydro Book of Authorities.

1 recommendations of the Review Board. In essence, the product of the
2 consultation process is reflected in the Review Board's Environmental
3 Assessment Reports. These reports, while not necessarily producing the results
4 sought by the Applicants, do reflect the collective input of all of the parties
5 involved, including the Applicants. The Environmental Assessment Report
6 concerning the Extension Project clearly shows that many of the concerns of the
7 Applicants were taken into account. While the Review Board ultimately endorsed
8 the project, it did so only with significant mitigating measures and suggestions
9 which were supported by the Applicants and which went a long way in
10 addressing their main concerns.

11 [119] Up until this point, the process, in my view, provided an opportunity for the
12 Applicants to express their interests and concerns, and ensured that these
13 concerns were seriously considered and, wherever possible, demonstrably
14 integrated into the proposed plan of action. Up until this point in the process, I am
15 satisfied that the Applicants benefited from formal participation in the decision-
16 making process.

17 Recently, in *Brokenhead Ojibway First Nation v. Canada (Attorney General)*,³³ (***Brokenhead***)
18 the Federal Court considered the process employed by the NEB and concluded (paragraph 42)
19 "that the process of consultation and accommodation employed by the NEB was sufficient to
20 address the specific concerns of Aboriginal communities potentially affected by
21 the...Projects...". The process at issue in the present case is very similar to that considered in
22 the *Brokenhead* case. The NEB process requires proponents to engage in direct consultation
23 with First Nations and to file evidence of the concerns raised with the NEB during the hearing
24 process. The NEB regulatory process included a public hearing wherein the issues were
25 adjudicated by a quasi-judicial body. The same is true of the Commission in the case of the
26 Section 5 Inquiry. BC Hydro is required to engage in direct consultation with First Nations and to
27 file evidence of concerns raised with the Commission during the hearing process. The
28 Commission regulatory process includes a public hearing wherein the issues will be adjudicated
29 by a quasi-judicial body.

30 The NEB process at issue in the *Brokenhead* case was to issue a CPCN. If there is any
31 distinction between the Section 5 Inquiry and the *Brokenhead* case, it is submitted that the
32 standards applicable to issuing a final CPCN necessarily have to be, if anything, more rigorous
33 than those applicable to a preliminary form of strategic planning (which will, in some cases, be
34 followed by a CPCN and other regulatory processes). Given that the NEB process has been

³³ 2009 FC 484; copy at **Tab 15** of the BC Hydro Book of Authorities. The Applicant First Nation has indicated to the Federal Court it will not be appealing this decision.

1 found capable of adequately discharging the Crown's duty to consult, BC Hydro submits that the
2 combined consultation and regulatory process envisioned for the Section 5 Inquiry process will
3 similarly prove to be adequate to maintain the honour of the Crown and discharge any
4 consultation obligations at this stage.

5 Indeed, in the current circumstances, there are additional procedural mechanisms in place (that
6 are not typically present in other regulatory or administrative processes, including those
7 considered above) that ensure First Nations and all parties the opportunity to raise concerns
8 before any final decision by the Commission. Pursuant to paragraph 12 of the ToR, before
9 finalizing its report, the Commission must (a) publish a draft report; (b) provide an opportunity to
10 make written comments on the draft report; (c) provide a reasonable opportunity to respond to
11 comments; and (d) incorporate, as it considers appropriate, the comments and responses
12 received.

13 In the current circumstances, the Commission's hearing process (while structured differently
14 from direct consultations due to its quasi-judicial nature) provides all the elements of
15 consultation (as required by the SCC). The Commission's hearing process ensures that
16 participant First Nations are:

- 17 a) Provided adequate notice;
- 18 b) Provided all necessary information in a timely way;
- 19 c) Provided the opportunity to engage in direct consultation with
20 BC Hydro and/or attend Commission hearings proceedings;
- 21 d) Provided an opportunity to express their interests and concerns
22 through submissions to the Commission; and
- 23 e) Ensured that their representations are seriously considered and,
24 whenever possible, demonstrably integrated into the Commission's
25 ultimate findings.

1 These elements fulfil the requirements of the Crown's duty.³⁴

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated: 23 July 2009

BRITISH COLUMBIA HYDRO AND POWER AUTHORITY

Per: Craig Godsoe

Craig Godsoe

Solicitor & Counsel



Ken Duke

Solicitor & Counsel

³⁴ See *Mikisew, supra*, note 5, at paragraph 64, citing *Halfway River First Nation v. B.C. (Ministry of Forests)*, [1999] 64 B.C.L.R. (3d) 206; 1999 BCCA 470, at paragraphs 159-160, per Finch J.A. (now C.J.B.C.), copy at **Tab 16** of the BC Hydro Book of Authorities.

1 **STATUTORY INSTRUMENTS**

- 2 1. *Utilities Commission Act*
 3 2. Terms of Reference
 4 3. *Administrative Tribunals Act*

5 **AUTHORITIES**

- 6 4. *Haida Nation v. British Columbia (Minister of Forests)*
 7 5. *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*
 8 6. *Quebec (Attorney General) v. Canada (National Energy Board)*
 9 7. *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)*
 10 8. *In the matter of British Columbia Transmission Corporation and an Application for*
 11 *Approval of a Transmission System Capital Plan F2010 and F2011, Decision, 13*
 12 *July 2009*
 13 9. *Canada (Minister of National Revenue) v. Coopers & Lybrand*
 14 10. *British Columbia (Attorney General) v. British Columbia (Information and Privacy*
 15 *Commissioner)*
 16 11. *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*
 17 12. *Kelly Lake Cree Nation v. British Columbia (Ministry of Energy and Mines)*
 18 13. *Heiltsuk Tribal Council v. British Columbia (Minister of Sustainable Resource*
 19 *Management)*
 20 14. *Ka'a'Gee Tu First Nation v. Canada (Attorney General)*
 21 15. *Brokenhead Ojibway First Nation v. Canada (Attorney General)*
 22 16. *Halfway River First Nation v. B.C. (Ministry of Forests)*
 23 17. *Black's Law Dictionary*
 24 18. Certificate of Public Convenience and Necessity Application Guidelines

This Act is Current to July 8, 2009

UTILITIES COMMISSION ACT
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Definitions

1 In this Act:

"**appraisal**" means appraisal by the commission;

"**authority**" means the British Columbia Hydro and Power Authority;

"commission" means the British Columbia Utilities Commission continued under this Act;

"compensation" means a rate, remuneration, gain or reward of any kind paid, payable, promised, demanded, received or expected, directly or indirectly, and includes a promise or undertaking by a public utility to provide service as consideration for, or as part of, a proposal or contract to dispose of land or any interest in it;

"costs" includes fees, counsel fees and expenses;

"demand-side measure" means a rate, measure, action or program undertaken

- (a) to conserve energy or promote energy efficiency,
- (b) to reduce the energy demand a public utility must serve, or
- (c) to shift the use of energy to periods of lower demand;

"distribution equipment" means posts, pipes, wires, transmission mains, distribution mains and other apparatus of a public utility used to supply service to the utility customers;

"expenses" includes expenses of the commission;

"government's energy objectives"

- (a) to encourage public utilities to reduce greenhouse gas emissions;
- (b) to encourage public utilities to take demand-side measures;
- (c) to encourage public utilities to produce, generate and acquire electricity from clean or renewable sources;
- (d) to encourage public utilities to develop adequate energy transmission infrastructure and capacity in the time required to serve persons who receive or may receive service from the public utility;
- (e) to encourage public utilities to use innovative energy technologies
 - (i) that facilitate electricity self-sufficiency or the fulfillment of their long-term transmission requirements, or
 - (ii) that support energy conservation or efficiency or the use of clean or renewable sources of energy;

(f) to encourage public utilities to take prescribed actions in support of any other goals prescribed by regulation;

"petroleum industry" includes the carrying on within British Columbia of any of the following industries or businesses:

- (a) the distillation, refining or blending of petroleum;
- (b) the manufacture, refining, preparation or blending of products obtained from petroleum;
- (c) the storage of petroleum or petroleum products;
- (d) the wholesale or retail distribution or sale of petroleum products;
- (e) the retail distribution of liquefied or compressed natural gas;

"petroleum products" includes gasoline, naphtha, benzene, kerosene, lubricating oils, stove oil, fuel oil, furnace oil, paraffin, aviation fuels, butane, propane and other liquefied petroleum gas and all derivatives of petroleum and all products obtained from petroleum, whether or not blended with or added to other things;

"public hearing" means a hearing of which public notice is given, which is open to the public, and at which any person whom the commission determines to have an interest in the matter may be heard;

"public utility" means a person, or the person's lessee, trustee, receiver or liquidator, who owns or operates in British Columbia, equipment or facilities for

- (a) the production, generation, storage, transmission, sale, delivery or provision of electricity, natural gas, steam or any other agent for the production of light, heat, cold or power to or for the public or a corporation for compensation, or
- (b) the conveyance or transmission of information, messages or communications by guided or unguided electromagnetic waves, including systems of cable, microwave, optical fibre or radiocommunications if that service is offered to the public for compensation,

but does not include

- (c) a municipality or regional district in respect of services provided by the municipality or regional district within its own boundaries,

(d) a person not otherwise a public utility who provides the service or commodity only to the person or the person's employees or tenants, if the service or commodity is not resold to or used by others,

(e) a person not otherwise a public utility who is engaged in the petroleum industry or in the wellhead production of oil, natural gas or other natural petroleum substances,

(f) a person not otherwise a public utility who is engaged in the production of a geothermal resource, as defined in the *Geothermal Resources Act*, or

(g) a person, other than the authority, who enters into or is created by, under or in furtherance of an agreement designated under section 12 (9) of the *Hydro and Power Authority Act*, in respect of anything done, owned or operated under or in relation to that agreement;

"rate" includes

(a) a general, individual or joint rate, fare, toll, charge, rental or other compensation of a public utility,

(b) a rule, practice, measurement, classification or contract of a public utility or corporation relating to a rate, and

(c) a schedule or tariff respecting a rate;

"service" includes

(a) the use and accommodation provided by a public utility,

(b) a product or commodity provided by a public utility, and

(c) the plant, equipment, apparatus, appliances, property and facilities employed by or in connection with a public utility in providing service or a product or commodity for the purposes in which the public utility is engaged and for the use and accommodation of the public;

"tenant" does not include a lessee for a term of more than 5 years;

"transmission corporation" has the same meaning as in the *Transmission Corporation Act*;

"value" or **"appraised value"** means the value determined by the commission.

Part 1 – Utilities Commission

Commission continued

- 2 (1) The British Columbia Utilities Commission is continued consisting of individuals appointed as follows by the Lieutenant Governor in Council after a merit based process:
- (a) one commissioner designated as the chair;
 - (b) other commissioners appointed after consultation with the chair.
- (2) The Lieutenant Governor in Council, after consultation with the chair, may designate a commissioner appointed under subsection (1) (b) as a deputy chair.
- (3) The chair may appoint a deputy chair or commissioner to act as chair for any purpose specified in the appointment.
- (4) Sections 1 to 13, 15, 18 to 21, 28 to 30, 32, 34 (3) and (4), 35 to 42, 44, 46.3, 48, 49, 54, 56, 60 (a) and (b) and 61 of the *Administrative Tribunals Act* apply to the commission, and for that purpose a reference to a deputy chair in this Act is a reference to a vice chair under that Act.
- (5) The chair is the chief executive officer of the commission and has supervision over and direction of the work and the staff of the commission.

Commission subject to direction

- 3 (1) Subject to subsection (3), the Lieutenant Governor in Council, by regulation, may issue a direction to the commission with respect to the exercise of the powers and the performance of the duties of the commission, including, without limitation, a direction requiring the commission to exercise a power or perform a duty, or to refrain from doing either, as specified in the regulation.
- (2) The commission must comply with a direction issued under subsection (1), despite
- (a) any other provision of
 - (i) this Act, except subsection (3) of this section, or
 - (ii) the regulations, or
 - (b) any previous decision of the commission.

- (3) The Lieutenant Governor in Council may not under subsection (1) specifically and expressly
- (a) declare an order or decision of the commission to be of no force or effect, or
 - (b) require the commission to rescind an order or a decision.

Sittings and divisions

- 4 (1) The commission
- (a) must sit at the times and conduct its proceedings in a manner it considers convenient for the proper discharge and speedy dispatch of its duties under this Act
 - (b) [Repealed 2004-45-164(b).]
- (2) The chair may organize the commission into divisions.
- (3) The commissioners must sit
- (a) as the commission, or
 - (b) as a division of the commission.
- (4) If commissioners sit as a division
- (a) 2 or more divisions may sit at the same time,
 - (b) the division has all the jurisdiction of and may exercise and perform the powers and duties of the commission, and
 - (c) a decision or action of the division is a decision or action of the commission.
- (5) At a sitting of the commission or of a division of the commission, one commissioner is a quorum.
- (6) The chair may designate a commissioner to serve as chair at any sitting of the commission or a division of it.
- (7) If a proceeding is being held by the commission or by a division and a sitting commissioner is absent or unable to attend,
- (a) that commissioner is thereafter disqualified from continuing to sit on the proceeding, and
 - (b) despite subsection (5), the commissioner or commissioners remaining present and sitting must exercise and perform all the jurisdiction, powers and duties of the commission.
- (8) and (9) [Repealed 2003-46-2.]

(10) In the case of a tie vote at a sitting of the commission or a division of the commission, the decision of the chair of the commission or the division governs.

(11) If a division is comprised of one member and that member is unable for any reason to complete the member's duties, the chair of the commission, with the consent of all parties to the application, may organize a new division to continue to hear and determine the matter on terms agreed to by the parties, and the vacancy does not invalidate the proceeding.

Commission's duties

5 (0.1) In this section, "**minister**" means the minister responsible for the administration of the *Hydro and Power Authority Act*.

(1) On the request of the Lieutenant Governor in Council, it is the duty of the commission to advise the Lieutenant Governor in Council on any matter, whether or not it is a matter in respect of which the commission otherwise has jurisdiction.

(2) If, under subsection (1), the Lieutenant Governor in Council refers a matter to the commission, the Lieutenant Governor in Council may specify terms of reference requiring and empowering the commission to inquire into the matter.

(3) The commission may carry out a function or perform a duty delegated to it under an enactment of British Columbia or Canada.

(4) The commission, in accordance with subsection (5), must conduct an inquiry to make determinations with respect to British Columbia's infrastructure and capacity needs for electricity transmission for the period ending 20 years after the day the inquiry begins or, if the terms of reference given under subsection (6) specify a different period, for that period.

(5) An inquiry under subsection (4) must begin

(a) by March 31, 2009, and

(b) at least once every 6 years after the conclusion of the previous inquiry,

unless otherwise ordered by the Lieutenant Governor in Council.

(6) For an inquiry under subsection (4), the minister may specify, by order, terms of reference requiring and empowering the commission to inquire into the matter referred to in that subsection, including terms of reference

regarding the manner in which and the time by which the commission must issue its determinations under subsection (4).

(7) The minister may declare, by regulation, that the commission may not, during the period specified in the regulation, reconsider, vary or rescind a determination made under subsection (4).

(8) Despite section 75, if a regulation is made for the purposes of subsection (7) of this section with respect to a determination, the commission is bound by that determination in any hearing or proceeding held during the period specified in the regulation.

(9) The commission may order a public utility to submit an application under section 46, by the time specified in the order, in relation to a determination made under subsection (4).

Repealed

6 [Repealed 2004-45-165.]

Employees

7 Despite the *Public Service Act*, the commission may employ a secretary and other officers and other employees it considers necessary and may determine their duties, conditions of employment and remuneration.

Technical consultants

8 The commission may appoint or engage persons having special or technical knowledge necessary to assist the commission in carrying out its functions.

Pensions

9 The Lieutenant Governor in Council may, by order, direct that the Public Service Pension Plan, continued under the *Public Sector Pension Plans Act*, applies to commissioners, officers and other employees of the commission, but the commission may, alone or in cooperation with other corporations, departments, commissions or other agencies of the Crown, establish, support or participate in any one or more of

(a) a pension or superannuation plan, or

(b) a group insurance plan

for the benefit of commissioners, officers and other employees of the commission and their dependants.

Secretary's duties**10** (1) The secretary must

- (a) keep a record of the proceedings before the commission,
- (b) ensure that every rule, regulation and order of the commission is filed in the records of the commission,
- (c) have custody of all rules, regulations and orders made by the commission and all other records and documents of, or filed with, the commission, and
- (d) carry out the instructions and directions of the commission under this Act respecting the secretary's duties or office.

(2) On the application of a person who pays a prescribed fee, the secretary must deliver to the person a certified copy of any rule, regulation or order of the commission.

(3) In the absence of the secretary, the duties of the secretary under this Act may be performed by another person appointed by the commission.

(4) A rule, regulation and order of the commission must be signed by the chair, a deputy chair or an acting chair, and the original or a copy of it must be delivered to the secretary for filing.

Conflict of interest**11** (1) A commissioner or employee of the commission must not, directly or indirectly,

- (a) hold, acquire or have a beneficial interest in a share, stock, bond, debenture or other security of a corporation or other person subject to regulation under Part 3 of this Act,
- (b) have a significant beneficial interest in a device, appliance, machine, article, patent or patented process, or a part of it, that is required or used by a corporation or other person referred to in paragraph (a) for the purpose of its equipment or service, or
- (c) have a significant beneficial interest in a contract for the construction of works or the provision of a service for or by a corporation or other person referred to in paragraph (a).

(2) A commissioner or employee of the commission, in whom a beneficial interest referred to in subsection (1) is or becomes vested, must divest himself or herself of the beneficial interest within 3 months after

appointment to the commission or acquisition of the property, as the case may be.

(3) The use or purchase for personal or domestic purposes, of gas, heat, light, power, electricity or petroleum products or service from a corporation or other person subject to regulation under this Act is not a contravention of this section, and does not disqualify a commissioner or employee from acting in any matter affecting that corporation or other person.

Obligation to keep information confidential

12 (1) Every commissioner and every officer and employee of the commission must keep secret all information coming to the person's knowledge during the course of the administration of this Act, except insofar as disclosure is necessary for the administration of this Act or insofar as the commission authorizes the person to release the information.

(2) A commissioner, officer or employee of the commission must not be required to testify or produce evidence in any proceeding, other than a criminal proceeding, about records or information obtained in the discharge of duties under this Act.

(3) Despite subsection (2), the Supreme Court may require the commission to produce the record of a proceeding that is the subject of an application for judicial review under the *Judicial Review Procedure Act*.

Annual report

13 (1) In each year, the commission must make a report to the Lieutenant Governor in Council for the preceding fiscal year, setting out briefly

(a) all applications and complaints to the commission under this Act and summaries of the commission's findings on them,

(b) other matters that the commission considers to be of public interest in connection with the discharge of its duties under this Act, and

(c) other information the Lieutenant Governor in Council directs.

(2) The report must be laid before the Legislative Assembly as soon as possible after it is submitted to the Lieutenant Governor in Council.

Part 2

Repealed

14-20 [Repealed 2003-46-5.]

Part 3 — Regulation of Public Utilities

Application of this Part

- 21 (1) This Part applies only to a public utility that is subject to the legislative authority of the Province.
- (2) The provision by a public utility of a class of service in respect of which the public utility is not subject to the legislative authority of the Province does not make this Part inapplicable to that public utility in respect of any other class of service.

Exemptions

- 22 (1) In this section:

"eligible person" means a person, or a class of persons, that

- (a) generates, produces, transmits, distributes or sells electricity,
- (b) for the purpose of heating or cooling any building, structure or equipment or for any industrial purpose, heats, cools or refrigerates water, air or any heating medium or coolant, using for that purpose equipment powered by a fuel, a geothermal resource or solar energy, or
- (c) enters into an energy supply contract, within the meaning of section 68, for the provision of electricity;

"minister" means the minister responsible for the administration of the *Hydro and Power Authority Act*.

- (2) The minister, by regulation, may

- (a) exempt from any or all of section 71 and the provisions of this Part
 - (i) an eligible person, or
 - (ii) an eligible person in respect of any equipment, facility, plant, project, activity, contract, service or system of the eligible person, and
- (b) in respect of an exemption made under paragraph (a), impose

any terms and conditions the minister considers to be in the public interest.

(3) The minister, before making a regulation under subsection (2), may refer the matter to the commission for a review.

General supervision of public utilities

23 (1) The commission has general supervision of all public utilities and may make orders about

- (a) equipment,
- (b) appliances,
- (c) safety devices,
- (d) extension of works or systems,
- (e) filing of rate schedules,
- (f) reporting, and
- (g) other matters it considers necessary or advisable for
 - (i) the safety, convenience or service of the public, or
 - (ii) the proper carrying out of this Act or of a contract, charter or franchise involving use of public property or rights.

(2) Subject to this Act, the commission may make regulations requiring a public utility to conduct its operations in a way that does not unnecessarily interfere with, or cause unnecessary damage or inconvenience to, the public.

Commission must make examinations and inquiries

24 In its supervision of public utilities, the commission must make examinations and conduct inquiries necessary to keep itself informed about

- (a) the conduct of public utility business,
- (b) compliance by public utilities with this Act, regulations or any other law, and
- (c) any other matter in the commission's jurisdiction.

Commission may order improved service

25 If the commission, after a hearing held on its own motion or on complaint, finds that the service of a public utility is unreasonable, unsafe, inadequate

or unreasonably discriminatory, the commission must

- (a) determine what is reasonable, safe, adequate and fair service, and
- (b) order the utility to provide it.

Commission may set standards

26 After a hearing held on the commission's own motion or on complaint, the commission may do one or more of the following:

- (a) determine and set just and reasonable standards, classifications, rules, practices or service to be used by a public utility;
- (b) determine and set adequate and reasonable standards for measuring quantity, quality, pressure, initial voltage or other conditions of supplying service;
- (c) prescribe reasonable regulations for examining, testing or measuring a service;
- (d) establish or approve reasonable standards for accuracy of meters and other measurement appliances;
- (e) provide for the examination and testing of appliances used to measure a service of a utility.

Joint use of facilities

27 (1) If the commission, after a hearing, finds that

- (a) public convenience and necessity require the use by a public utility of conduits, subways, poles, wires or other equipment belonging to another public utility, and
- (b) the use will not prevent the owner or other users from performing their duties or result in any substantial detriment to their service,

the commission may, if the utilities fail to agree on the use, conditions or compensation, make an order it considers reasonable, directing that the use or joint use of the conduits, subways, poles, wires or other equipment be allowed and prescribing conditions of and compensation for the use.

(2) If the commission, after a hearing, finds that the provision of adequate service by one public utility or the safety of the persons operating or using

that service requires that wires or cables carrying electricity and run, placed, erected, maintained or used by another public utility be placed, constructed or equipped with safety devices, the commission may make an order it considers reasonable about the placing, construction or equipment.

(3) By the same or a later order, the commission may

(a) direct that the cost of the placing, construction or equipment be at the expense of the public utility whose wire, cable or apparatus was most recently placed, or

(b) in the discretion of the commission, apportion the cost between the utilities.

Utility must provide service if supply line near

28 (1) On being requested by the owner or occupier of the premises to do so, a public utility must supply its service to premises that are located within 90 metres of its supply line or any lesser distance that the commission prescribes suitable for that purpose.

(2) Before supplying the service under subsection (1) or making a connection for the purpose, or as a condition of continuing to supply the service, the public utility may require the owner or occupier to give reasonable security for repayment of the costs of making the connection as set out in the filed schedule of rates.

(3) After a hearing and for proper cause, the commission may relieve a public utility from the obligation to supply service under this Act on terms the commission considers proper and in the public interest.

Commission may order utility to provide service if supply line distant

29 On the application of a person whose premises are located more than 90 metres from a supply line suitable for that purpose, the commission may order a public utility that controls or operates the line

(a) to supply, within the time the commission directs, the service required by that person, and

(b) to make extensions and install necessary equipment and apparatus on terms the commission directs, which terms may include payment of all or part of the cost by the applicant.

Commission may order extension of existing service

30 If the commission, after a hearing, determines that

(a) an extension of the existing services of a public utility, in a general area that the public utility may properly be considered responsible for developing, is feasible and required in the public interest, and

(b) the construction and maintenance of the extension will not necessitate a substantial increase in rates chargeable, or a decrease in services provided, by the utility elsewhere,

the commission may order the utility to make the extension on terms the commission directs, which may include payment of all or part of the cost by the persons affected.

Regulation of agreements

31 The commission may make rules governing conditions to be contained in agreements entered into by public utilities for their regulated services or for a class of regulated service.

Use of municipal thoroughfares

32 (1) This section applies if a public utility

(a) has the right to enter a municipality to place its distribution equipment on, along, across, over or under a public street, lane, square, park, public place, bridge, viaduct, subway or watercourse, and

(b) cannot come to an agreement with the municipality on the use of the street or other place or on the terms of the use.

(2) On application and after any inquiry it considers advisable, the commission may, by order, allow the use of the street or other place by the public utility for that purpose and specify the manner and terms of use.

Dispensing with municipal consent

33 (1) This section applies if a public utility

(a) cannot agree with a municipality respecting placing its distribution equipment on, along, across, over or under a public street, lane, square, park, public place, bridge, viaduct, subway or watercourse in a municipality, and

(b) the public utility is otherwise unable, without expenditures

that the commission considers unreasonable, to extend its system, line or apparatus from a place where it lawfully does business to another place where it is authorized to do business.

(2) On application and after a hearing, for the purpose of that extension only and without unduly preventing the use of the street or other place by other persons, the commission may, by order,

(a) allow the use of the street or other place by the public utility, despite any law or contract granting to another person exclusive rights, and

(b) specify the manner and terms of the use.

Order to extend service in municipality

34 (1) On the complaint of a municipality that a public utility doing business in the municipality fails to extend its service to a part of the municipality, and after any hearing the commission considers advisable, the commission may order the public utility to extend its service in a way that the commission considers reasonable and proper.

(2) An order under subsection (1) may

(a) in the commission's discretion, impose terms for the extension, including the expenditure to be incurred for all necessary works, and

(b) apportion the cost between the public utility, the municipality and consumers receiving service from the extension.

Other orders to extend service

35 If the commission, after a hearing, concludes that in its opinion an extension by a public utility of its existing service would provide sufficient business to justify the construction and maintenance of the extension, and the financial condition of the public utility reasonably warrants the capital expenditure required, the commission may order the utility to extend its service to the extent the commission considers reasonable and proper.

Use of municipal structures

36 Subject to any agreement between a public utility and a municipality and to the franchise or rights of the public utility, and after any hearing the commission considers advisable, the commission may, by order, specify the terms on which the public utility may use for any purpose of its service

- (a) a highway in the municipality, or
- (b) a public bridge, viaduct or subway constructed or to be constructed by the municipality alone or jointly with another municipality, corporation or government.

Supervisors and inspectors

- 37 (1) If the commission considers that a supervisor or inspector should be appointed to supervise or inspect, continuously or otherwise, the system, works, plant, equipment or service of a public utility with a view to establishing and carrying out measures for
- (a) the safety of the public and of the users of the utility's service, or
 - (b) adequacy of service,
- the commission may appoint a supervisor or inspector for that utility and may specify the person's duties.
- (2) The commission may
- (a) set the salary and expenses of a supervisor or inspector appointed under subsection (1), and
 - (b) order the amount set
 - (i) to be borne by the municipality in which the operations of the public utility are carried on or its service is provided, or
 - (ii) to be borne or apportioned in a way the commission considers equitable.

Public utility must provide service

- 38 A public utility must
- (a) provide, and
 - (b) maintain its property and equipment in a condition to enable it to provide,
- a service to the public that the commission considers is in all respects adequate, safe, efficient, just and reasonable.

No discrimination or delay in service

- 39 On reasonable notice, a public utility must provide suitable service without

undue discrimination or undue delay to all persons who

- (a) apply for service,
- (b) are reasonably entitled to it, and
- (c) pay or agree to pay the rates established for that service under this Act.

Exemption for part of municipality

- 40 (1) On application, the commission may, by order, exempt a municipality from section 39 except in a defined area.
- (2) On application by any person and after notice to the municipality, the commission may enlarge or reduce an area defined under subsection (1).

No discontinuance without permission

- 41 A public utility that has been granted a certificate of public convenience and necessity or a franchise, or that has been deemed to have been granted a certificate of public convenience and necessity, and has begun any operation for which the certificate or franchise is necessary, or in respect of which the certificate is deemed to have been granted, must not cease the operation or a part of it without first obtaining the permission of the commission.

Duty to obey orders

- 42 A public utility must obey the lawful orders of the commission made under this Act for its business or service, and must do all things necessary to secure observance of those orders by its officers, agents and employees.

Duty to provide information

- 43 (1) A public utility must, for the purposes of this Act,
- (a) answer specifically all questions of the commission, and
 - (b) provide to the commission
 - (i) the information the commission requires, and
 - (ii) a report, submitted annually and in the manner the commission requires, regarding the demand-side measures taken by the public utility during the period addressed by the report, and the effectiveness of those measures.
- (1.1) The authority, in addition to providing the information and reports referred to in subsection (1), must provide to the commission, in

accordance with the regulations, an annual report comparing the electricity rates charged by the authority with electricity rates charged by public utilities in other jurisdictions in North America, including an assessment of whether the authority's electricity rates are competitive with those other rates.

(2) A public utility that receives from the commission any form of return must fully and correctly answer each question in the return and deliver it to the commission.

(3) On request by the commission, a public utility must deliver to the commission

(a) all profiles, contracts, reports of engineers, accounts and records in its possession or control relating in any way to its property or service or affecting its business, or verified copies of them, and

(b) complete inventories of the utility's property in the form the commission directs.

(4) On request by the commission, a public utility must file with the commission a statement in writing setting out the name, title of office, post office address and the authority, powers and duties of

(a) every member of the board of directors and the executive committee,

(b) every trustee, superintendent, chief or head of construction or operation, or of any department, branch, division or line of construction or operation, and

(c) other officers of the utility.

(5) The statement required under subsection (4) must be filed in a form that discloses the source and origin of each administrative act, rule, decision, order or other action of the utility.

Duty to keep records

44 (1) A public utility must have in British Columbia an office in which it must keep all accounts and records required by the commission to be kept in British Columbia.

(2) A public utility must not remove or permit to be removed from British Columbia an account or record required to be kept under subsection (1), except on conditions specified by the commission.

Long-term resource and conservation planning

44.1 (1) In this section, "**demand increase**" means the greater of

(a) the difference between

(i) the sum of the estimate referred to in subsection (4) (b) and a prescribed amount, if any, and

(ii) the demand the authority would serve during the period referred to in subsection (4) (b) if the demand in each year of that period remains equal to the demand referred to in subsection (4) (a), and

(b) zero.

(2) Subject to subsection (4), a public utility must file with the commission, in the form and at the times the commission requires, a long-term resource plan including all of the following:

(a) an estimate of the demand for energy the public utility would expect to serve if the public utility does not take new demand-side measures during the period addressed by the plan;

(b) a plan of how the public utility intends to reduce the demand referred to in paragraph (a) by taking cost-effective demand-side measures;

(c) an estimate of the demand for energy that the public utility expects to serve after it has taken cost-effective demand-side measures;

(d) a description of the facilities that the public utility intends to construct or extend in order to serve the estimated demand referred to in paragraph (c);

(e) information regarding the energy purchases from other persons that the public utility intends to make in order to serve the estimated demand referred to in paragraph (c);

(f) an explanation of why the demand for energy to be served by the facilities referred to in paragraph (d) and the purchases referred to in paragraph (e) are not planned to be replaced by demand-side measures;

(g) any other information required by the commission.

(3) The commission may exempt a public utility from the requirement to include in a long-term resource plan filed under subsection (2) any of the

information referred to in paragraphs (a) to (f) of that subsection if the commission is satisfied that the information is not applicable with respect to the nature of the service provided by the public utility

(4) A long-term resource plan filed under subsection (2) by the authority before the end of the 2020 calendar year must include, in addition to everything referred to in subsection (2) (a) to (g), all of the following:

(a) a statement of the demand for electricity the authority served in the year beginning on April 1, 2007, and ending on March 31, 2008;

(b) an estimate of the total demand for electricity the authority would expect to serve in the period beginning on April 1, 2008, and ending on March 31, 2021, if no new demand-side measures are taken during that period;

(c) a statement of the demand-side measures the authority would need to take so that, in combination with demand-side measures taken by the government of British Columbia or of Canada or a local authority, the demand increase would be reduced by 50% by 2020.

(5) The commission may establish a process to review long-term resource plans filed under subsection (2).

(6) After reviewing a long-term resource plan filed under subsection (2), the commission must

(a) accept the plan, if the commission determines that carrying out the plan would be in the public interest, or

(b) reject the plan.

(7) The commission may accept or reject, under subsection (6), a part of a public utility's plan, and, if the commission rejects a part of a plan,

(a) the public utility may resubmit the part within a time specified by the commission, and

(b) the commission may accept or reject, under subsection (6), the part resubmitted under paragraph (a) of this subsection.

(8) In determining under subsection (6) whether to accept a long-term resource plan, the commission must consider

(a) the government's energy objectives,

(b) whether the plan is consistent with the requirements under

sections 64.01 and 64.02, if applicable,

(c) whether the plan shows that the public utility intends to pursue adequate, cost-effective demand-side measures, and

(d) the interests of persons in British Columbia who receive or may receive service from the public utility.

(9) In accepting under subsection (6) a long-term resource plan, or part of a plan, the commission may do one or both of the following:

(a) order that a proposed utility plant or system, or extension of either, referred to in the accepted plan or the part is exempt from the operation of section 45 (1);

(b) order that, despite section 75, a matter the commission considers to be adequately addressed in the accepted plan or the part is to be considered as conclusively determined for the purposes of any hearing or proceeding to be conducted by the commission under this Act, other than a hearing or proceeding for the purposes of section 99.

Expenditure schedule

44.2 (1) A public utility may file with the commission an expenditure schedule containing one or more of the following:

(a) a statement of the expenditures on demand-side measures the public utility has made or anticipates making during the period addressed by the schedule;

(b) a statement of capital expenditures the public utility has made or anticipates making during the period addressed by the schedule;

(c) a statement of expenditures the public utility has made or anticipates making during the period addressed by the schedule to acquire energy from other persons.

(2) The commission may not consent under section 61 (2) to an amendment to or a rescission of a schedule filed under section 61 (1) to the extent that the amendment or the rescission is for the purpose of recovering expenditures referred to in subsection (1) (a) of this section, unless

(a) the expenditure is the subject of a schedule filed and accepted under this section, or

(b) the amendment or rescission is for the purpose of setting an

interim rate.

- (3) After reviewing an expenditure schedule submitted under subsection (1), the commission, subject to subsections (5) and (6), must
 - (a) accept the schedule, if the commission considers that making the expenditures referred to in the schedule would be in the public interest, or
 - (b) reject the schedule.
- (4) The commission may accept or reject, under subsection (3), a part of a schedule.
- (5) In considering whether to accept an expenditure schedule, the commission must consider
 - (a) the government's energy objectives,
 - (b) the most recent long-term resource plan filed by the public utility under section 44.1, if any,
 - (c) whether the schedule is consistent with the requirements under section 64.01 or 64.02, if applicable,
 - (d) if the schedule includes expenditures on demand-side measures, whether the demand-side measures are cost-effective within the meaning prescribed by regulation, if any, and
 - (e) the interests of persons in British Columbia who receive or may receive service from the public utility.
- (6) If the commission considers that an expenditure in an expenditure schedule was determined to be in the public interest in the course of determining that a long-term resource plan was in the public interest under section 44.1 (6),
 - (a) subsection (5) of this section does not apply with respect to that expenditure, and
 - (b) the commission must accept under subsection (3) the expenditure in the expenditure schedule.

Certificate of public convenience and necessity

- 45 (1) Except as otherwise provided, after September 11, 1980, a person must not begin the construction or operation of a public utility plant or system, or an extension of either, without first obtaining from the commission a certificate that public convenience and necessity require or will require the

construction or operation.

(2) For the purposes of subsection (1), a public utility that is operating a public utility plant or system on September 11, 1980 is deemed to have received a certificate of public convenience and necessity, authorizing it

(a) to operate the plant or system, and

(b) subject to subsection (5), to construct and operate extensions to the plant or system.

(3) Nothing in subsection (2) authorizes the construction or operation of an extension that is a reviewable project under the *Environmental Assessment Act*.

(4) The commission may, by regulation, exclude utility plant or categories of utility plant from the operation of subsection (1).

(5) If it appears to the commission that a public utility should, before constructing or operating an extension to a utility plant or system, apply for a separate certificate of public convenience and necessity, the commission may, not later than 30 days after construction of the extension is begun, order that subsection (2) does not apply in respect of the construction or operation of the extension.

(6) A public utility must file with the commission at least once each year a statement in a form prescribed by the commission of the extensions to its facilities that it plans to construct.

(6.1) [Repealed 2008-13-8.]

(6.2) [Repealed 2008-13-8.]

(7) Except as otherwise provided, a privilege, concession or franchise granted to a public utility by a municipality or other public authority after September 11, 1980 is not valid unless approved by the commission.

(8) The commission must not give its approval unless it determines that the privilege, concession or franchise proposed is necessary for the public convenience and properly conserves the public interest.

(9) In giving its approval, the commission

(a) must grant a certificate of public convenience and necessity, and

(b) may impose conditions about

(i) the duration and termination of the privilege, concession or franchise, or

(ii) construction, equipment, maintenance, rates or service, as the public convenience and interest reasonably require.

Procedure on application

- 46** (1) An applicant for a certificate of public convenience and necessity must file with the commission information, material, evidence and documents that the commission prescribes.
- (2) The commission has a discretion whether or not to hold any hearing on the application.
- (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 and 64.02, 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.
- (4) If a public utility desires to exercise a right or privilege under a consent, franchise, licence, permit, vote or other authority that it proposes to obtain but that has not, at the date of the application, been granted to it, the public utility may apply to the commission for an order preliminary to the issue of the certificate.
- (5) On application under subsection (4), the commission may make an order declaring that it will, on application, under rules it specifies, issue the

desired certificate, on the terms it designates in the order, after the public utility has obtained the proposed consent, franchise, licence, permit, vote or other authority.

(6) On evidence satisfactory to the commission that the consent, franchise, licence, permit, vote or other authority has been secured, the commission must issue a certificate under section 45.

(7) The commission may amend a certificate previously issued, or issue a new certificate, for the purpose of renewing, extending or consolidating a certificate previously issued.

(8) A public utility to which a certificate is, or has been, issued, or to which an exemption is, or has been, granted under section 45 (4), is authorized, subject to this Act, to construct, maintain and operate the plant, system or extension authorized in the certificate or exemption.

Order to cease work

47 (1) If a public utility

(a) is engaged, or is about to engage, in the construction or operation of a plant or system, and

(b) has not secured or has not been exempted from the requirement for, or is not deemed to have received a certificate of public convenience and necessity required under this Act,

any interested person may file a complaint with the commission.

(2) The commission may, with or without notice, make an order requiring the public utility complained of to cease the construction or operation until the commission makes and files its decision on the complaint, or until further order of the commission.

(3) The commission may, after a hearing, make the order and specify the terms under this Act that it considers advisable.

(4) If the commission considers it necessary to determine whether a person is engaged or is about to engage in construction or operation of any plant or system, the commission may request that person to provide information required by it and to answer specifically all questions of the commission, and the person must comply.

Cancellation or suspension of franchises and permits

48 (1) If the commission, after a hearing, determines that a public utility

holding a franchise, licence or permit has failed to exercise or has not continued to exercise or use the right and privilege granted by the franchise, licence or permit, the commission may

(a) cancel the franchise, licence or permit, or

(b) suspend for a time the commission considers advisable the rights, or any of them, under the franchise, licence or permit.

(2) If a franchise, licence or permit is cancelled, the utility must cease to operate.

(3) If a right under a franchise, licence or permit is suspended, the utility must cease to exercise the suspended right during the period of suspension.

Accounts and reports

49 The commission may, by order, require every public utility to do one or more of the following:

(a) keep the records and accounts of the conduct of the utility's business that the commission may specify, and for public utilities of the same class, adopt a uniform system of accounting specified by the commission;

(b) provide, at the times and in the form and manner the commission specifies, a detailed report of finances and operations, verified as specified;

(c) file with the commission, at the times and in the form and manner the commission specifies, a report of every accident occurring to or on the plant, equipment or other property of the utility, if the accident is of such nature as to endanger the safety, health or property of any person;

(d) obtain from a board, tribunal, municipal or other body or official having jurisdiction or authority, permission, if necessary, to undertake or carry on a work or service ordered by the commission to be undertaken or carried on that is contingent on the permission.

Commission approval of issue of securities

50 (1) In this section, "**security**" means any share of any class of shares of a public utility or any bond, debenture, note or other obligation of a public utility whether secured or unsecured.

(2) Except in the case of a security evidencing indebtedness payable less than one year from its date, a public utility must not issue a security without first obtaining approval of the commission under this section and, if section 54 applies, under that section.

(3) Without first obtaining the commission's approval, a public utility must not,

(a) in respect of a security that it has issued,

(i) increase a fixed dividend or fixed interest rate,

(ii) alter a maturity date for the issue,

(iii) restrict the utility's right to redeem the issue,

(iv) increase the premium to be paid on redemption, or

(v) make a material alteration in the characteristics of the security, or

(b) purchase, redeem or otherwise acquire shares of any class of the utility except in accordance with any special rights or restrictions attached to them.

(4) Subsections (2) and (3) do not apply to the issue of shares under a genuine employee share purchase plan or genuine employee share option plan that has been filed with the commission.

(5) Without first obtaining the commission's approval, a public utility must not guarantee the payment of all or part of a loan or all or part of the interest on a loan made to another person.

(6) A public utility is not liable under a guarantee given by it after June 29, 1988, in contravention of subsection (5) or of a condition of approval imposed under subsection (7).

(7) The commission may give its approval under this section subject to conditions and requirements considered necessary or desirable in the public interest.

(8) A municipality is not a utility for the purpose of this section.

Restraint on capitalization

51 A public utility must not do any of the following:

(a) capitalize a franchise or right to be a corporation;

(b) capitalize a franchise, licence, permit or concession in excess of the amount that, exclusive of tax or annual charge, is paid to

- the government, a municipality or other public authority as consideration for the franchise, licence, permit or concession;
- (c) issue a security or evidence of indebtedness against a contract for consolidation, amalgamation, merger or lease.

Restraint on disposition

- 52 (1) Except for a disposition of its property in the ordinary course of business, a public utility must not, without first obtaining the commission's approval,
- (a) dispose of or encumber the whole or a part of its property, franchises, licences, permits, concessions, privileges or rights, or
 - (b) by any means, direct or indirect, merge, amalgamate or consolidate in whole or in part its property, franchises, licences, permits, concessions, privileges or rights with those of another person.
- (2) The commission may give its approval under this section subject to conditions and requirements considered necessary or desirable in the public interest.

Consolidation, amalgamation and merger

- 53 (1) A public utility must not consolidate, amalgamate or merge with another person
- (a) unless the Lieutenant Governor in Council
 - (i) has first received from the commission a report under this section including an opinion that the consolidation, amalgamation or merger would be beneficial in the public interest, and
 - (ii) has, by order, consented to the consolidation, amalgamation or merger, and
 - (b) except in accordance with an order made under paragraph (a).
- (2) The Lieutenant Governor in Council may, in an order under subsection (1) (a), include conditions and requirements that the Lieutenant Governor in Council considers necessary or advisable.
- (3) An application for consent of the Lieutenant Governor in Council under subsection (1) must be made to the commission by the public utility.
- (4) The commission must inquire into the application and may for that

purpose hold a hearing.

(5) On conclusion of its inquiry, the commission must,

(a) if it is of the opinion that the consolidation, amalgamation or merger would be beneficial in the public interest, submit its report and findings to the Lieutenant Governor in Council, or

(b) dismiss the application.

(6) If a public utility gives notice to its shareholders of a meeting of shareholders in connection with a consolidation, amalgamation or merger, it must

(a) set out in the notice the provisions of this section, and

(b) file a copy of the notice with the commission at the time of mailing to the shareholders.

Reviewable interests

54 (1) In this section:

"child" includes a child in respect of whom a person referred to in the definition of "spouse" stands in the place of a parent;

"offeree" means a person to whom a take over bid is made;

"offeror" means a person, other than an agent, who makes a take over bid and includes 2 or more persons

(a) whose bids are made jointly or in concert, or

(b) who intend to exercise jointly or in concert any voting rights attaching to the shares for which a take over bid is made;

"spouse" means a person who

(a) is married to another person, or

(b) is living and cohabiting with another person in a marriage-like relationship, including a marriage-like relationship between persons of the same gender, and has lived and cohabited in that relationship for a period of at least 2 years;

"take over bid" has the same meaning as in section 92 of the *Securities Act*;

"voting share" means a share that has, or may under any special rights or restrictions attached to the share have, the right to vote for the

election of directors, and for this purpose "**share**" includes

- (a) a security convertible into such a share, and
- (b) options and rights to acquire such a share or such a convertible security.

(2) For the purposes of this section, persons are associates if any of the following apply:

- (a) one of the persons is a corporation
 - (i) of which more than 10% of the shares outstanding of any class of the corporation are beneficially owned or controlled, directly or indirectly, by the other person, or
 - (ii) of which the other is a director or officer;
- (b) each of the persons is a corporation and
 - (i) more than 10% of the shares outstanding of any class of shares of one are beneficially owned or controlled, directly or indirectly, by the other, or
 - (ii) more than 10% of the shares outstanding of any class of shares of each are beneficially owned or controlled, directly or indirectly, by the same person;
- (c) they are partners or one is a partnership of which the other is a partner;
- (d) one is a trust in which the other has a substantial beneficial interest or for which the other serves as trustee or in a similar capacity;
- (e) they are obligated to act in concert in exercising a voting right in respect of shares of the utility;
- (f) one is the spouse or child of the other;
- (g) one is a relative of the other or of the other's spouse and has the same home as the other.

(3) For the purpose of subsection (2), if a person has more than one associate, those associates are associates of each other.

(4) For the purpose of this section, a person has a reviewable interest in a public utility if

- (a) the person owns or controls, or
- (b) the person and the person's associates own or control,

in the aggregate more than 20% of the voting shares outstanding of any class of shares of the utility.

- (5) A public utility must not, without the approval of the commission,
- (a) issue, sell, purchase or register on its books a transfer of shares in the capital of the utility or create, or
 - (b) attach to any shares, whether issued or unissued, any special rights or restrictions,

if the issue, sale, purchase or registration or the creation or attachment of the special rights or restrictions would

- (c) cause any person to have a reviewable interest,
- (d) increase the percentage of voting shares owned by a person who has a reviewable interest,
- (e) be a registration of a transfer of shares, the acquisition of which was contrary to subsection (7) or (8), or
- (f) increase the voting rights attached to any shares owned by a person who has a reviewable interest.

(6) Failure of a public utility to comply with subsection (5) does not give rise to an offence if the public utility acts in the genuine belief based on an enquiry made with reasonable care, that the issue, sale, purchase or registration, or the creation or attachment of the special rights or restrictions, would not have the effects referred to in subsection (5) (c) to (f).

(7) A person must not acquire or acquire control of such numbers of any class of shares of a public utility as

- (a) in themselves, or
- (b) together with shares already owned or controlled by the person and the person's associates,

cause the person to have a reviewable interest in a public utility unless the person has obtained the commission's approval.

(8) Except if the acquisition or acquisition of control does not increase the percentage of voting shares held, owned or controlled by the person or by the person and the person's associates, a person having a reviewable interest in a public utility and any associate of that person must not acquire or acquire control of any voting shares in the public utility unless the person or associate has obtained the commission's approval.

(9) The commission may give its approval under this section subject to conditions and requirements it considers necessary or desirable in the public interest, but the commission must not give its approval under this section unless it considers that the public utility and the users of the service of the public utility will not be detrimentally affected.

(10) If the commission determines that there has been a contravention of subsection (5), (7) or (8), the commission may, on notice to the public utility and after a hearing, make an order imposing on the public utility conditions and requirements respecting the management and operation of the utility.

(11) A proceeding must not be brought against the commission or the government by reason of the exercise by the commission of its powers under subsection (9) or (10).

(12) An offeror who makes a take over bid for shares of a public utility must

(a) file with the commission a copy of the take over bid and all supporting or supplementary material within 5 days after the date the material is first sent to offerees, and

(b) include in or attach to the take over bid a notice setting out the provisions of this section and stating the number, without duplication, and designation of any shares of the public utility held by the offeror and the offeror's associates.

(13) Nothing in subsection (12) relieves a person from any requirement under the *Securities Act*.

Appraisal of utility property

55 (1) The commission may

(a) ascertain by appraisal the value of the property of a public utility, and

(b) inquire into every fact that, in its judgment, has a bearing on that value, including the amount of money actually and reasonably expended in the undertaking to provide service reasonably adequate to the requirements of the community served by the utility as that community exists at the time of the appraisal.

(2) In making its appraisal, the commission must have access to all records in the possession of a municipality or any ministry or board of the

government.

- (3) In making its appraisal under this section, the commission may order
- (a) that all or part of the costs and expenses of the commission in making the appraisal must be paid by the public utility, and
 - (b) that the utility pay an amount as the work of appraisal proceeds.
- (4) The certificate of the chair of the commission is conclusive evidence of the amounts payable under subsection (3).
- (5) Expenses approved by the commission in connection with an appraisal, including expenses incurred by the public utility whose property is appraised, must be charged by the utility to the cost of operating the property as a current item of expense, and the commission may, by order, authorize or require the utility to amortize this charge over a period and in the manner the commission specifies.

Depreciation accounts and funds

- 56 (1) If the commission, after inquiry, considers that it is necessary and reasonable that a depreciation account should be carried by a public utility, the commission may, by order, require the utility to keep an adequate depreciation account under rules and forms of account specified by the commission.
- (2) The commission must determine and, by order after a hearing, set proper and adequate rates of depreciation.
- (3) The rates must be set so as to provide, in addition to the expense of maintenance, the amounts required to keep the public utility's property in a state of efficiency in accordance with technical and engineering progress in that industry of the utility.
- (4) A public utility must adjust its depreciation accounts to conform to the rates fixed by the commission and, if ordered by the commission, must set aside out of earnings whatever money is required and carry it in a depreciation fund.
- (5) Without the consent of the commission, the depreciation fund must not be expended other than for replacement, improvement, new construction, extension or addition to the property of the utility.

Reserve funds

57 (1) The commission may, by order, require a public utility to create and maintain a reserve fund for any purpose the commission considers proper, and may fix the amount or rate to be charged each year in the accounts of the utility for the purpose of creating the reserve fund.

(2) The commission may order that no reserve fund other than that created and maintained as directed by the commission may be created by a public utility.

Commission may order amendment of schedules

58 (1) The commission may,

(a) on its own motion, or

(b) on complaint by a public utility or other interested person that the existing rates in effect and collected or any rates charged or attempted to be charged for service by a public utility are unjust, unreasonable, insufficient, unduly discriminatory or in contravention of this Act, the regulations or any other law,

after a hearing, determine the just, reasonable and sufficient rates to be observed and in force.

(2) If the commission makes a determination under subsection (1), it must, by order, set the rates.

(2.1) The commission must set rates for the authority in accordance with

(a) the prescribed requirements, if any, and

(b) the prescribed factors and guidelines, if any.

(2.2) A requirement prescribed for the purposes of subsection (2.1) (a) applies despite

(a) any other provision of

(i) this Act, including, for greater certainty, section 58.1, or

(ii) the regulations, except a regulation under section 3, or

(b) any previous decision of the commission.

(2.3) Subsections (2.1) (a) and (2.2) are repealed on March 31, 2010.

(2.4) Despite subsection (2.3), a requirement prescribed for the purposes of subsection (2.1) (a) that is in effect immediately before March 31, 2010, continues to apply after that date as though subsection (2.2) were still in force, unless the prescribed requirement is amended or repealed after that date.

- (3) The public utility affected by an order under this section must
- (a) amend its schedules in conformity with the order, and
 - (b) file amended schedules with the commission.

Rate rebalancing

58.1 (1) In this section, "**revenue-cost ratio**" means the amount determined by dividing the authority's revenues from a class of customers during a period of time by the authority's costs to serve that class of customers during the same period of time.

- (2) This section applies despite
- (a) any other provision of
 - (i) this Act, or
 - (ii) the regulations, except a regulation under section 3 or 125.1 (4) (f), or
 - (b) any previous decision of the commission.

(3) The following decision and orders of the commission are of no force or effect to the extent that they require the authority to do anything for the purpose of changing revenue-cost ratios:

- (a) 2007 RDA Phase 1 Decision, issued October 26, 2007;
- (b) order G-111-07, issued September 7, 2007;
- (c) order G-130-07, issued October 26, 2007;
- (d) order G-10-08, issued January 21, 2008,

and the rates of the authority that applied immediately before this section comes into force continue to apply and are deemed to be just, reasonable and not unduly discriminatory.

(4) Nothing in subsection (3) prevents the commission from setting rates for the authority, but the commission may not set rates for the authority for the purpose of changing the revenue-cost ratio for a class of customers.

(5) Subsection (4) is repealed on March 31, 2010.

(6) Nothing in subsection (3) prevents the commission from setting rates for the authority, but the commission, after March 31, 2010, may not set rates for the authority such that the revenue-cost ratio, expressed as a percentage, for any class of customers increases by more than 2 percentage points per year compared to the revenue-cost ratio for that class

immediately before the increase.

Discrimination in rates

- 59 (1) A public utility must not make, demand or receive
- (a) an unjust, unreasonable, unduly discriminatory or unduly preferential rate for a service provided by it in British Columbia, or
 - (b) a rate that otherwise contravenes this Act, the regulations, orders of the commission or any other law.
- (2) A public utility must not
- (a) as to rate or service, subject any person or locality, or a particular description of traffic, to an undue prejudice or disadvantage, or
 - (b) extend to any person a form of agreement, a rule or a facility or privilege, unless the agreement, rule, facility or privilege is regularly and uniformly extended to all persons under substantially similar circumstances and conditions for service of the same description.
- (3) The commission may, by regulation, declare the circumstances and conditions that are substantially similar for the purpose of subsection (2) (b).
- (4) It is a question of fact, of which the commission is the sole judge,
- (a) whether a rate is unjust or unreasonable,
 - (b) whether, in any case, there is undue discrimination, preference, prejudice or disadvantage in respect of a rate or service, or
 - (c) whether a service is offered or provided under substantially similar circumstances and conditions.
- (5) In this section, a rate is "unjust" or "unreasonable" if the rate is
- (a) more than a fair and reasonable charge for service of the nature and quality provided by the utility,
 - (b) insufficient to yield a fair and reasonable compensation for the service provided by the utility, or a fair and reasonable return on the appraised value of its property, or
 - (c) unjust and unreasonable for any other reason.

Setting of rates

60 (1) In setting a rate under this Act

- (a) the commission must consider all matters that it considers proper and relevant affecting the rate,
- (b) the commission must have due regard to the setting of a rate that
 - (i) is not unjust or unreasonable within the meaning of section 59,
 - (ii) provides to the public utility for which the rate is set a fair and reasonable return on any expenditure made by it to reduce energy demands, and
 - (iii) encourages public utilities to increase efficiency, reduce costs and enhance performance,
- (b.1) the commission may use any mechanism, formula or other method of setting the rate that it considers advisable, and may order that the rate derived from such a mechanism, formula or other method is to remain in effect for a specified period, and
- (c) if the public utility provides more than one class of service, the commission must
 - (i) segregate the various kinds of service into distinct classes of service,
 - (ii) in setting a rate to be charged for the particular service provided, consider each distinct class of service as a self contained unit, and
 - (iii) set a rate for each unit that it considers to be just and reasonable for that unit, without regard to the rates fixed for any other unit.

(2) In setting a rate under this Act, the commission may take into account a distinct or special area served by a public utility with a view to ensuring, so far as the commission considers it advisable, that the rate applicable in each area is adequate to yield a fair and reasonable return on the appraised value of the plant or system of the public utility used, or prudently and reasonably acquired, for the purpose of providing the service in that special area.

(3) If the commission takes a special area into account under subsection (2), it must have regard to the special considerations applicable

to an area that is sparsely settled or has other distinctive characteristics.

(4) For this section, the commission must exclude from the appraised value of the property of the public utility any franchise, licence, permit or concession obtained or held by the utility from a municipal or other public authority beyond the money, if any, paid to the municipality or public authority as consideration for that franchise, licence, permit or concession, together with necessary and reasonable expenses in procuring the franchise, licence, permit or concession.

Rate schedules to be filed with commission

- 61** (1) A public utility must file with the commission, under rules the commission specifies and within the time and in the form required by the commission, schedules showing all rates established by it and collected, charged or enforced or to be collected or enforced.
- (2) A schedule filed under subsection (1) must not be rescinded or amended without the commission's consent.
- (3) The rates in schedules as filed and as amended in accordance with this Act and the regulations are the only lawful, enforceable and collectable rates of the public utility filing them, and no other rate may be collected, charged or enforced.
- (4) A public utility may file with the commission a new schedule of rates that the utility considers to be made necessary by a rise in the price, over which the utility has no effective control, required to be paid by the public utility for its gas supplies, other energy supplied to it, or expenses and taxes, and the new schedule may be put into effect by the public utility on receiving the approval of the commission.
- (5) Within 60 days after the date it approves a new schedule under subsection (4), the commission may,
- (a) on complaint of a person whose interests are affected, or
 - (b) on its own motion,
- direct an inquiry into the new schedule of rates having regard to the fixing of a rate that is not unjust or unreasonable.
- (6) After an inquiry under subsection (5), the commission may
- (a) rescind or vary the increase and order a refund or customer credit by the utility of all or part of the money received by way of increase, or

(b) confirm the increase or part of it.

Schedules must be available to public

62 A public utility must keep a copy of the schedules filed open to and available for public inspection under commission rules.

Schedules must be observed

63 A public utility must not, without the consent of the commission, directly or indirectly, in any way charge, demand, collect or receive from any person for a regulated service provided by it, or to be provided by it, compensation that is greater than, less than or other than that specified in the subsisting schedules of the utility applicable to that service and filed under this Act.

Orders respecting contracts

64 (1) If the commission, after a hearing, finds that under a contract entered into by a public utility a person receives a regulated service at rates that are unduly preferential or discriminatory, the commission may

(a) declare the contract unenforceable, either wholly or to the extent the commission considers proper, and the contract is then unenforceable to the extent specified, or

(b) make any other order it considers advisable in the circumstances.

(2) If a contract is declared unenforceable either wholly or in part, the commission may order that rights accrued before the date of the order be preserved, and those rights may then be enforced as fully as if no proceedings had been taken under this section.

Part 3.1 – Energy Security and the Environment

Electricity self-sufficiency

64.01 (1) The authority must

(a) by the 2016 calendar year, achieve electricity self-sufficiency according to the prescribed criteria, and

(b) maintain, according to the prescribed criteria, electricity self-sufficiency in each calendar year after achieving it.

(2) A public utility, in planning for

- (a) the construction or extension of generation facilities, and
- (b) energy purchases,

must consider the government's goal that British Columbia be electricity self-sufficient by the 2016 calendar year and maintain self-sufficiency after that year.

Clean and renewable resources

64 . 02 (1) To facilitate the achievement of the government's goal that at least 90% of the electricity generated in British Columbia be generated from clean or renewable resources, a person to whom this section applies

- (a) must pursue actions to meet the prescribed targets in relation to clean or renewable resources, and
- (b) must use the prescribed guidelines in planning for
 - (i) the construction or extension of generation facilities, and
 - (ii) energy purchases.

(2) This section applies to

- (a) the authority, and
- (b) a prescribed public utility, if any, and a public utility in a class of prescribed public utilities, if any.

Standing offer

64 . 03 (1) In this section, "**eligible facility**" means a generation facility that

- (a) either
 - (i) has only one generator with a nameplate capacity of 10 megawatts or less or has more than one generator and the total nameplate capacity of all of them is 10 megawatts or less, or
 - (ii) meets the prescribed requirements, and
- (b) either
 - (i) is a high-efficiency cogeneration facility, or
 - (ii) generates energy by means of a prescribed technology or from clean or renewable resources,

but does not include a prescribed generation facility or class of generation facilities.

- (2) The authority must establish and maintain a standing offer
- (a) during the times prescribed by and in accordance with the regulations, if any, and
 - (b) on the terms and conditions, if any, approved by the commission under subsection (3),

to enter into an energy supply contract for the purchase of electricity from eligible facilities.

(3) Subject to regulations made for the purposes of subsection (2) (a), the commission, by order and on application by the authority, may approve terms and conditions for the purposes of subsection (2) (b) if the commission considers that the terms and conditions are in the public interest.

(4) The commission may not issue an order under section 71 (3) with respect to a contract entered into in accordance with the regulations made for the purposes of subsection (2) (a), and exclusively on the terms and conditions referred to in subsection (2) (b), of this section.

Smart meters

64.04 (1) In this section:

"private dwelling" means

- (a) a structure that is occupied as a private residence, or
- (b) if only part of a structure is occupied as a private residence, that part of the structure;

"smart meter" means a meter that meets the prescribed requirements, and includes related components, equipment and metering and communication infrastructure that meet the prescribed requirements.

(2) Subject to subsection (3), the authority must install and put into operation smart meters in accordance with and to the extent required by the regulations.

(3) The authority must complete all obligations imposed under subsection (2) by the end of the 2012 calendar year.

(4) If a public utility, other than the authority, makes an application under the Act in relation to advanced meters, the commission, in considering that application, must consider the government's goal of having advanced meters and associated infrastructure in use with respect to customers other

than those of the authority.

(5) The authority may, by itself, or by its engineers, surveyors, agents, contractors, subcontractors or employees, enter on any land, other than a private dwelling, without the consent of the owner, for a purpose relating to the use, maintenance, safeguarding, installation, replacement, repair, inspection, calibration or reading of its meters, including smart meters.

Part 4 – Carriers, Purchasers and Processors

Definition

64 . 1 In this Part, "**sufficient notice**" means notice in the manner and form, within the period, with the content and by the person required by the commission.

Common carrier

65 (1) In this section, "**common carrier**" means a person declared to be a common carrier by the commission under subsection (2) (a).

(2) On application by an interested person and after a hearing, sufficient notice of which has been given to all persons the commission believes may be affected, the commission may

(a) issue an order, to be effective on a date determined by it, declaring a person who owns or operates a pipeline for the transportation of

(i) one or more of crude oil, natural gas and natural gas liquids, or

(ii) any other type of energy resource prescribed by the Lieutenant Governor in Council,

to be a common carrier with respect to the operation of the pipeline, and

(b) in the order establish the conditions under which the common carrier must accept and carry energy resources.

(3) On application by a person that uses or seeks to use facilities operated by a common carrier, the commission, by order and after a hearing, sufficient notice of which has been given to all persons the commission believes may be affected, may establish the conditions under which the common carrier must accept and carry crude oil, natural gas, natural gas

liquids or prescribed energy resources referred to in subsection (2) (a).

(4) A common carrier must not unreasonably discriminate

(a) between itself and persons who apply to the common carrier to transport, in its pipeline, crude oil, natural gas, natural gas liquids or prescribed energy resources referred to in subsection (2) (a) (ii), or

(b) among the persons who so apply.

(5) A common carrier must comply with the conditions in any order applicable to the common carrier that is made under this section.

(6) The commission may, by order and after a hearing, sufficient notice of which has been given to all persons the commission believes may be affected, vary an order made under this section.

(7) If an agreement between a common carrier and another person

(a) is made before an order is made under this section, and

(b) is inconsistent with the conditions established by the commission in an order made under this section,

the commission may, in the order or in a subsequent order, after a hearing, sufficient notice of which has been given to all persons the commission believes may be affected, vary the agreement between the parties to eliminate the inconsistency.

(8) Subject to subsection (9), if an agreement is varied under subsection (7), the common carrier and the commission are not liable for damages suffered as a result of that variation by the other party to the agreement.

(9) Subsection (8) does not apply to a common carrier referred to in that subsection in relation to anything done or omitted by that person in bad faith.

Common purchaser

66 (1) In this section, "**common purchaser**" means a person declared to be a common purchaser by the commission under subsection (2).

(2) On application by an interested person and after a hearing, sufficient notice of which has been given to persons the commission believes may be affected, the commission may issue an order, to be effective on a date determined by it, declaring a person who purchases or otherwise acquires, from a pool designated by the commission, crude oil, natural gas or natural

gas liquids to be a common purchaser of the crude oil, natural gas or natural gas liquids.

(3) On application by a person whose crude oil, natural gas or natural gas liquids is or will be purchased by a common purchaser, the commission, by order and after a hearing, sufficient notice of which has been given to all persons the commission believes may be affected, may establish the conditions under which the common purchaser must purchase crude oil, natural gas or natural gas liquid.

(4) A common purchaser must not unreasonably discriminate

(a) between itself and persons who apply for the services offered by the common purchaser, or

(b) among the persons who so apply.

(5) A common purchaser must comply with the conditions in any order applicable to the common purchaser that is made under this section.

(6) The commission may, by order and after a hearing, sufficient notice of which has been given to all persons the commission believes may be affected, vary an order made under this section.

(7) If an agreement between a common purchaser and another person

(a) is made before an order is made under this section, and

(b) is inconsistent with the conditions established by the commission in an order made under this section,

the commission may, in the order or in a subsequent order, after a hearing, sufficient notice of which has been given to all persons the commission believes may be affected, vary the agreement between the parties to eliminate the inconsistency.

(8) Subject to subsection (9), if an agreement is varied under subsection (7), the common purchaser and the commission are not liable for damages suffered as a result of that variation by the other party to the agreement.

(9) Subsection (8) does not apply to a common purchaser referred to in that subsection in relation to anything done or omitted by that person in bad faith.

Common processor

67 (1) In this section, "**common processor**" means a person declared to be a common processor by the commission under subsection (2).

(2) On application by an interested person and after a hearing, sufficient notice of which has been given to all persons the commission believes may be affected, the commission may issue an order, to be effective on a date determined by it, declaring the person that owns or operates a plant for processing natural gas to be a common processor of natural gas.

(3) On application by a person that uses or seeks to use facilities operated by a common processor, the commission, by order and after a hearing, sufficient notice of which has been given to all persons the commission believes may be affected, may establish the conditions under which the common processor must accept and process natural gas.

(4) A common processor must not unreasonably discriminate

(a) between itself and persons who apply for the services offered by the common processor, or

(b) among the persons who so apply.

(5) A common processor must comply with the conditions in any order applicable to the common processor made under this section.

(6) The commission may, by order and after a hearing, sufficient notice of which has been given to all persons the commission believes may be affected, vary an order made under this section.

(7) If an agreement between a common processor and another person

(a) is made before an order is made under this section, and

(b) is inconsistent with the conditions established by the commission in an order made under this section,

the commission may, in the order or a subsequent order, after a hearing, sufficient notice of which has been given to all persons the commission believes may be affected, vary the agreement between the parties to eliminate the inconsistency.

(8) Subject to subsection (9), if an agreement is varied under subsection (7), the common processor and the commission are not liable for damages suffered as a result of that variation by the other party to the agreement.

(9) Subsection (8) does not apply to a common processor referred to in that subsection in relation to anything done or omitted by that person in bad faith.

Part 5 – Electricity Transmission

Definitions

68 In this Part:

"electricity transmission facilities" means conductors, circuits, transmission towers, substations, switching stations, transformers and any other equipment or facilities that are necessary for the purpose of transmitting electricity;

"energy" means electricity or natural gas;

"energy supply contract" means a contract under which energy is sold by a seller to a public utility or another buyer, and includes an amendment of that contract, but does not include a contract in respect of which a schedule is approved under section 61 of this Act;

"gas marketer" means a person who holds a gas marketer licence issued under section 71.1 (6) (a);

"low-volume consumer" has the meaning ascribed to it under rules made by the commission under section 71.1 (10);

"natural gas" means any methane, propane or butane that is sold for consumption as a domestic, commercial or industrial fuel or as an industrial raw material;

"public utility" means a public utility to which Part 3 applies;

"seller" means a person who sells or trades in energy.

Repealed

69 [Repealed 2003-46-10.]

Use of electricity transmission facilities

70 (1) On application and after a hearing, the commission may make an order directing a public utility to allow a person, other than a public utility, to use the electricity transmission facilities of the public utility if the commission finds that

(a) the person and the public utility have failed to agree on the use of the facilities or on the conditions or compensation for their use,

(b) the use of the facilities will not prevent the public utility or other users from performing their duties or result in any

substantial detriment to their service, and

(c) the public interest requires the use of the facilities by the person.

(2) An order under subsection (1) may contain terms and conditions the commission considers advisable, including terms and conditions respecting the rates payable to the public utility for the use of its electricity transmission facilities.

(3) After a hearing, the commission may, by order, vary or rescind an order made under this section.

(4) Any interested person may apply to the commission for an order under this section, and the application must contain the information the commission specifies.

Energy supply contracts

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

(a) file a copy of the contract with the commission under rules and within the time it specifies, and

(b) provide to the commission any information it considers necessary to determine whether the contract is in the public interest.

(1.1) Subsection (1) does not apply to an energy supply contract for the sale of natural gas unless the sale is to a public utility.

(2) The commission may make an order under subsection (3) if the commission, after a hearing, determines that an energy supply contract to which subsection (1) applies is not in the public interest.

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

(a) the government's energy objectives,

(b) the most recent long-term resource plan filed by the public utility under section 44.1, if any,

(c) whether the energy supply contract is consistent with requirements imposed under section 64.01 or 64.02, if applicable,

(d) the interests of persons in British Columbia who receive or may receive service from the public utility,

- (e) the quantity of the energy to be supplied under the contract,
- (f) the availability of supplies of the energy referred to in paragraph (e),
- (g) the price and availability of any other form of energy that could be used instead of the energy referred to in paragraph (e), and
- (h) in the case only of an energy supply contract that is entered into by a public utility, the price of the energy referred to in paragraph (e).

(2.2) Subsection (2.1) (a) to (c) does not apply if the commission considers that the matters addressed in the energy supply contract filed under subsection (1) were determined to be in the public interest in the course of considering a long-term resource plan under section 44.1.

(2.3) A public utility may submit to the commission a proposed energy supply contract setting out the terms and conditions of the contract and a process the public utility intends to use to acquire power from other persons in accordance with those terms and conditions.

(2.4) If satisfied that it is in the public interest to do so, the commission, by order, may approve a proposed contract submitted under subsection (2.3) and a process referred to in that subsection.

(2.5) In considering the public interest under subsection (2.4), the commission must consider

- (a) the government's energy objectives,
- (b) the most recent long-term resource plan filed by the public utility under section 44.1,
- (c) whether the application for the proposed contract is consistent with the requirements imposed on the public utility under sections 64.01 and 64.02, if applicable, and
- (d) the interests of persons in British Columbia who receive or may receive service from the public utility.

(2.6) If the commission issues an order under subsection (2.4), the commission may not issue an order under subsection (3) with respect to a contract

- (a) entered into exclusively on the terms and conditions, and
- (b) as a result of the process

referred to in subsection (2.3).

(3) If subsection (2) applies, the commission may

(a) by order, declare the contract unenforceable, either wholly or to the extent the commission considers proper, and the contract is then unenforceable to the extent specified, or

(b) make any other order it considers advisable in the circumstances.

(4) If an energy supply contract is, under subsection (3) (a), declared unenforceable either wholly or in part, the commission may order that rights accrued before the date of the order under that subsection be preserved, and those rights may then be enforced as fully as if no proceedings had been taken under this section.

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

Gas marketers

71.1 (1) A person must not perform a gas marketing activity within the meaning of subsection (2) unless

(a) the person is a public utility and the public utility performs the gas marketing activity within any area in which it is authorized to provide service, or

(b) the person holds a gas marketer licence issued to the person under subsection (6) (a).

(2) For the purposes of subsection (1), a person performs a gas marketing activity if the person

(a) sells or offers to sell natural gas to a low-volume consumer,

(b) acts as the agent or broker for a seller in a sale of natural gas to a low-volume consumer, or

(c) acts or offers to act as the agent or broker of a low-volume consumer in a purchase of natural gas.

(3) A gas marketer must comply with the commission rules issued under subsection (10) and the terms and conditions, if any, attached to the gas marketer licence held by the gas marketer.

(4) A gas marketer must not carry on or offer to carry on business as a gas

marketer in a name other than the name in which it is licensed unless authorized to do so in the licence.

(5) If a person is not in compliance with subsection (1), (3) or (4), the commission may do one or more of

(a) declare an energy supply contract between the person and a low-volume consumer unenforceable, either wholly or to the extent the commission considers proper, in which event the contract is enforceable to the extent specified, and

(b) if the person is a gas marketer,

(i) amend the terms and conditions of, or impose new terms and conditions on, the gas marketer licence, and

(ii) suspend or cancel the gas marketer licence.

(6) The commission may

(a) on application, issue a gas marketer licence to any person who is not a public utility,

(b) impose, in respect of any gas marketer licence issued by the commission, terms and conditions that the commission considers appropriate,

(c) amend any of the terms and conditions imposed in respect of a gas marketer licence, and

(d) suspend or cancel a gas marketer licence.

(7) The commission may require, as a condition of granting a gas marketer licence, that the gas marketer post security in a form, and in accordance with such terms and conditions, as the commission considers appropriate.

(8) The commission may order that some or all of the security posted by a gas marketer in accordance with a requirement imposed under subsection (7) be paid out to those persons who the commission considers have been or may be affected by an act or omission of the gas marketer.

(9) Section 43 applies to each gas marketer as if that gas marketer were a public utility.

(10) The commission may make the following rules:

(a) defining "low-volume consumer";

(b) respecting the process by which application may be made for a gas marketer licence and specifying the form and content of applications for that licence;

- (c) respecting the imposition of terms and conditions on gas marketer licences;
- (d) requiring an applicant for a gas marketer licence to obtain a bond, letter of credit or other specified security and requiring the filing with the commission of proof, satisfactory to the commission, of that security;
- (e) respecting the form and content of security that may be required under paragraph (d) and the person by whom and the terms on which it is to be held;
- (f) respecting the circumstances in which and the persons to whom disbursement of some or all of the security required under paragraph (d) is to be made.

Part 6 – Commission Jurisdiction

Jurisdiction of commission to deal with applications

- 72 (1) The commission has jurisdiction to inquire into, hear and determine an application by or on behalf of any party interested, complaining that a person constructing, maintaining, operating or controlling a public utility service or charged with a duty or power relating to that service, has done, is doing or has failed to do anything required by this Act or another general or special Act, or by a regulation, order, bylaw or direction made under any of them.
- (2) The commission has jurisdiction to inquire into, hear and determine an application by or on behalf of any party interested, requesting the commission to
- (a) give a direction or approval which by law it may give, or
 - (b) approve, prohibit or require anything to which by any general or special Act, the commission's jurisdiction extends.

Mandatory and restraining orders

- 73 (1) The commission may order and require a person to do immediately or by a specified time and in the way ordered, so far as is not inconsistent with this Act, the regulations or another Act, anything that the person is or may be required or authorized to do under this Act or any other general or special Act and to which the commission's jurisdiction extends.

(2) The commission may forbid and restrain the doing or continuing of anything contrary to or which may be forbidden or restrained under any Act, general or special, to which the commission's jurisdiction extends.

Inspections and depositions

74 For the purposes of this Act, the commission may

- (a) enter on and inspect property, and
- (b) require the taking of depositions inside or outside of British Columbia.

Commission not bound by precedent

75 The commission must make its decision on the merits and justice of the case, and is not bound to follow its own decisions.

Jurisdiction as to liquidators and receivers

76 (1) The fact that a liquidator, receiver, manager or other official of a public utility, or other person engaged in the petroleum industry, or a person seizing a public utility's property has been appointed by a court in British Columbia, or is acting under the authority of a court, does not prevent the exercise by the commission of any jurisdiction conferred by this Act.

(2) A liquidator, receiver, manager, official or person seizing must act in accordance with this Act and the orders and directions of the commission, whether the orders are general or particular.

(3) The liquidator or other person referred to in subsection (1), and any person acting under that person, must obey the orders of the commission, within its jurisdiction, and the commission may enforce its orders against the person even though the person is appointed by or acts under the authority of a court.

Power to extend time

77 If a work, act, matter or thing is, by order or decision of the commission, required to be performed or completed within a specified time, the commission may, if the circumstances of the case in its opinion so require, extend the time so specified

- (a) on notice and hearing; or
- (b) in its discretion, on application, without notice to any person.

Evidence

78 (1) [Repealed 2004-45-169.]

(2) An inquiry that the commission considers necessary may be made by a member or officer or by a person appointed by the commission to make the inquiry, and the commission may act on that person's report.

(3) Each member, officer and person appointed has, for the purpose of the inquiry, the powers conferred on the commission by section 74 of this Act and section 34 (3) and (4) of the *Administrative Tribunals Act*.

(4) If a person is appointed to inquire and report on a matter, the commission may order by whom, and in what proportion, the costs incurred must be paid, and may set the amount of the costs.

Findings of fact conclusive

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

Commission not bound by judicial acts

80 In determining a question of fact, the commission is not bound by the finding or order of a court in a proceeding involving the determination of that fact, and the finding or order is, before the commission, evidence only.

Pending litigation

81 The fact that a suit, prosecution or other proceeding in a court involving questions of fact is pending does not deprive the commission of jurisdiction to hear and determine the same questions of fact.

Power to inquire without application

82 (1) The commission

(a) may, on its own motion, and

(b) must, on the request of the Lieutenant Governor in Council,

inquire into, hear and determine a matter that under this Act it may inquire into, hear or determine on application or complaint.

(2) For the purpose of subsection (1), the commission has the same powers as are vested in it by this Act in respect of an application or complaint.

Action on complaints

- 83 If a complaint is made to the commission, the commission has powers to determine whether a hearing or inquiry is to be had, and generally whether any action on its part is or is not to be taken.

General powers not limited

- 84 The enumeration in this Act of a specific commission power or authority does not exclude or limit other powers or authorities given to the commission.

Hearings to be held in certain cases

- 85 (1) Except in case of urgency, of which the commission is sole judge, the commission must not, without a hearing, make an order involving an outlay, loss or deprivation to a public utility.
- (2) If an order is made in case of urgency without a hearing, on the application of a person interested, the commission must as soon as practicable hear and reconsider the matter and make any further order it considers advisable.

Public hearing

- 86 If this Act requires that a hearing be held, it must be a public hearing whenever, in the opinion of the commission or the Lieutenant Governor in Council, a public hearing is in the public interest.

Repealed

- 86.1 [Repealed 2004-45-170.]

When oral hearings not required

- 86.2 (1) Despite any other provision of this Act, in any circumstance in which, under this Act, a hearing may or must be held, the commission may conduct a written hearing.
- (2) The commission may make rules respecting the circumstances in which and the process by which written hearings may be conducted and specifying the form and content of materials to be provided for written hearings.

Recitals not required in orders

- 87 In making an order, the commission is not required to recite or show on the

face of the order the taking of any proceeding, the giving of any notice or the existence of any circumstance necessary to give the commission jurisdiction.

Application of orders

- 88** (1) In making an order, rule or regulation, the commission may make it apply to all cases, or to a particular case or class of cases, or to a particular person.
- (2) The commission may exempt a person from the operation of an order, rule or regulation made under this Act for a time the commission considers advisable.
- (3) The commission may, on conditions it considers advisable, with the advance approval of the Lieutenant Governor in Council, exempt a person, equipment or facilities from the application of all or any of the provisions of this Act or may limit or vary the application of this Act.
- (4) The commission has no power under this section to make an order respecting a person, or a person in respect of a matter, who has been exempted under to section 22.

Withdrawal of application

- 88.1** If an applicant withdraws all or part of an application or the parties advise the commission that they have reached a settlement of all or part of an application, the commission may order that the application or part of it is dismissed.

Partial relief

- 89** On an application under this Act, the commission may make an order granting the whole or part of the relief applied for or may grant further or other relief, as the commission considers advisable.

Commencement of orders

- 90** (1) In an order or regulation, the commission may direct that the order or regulation or part of it comes into operation
- (a) at a future time,
 - (b) on the happening of an event specified in the order or regulation, or
 - (c) on the performance, to the satisfaction of the commission, by

a person named by it of a term imposed by the order.

(2) The commission may, in the first instance, make an interim order, and reserve further direction for an adjourned hearing or further application.

Orders without notice

91 (1) If the special circumstance of a case so requires, the commission may, without notice, make an interim order authorizing, requiring or forbidding anything to be done that the commission is empowered to authorize, require or forbid on application, notice or hearing.

(2) The commission must not make an interim order under subsection (1) for a longer time than it considers necessary for a hearing and decision.

(3) A person interested may, before final decision, apply to modify or set aside an interim order made without notice.

Directions

92 If, in the exercise of a commission power under an Act, the commission directs that a structure, appliance, equipment or works be provided, constructed, reconstructed, removed, altered, installed, operated, used or maintained, the commission may, except as otherwise provided in the Act conferring the power, order

(a) by what person interested at or within what time,

(b) at whose cost and expense,

(c) on what terms including payment of compensation, and

(d) under what supervision,

the structure, appliance, equipment or works must be carried out.

Repealed

93 - 94 [Repealed 2004-45-170.]

Lien on land

95 (1) If the commission makes an order for payment of money, costs or a penalty, the commission may register a copy of the order certified by the commission's secretary in a land title office.

(2) On registration in a land title office, an order is a lien and charge on all the land of the person ordered to make the payment that is in the land title

district in which the order is registered, to the same extent and with the same effect and realizable in the same way as a judgment of the Supreme Court under the *Court Order Enforcement Act*.

Substitute to carry out orders

- 96 (1) If a person defaults in doing anything directed by an order of the commission under this Act,
- (a) the commission may authorize a person it considers suitable to do the thing, and
 - (b) the person authorized may do the thing authorized and may recover from the person in default the expense incurred in doing the thing, as money paid for and at the request of that person.
- (2) The certificate of the commission of the amount expended is conclusive evidence of the amount of the expense.

Entry, seizure and management

- 97 (1) The commission may take the steps and employ the persons it considers necessary to enforce an order made by it, and, for that purpose, may forcibly or otherwise enter on, seize and take possession of the whole or part of the business and the property of a public utility affected by the order, together with the records, offices and facilities of the utility.
- (2) The commission may, until the order has been enforced or until the Lieutenant Governor in Council otherwise orders, assume, take over and continue the management of the business and property of the utility in the interest of its shareholders, creditors and the public.
- (3) While the commission continues to manage or direct the management of the utility, the commission may exercise, for the business and property, the powers, duties, rights and functions of the directors, officers or managers of the utility in all respects, including the employment and dismissal of officers or employees and the employment of others.
- (4) On the commission taking possession of the business and property of the utility, each officer and employee of the utility must obey the lawful orders and instructions of the commission for that business and property, and of any person placed by the commission in authority in the management of the utility or a department of its undertaking or service.
- (5) On taking possession of the business and property of a public utility, the commission may determine, receive or pay out all money due to or owing

by the utility, and give cheques and receipts for money to the same extent and to the same effect as the utility or its officers or employees could do.

(6) The costs incurred by the commission under this section are in the discretion of the commission, and the commission may order by whom and in what amount or proportion costs are to be paid.

Defaulting utility may be dissolved

98 (1) If a public utility incorporated under an Act of the Legislature fails to comply with a commission order, and the commission believes that no effective means exist to compel the utility to comply, the commission, in its discretion, may transmit to the Attorney General a certificate, signed by its chair and secretary, setting out the nature of the order and the default of the public utility.

(2) Ten days after publication in the Gazette of a notice of receipt of the certificate by the Attorney General, the Lieutenant Governor in Council may, by order, dissolve the public utility.

Part 7 — Decisions and Appeals

Reconsideration by commission

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

Requirement for hearing

100 If a hearing is held or required under this Act before a rule or regulation is made, the rule or regulation must not be altered, suspended or revoked without a hearing.

Appeal to Court of Appeal

101 (1) An appeal lies from a decision or order of the commission to the Court of Appeal with leave of a justice of that court.

(2) The party appealing must give notice of the application for leave to appeal, stating the grounds of appeal, to the commission, to the Attorney General and to any party adverse in interest, at least 2 clear days before the hearing of the application.

(3) If leave is granted, within 15 days from the granting, the appellant must

give notice of appeal to the commission, to the Attorney General, and to any party adverse in interest.

(4) The commission and the Attorney General may be heard by counsel on the appeal.

(5) On the determination of the questions involved in the appeal, the Court of Appeal must certify its opinion to the commission, and an order of the commission must conform to that opinion.

No automatic stay of proceedings while matter appealed

102 (1) An appeal to the Court of Appeal does not of itself stay or suspend the operation of the decision, order, rule or regulation appealed from, but the Court of Appeal may grant a suspension, in whole or in part, until the appeal is decided, on the terms the court considers advisable.

(2) The commission may, in its discretion, suspend the operation of its decision, order, rule or regulation from which an appeal is taken until the decision of the Court of Appeal is given.

Costs of appeal

103 (1) Payment of the costs incurred for an application or appeal to the Court of Appeal may be enforced in the same way as payment of costs ordered by the commission.

(2) Neither the commission nor an officer, employee or agent of the commission is liable for costs in respect of an application or appeal referred to in subsection (1).

Case stated by commission

104 (1) The commission may, on its own motion or on the application of a party who gives the security the commission directs, and must, on the request of the Attorney General, state a case in writing for the opinion of the Court of Appeal on a question that, in the opinion of the commission or of the Attorney General, is a question of law.

(2) The Court of Appeal must hear and determine all questions of law arising on the stated case and must remit the matter to the commission with the court's opinion.

(3) The court's opinion is binding on the commission and on all parties.

Jurisdiction of commission exclusive

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

Part 8 – Offences and Penalties

Offences

- 106** (1) The following persons commit an offence:
- (a) a person who fails or refuses to obey an order of the commission made under this Act;
 - (b) a person who does, causes or permits to be done an act, matter or thing contrary to this Act or omits to do an act, matter or thing required to be done by this Act;
 - (c) a public utility
 - (i) that fails or refuses to prepare and provide to the commission in the time, manner and form, and with the particulars and verification required under this Act, an information return, the answer to a question submitted by the commission or information required by the commission under this Act,
 - (ii) that willfully or negligently makes a return or provides information to the commission that is false in any particular,
 - (iii) that gives, or an officer of which gives, to an officer, agent, manager or employee of the utility a direction, instruction or request to do or refrain from doing an act referred to in paragraph (d) (i) to (vii) and in respect of which the officer, agent, manager or employee is convicted under paragraph (d) (i) to (vii), or
 - (iv) an officer, agent, manager or employee of which is convicted of an offence under paragraph (d) (viii);
 - (d) an officer, agent, manager or employee of a public utility
 - (i) who fails or refuses to complete and provide to the commission a report or form of return required under this

Act,

(ii) who fails or refuses to answer a question contained in a report or form of return required under this Act,

(iii) who willfully gives a false answer to a question contained in a report or form of return required under this Act,

(iv) who evades a question or gives an evasive answer to a question contained in a report or form of return required under this Act, if the person has the means to ascertain the facts,

(v) who, after proper demand under this Act, fails or refuses to exhibit to the commission or a person authorized by it an account, record or memorandum of the public utility that is in the person's possession or under the person's control,

(vi) who fails to properly use and keep the system of accounting of the public utility specified by the commission under this Act,

(vii) who refuses to do any act or thing in that system of accounting when directed by the commission or its representative,

(viii) on whom the commission serves notice directing the person to provide to the commission information or a return that the utility may be required to provide under this Act and who willfully refuses or fails to provide the information or return to the best of the person's knowledge, or means of knowledge, in the manner and time directed by the commission, or

(ix) who knowingly registers or causes to be registered on the books of the public utility any issue or transfer of shares that has been made contrary to section 54 (5), (7) or (8);

(e) the president, and each vice president, director, managing director, superintendent and manager of a public utility that fails or refuses to obey an order of the commission made under this Act;

(f) the mayor and each councillor or member of the ruling body of a municipality that fails or refuses to obey an order of the commission made under this Act;

(g) [Repealed 2003-46-15.]

(h) a person who obstructs or interferes with a commissioner, officer or person in the exercise of rights conferred or duties imposed under this Act;

(i) a person who knowingly solicits, accepts or receives, directly or indirectly, a rebate, concession or discrimination for service of a public utility, if the service is provided or received in violation of this Act;

(j) except so far as the person's public duty requires the person to report on or take official action, an officer or employee of the commission, or person having access to or knowledge of a return made to the commission or of information procured or evidence taken under this Act, other than a public inquiry or public hearing, who, without first obtaining the authority of the commission, publishes or makes known information, having obtained or knowing it to have been derived from the return, information or evidence;

(k) a person who applies to a public utility to register on its books any issue or transfer of shares that has been made contrary to section 54 (5), (7) or (8).

(2) Subsection (1) (e) and (f) does not apply if the person proves

(a) that, according to the person's position and authority, the person took all necessary and proper means in the person's power to obey and carry out, and to procure obedience to and the carrying out of the order, and

(b) that the person was not at fault for the failure or refusal.

(3) Subsection (1) (h) does not apply if the commissioner, officer or person does not, on request at the time, produce a certificate of his or her appointment or authority.

(4) A person convicted of an offence under this section is liable to a penalty not greater than \$10 000.

(5) If this Act makes anything an offence, each day the offence continues constitutes a separate offence.

(6) Nothing in or done under this section affects the liability of a public utility otherwise existing or prejudices enforcement of an order of the commission in any way otherwise available.

Restraining orders

107 (1) If a person, to or in respect of whom

- (a) [Repealed 2003-46-16.]
- (b) a certificate of public convenience and necessity,
- (c) an order under section 22, 53 or 54 (10), or
- (d) an approval given under section 50 or 54 (5), (7) or (8),

is issued, contravenes a condition or requirement of the certificate, order or approval, the contravention may be restrained in a proceeding brought by the minister in the Supreme Court.

(2) [Repealed 2003-46-16.]

Revocation of certificates

108 If a person contravenes a condition or requirement of an order made under section 22,

- (a) the Lieutenant Governor in Council may revoke
 - (i) the energy project certificate or energy operation certificate in respect of which the contravention occurred, and
 - (ii) any approval, licence or permit given or issued, in association with the certificate, or
- (b) the minister responsible for the administration of the *Hydro and Power Authority Act* may revoke the order.

Remedies not mutually exclusive

109 If a person contravenes

- (a) [Repealed 2003-46-18.]
- (b) a condition or requirement of an order made under section 22, 53 or 54 (10),
- (c) the conditions of an approval given under section 50 or 54 (5), (7) or (8), or
- (d) a condition or requirement of a certificate of public convenience and necessity,

the penalties for the contravention provided for in section 106, the remedies for the contravention provided for in section 107 and, if applicable, the

remedies provided for in section 108 are not mutually exclusive, and any or all of them may be applied in the one case.

Part 9 – General

Powers of commission in relation to other Acts

110 The powers given to the commission by this Act apply

- (a) even though the subject matter about which the powers are exercisable is the subject matter of an agreement or another Act,
- (b) in respect of service and rates, whether fixed by or the subject of an agreement or other Act, or otherwise, and
- (c) if the service or rates are governed by an agreement, whether the agreement is incorporated in, or ratified, or made binding by a general or special Act, or otherwise.

Substantial compliance

111 Substantial compliance with this Act is sufficient to give effect to the orders, rules, regulations and acts of the commission, and they must not be declared inoperative, illegal or void for want of form or an error or omission of a technical or clerical nature.

Vicarious liability

112 In construing and enforcing this Act, or a rule, regulation, order or direction of the commission, an act, omission or failure of an officer, agent or other person acting for or employed by a public utility, if within the scope of the person's employment, is deemed in every case to be the act, omission or failure of the utility.

Public utilities may apply

113 A person who is subject to regulation under this Act may make application or complaint to the commission about a matter affecting a public utility, as if made by another party interested.

Municipalities may apply

- 114** (1) In this section, "**municipality**" includes a regional district.
- (2) If a municipality believes that the interests of the public in the

municipality or a part of it are sufficiently concerned, the municipality may, by resolution, become an applicant, complainant or intervenant in a matter within the commission's jurisdiction.

(3) The municipality may, for subsection (2), take a proceeding or incur expense necessary

(a) to submit the matter to the commission,

(b) to oppose an application or complaint before the commission,
or

(c) if necessary, to become a party to a proceeding or appeal under this Act.

Certified documents as evidence

115 (1) A copy of a rule, regulation, order or other document in the commission secretary's custody, purporting to be certified by the secretary to be a true copy, is evidence of the document without proof of the signature.

(2) A certificate purporting to be signed by the commission secretary stating that no rule, regulation or order on a specified matter has been made by the commission, is evidence of the fact stated without proof of the signature.

Class representation

116 (1) With the approval of the Attorney General, the commission may appoint counsel to represent a class of persons interested in a matter for the purpose of instituting or attending on an application or hearing before the commission or another tribunal or authority.

(2) The commission may fix the costs of the counsel and may order by whom and in what amount or proportion they be paid.

Costs of commission

117 (1) In this section, "**costs of the commission**" includes costs incurred by the commission for the services of consultants and experts engaged in connection with the proceeding.

(2) The commission may order that the costs of the commission incidental to a proceeding before it are to be paid by one or more participants in the proceeding in such amounts and proportions as the commission may determine.

Participant costs

118 (1) The commission may order a participant in a proceeding before the commission to pay all or part of the costs of another participant in the proceeding.

(2) If the commission considers it to be in the public interest, the commission may pay all or part of the costs of participants in proceedings before the commission that were commenced on or after April 1, 1993 or that are commenced after June 18, 1993.

(3) Amounts paid for costs under subsection (2) must not exceed the limits prescribed for the purposes of this section.

Tariff of fees

119 With the advance approval of the Lieutenant Governor in Council, the commission may prescribe a tariff of fees for a matter within the commission's jurisdiction.

No waiver of rights

120 (1) Nothing in this Act releases or waives a right of action by the commission or a person for a right, penalty or forfeiture that arises under a law of British Columbia.

(2) No penalty enforceable under this Act is a bar to or affects recovery for a right, or affects or bars a proceeding against or prosecution of a public utility, its directors, officers, agents or employees.

Relationship with *Local Government Act*

121 (1) Nothing in or done under the *Community Charter* or the *Local Government Act*

(a) supersedes or impairs a power conferred on the commission or an authorization granted to a public utility, or

(b) relieves a person of an obligation imposed under this Act or the *Gas Utility Act*.

(2) In this section, "**authorization**" means

(a) a certificate of public convenience and necessity issued under section 46,

(b) an exemption from the application of section 45 granted, with the advance approval of the Lieutenant Governor in Council, by the commission under section 88, and

(c) an exemption from section 45 granted under section 22, only if the public utility meets the conditions prescribed by the Lieutenant Governor in Council.

(3) For the purposes of subsection (2) (c), the Lieutenant Governor in Council may prescribe different conditions for different public utilities or categories of public utilities.

Repealed

122 [Repealed 2004-45-172.]

Service of notice

123 (1) A notice that the commission is empowered or required to give to a person under this Act must be in writing and may be served either personally or by mailing it to the person's address.

(2) If a notice is mailed, service of the notice is deemed to be effected at the time at which the letter containing the notice, properly addressed, postage prepaid and mailed, would be delivered in the ordinary course of post.

Reasons to be given

124 (1) If an application to the commission is opposed, the commission must prepare written reasons for its decision.

(2) If an application is unopposed, the commission may, and at the request of the applicant must, prepare written reasons for its decision.

(3) Written reasons must be made available by the secretary to any person on payment of the fee set by the commission.

(4) [Repealed 2003-46-20.]

Regulations

125 (1) The Lieutenant Governor in Council may make regulations as referred to in section 41 of the *Interpretation Act*.

(2) Without limiting subsection (1), the Lieutenant Governor in Council may, for the purpose of recovering the expenses arising out of the administration of this Act in a fiscal year, make regulations as follows:

(a) setting, or authorizing the commission to set, by order of the commission, and to collect fees, levies or other charges from

- (i) public utilities, a class of public utility or a particular public utility, and
 - (ii) other persons to whom a provision of this Act applies or a class of those persons;
- (b) setting, or authorizing the commission to set, the fees, levies or other charges payable by the members of the different classes referred to in paragraph (a) in different amounts;
- (c) exempting, or authorizing the commission to exempt, a public utility or other person, or a class of either of them, from the payment of a fee, levy or other charge;
- (d) authorizing the commission to retain all or part of any fees, levies or other charges collected by the commission under a regulation.
- (3) The commission may make regulations on a matter for which it is empowered by this Act to make regulations.

Minister's regulations

125.1 (1) In this section, "**minister**" means the minister responsible for the administration of the *Hydro and Power Authority Act*.

(2) The minister may make regulations respecting the government's energy objectives, as defined in section 1, including, without limitation, regulations as follows:

- (a) defining a word or phrase used in the definition;
- (b) prescribing actions and goals for the purposes of paragraph (f) of the definition;
- (c) establishing factors or guidelines the commission must use in considering the government's energy objectives, including guidelines regarding the relative priority of the objectives referred to in paragraphs (a) to (f) of the definition.

(3) A regulation under subsection (2) may be made with respect to the government's energy objectives generally or with respect to their application in any particular case.

(4) The minister may make regulations as follows:

- (a) making declarations for the purposes of section 5 (7);
- (b) respecting exemptions under section 22;

- (c) respecting reports to be provided to the commission by the authority under section 43 (1.1), including, without limitation, respecting the jurisdictions with which comparisons are to be made, the rate classes to be considered, the factors to be used in making the comparisons and conducting the assessments, and the meaning to be given to the word "competitive";
- (d) prescribing, for the purposes of paragraph (a) (i) of the definition of "demand increase" in section 44.1 (1), an amount representing an increase in resource requirements of the authority not related to an estimated increased demand referred to in section 44.1 (4) (b);
- (e) for the purposes of section 44.1 and 44.2,
 - (i) prescribing rules for determining whether a demand-side measure, or a class of demand-side measures, is adequate, cost-effective or both,
 - (ii) declaring a demand-side measure, or a class of demand-side measures, to be cost effective and necessary for adequacy,
 - (iii) prescribing rules or factors a public utility must use in making the estimate referred to in section 44.1 (2) (a), and
 - (iv) prescribing rules or factors the authority must use in making the estimate referred to in section 44.1 (4) (b);
- (f) prescribing requirements for the purposes of section 58 (2.1) (a);
- (g) prescribing factors and guidelines for the purposes of section 58 (2.1) (b), including, without limitation, factors and guidelines to encourage
 - (i) energy conservation or efficiency,
 - (ii) the use of energy during periods of lower demand,
 - (iii) the development and use of energy from clean or renewable resources, or
 - (iv) the reduction of the energy demand a public utility must serve;
- (h) defining a term or phrase used in section 58.1 and not defined in this Act;
- (i) identifying facts that must be used in interpreting the definition

in section 58.1;

(j) defining a term or phrase used in Part 3.1 and not defined in that Part;

(k) prescribing criteria respecting self-sufficiency for the purposes of section 64.01 (1) (a) and (b);

(l) prescribing targets for the purposes of section 64.02 (1) (a), guidelines for the purposes of section 64.02 (1) (b) and public utilities and classes of public utilities for the purposes of section 64.02 (2) (b);

(m) for the purposes of section 64.03, respecting eligible facilities, including prescribing generation facilities and classes of generation facilities, and respecting the standing offer to be established and maintained under that section;

(n) for the purposes of section 64.04, respecting smart meters and their installation, including, without limitation,

(i) the types of smart meters to be installed, including the features or functions each meter must have or be able to perform, and

(ii) the classes of users for whom smart meters must be installed, and requiring the authority to install different types of smart meters for different classes of users;

(o) prescribing standard-making bodies for the purposes of section 125.2 (1) and matters for the purposes of section 125.2 (3) (d);

(p) prescribing owners, operators, direct users, generators and distributors, or classes of any of them, for the purposes of section 125.2 (8).

(5) In making a regulation under this section, the minister may

(a) make regulations of specific or general application, and

(b) make different regulations for different persons, places, things, measures, transactions or activities.

Adoption of reliability standards, rules or codes

125.2 (1) In this section:

"reliability standard" means a reliability standard, rule or code established by a standard-making body for the purpose of being a

mandatory reliability standard for planning and operating the North American bulk power system, and includes any substantial change to any of those standards, rules or codes;

"standard-making body" means

- (a) the North American Electric Reliability Corporation,
- (b) the Western Electricity Coordinating Council, and
- (c) a prescribed standard-making body.

(2) For greater certainty, the commission has exclusive jurisdiction to determine whether a reliability standard is in the public interest and should be adopted in British Columbia.

(3) The transmission corporation must review each reliability standard and provide to the commission, in accordance with the regulations, a report assessing

- (a) any adverse impact of the reliability standard on the reliability of electricity transmission in British Columbia if the reliability standard were adopted under subsection (6),
- (b) the suitability of the reliability standard for British Columbia,
- (c) the potential cost of the reliability standard if it were adopted under subsection (6), and
- (d) any other matter prescribed by regulation or identified by order of the commission for the purposes of this section.

(4) The commission may make an order for the purposes of subsection (3) (d).

(5) If the commission receives a report under subsection (3), the commission must

- (a) make the report available to the public in a reasonable manner, which may include by electronic means, and for a reasonable period of time, and
- (b) consider any comments the commission receives in reply to the publication referred to in paragraph (a).

(6) After complying with subsection (5), the commission, subject to subsection (7), must adopt the reliability standards addressed in the report if the commission considers that the reliability standards are required to maintain or achieve consistency in British Columbia with other jurisdictions that have adopted the reliability standards.

(7) The commission is not required to adopt a reliability standard under subsection (6) if the commission determines, after a hearing, that the reliability standard is not in the public interest.

(8) A reliability standard adopted under subsection (6) applies to every

(a) prescribed owner, operator and direct user of the bulk power system, and

(b) prescribed generator and distributor of electricity.

(9) Subsection (8) applies to a person prescribed for the purposes of that subsection despite any exemption issued to the person under section 22 or 88 (3).

(10) The commission may make orders providing for the administration of adopted reliability standards.

(11) The commission, on its own motion or on complaint, may

(a) rescind an adoption made under subsection (6), or

(b) adopt a reliability standard previously rejected under subsection (7)

if the commission determines, after a hearing, that the rescission or adoption is in the public interest.

(12) The commission, without the approval of the minister responsible for the administration of the *Hydro and Power Authority Act*, may not set a standard or rule under section 26 of this Act with respect to a matter addressed by a reliability standard assessed in a report submitted to the commission under subsection (3) of this section.

Intent of Legislature

126 If a provision of this Act is held to be beyond the powers of British Columbia, that provision must be severed from the remainder of the Act, and the remaining provisions of the Act have the same effect as if they had been originally enacted as a separate enactment and as the only provisions of this Act.



DEC 17 2008

Mr. Len Kelsey
Chair and Chief Executive Officer
British Columbia Utilities Commission
Box 250
900 Howe Street, Sixth Floor
Vancouver, BC V6Z 2N3

Dear Mr. Kelsey:

On July 17, 2008, I wrote to Mr. Robert Hobbs, then Chair and Chief Executive Officer of the British Columbia Utilities Commission (BCUC), to inform him that the Minister of Energy, Mines and Petroleum Resources intends to provide Terms of Reference for the BCUC inquiry required under Section 5 of the *Utilities Commission Act*.

Please find enclosed the Terms of Reference for the inquiry signed by the Minister.

Please feel free to contact me if you have any questions or concerns.

Yours truly,


Greg Reimer
Deputy Minister

Enclosure

BCUC Log # 27984
RECEIVED

DEC 18 2008

Routing _____

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Ministry of
Energy, Mines and
Petroleum Resources

Office of the
Deputy Minister

Mailing Address:
PO Box 9319 Stn. Prov. Govt.
Victoria BC V8W 9N3
Telephone: 250 952-0504
Facsimile: 250 952-0269

Location:
1810 Blanshard Street
Victoria
website:
www.empr.gov.bc.ca

pc: Mr. Bob Elton
President and Chief Executive Officer
BC Hydro

Mr. David Emerson
President and Chief Executive Officer
British Columbia Transmission Corporation

Mr. John Walker
President and Chief Executive Officer
FortisBC

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TERMS OF REFERENCE

IN THE MATTER OF the *Utilities Commission Act* (the *Act*)

and

IN THE MATTER OF an Inquiry Under Section 5(4) of the *Act* relating to
British Columbia's Electricity Transmission Infrastructure and Capacity Needs
for the Next 30 Years

WHEREAS on February 27, 2007, the Province of British Columbia announced
The BC Energy Plan: A Vision for Clean Energy Leadership (Energy Plan); and

WHEREAS the *Act* and regulations issued under the *Act* provide that the
BC Hydro and Power Authority (BC Hydro) is to achieve energy and capacity
self-sufficiency by 2016 and maintain self-sufficiency each year after achieving it,
which includes an additional 3,000 gigawatt-hours (GWh) of supply per year from
electricity generating facilities within the Province as soon as practicable but no
later than 2026, and the *Act* provides that other public utilities, in planning for the
construction or extension of generation facilities and energy purchases, must
consider the Government's goal that British Columbia be electricity self-sufficient
by the 2016 calendar year and maintain self-sufficiency after that year; and

WHEREAS the long lead times associated with electricity transmission system
development and the planning of the system to meet near-term needs can result in
insufficient capacity, under-sized electricity transmission infrastructure, an
excessive number of transmission corridors and limitations on economic
development in an area; and

WHEREAS a planned and rational expansion of the electricity transmission
system that considers current requirements, the needs that will likely arise in the
future, and the desirability of minimizing impacts in supplying these needs is in
the best interest of British Columbians from a social, environmental and economic
perspective; and

WHEREAS the Energy Plan sets a goal of ensuring that 90 percent of total
electricity generation in British Columbia is from clean or renewable sources,
and thermal generation will be required to have zero net emissions of greenhouse
gases, or, in the case of coal fired generation facilities, will be required to capture
and store or sequester greenhouse gas emissions; and

WHEREAS under the *Greenhouse Gas Reduction Targets Act*, the Province of
British Columbia has established targets for the purpose of reducing
British Columbia greenhouse gas emissions by 2020 and 2050; and

1 WHEREAS on April 20, 2007, British Columbia became a partner in the Western
2 Climate Initiative and subsequently signed Memoranda of Understanding with
3 California and Washington in which it was agreed to support and adopt policies to
4 create more renewable energy generation and transmission; and

5
6 WHEREAS industries, businesses and individuals in British Columbia, and other
7 jurisdictions, may increase their use of electricity with low life cycle greenhouse
8 gas emissions as a way to reduce their greenhouse gas emissions; and

9
10 WHEREAS the 2007 Speech from the Throne stated that Government will pursue
11 British Columbia's potential as a net exporter of clean, renewable energy; and

12
13 WHEREAS trade in electric power with other jurisdictions helps generate revenue to
14 BC Hydro, and this revenue reduces total revenues required to be collected from
15 domestic customers; and

16
17 WHEREAS the British Columbia Transmission Corporation's (BCTC's) open
18 access transmission tariff will, subject to any change approved by the
19 British Columbia Utilities Commission (the Commission), continue to provide
20 customers the opportunity to request and contract for transmission services,
21 including interconnection and wheeling services; and

22
23 WHEREAS there is a need to fully consider the potential long-term regional
24 development of generation resources and the long-term transmission needs to
25 access those resources; and

26
27 WHEREAS subsection 5(4) of the *Act* provides that the Commission must
28 conduct an inquiry to make determinations with respect to British Columbia's
29 infrastructure and capacity needs for electricity transmission and, pursuant to
30 subsection 5(5), must commence that inquiry by March 31, 2009 unless otherwise
31 ordered by the Lieutenant Governor in Council; and

32
33 WHEREAS following the determinations made in the inquiry, applications for
34 Certificates of Public Convenience and Necessity or other regulatory filings to be
35 filed with the Commission under the *Act*, will be brought forward to pursue specific
36 transmission projects to address the needs determined in the inquiry; and

37
38 WHEREAS subsection 5(7) of the *Act* provides that the Minister responsible for the
39 administration of the *Hydro and Power Authority Act* (Minister) may declare, by
40 regulation, that the Commission may not, during the period specified in the
41 regulation, reconsider, vary or rescind a determination made under subsection 5(4)
42 of the *Act*; and

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WHEREAS subsection 5(6) of the *Act* provides that the Minister may specify, by order, terms of reference requiring and empowering the Commission to inquire into the matters referred to in subsection 5(4) of the *Act* including terms of reference regarding the manner in which and the time by which the Commission must issue its determination;

NOW THEREFORE I order that the following Terms of Reference are specified pursuant to subsection 5(6) of the *Act*:

1. In these Terms of Reference,
 - "load-serving utilities" means BC Hydro and FortisBC Inc.; and
 - "transmission service providers" means BCTC and FortisBC Inc.
2. The general purpose of this inquiry is for the Commission to make determinations with respect to British Columbia's electricity transmission infrastructure and capacity needs for a 30-year period, commencing from the date this inquiry begins (the "Determination Period").
3. The Commission must assess:
 - (a) the generation resources in British Columbia that will potentially be developed during the Determination Period, grouped by geographic location, considering:
 - (i) the electricity resource potential identified in the BC Hydro 2008 Long Term Acquisition Plan, if accepted, or any other long-term resource plans filed and accepted under the *Act*, and electricity resource potential identified in any evidence filed in the inquiry;
 - (ii) their generating capability, type, and geographic area;
 - (iii) that certain areas in British Columbia will be inappropriate for the development of generation resources, such as, but not limited to, parks and protected areas;
 - (iv) that electricity resources will be required to be developed to serve the electrical energy and capacity requirements of the load-serving utilities taking into account the objectives of the Energy Plan, the provisions of the *Act* and regulations issued under the *Act*;
 - (v) potential future market opportunities to export clean or renewable or low-carbon electricity to other jurisdictions that is surplus to the requirements of load-serving utilities in British Columbia; and

- 1 (b) the most cost-effective and most probable sequence(s) of development by
2 geographic area, in accordance with existing legislation and regulations, of the
3 generation resources referred to in subparagraph 3(a).
4
- 5 4. The Commission must make determinations respecting the need for, and timing of,
6 additional transmission infrastructure and capacity, within the Determination Period,
7 that would allow for:
8
- 9 (a) the supply and delivery of electricity as assessed under paragraph 3; and
10
11 (b) improved electricity transmission intertie capacity between British Columbia and
12 the United States or Alberta that can be used effectively to permit continued
13 optimization of the electricity system in British Columbia, and to support the
14 export of surplus electricity as assessed under paragraph 3.
15
- 16 5. In making the determinations referred to in paragraph 4, the Commission may not
17
18 (a) make determinations on the merits of specific generation projects; or
19
20 (b) make determinations with respect to the specific routing or technological
21 specifications of electricity transmission projects.
22
- 23 6. In making the assessment under paragraph 3, and the determinations under paragraph 4,
24 the Commission must:
25
- 26 (a) take a long-term view of transmission development, in which long-term needs
27 are considered along with immediate needs, with the view to support:
28
- 29 (i) additional transmission infrastructure and capacity that would
30 accommodate reasonably foreseeable resource and economic
31 development; and
32
- 33 (ii) an efficient development of transmission that would avoid multiple
34 transmission lines when, for example, one appropriately sized
35 transmission line would serve the need in the foreseeable future; and
36
- 37 (b) recognize and take account of the following:
38
- 39 (i) British Columbia is to achieve energy and capacity self-sufficiency by
40 2016 and maintain self-sufficiency after achieving it, which for
41 BC Hydro includes an additional 3,000 GWh of supply per year from
42 electricity generating facilities within the Province as soon as
43 practicable but no later than 2026;
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- 45 (ii) British Columbia's clean or renewable electricity will continue to
46 account for at least 90 percent of total generation;

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- (iii) allowing only for transmission development based on near-term need creates a barrier which can hinder future resource development and economic growth in British Columbia, particularly where that growth would comprise initiatives from several smaller developments, rather than a single development;
- (iv) it is desirable to support the most efficient use of generation resources from a Province-wide perspective;
- (v) development and use of clean or renewable electricity resources will support meeting British Columbia's commitment to reducing greenhouse gas emissions by 2020 and for each subsequent calendar year to at least 33 percent less than the level of those emissions in 2007, and by 2050 and for each subsequent calendar year to at least 80 percent less than the level of those emissions in 2007;
- (vi) other jurisdictions will continue to pursue the reduction of greenhouse gas emissions and increase the use of renewable energy, and development and use of British Columbia's clean or renewable electricity resources may help other jurisdictions meet their goals and create economic opportunities in British Columbia;
- (vii) it is desirable to maximize the net benefit from trade in electric power with neighbouring jurisdictions in the United States and Alberta; and
- (viii) Government has committed to transmission capacity north of Skeena substation extending at least to Bob Quinn Lake having a capacity of at least 287 kilovolts through partnership with the private sector to fund such transmission capacity.

7. In addition to other evidence and submissions, and subject to paragraph (6) and (8), in making the assessments referred to in paragraph (3) and the determinations referred to in paragraph (4), the Commission must have regard for:

- (a) the load-serving utilities' long-term resource plans filed under section 44.1 of the *Act*, including their most recently filed and relevant contingency resource plans as accepted by the Commission;

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- (b) any long-term plans of the transmission service providers filed and reviewed under section 44.1 of the *Act*, and any expenditure schedules of the transmission service providers filed under section 44.2 of the *Act*, and any decisions with respect to these plans issued by the Commission in the course of this inquiry; and
 - (c) evidence regarding the load-serving utilities' energy and capacity requirements under scenarios that in the Commission's opinion are reasonable, and reflect considerations detailed in paragraph 6, which may not be adequately addressed within the load-serving utilities' most recently filed long-term resource plans, including scenarios in which, during the Determination Period;
 - (i) there is an increase in electricity use, substituting for other forms of energy, as a means of reducing greenhouse gas emissions; and
 - (ii) the potential for long-term economic expansion in areas of British Columbia, such as the northeast region of British Columbia, is explicitly incorporated.
8. In addition to any other evidence and submissions relevant to the inquiry that the load-serving utilities may wish to provide, if not adequately addressed in their most recently approved long-term resource plans, the Commission must allow the load-serving utilities to provide evidence and submissions regarding:
- (a) their electrical energy and capacity requirements for the Determination Period;
 - (b) the facilities they would intend to construct, extend or expand, and the volume of purchases of electricity from other persons they would intend to make, in order to meet these requirements in the Determination Period;
 - (c) the most cost-effective and most probable sequence of development, by geographic area, of the facilities and the energy sources allowing for the purchases referred to in paragraph (8)(b).
9. The Commission must invite and have regard for evidence and submissions from the transmission service providers with respect to the specific determinations the Commission should make respecting the need for, and timing of, additional transmission infrastructure and capacity within the Determination Period, and must allow the transmission service providers to provide evidence and submissions on any other matter that is relevant to this inquiry.

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10. For the purposes of conducting this inquiry, the Commission:

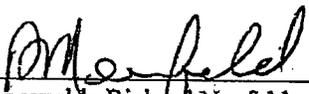
- (a) must invite and consider submissions, evidence and presentations from any interested person, including, without limitation, First Nations, communities, municipal and regional governments, other utilities, power producers, ratepayer groups and environmental non-governmental organizations;
- (b) may use all of the powers provided to it under the *Act*;
- (c) may make use of procedures to resolve specific issues within these Terms of Reference, including, as it considers appropriate, workshops, mediations, dispute resolution mechanisms, pre-hearing conferences, working groups and oral and written public hearings; and
- (d) may not complete the evidentiary portion of the inquiry until the current BC Hydro 2008 Long Term Acquisition Plan proceeding, Commission Project No. 3698514, has been completed and a decision has been issued.

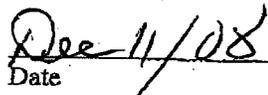
11. The Commission must prepare a report containing its determinations and reasons for the determinations and must provide the report to the Minister of Energy, Mines and Petroleum Resources.

12. Before finalizing its report, the Commission must:

- (a) publish a draft report, setting out the Commission's determinations,
- (b) for a period of 30 days, provide an opportunity for the public to make written comments to the Commission on the draft report, and make such comments publicly available;
- (c) provide for an additional period of comment, of a duration that in the Commission's opinion is appropriate in order to give a reasonable opportunity for the public to respond in writing to the comments referred to in subparagraph (b); and
- (d) incorporate, as it considers appropriate, the comments and responses referred to in subparagraphs (b) and (c) into the report referred to in paragraph 11.

13. The Commission must publish the draft report referred to in subparagraph 12(a) on or before June 30, 2010.


Honourable Richard Neufeld
Minister of Energy, Mines and Petroleum Resources


Date

This Act is Current to July 8, 2009

ADMINISTRATIVE TRIBUNALS ACT

[SBC 2004] CHAPTER 45

Assented to May 20, 2004

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Definitions

1 In this Act:

"**applicant**" includes an appellant, a claimant or a complainant;

"**application**" includes an appeal, a review or a complaint but excludes any interim or preliminary matter or an application to the court;

"**appointing authority**" means the person or the Lieutenant Governor in Council who, under another Act, has the power to appoint the chair, vice chair and members, or any of them, to the tribunal;

"**constitutional question**" means any question that requires notice to be given under section 8 of the *Constitutional Question Act*;

"**court**" means the Supreme Court;

"**decision**" includes a determination, an order or other decision;

"**dispute resolution process**" means a confidential and without prejudice process established by the tribunal to facilitate the settlement of one or more issues in dispute;

"**intervener**" means a person who is permitted by the tribunal to participate as an intervener in an application;

"**member**" means a person appointed to the tribunal to which a provision of this Act applies;

"**privative clause**" means provisions in the tribunal's enabling Act that give the tribunal exclusive and final jurisdiction to inquire into, hear and decide certain matters and questions and provide that a decision of the tribunal in respect of the matters within its jurisdiction is final and binding and not open to review in any court;

"**tribunal**" means a tribunal to which some or all of the provisions of this Act are made applicable under the tribunal's enabling Act;

"**tribunal's enabling Act**" means the Act under which the tribunal is established or continued.

Chair's initial term and reappointment

2 (1) The chair of the tribunal may be appointed by the appointing authority,

after a merit based process, to hold office for an initial term of 3 to 5 years.

(2) The chair may be reappointed by the appointing authority for additional terms of up to 5 years.

Member's initial term and reappointment

3 (1) A member, other than the chair, may be appointed by the appointing authority, after a merit based process and consultation with the chair, to hold office for an initial term of 2 to 4 years.

(2) A member may be reappointed by the appointing authority as a member of the tribunal for additional terms of up to 5 years.

Appointment of acting chair

4 (1) If the chair expects to be absent or is absent, the chair may designate a vice chair as the acting chair for the period that the chair is absent.

(2) If the chair expects to be absent or is absent and there is no vice chair or if there is a vice chair and the vice chair is not willing or able to act as chair, the chair may designate a member as the acting chair for the period that the chair is absent.

(3) Despite subsections (1) and (2), if the chair is absent or incapacitated for an extended period of time, the appointing authority may designate a vice chair as the acting chair for the period that the chair is absent or incapacitated.

(4) Despite subsections (1) and (2), if the chair is absent or incapacitated for an extended period of time and there is no vice chair or if there is a vice chair and the vice chair is not willing or able to act as chair, the appointing authority may designate a member, or appoint an individual who would otherwise be qualified for appointment as a member or as the chair, as the acting chair for the period that the chair is absent or incapacitated.

(5) If the tribunal has no chair, the appointing authority may appoint an individual, who is a member, or appoint an individual who would otherwise be qualified for appointment as a member or as the chair, as the acting chair for a term of up to 6 months.

(6) In exceptional circumstances an individual may be appointed as the acting chair under subsection (5) for an additional term of up to 6 months.

(7) Subsections (3), (4) and (5) apply whether or not an individual is designated, under the Act under which the chair is appointed, to act on

behalf of the chair.

- (8) An individual designated or appointed under any of subsections (1) to (5) has all the powers and may perform all the duties of the chair.

Member's absence or incapacitation

- 5 (1) If a member is absent or incapacitated for an extended period of time or expects to be absent for an extended period of time, the appointing authority, after consultation with the chair, may appoint another person, who would otherwise be qualified for appointment as a member, to replace the member until the member returns to full duty or the member's term expires, whichever comes first.
- (2) The appointment of a person to replace a member under subsection (1) is not affected by the member returning to less than full duty.

Member's temporary appointment

- 6 (1) If the tribunal requires additional members, the chair, after consultation with the minister responsible for the Act under which the tribunal is established, may appoint an individual, who would otherwise be qualified for appointment as a member, to be a member for up to 6 months.
- (2) Under subsection (1), an individual may be appointed to the tribunal only twice in any 2 year period.
- (3) An appointing authority may establish conditions and qualifications for appointments under subsection (1).

Powers after resignation or expiry of term

- 7 (1) If a member resigns or their appointment expires, the chair may authorize that individual to continue to exercise powers as a member of the tribunal in any proceeding over which that individual had jurisdiction immediately before the end of their term.
- (2) An authorization under subsection (1) continues until a final decision in that proceeding is made.
- (3) If an individual performs duties under subsection (1), section 10 applies.

Termination for cause

- 8 The appointing authority may terminate the appointment of the chair, a vice chair or a member for cause.

Responsibilities of the chair

9 The chair is responsible for the effective management and operation of the tribunal and the organization and allocation of work among its members.

Remuneration and benefits for members

10 (1) In accordance with general directives of the Treasury Board, members must be reimbursed for reasonable travelling and out of pocket expenses necessarily incurred in carrying out their duties.

(2) In accordance with general directives of the Treasury Board, the minister responsible for the tribunal's enabling Act must set the remuneration for those members who are to receive remuneration.

General power to make rules respecting practice and procedure

11 (1) Subject to this Act and the tribunal's enabling Act, the tribunal has the power to control its own processes and may make rules respecting practice and procedure to facilitate the just and timely resolution of the matters before it.

(2) Without limiting subsection (1), the tribunal may make rules as follows:

- (a) respecting the holding of pre-hearing conferences, including confidential pre-hearing conferences, and requiring the parties and any interveners to attend a pre-hearing conference;
- (b) respecting dispute resolution processes;
- (c) respecting receipt and disclosure of evidence, including but not limited to pre-hearing receipt and disclosure and pre-hearing examination of a party on oath, affirmation or by affidavit;
- (d) respecting the exchange of records and documents by parties;
- (e) respecting the filing of written submissions by parties;
- (f) respecting the filing of admissions by parties;
- (g) specifying the form of notice to be given to a party by another party or by the tribunal requiring a party to diligently pursue an application and specifying the time within which and the manner in which the party must respond to the notice;
- (h) respecting service and filing of notices, documents and orders, including substituted service;
- (i) requiring a party to provide an address for service or delivery

of notices, documents and orders;

(j) providing that a party's address of record is to be treated as an address for service;

(k) respecting procedures for preliminary or interim matters;

(l) respecting amendments to an application or responses to it;

(m) respecting the addition of parties to an application;

(n) respecting adjournments;

(o) respecting the extension or abridgement of time limits provided for in the rules;

(p) respecting the transcribing or tape recording of its proceedings and the process and fees for reproduction of a tape recording if requested by a party;

(q) establishing the forms it considers advisable;

(r) respecting the joining of applications;

(s) respecting exclusion of witnesses from proceedings;

(t) respecting the effect of a party's non-compliance with the tribunal's rules;

(u) respecting access to and restriction of access to tribunal documents by any person;

(v) respecting witness fees and expenses;

(w) respecting applications to set aside any summons served by a party.

(3) In an application, the tribunal may waive or modify one or more of its rules in exceptional circumstances.

(4) The tribunal must make accessible to the public any rules of practice and procedure made under this section.

Practice directives tribunal must make

12 (1) The tribunal must issue practice directives respecting

(a) the usual time period for completing an application and for completing the procedural steps within an application, and

(b) the usual time period within which the tribunal's final decision and reasons are to be released after the hearing of the application is completed.

(2) The tribunal is not bound by its practice directives in the exercise of its powers or the performance of its duties.

(3) Practice directives issued under subsection (1) must be consistent with this Act and with the tribunal's enabling Act, the regulations made under those Acts and any rules of practice and procedure made by the tribunal.

(4) The tribunal must make accessible to the public any practice directives made under this section.

Practice directives tribunal may make

13 (1) The tribunal may issue practice directives consistent with this Act and with the tribunal's enabling Act, the regulations made under those Acts and any rules of practice and procedure made by the tribunal.

(2) The tribunal is not bound by its practice directives in the exercise of its powers or the performance of its duties.

(3) The tribunal must make accessible to the public any practice directives made under subsection (1).

General power to make orders

14 In order to facilitate the just and timely resolution of an application the tribunal, if requested by a party or an intervener, or on its own initiative, may make any order

(a) for which a rule is made by the tribunal under section 11,

(b) for which a rule is prescribed under section 60, or

(c) in relation to any matter that the tribunal considers necessary for purposes of controlling its own proceedings.

Interim orders

15 The tribunal may make an interim order in an application.

Consent orders

16 (1) On the request of the parties to an application, the tribunal may make a consent order if it is satisfied that the order is consistent with its enabling Act.

(2) If the tribunal declines to make a consent order under subsection (1), it must provide the parties with reasons for doing so.

Withdrawal or settlement of application

- 17** (1) If an applicant withdraws all or part of an application or the parties advise the tribunal that they have reached a settlement of all or part of an application, the tribunal must order that the application or the part of it is dismissed.
- (2) If the parties reach a settlement in respect of all or part of the subject matter of an application, on the request of the parties, the tribunal may make an order that includes the terms of settlement if it is satisfied that the order is consistent with its enabling Act.
- (3) If the tribunal declines to make an order under subsection (2), it must provide the parties with reasons.

Failure of party to comply with tribunal orders and rules

- 18** If a party fails to comply with an order of the tribunal or with the rules of practice and procedure of the tribunal, including any time limits specified for taking any actions, the tribunal, after giving notice to that party, may do one or more the following:
- (a) schedule a written, electronic or oral hearing;
 - (b) continue with the application and make a decision based on the information before it, with or without providing an opportunity for submissions;
 - (c) dismiss the application.

Service of notice or documents

- 19** (1) If the tribunal is required to provide a notice or any document to a party or other person in an application, it may do so by personal service of a copy of the notice or document or by sending the copy to the person by any of the following means:
- (a) ordinary mail;
 - (b) electronic transmission, including telephone transmission of a facsimile;
 - (c) if specified in the tribunal's rules, another method that allows proof of receipt.
- (2) If the copy is sent by ordinary mail, it must be sent to the most recent address known to the tribunal and must be considered to be received on the

fifth day after the day it is mailed, unless that day is a holiday, in which case the copy must be considered to be received on the next day that is not a holiday.

(3) If the copy is sent by electronic transmission it must be considered to be received on the day after it was sent, unless that day is a holiday, in which case the copy must be considered to be received on the next day that is not a holiday.

(4) If the copy is sent by a method referred to in subsection (1) (c), the tribunal's rules govern the day on which the copy must be considered to be received.

(5) If through absence, accident, illness or other cause beyond the party's control a party who acts in good faith does not receive the copy until a later date than the date provided under subsection (2), (3) or (4), that subsection does not apply.

When failure to serve does not invalidate proceeding

20 If a notice or document is not served in accordance with section 19, the proceeding is not invalidated if

- (a) the contents of the notice or document were known by the person to be served within the time allowed for service,
- (b) the person to be served consents, or
- (c) the failure to serve does not result in prejudice to the person, or any resulting prejudice can be satisfactorily addressed by an adjournment or other means.

Notice of hearing by publication

21 If the tribunal is of the opinion that because there are so many parties to an application or for any other reason it is impracticable to give notice of a hearing to a party by a method referred to in section 19 (1) (a) to (c), the tribunal may give notice of a hearing by public advertisement or otherwise as the tribunal directs.

Notice of appeal (inclusive of prescribed fee)

22 (1) A decision may be appealed by filing a notice of appeal with the tribunal.

(2) A notice of appeal must

- (a) be in writing or in another form authorized by the tribunal's

rules,

(b) identify the decision that is being appealed,

(c) state why the decision should be changed,

(d) state the outcome requested,

(e) contain the name, address and telephone number of the appellant, and if the appellant has an agent to act on the appellant's behalf in respect of the appeal, the name of the agent and a telephone number at which the agent may be contacted during regular business hours,

(f) include an address for delivery of any notices in respect of the appeal, and

(g) be signed by the appellant or the appellant's agent.

(3) A notice of appeal must be accompanied by payment of the prescribed fee.

(4) Despite subsection (3), if a notice of appeal is deficient or if the prescribed fee is outstanding, the chair or the chair's delegate may allow a reasonable period of time within which the notice may be corrected or the fee is to be paid.

Notice of appeal (exclusive of prescribed fee)

23 (1) A decision may be appealed by filing a notice of appeal with the tribunal.

(2) A notice of appeal must

(a) be in writing or in another form authorized by the tribunal's rules,

(b) identify the decision that is being appealed,

(c) state why the decision should be changed,

(d) state the outcome requested,

(e) contain the name, address and telephone number of the appellant, and if the appellant has an agent to act on the appellant's behalf in respect of the appeal, the name of the agent and a telephone number at which the agent may be contacted during regular business hours,

(f) include an address for delivery of any notices in respect of the appeal, and

(g) be signed by the appellant or the appellant's agent.

(3) If a notice of appeal is deficient the chair or the chair's delegate may allow a reasonable period of time within which the notice may be corrected.

Time limit for appeals

24 (1) A notice of appeal respecting a decision must be filed within 30 days of the decision being appealed, unless the tribunal's enabling Act provides otherwise.

(2) Despite subsection (1), the tribunal may extend the time to file a notice of appeal, even if the time to file has expired, if satisfied that special circumstances exist.

Appeal does not operate as stay

25 The commencement of an appeal does not operate as a stay or suspend the operation of the decision being appealed unless the tribunal orders otherwise.

Organization of tribunal

26 (1) The chair of the tribunal may organize the tribunal into panels, each comprised of one or more members.

(2) If the chair organizes a panel comprised of more than one member, the chair must designate one of those members as chair of the panel.

(3) The members of the tribunal may sit

(a) as the tribunal, or

(b) as a panel of the tribunal.

(4) Two or more panels may sit at the same time.

(5) If members of the tribunal sit as a panel,

(a) the panel has the jurisdiction of, and may exercise and perform the powers and duties of, the tribunal, and

(b) a decision of the panel is a decision of the tribunal.

(6) The decision of a majority of the members of a panel of the tribunal is a decision of the tribunal and, in the case of a tie, the decision of the chair of the panel governs.

(7) If a member of a panel is unable for any reason to complete the member's duties, the remaining members of that panel, with consent of the

chair of the tribunal, may continue to hear and determine the matter, and the vacancy does not invalidate the proceeding.

(8) If a panel is comprised of one member and that member is unable for any reason to complete the member's duties, the chair of the tribunal, with the consent of all parties to the application, may organize a new panel to continue to hear and determine the matter on terms agreed to by the parties, and the vacancy does not invalidate the proceeding.

(9) The chair or the chair's delegate may hear and decide any interim or preliminary matter in an application, and for that purpose may exercise any of the powers of the tribunal necessary to decide the matter.

Staff of tribunal

27 (1) Employees necessary to carry out the powers, functions and duties of the tribunal may be appointed under the *Public Service Act*.

(2) The chair of the tribunal may engage or retain consultants, investigators, lawyers, expert witnesses or other persons the tribunal considers necessary to exercise its powers and carry out its duties under the tribunal's enabling Act and may determine their remuneration.

(3) The *Public Service Act* does not apply to a person retained under subsection (2) of this section.

Appointment of person to conduct dispute resolution process

28 (1) The chair of the tribunal may appoint a member or staff of the tribunal or other person to conduct a dispute resolution process.

(2) If a member of the tribunal is appointed under subsection (1), that member, in addition to assisting in a dispute resolution process, may make pre-hearing orders in respect of the application but must not hear the merits of the application unless all parties consent.

Disclosure protection

29 (1) In a proceeding, other than a criminal proceeding, unless the parties to an application consent, a person must not disclose or be compelled to disclose

(a) a document or other record created by a party specifically for the purposes of achieving a settlement of one or more issues through a dispute resolution process, or

(b) a statement made by a party in a dispute resolution process specifically for the purpose of achieving a settlement of one or more issues in dispute.

(2) Subsection (1) does not apply to a settlement agreement.

Tribunal duties

30 Tribunal members must faithfully, honestly and impartially perform their duties and must not, except in the proper performance of those duties, disclose to any person any information obtained as a member.

Summary dismissal

31 (1) At any time after an application is filed, the tribunal may dismiss all or part of it if the tribunal determines that any of the following apply:

- (a) the application is not within the jurisdiction of the tribunal;
- (b) the application was not filed within the applicable time limit;
- (c) the application is frivolous, vexatious or trivial or gives rise to an abuse of process;
- (d) the application was made in bad faith or filed for an improper purpose or motive;
- (e) the applicant failed to diligently pursue the application or failed to comply with an order of the tribunal;
- (f) there is no reasonable prospect the application will succeed;
- (g) the substance of the application has been appropriately dealt with in another proceeding.

(2) Before dismissing all or part of an application under subsection (1), the tribunal must give the applicant an opportunity to make written submissions or otherwise be heard.

(3) If the tribunal dismisses all or part of an application under subsection (1), the tribunal must inform the parties and any interveners of its decision in writing and give reasons for that decision.

Representation of parties to an application

32 A party to an application may be represented by counsel or an agent and may make submissions as to facts, law and jurisdiction.

Intervenors

- 33** (1) The tribunal may allow a person to intervene in an application if the tribunal is satisfied that
- (a) the person can make a valuable contribution or bring a valuable perspective to the application, and
 - (b) the potential benefits of the intervention outweigh any prejudice to the parties caused by the intervention.
- (2) The tribunal may limit the participation of an intervener in one or more of the following ways:
- (a) in relation to cross examination of witnesses;
 - (b) in relation to the right to lead evidence;
 - (c) to one or more issues raised in the application;
 - (d) to written submissions;
 - (e) to time limited oral submissions.
- (3) If 2 or more applicants for intervener status have the same or substantially similar views or expertise, the tribunal may require them to file joint submissions.

Power to compel witnesses and order disclosure

- 34** (1) A party to an application may prepare and serve a summons in the form established by the tribunal, requiring a person
- (a) to attend an oral or electronic hearing to give evidence on oath or affirmation or in any other manner that is admissible and relevant to an issue in the application, or
 - (b) to produce for the tribunal, that party or another party a document or other thing in the person's possession or control that is admissible and relevant to an issue in the application.
- (2) A party to an application may apply to the court for an order
- (a) directing a person to comply with a summons served by a party under subsection (1), or
 - (b) directing any directors and officers of a person to cause the person to comply with a summons served by a party under subsection (1).
- (3) Subject to section 29, at any time before or during a hearing, but before its decision, the tribunal may make an order requiring a person

(a) to attend an oral or electronic hearing to give evidence on oath or affirmation or in any other manner that is admissible and relevant to an issue in an application, or

(b) to produce for the tribunal or a party a document or other thing in the person's possession or control, as specified by the tribunal, that is admissible and relevant to an issue in an application.

(4) The tribunal may apply to the court for an order

(a) directing a person to comply with an order made by the tribunal under subsection (3), or

(b) directing any directors and officers of a person to cause the person to comply with an order made by the tribunal under subsection (3).

Recording tribunal proceedings

35 (1) The tribunal may transcribe or tape record its proceedings.

(2) If the tribunal transcribes or tape records a proceeding, the transcription or tape recording must be considered to be correct and to constitute part of the record of the proceeding.

(3) If, by a mechanical or human failure or other accident, the transcription or tape recording of a proceeding is destroyed, interrupted or incomplete, the validity of the proceeding is not affected.

Form of hearing of application

36 In an application or an interim or preliminary matter, the tribunal may hold any combination of written, electronic and oral hearings.

Applications involving similar questions

37 (1) If 2 or more applications before the tribunal involve the same or similar questions, the tribunal may

(a) combine the applications or any part of them,

(b) hear the applications at the same time,

(c) hear the applications one immediately after the other, or

(d) stay one or more of the applications until after the determination of another one of them.

(2) The tribunal may make additional orders respecting the procedure to be followed with respect to applications under this section.

Examination of witnesses

38 (1) Subject to subsection (2), in an oral or electronic hearing a party to an application may call and examine witnesses, present evidence and submissions and conduct cross examination of witnesses as reasonably required by the tribunal for a full and fair disclosure of all matters relevant to the issues in the application.

(2) The tribunal may reasonably limit further examination or cross examination of a witness if it is satisfied that the examination or cross examination has been sufficient to disclose fully and fairly all matters relevant to the issues in the application.

(3) The tribunal may question any witness who gives oral evidence in an oral or electronic hearing.

Adjournments

39 (1) An application may be adjourned by the tribunal on its own motion or if it is shown to the satisfaction of the tribunal that the adjournment is required to permit an adequate hearing to be held.

(2) In considering whether an application should be adjourned, the tribunal must have regard to the following factors:

- (a) the reason for the adjournment;
- (b) whether the adjournment would cause unreasonable delay;
- (c) the impact of refusing the adjournment on the parties;
- (d) the impact of granting the adjournment on the parties;
- (e) the impact of the adjournment on the public interest.

Information admissible in tribunal proceedings

40 (1) The tribunal may receive and accept information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in a court of law.

(2) Despite subsection (1), the tribunal may exclude anything unduly repetitious.

(3) Nothing is admissible before the tribunal that is inadmissible in a court

because of a privilege under the law of evidence.

(4) Nothing in subsection (1) overrides the provisions of any Act expressly limiting the extent to or purposes for which any oral testimony, documents or things may be admitted or used in evidence.

(5) Notes or records kept by a person appointed by the tribunal to conduct a dispute resolution process in relation to an application are inadmissible in tribunal proceedings.

Hearings open to public

41 (1) An oral hearing must be open to the public.

(2) Despite subsection (1), the tribunal may direct that all or part of the information be received to the exclusion of the public if the tribunal is of the opinion that

(a) the desirability of avoiding disclosure in the interests of any person or party affected or in the public interest outweighs the desirability of adhering to the principle that hearings be open to the public, or

(b) it is not practicable to hold the hearing in a manner that is open to the public.

(3) The tribunal must make a document submitted in a hearing accessible to the public unless the tribunal is of the opinion that subsection (2) (a) or section 42 applies to that document.

Discretion to receive evidence in confidence

42 The tribunal may direct that all or part of the evidence of a witness or documentary evidence be received by it in confidence to the exclusion of a party or parties or any interveners, on terms the tribunal considers necessary, if the tribunal is of the opinion that the nature of the information or documents requires that direction to ensure the proper administration of justice.

Discretion to refer questions of law to court

43 (1) The tribunal has jurisdiction to determine all questions of fact, law or discretion that arise in any matter before it, including constitutional questions.

(2) If a question of law, including a constitutional question, is raised by a

party in a tribunal proceeding, on the request of a party or on its own initiative, at any stage of an application the tribunal may refer that question to the court in the form of a stated case.

(3) If a constitutional question is raised by a party in an application, on the request of the Attorney General, the tribunal must refer that question to the court in the form of a stated case.

(4) The stated case under subsection (2) or (3) must

- (a) be prepared by the tribunal,
- (b) be in writing,
- (c) be filed with the court registry, and
- (d) include a statement of the facts and relevant evidence.

(5) Subject to the direction of the court, the tribunal must

- (a) to the extent that it is practicable in light of the stated case, proceed to hear and decide all questions except the questions raised in the stated case,
- (b) suspend the application as it relates to the stated case and reserve its decision until the opinion of the court has been given, and
- (c) decide the application in accordance with the opinion.

(6) A stated case must be brought on for hearing as soon as practicable.

(7) Subject to subsection (8), the court must hear and determine the stated case and give its decision as soon as practicable.

(8) The court may refer the stated case back to the tribunal for amendment or clarification, and the tribunal must promptly amend and return the stated case for the opinion of the court.

Tribunal without jurisdiction over constitutional questions

44 (1) The tribunal does not have jurisdiction over constitutional questions.

(2) Subsection (1) applies to all applications made before, on or after the date that the subsection applies to a tribunal.

Tribunal without jurisdiction over *Canadian Charter of Rights and Freedoms* issues

45 (1) The tribunal does not have jurisdiction over constitutional questions relating to the *Canadian Charter of Rights and Freedoms*.

(1.1) Subsection (1) applies to all applications made before, on or after the date that the subsection applies to a tribunal.

(2) If a constitutional question, other than one relating to the *Canadian Charter of Rights and Freedoms*, is raised by a party in a tribunal proceeding

(a) on the request of a party or on its own initiative, at any stage of an application the tribunal may refer that question to the court in the form of a stated case, or

(b) on the request of the Attorney General, the tribunal must refer that question to the court in the form of a stated case.

(3) The stated case must

(a) be prepared by the tribunal,

(b) be in writing,

(c) be filed with the court registry, and

(d) include a statement of the facts and relevant evidence.

(4) Subject to the direction of the court, the tribunal must

(a) to the extent that it is practicable in light of the stated case, proceed to hear and decide all questions except the questions raised in the stated case,

(b) suspend the application as it relates to the stated case and reserve its decision until the opinion of the court has been given, and

(c) decide the application in accordance with the opinion.

(5) A stated case must be brought on for hearing as soon as practicable.

(6) Subject to subsection (7), the court must hear and determine the stated case and give its decision as soon as practicable.

(7) The court may refer the stated case back to the tribunal for amendment or clarification, and the tribunal must promptly amend and return the stated case for the opinion of the court.

Notice to Attorney General if constitutional question raised in application

46 If a constitutional question over which the tribunal has jurisdiction is raised in a tribunal proceeding, the party who raises the question must give notice in compliance with section 8 of the *Constitutional Question Act*.

Discretion to decline jurisdiction to apply the *Human Rights Code*

46.1 (1) The tribunal may decline jurisdiction to apply the *Human Rights Code* in any matter before it.

(2) Without limiting the matters the tribunal may consider when determining whether to decline jurisdiction under subsection (1), the tribunal may consider whether, in the circumstances, there is a more appropriate forum in which the *Human Rights Code* may be applied.

(3) If, in an application before the tribunal, a party or an intervener raises the question of whether there is a conflict between the *Human Rights Code* and any other enactment, the party or intervener must serve notice on the Attorney General in accordance with this section.

(4) The notice must contain the following information:

- (a) the names and addresses for delivery of the parties and interveners to the application;
- (b) the name of the tribunal and address of the tribunal's registry;
- (c) any identification numbers assigned by the tribunal to the application;
- (d) the section of the enactment and the section of the *Human Rights Code* that may conflict and the basis on which the question of a conflict arises;
- (e) the date, time and location of any hearing scheduled by the tribunal to consider the question.

(5) The notice must be served on the Attorney General at least 14 days before the date of any hearing scheduled by the tribunal to consider the question, unless the Attorney General, in writing, waives this requirement.

(6) The tribunal may not hear the question of whether there is a conflict between the *Human Rights Code* and any other enactment until after the Attorney General has been served with notice in accordance with this section.

(7) If the party or intervener required to serve notice on the Attorney General does not provide proof of service satisfactory to the tribunal, the tribunal may

- (a) adjourn the hearing of the question until the party or intervener provides proof of service satisfactory to the tribunal, or
- (b) decline to consider the question and proceed to hear the

remainder of the application.

(8) If the Attorney General has been served with notice in accordance with this section and intends to appear at the hearing scheduled to consider the question, the Attorney General

(a) must give notice to the tribunal and the parties and interveners to the application at least 3 days before the date of the hearing, and

(b) has the same rights as any other party to the hearing.

(9) Subsections (3) to (8) do not apply if the Attorney General is representing a party or intervener in the application before the tribunal.

(10) This section applies to all applications made before, on or after the date that this section applies to a tribunal.

Limited jurisdiction and discretion to decline jurisdiction to apply the *Human Rights Code*

46.2 (1) Subject to subsection (2), the tribunal may decline jurisdiction to apply the *Human Rights Code* in any matter before it.

(2) The tribunal does not have jurisdiction over a question of whether there is a conflict between the *Human Rights Code* and any other enactment.

(3) Without limiting the matters the tribunal may consider when determining whether to decline jurisdiction under subsection (1), the tribunal may consider whether, in the circumstances, there is a more appropriate forum in which the *Human Rights Code* may be applied.

(4) This section applies to all applications made before, on or after the date that this section applies to a tribunal.

Tribunal without jurisdiction to apply the *Human Rights Code*

46.3 (1) The tribunal does not have jurisdiction to apply the *Human Rights Code*.

(2) Subsection (1) applies to all applications made before, on or after the date that the subsection applies to a tribunal.

Power to award costs

47 (1) Subject to the regulations, the tribunal may make orders for payment as follows:

(a) requiring a party to pay part of the costs of another party or an intervener in connection with the application;

(b) requiring an intervener to pay part of the costs of a party or another intervener in connection with the application;

(c) if the tribunal considers the conduct of a party has been improper, vexatious, frivolous or abusive, requiring the party to pay part of the actual costs and expenses of the tribunal in connection with the application.

(2) An order under subsection (1), after filing in the court registry, has the same effect as an order of the court for the recovery of a debt in the amount stated in the order against the person named in it, and all proceedings may be taken on it as if it were an order of the court.

Maintenance of order at hearings

48 (1) At an oral hearing, the tribunal may make orders or give directions that it considers necessary for the maintenance of order at the hearing, and, if any person disobeys or fails to comply with any order or direction, the tribunal may call on the assistance of any peace officer to enforce the order or direction.

(2) A peace officer called on under subsection (1) may take any action that is necessary to enforce the order or direction and may use such force as is reasonably required for that purpose.

(3) Without limiting subsection (1), the tribunal, by order, may

(a) impose restrictions on a person's continued participation in or attendance at a proceeding, and

(b) exclude a person from further participation in or attendance at a proceeding until the tribunal orders otherwise.

Contempt proceeding for uncooperative witness or other person

49 (1) The failure or refusal of a person summoned as a witness to do any of the following makes the person, on application to the court by the tribunal, liable to be committed for contempt as if in breach of an order or judgment of the court:

(a) attend a hearing;

(b) take an oath or affirmation;

(c) answer questions;

(d) produce the records or things in their custody or possession.

(2) The failure or refusal of a person to comply with an order or direction under section 48 makes the person, on application to the court by the tribunal, liable to be committed for contempt as if in breach of an order or judgment of the court.

(3) Subsections (1) and (2) do not limit the conduct for which a finding of contempt may be made by the court in respect of conduct by a person in a proceeding before the tribunal.

Decisions

50 (1) If the tribunal makes an order for the payment of money as part of its decision, it must set out in the order the principal sum, and if the tribunal has power to award interest and interest is payable, the rate of interest and the date from which it is to be calculated.

(2) The tribunal may attach terms or conditions to a decision.

(3) The tribunal's decision is effective on the date on which it is issued, unless otherwise specified by the tribunal.

(4) The tribunal must make its decisions accessible to the public.

Final decision

51 The tribunal must make its final decision in writing and give reasons for the decision.

Notice of decision

52 (1) Subject to subsection (2), the tribunal must send each party and any interveners in an application a copy of its final decision.

(2) If the tribunal is of the opinion that because there are so many parties to an application or for any other reason that it is impracticable to send its final decision to each party as provided in subsection (1), the tribunal may give reasonable notice of its decision by public advertisement or otherwise as the tribunal directs.

(3) A notice of a final decision given by the tribunal under subsection (2) must inform the parties of the place where copies of that decision may be obtained.

Amendment to final decision

53 (1) If a party applies or on the tribunal's own initiative, the tribunal may amend a final decision to correct any of the following:

- (a) a clerical or typographical error;
- (b) an accidental or inadvertent error, omission or other similar mistake;
- (c) an arithmetical error made in a computation.

(2) Unless the tribunal determines otherwise, an amendment under subsection (1) must not be made more than 30 days after all parties have been served with the final decision.

(3) Within 30 days of being served with the final decision, a party may apply to the tribunal for clarification of the final decision and the tribunal may amend the final decision only if the tribunal considers that the amendment will clarify the final decision.

(4) The tribunal may not amend a final decision other than in those circumstances described in subsections (1) to (3).

(5) This section must not be construed as limiting the tribunal's ability, on request of a party, to reopen an application in order to cure a jurisdictional defect.

Enforcement of tribunal's final decision

54 (1) A party in whose favour the tribunal makes a final decision, or a person designated in the final decision, may file a certified copy of the final decision with the court.

(2) A final decision filed under subsection (1) has the same force and effect, and all proceedings may be taken on it, as if it were a judgment of the court.

Compulsion protection

55 (1) A tribunal member, a person acting on behalf of or under the direction of a tribunal member or a person who conducts a dispute resolution process on behalf of or under the direction of the tribunal must not be required to testify or produce evidence in any proceeding, other than a criminal proceeding, about records or information obtained in the discharge of duties under the tribunal's enabling Act or this Act.

(2) Despite subsection (1), the court may require the tribunal to produce the record of a proceeding that is the subject of an application for judicial review under the *Judicial Review Procedure Act*.

Immunity protection for tribunal and members

56 (1) In this section, "**decision maker**" includes a tribunal member, adjudicator, registrar or other officer who makes a decision in an application or an interim or preliminary matter, or a person who conducts a dispute resolution process.

(2) Subject to subsection (3), no legal proceeding for damages lies or may be commenced or maintained against a decision maker, the tribunal or the government because of anything done or omitted

(a) in the performance or intended performance of any duty under this Act or the tribunal's enabling Act, or

(b) in the exercise or intended exercise of any power under this Act or the tribunal's enabling Act.

(3) Subsection (2) does not apply to a person referred to in that subsection in relation to anything done or omitted by that person in bad faith.

Time limit for judicial review

57 (1) Unless this Act or the tribunal's enabling Act provides otherwise, an application for judicial review of a final decision of the tribunal must be commenced within 60 days of the date the decision is issued.

(2) Despite subsection (1), either before or after expiration of the time, the court may extend the time for making the application on terms the court considers proper, if it is satisfied that there are serious grounds for relief, there is a reasonable explanation for the delay and no substantial prejudice or hardship will result to a person affected by the delay.

Standard of review if tribunal's enabling Act has privative clause

58 (1) If the tribunal's enabling Act contains a privative clause, relative to the courts the tribunal must be considered to be an expert tribunal in relation to all matters over which it has exclusive jurisdiction.

(2) In a judicial review proceeding relating to expert tribunals under subsection (1)

(a) a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with unless it is patently unreasonable,

(b) questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to

whether, in all of the circumstances, the tribunal acted fairly, and
(c) for all matters other than those identified in paragraphs (a) and (b), the standard of review to be applied to the tribunal's decision is correctness.

(3) For the purposes of subsection (2) (a), a discretionary decision is patently unreasonable if the discretion

- (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.

Standard of review if tribunal's enabling Act has no privative clause

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.

(2) A court must not set aside a finding of fact by the tribunal unless there is no evidence to support it or if, in light of all the evidence, the finding is otherwise unreasonable.

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

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

- (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.

(5) Questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly.

Power to make regulations

60 The Lieutenant Governor in Council may make regulations as follows:

- (a) prescribing rules of practice and procedure for the tribunal;

- (b) repealing or amending a rule made by the tribunal;
- (c) prescribing tariffs of fees to be paid with respect to the filing of different types of applications, including preliminary and interim applications;
- (d) prescribing the circumstances in which an award of costs may be made by the tribunal;
- (e) prescribing a tariff of costs payable under a tribunal order to pay part of the costs of a party or intervener;
- (f) prescribing limits and rates relating to a tribunal order to pay part of the actual costs and expenses of the tribunal.

Application of *Freedom of Information and Protection of Privacy Act*

61 (1) In this section, "**decision maker**" includes a tribunal member, adjudicator, registrar or other officer who makes a decision in an application or an interim or preliminary matter, or a person who conducts a dispute resolution process.

(2) The *Freedom of Information and Protection of Privacy Act*, other than section 44 (1) (b), (2), (2.1) and (3), does not apply to any of the following:

- (a) a personal note, communication or draft decision of a decision maker;
- (b) notes or records kept by a person appointed by the tribunal to conduct a dispute resolution process in relation to an application;
- (c) any information received by the tribunal in a hearing or part of a hearing from which the public, a party or an intervener was excluded;
- (d) a transcription or tape recording of a tribunal proceeding;
- (e) a document submitted in a hearing for which public access is provided by the tribunal;
- (f) a decision of the tribunal for which public access is provided by the tribunal.

(3) Subsection (2) does not apply to personal information, as defined in the *Freedom of Information and Protection of Privacy Act*, that has been in existence for 100 or more years or to other information that has been in existence for 50 or more years.

Application of Act to appointments under *Criminal Code*

62 Sections 1 to 5, 8 to 10 and 61 apply to the review board established or designated under section 672.38 of the *Criminal Code*.

Consequential Amendments

[Note: See Table of Legislative Changes for the status of sections 63 to 188.]

Section(s)	Affected Act
63-66	<i>Agricultural Land Commission Act</i>
67-77	<i>Assessment Act</i>
78	<i>Business Practices and Consumer Protection Act</i>
79-82	<i>Community Care and Assisted Living Act</i>
83-87	<i>Employment and Assistance Act</i>
88-93	<i>Employment Standards Act</i>
94-98	<i>Expropriation Act</i>
99-100	<i>Financial Institutions Act</i>
101	<i>Forest and Range Practices Act</i>
102-103	<i>Hospital Act</i>
104-106	<i>Human Rights Code</i>
107-108	<i>Industry Training Authority Act</i>
109-110	<i>Labour Relations Code</i>
111	<i>Local Government Act</i>
112-114	<i>Manufactured Home Park Tenancy Act</i>
115-119	<i>Mental Health Act</i>
120-127	<i>Natural Products Marketing (BC) Act</i>
128-130	<i>Parole Act</i>
131-141	<i>Passenger Transportation Act</i>
142-152	<i>Petroleum and Natural Gas Act</i>
153-155	<i>Residential Tenancy Act</i>
156-160	<i>Safety Standards Act</i>
161-162	<i>Securities Act</i>
163-173	<i>Utilities Commission Act</i>
174-188	<i>Workers Compensation Act</i>

Transitional Provision

Transitional: existing appointments

189 (1) Existing designations, made before February 13, 2004, of members of the British Columbia Securities Commission as the chair and vice chairs of

the commission and the appointments of those members are continued as expressed in the orders by which they were appointed.

(2) This section is repealed on a date set by regulation of the Lieutenant Governor in Council.

Repeal

190 The *Administrative Tribunals Appointment and Administration Act*, S.B.C. 2003, c. 47, is repealed.

Commencement

191 The provisions of this Act referred to in column 1 of the following table come into force as set out in column 2 of the table:

Item	Column 1 Provisions of Act	Column 2 Commencement
1	Anything not elsewhere covered by this table	The date of Royal Assent
2	Sections 1 to 176	By regulation of the Lieutenant Governor in Council
3	Section 177	March 3, 2003
4	That part of Section 178 enacting 236 (5) of the <i>Workers Compensation Act</i>	March 3, 2003
5	That part of section 178 enacting Section 236 (1) to (4) of the <i>Workers Compensation Act</i>	By regulation of the Lieutenant Governor in Council
6	Sections 179 to 190	By regulation of the Lieutenant Governor in Council

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

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

Appellants

v.

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

Respondents

and between

Weyerhaeuser Company Limited

Appellant

v.

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

Respondents

and

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

Interveners

2004 SCC 73 (CanLII)

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

Neutral citation: 2004 SCC 73.

File No.: 29419.

2004: March 24; 2004: November 18.

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

on appeal from the court of appeal for british columbia

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Allan Donovan, for the intervener the Haisla Nation.

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

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

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

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

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

The judgment of the Court was delivered by

THE CHIEF JUSTICE —

I. Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. Analysis

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. When the Duty to Consult and Accommodate Arises

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

46 Meaningful consultation may oblige the Crown to make changes to its proposed action based on information obtained through consultations. The New Zealand Ministry of Justice's *Guide for Consultation with Māori* (1997) provides insight (at pp. 21 and 31):

Consultation is not just a process of exchanging information. It also entails testing and being prepared to amend policy proposals in the light of information received, and providing feedback. Consultation therefore becomes a process which should ensure both parties are better informed
.....

...

... genuine consultation means a process that involves ...:

- gathering information to test policy proposals
- putting forward proposals that are not yet finalised
- seeking Māori opinion on those proposals
- informing Māori of all relevant information upon which those proposals are based
- not promoting but listening with an open mind to what Māori have to say
- being prepared to alter the original proposal
- providing feedback both during the consultation process and after the decision-process.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

F. *The Province's Duty*

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

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

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

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

G. Administrative Review

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

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

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

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

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

H. *Application to the Facts*

(1) Existence of the Duty

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

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

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

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

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

(2) Scope of the Duty

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

(i) *Strength of the Case*

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

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

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

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

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

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

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

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

(ii) *Seriousness of the Potential Impact*

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

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

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

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

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

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

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

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

(3) Did the Crown Fulfill its Duty?

78 The Province did not consult with the Haida on the replacement of T.F.L. 39. The chambers judge found, at para. 42:

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

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

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

III. Conclusion

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

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

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2004 SCC 73 (CanLII)



SUPREME COURT OF CANADA

CITATION: Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), [2005] 3 S.C.R. 388, 2005 SCC 69

DATE: 20051124
DOCKET: 30246

BETWEEN:

Mikisew Cree First Nation
Appellant
and

**Sheila Copps, Minister of Canadian Heritage,
and Thebacha Road Society**
Respondents

- and -

**Attorney General for Saskatchewan, Attorney General
of Alberta, Big Island Lake Cree Nation, Lesser Slave
Lake Indian Regional Council, Treaty 8 First Nations
of Alberta, Treaty 8 Tribal Association, Blueberry
River First Nations and Assembly of First Nations**
Interveners

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

REASONS FOR JUDGMENT: Binnie J. (McLachlin C.J. and Major, Bastarache, LeBel, Deschamps, Fish, Abella and Charron JJ. concurring)
(paras. 1 to 70)

2005 SCC 69 (CanLII)

Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), [2005] 3 S.C.R.
388, 2005 SCC 69

Mikisew Cree First Nation

Appellant

v.

**Sheila Copps, Minister of Canadian Heritage,
and Thebacha Road Society**

Respondents

and

**Attorney General for Saskatchewan, Attorney General
of Alberta, Big Island Lake Cree Nation, Lesser Slave
Lake Indian Regional Council, Treaty 8 First Nations
of Alberta, Treaty 8 Tribal Association, Blueberry
River First Nations and Assembly of First Nations**

Interveners

**Indexed as: Mikisew Cree First Nation v. Canada (Minister of Canadian
Heritage)**

Neutral citation: 2005 SCC 69.

File No.: 30246.

2005: March 14; 2005: November 24.

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

on appeal from the federal court of appeal

Indians — Treaty rights — Crown’s duty to consult — Crown exercising its treaty right and “taking up” surrendered lands to build winter road to meet regional transportation needs — Proposed road reducing territory over which Mikisew Cree First Nation would be entitled to exercise its treaty rights to hunt, fish and trap — Whether Crown had duty to consult Mikisew — If so, whether Crown discharged its duty — Treaty No. 8.

Crown — Honour of Crown — Duty to consult and accommodate Aboriginal peoples

Appeal — Role of intervener — New argument.

Under Treaty 8, made in 1899, the First Nations who lived in the area surrendered to the Crown 840,000 square kilometres of what is now northern Alberta, northeastern British Columbia, northwestern Saskatchewan and the southern portion of the Northwest Territories, an area whose size dwarfs France, exceeds Manitoba, Saskatchewan and Alberta and approaches the size of British Columbia. In exchange for this surrender, the First Nations were promised reserves and some other benefits including, most importantly to them, the rights to hunt, trap and fish throughout the land surrendered to the Crown except “such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes”.

The Mikisew Reserve is located within Treaty 8 in what is now Wood Buffalo National Park. In 2000, the federal government approved a winter road, which was to run through the Mikisew’s reserve, without consulting them. After the Mikisew protested, the road alignment was modified (but without consultation) to track around

the boundary of the reserve. The total area of the road corridor is approximately 23 square kilometres. The Mikisew's objection to the road goes beyond the direct impact of closure to hunting and trapping of the area covered by the winter road and included the injurious affection it would have on their traditional lifestyle which was central to their culture. The Federal Court, Trial Division set aside the Minister's approval based on breach of the Crown's fiduciary duty to consult with the Mikisew adequately and granted an interlocutory injunction against constructing the winter road. The court held that the standard public notices and open houses which were given were not sufficient and that the Mikisew were entitled to a distinct consultation process. The Federal Court of Appeal set aside the decision and found, on the basis of an argument put forward by an intervener, that the winter road was properly seen as a "taking up" of surrendered land pursuant to the treaty rather than an infringement of it. This judgment was delivered before the release of this Court's decisions in *Haida Nation* and *Taku River Tlingit First Nation*.

Held: The appeal should be allowed. The duty of consultation, which flows from the honour of the Crown, was breached.

The government's approach, rather than advancing the process of reconciliation between the Crown and the Treaty 8 First Nations, undermined it. [4]

When the Crown exercises its Treaty 8 right to "take up" land, its duty to act honourably dictates the content of the process. The question in each case is to determine the degree to which conduct contemplated by the Crown would adversely affect the rights of the aboriginal peoples to hunt, fish and trap so as to trigger the duty to consult. Accordingly, where the court is dealing with a proposed "taking up", it is

not correct to move directly to a *Sparrow* justification analysis even if the proposed measure, if implemented, would infringe a First Nation treaty right. The Court must first consider the process and whether it is compatible with the honour of the Crown. [33-34] [59]

The Crown, while it has a treaty right to “take up” surrendered lands, is nevertheless under the obligation to inform itself on the impact its project will have on the exercise by the Mikisew of their treaty hunting, fishing and trapping rights and to communicate its findings to the Mikisew. The Crown must then attempt to deal with the Mikisew in good faith and with the intention of substantially addressing their concerns. The duty to consult is triggered at a low threshold, but adverse impact is a matter of degree, as is the extent of the content of the Crown’s duty. Under Treaty 8, the First Nation treaty rights to hunt, fish and trap are therefore limited not only by geographical limits and specific forms of government regulation, but also by the Crown’s right to take up lands under the treaty, subject to its duty to consult and, if appropriate, to accommodate the concerns of the First Nation affected. [55-56]

Here, the duty to consult is triggered. The impacts of the proposed road were clear, established, and demonstrably adverse to the continued exercise of the Mikisew hunting and trapping rights over the lands in question. Contrary to the Crown’s argument, the duty to consult was not discharged in 1899 by the pre-treaty negotiations. [54-55]

However, given that the Crown is proposing to build a fairly minor winter road on surrendered lands where the Mikisew treaty rights are expressly subject to the “taking up” limitation, the content of the Crown’s duty of consultation in this case lies

at the lower end of the spectrum. The Crown is required to provide notice to the Mikisew and to engage directly with them. This engagement should include the provision of information about the project, addressing what the Crown knew to be the Mikisew's interests and what the Crown anticipated might be the potential adverse impact on those interests. The Crown must also solicit and listen carefully to the Mikisew's concerns, and attempt to minimize adverse impacts on its treaty rights. [64]

The Crown did not discharge its obligations when it unilaterally declared the road re-alignment would be shifted from the reserve itself to a track along its boundary. It failed to demonstrate an intention of substantially addressing aboriginal concerns through a meaningful process of consultation. [64-67]

The Attorney General of Alberta did not overstep the proper role of an intervener when he raised before the Federal Court of Appeal a fresh argument on the central issue of whether the Minister's approval of the winter road infringed Treaty 8. It is always open to an intervener to put forward any legal argument in support of what it submits is the correct legal conclusion on an issue properly before the court provided that in doing so its legal argument does not require additional facts not proven in evidence at trial, or raise an argument that is otherwise unfair to one of the parties. [40]

Cases Cited

Considered: *R. v. Badger*, [1996] 1 S.C.R. 771; *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550,

2004 SCC 74; **distinguished:** *R. v. Sparrow*, [1990] 1 S.C.R. 1075; **referred to:** *R. v. Sioui*, [1990] 1 S.C.R. 1025; *R. v. Marshall*, [1999] 3 S.C.R. 456; *R. v. Marshall*, [2005] 2 S.C.R. 220, 2005 SCC 43; *Halfway River First Nation v. British Columbia (Ministry of Forests)* (1999), 178 D.L.R. (4th) 666, 1999 BCCA 470; *R. v. Morgentaler*, [1993] 1 S.C.R. 462; *Lamb v. Kincaid* (1907), 38 S.C.R. 516; *Athey v. Leonati*, [1996] 3 S.C.R. 458; *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, [2002] 1 S.C.R. 678, 2002 SCC 19; *Province of Ontario v. Dominion of Canada* (1895), 25 S.C.R. 434; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245, 2002 SCC 79; *McInerney v. MacDonald*, [1992] 2 S.C.R. 138; *R. v. Smith*, [1935] 2 W.W.R. 433.

Statutes and Regulations Cited

Constitution Act, 1982, s. 35.

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APPEAL from a judgment of the Federal Court of Appeal (Rothstein, Sexton and Sharlow JJ.A.), [2004] 3 F.C.R. 436, (2004), 236 D.L.R. (4th) 648, 317 N.R. 258, [2004] 2 C.N.L.R. 74, [2004] F.C.J. No. 277 (QL), 2004 FCA 66, reversing a judgment of Hansen J. (2001), 214 F.T.R. 48, [2002] 1 C.N.L.R. 169, [2001] F.C.J. No. 1877 (QL), 2001 FCT 1426. Appeal allowed.

Jeffrey R. W. Rath and Allisun Taylor Rana, for the appellant.

Cheryl J. Tobias and Mark R. Kindrachuk, Q.C., for the respondent
Sheila Copps, Minister of Canadian Heritage.

No one appeared for the respondent the Thebacha Road Society.

P. Mitch McAdam, for the intervener the Attorney General for
Saskatchewan.

Robert J. Normey and Angela J. Brown, for the intervener the Attorney
General of Alberta.

James D. Jodouin and Gary L. Bainbridge, for the intervener the Big
Island Lake Cree Nation.

C. Allan Donovan and Bram Rogachevsky, for the intervener the Lesser Slave Lake Indian Regional Council.

Robert C. Freedman and Dominique Nouvet, for the intervener the Treaty 8 First Nations of Alberta.

E. Jack Woodward and Jay Nelson, for the intervener the Treaty 8 Tribal Association.

Thomas R. Berger, Q.C., and Gary A. Nelson, for the intervener the Blueberry River First Nations.

Jack R. London, Q.C., and Bryan P. Schwartz, for the intervener the Assembly of First Nations.

The judgment of the Court was delivered by

1 BINNIE J. — The fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions. The management of these relationships takes place in the shadow of a long history of grievances and misunderstanding. The multitude of smaller grievances created by the indifference of some government officials to aboriginal people’s concerns, and the lack of respect inherent in that indifference has been as destructive of the process of reconciliation as some of the larger and more explosive controversies. And so it is in this case.

2 Treaty 8 is one of the most important of the post-Confederation treaties. Made in 1899, the First Nations who lived in the area surrendered to the Crown 840,000 square kilometres of what is now northern Alberta, northeastern British Columbia, northwestern Saskatchewan and the southern portion of the Northwest Territories. Some idea of the size of this surrender is given by the fact that it dwarfs France (543,998 square kilometres), exceeds the size of Manitoba (650,087 square kilometres), Saskatchewan (651,900 square kilometres) and Alberta (661,185 square kilometres) and approaches the size of British Columbia (948,596 square kilometres). In exchange for this surrender, the First Nations were promised reserves and some other benefits including, most importantly to them, the following rights of hunting, trapping, and fishing:

And Her Majesty the Queen HEREBY AGREES with the said Indians that they shall have right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as before described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes. [Emphasis added.]

(Report of Commissioners for Treaty No. 8 (1899), at p. 12)

3 In fact, for various reasons (including lack of interest on the part of First Nations), sufficient land was not set aside for reserves for the Mikisew Cree First Nation (the “Mikisew”) until the 1986 Treaty Land Entitlement Agreement, 87 years after Treaty 8 was made. Less than 15 years later, the federal government approved a 118-kilometre winter road that, as originally conceived, ran through the new Mikisew First Nation Reserve at Peace Point. The government did not think it necessary to engage in consultation directly with the Mikisew before making this decision. After the Mikisew protested, the winter road alignment was changed to track

the boundary of the Peace Point reserve instead of running through it, again without consultation with the Mikisew. The modified road alignment traversed the traplines of approximately 14 Mikisew families who reside in the area near the proposed road, and others who may trap in that area although they do not live there, and the hunting grounds of as many as 100 Mikisew people whose hunt (mainly of moose), the Mikisew say, would be adversely affected. The fact the proposed winter road directly affects only about 14 Mikisew trappers and perhaps 100 hunters may not seem very dramatic (unless you happen to be one of the trappers or hunters in question) but, in the context of a remote northern community of relatively few families, it is significant. Beyond that, however, the principle of consultation in advance of interference with existing treaty rights is a matter of broad general importance to the relations between aboriginal and non-aboriginal peoples. It goes to the heart of the relationship and concerns not only the Mikisew but other First Nations and non-aboriginal governments as well.

- 4 In this case, the relationship was not properly managed. Adequate consultation in advance of the Minister's approval did not take place. The government's approach did not advance the process of reconciliation but undermined it. The duty of consultation which flows from the honour of the Crown, and its obligation to respect the existing treaty rights of aboriginal peoples (now entrenched in s. 35 of the *Constitution Act, 1982*), was breached. The Mikisew appeal should be allowed, the Minister's approval quashed, and the matter returned to the Minister for further consultation and consideration.

I. Facts

5 About 5 percent of the territory surrendered under Treaty 8 was set aside in 1922 as Wood Buffalo National Park. The Park was created principally to protect the last remaining herds of wood bison (or buffalo) in northern Canada and covers 44,807 square kilometres of land straddling the boundary between northern Alberta and southerly parts of the Northwest Territories. It is designated a UNESCO World Heritage Site. The Park itself is larger than Switzerland.

6 At present, it contains the largest free-roaming, self-regulating bison herd in the world, the last remaining natural nesting area for the endangered whooping crane, and vast undisturbed natural boreal forests. More to the point, it has been inhabited by First Nation peoples for more than over 8,000 years, some of whom still earn a subsistence living by hunting, fishing and commercial trapping within the Park boundaries. The Park includes the traditional lands of the Mikisew. As a result of the Treaty Land Entitlement Agreement, the Peace Point Reserve was formally excluded from the Park in 1988 but of course is surrounded by it.

7 The members of the Mikisew Cree First Nation are descendants of the Crees of Fort Chipewyan who signed Treaty 8 on June 21, 1899. It is common ground that its members are entitled to the benefits of Treaty 8.

A. The Winter Road Project

8 The proponent of the winter road is the respondent Thebacha Road Society, whose members include the Town of Fort Smith (located in the Northwest Territories on the northeastern boundary of Wood Buffalo National Park, where the Park headquarters is located), the Fort Smith Métis Council, the Salt River First Nation, and

Little Red River Cree First Nation. The advantage of the winter road for these people is that it would provide direct winter access among a number of isolated northern communities and to the Alberta highway system to the south. The trial judge accepted that the government's objective was to meet "regional transportation needs": (2001), 214 F.T.R. 48, 2001 FCT 1426, at para. 115.

B. The Consultation Process

9 According to the trial judge, most of the communications relied on by the Minister to demonstrate appropriate consultation were instances of the Mikisew's being provided with standard information about the proposed road in the same form and substance as the communications being distributed to the general public of interested stakeholders. Thus Parks Canada acting for the Minister, provided the Mikisew with the Terms of Reference for the environmental assessment on January 19, 2000. The Mikisew were advised that open house sessions would take place over the summer of 2000. The Minister says that the first formal response from the Mikisew did not come until October 10, 2000, some two months after the deadline she had imposed for "public" comment. Chief Poitras stated that the Mikisew did not formally participate in the open houses, because ". . . an open house is not a forum for us to be consulted adequately".

10 Apparently, Parks Canada left the proponent Thebacha Road Society out of the information loop as well. At the end of January 2001, it advised Chief Poitras that it had just been informed that the Mikisew did not support the road. Up to that point, Thebacha had been led to believe that the Mikisew had no objection to the road's going through the reserve. Chief Poitras wrote a further letter to the Minister

on January 29, 2001 and received a standard-form response letter from the Minister's office stating that the correspondence "will be given every consideration".

11 Eventually, after several more miscommunications, Parks Canada wrote Chief Poitras on April 30, 2001, stating in part: "I apologize to you and your people for the way in which the consultation process unfolded concerning the proposed winter road and any resulting negative public perception of the [Mikisew Cree First Nation]". At that point, in fact, the decision to approve the road with a modified alignment had already been taken.

12 On May 25, 2001, the Minister announced on the Parks Canada website that the Thebacha Road Society was authorized to build a winter road 10 metres wide with posted speed limits ranging from 10 to 40 kilometres per hour. The approval was said to be in accordance with "Parks Canada plans and policy" and "other federal laws and regulations". No reference was made to any obligations to the Mikisew.

13 The Minister now says the Mikisew ought not to be heard to complain about the process of consultation because they declined to participate in the public process that took place. Consultation is a two-way street, she says. It was up to the Mikisew to take advantage of what was on offer. They failed to do so. In the Minister's view, she did her duty.

14 The proposed winter road is wide enough to allow two vehicles to pass. Pursuant to s. 36(5) of the *Wood Buffalo National Park Game Regulations*, SOR/78-830, creation of the road would trigger a 200-metre wide corridor within which the use

of firearms would be prohibited. The total area of this corridor would be approximately 23 square kilometres.

15 The Mikisew objection goes beyond the direct impact of closure of the area covered by the winter road to hunting and trapping. The surrounding area would be, the trial judge found, injuriously affected. Maintaining a traditional lifestyle, which the Mikisew say is central to their culture, depends on keeping the land around the Peace Point reserve in its natural condition and this, they contend, is essential to allow them to pass their culture and skills on to the next generation of Mikisew. The detrimental impact of the road on hunting and trapping, they argue, may simply prove to be one more incentive for their young people to abandon a traditional lifestyle and turn to other modes of living in the south.

16 The Mikisew applied to the Federal Court to set aside the Minister's approval based on their view of the Crown's fiduciary duty, claiming that the Minister owes "a fiduciary and constitutional duty to adequately consult with Mikisew Cree First Nation with regard to the construction of the road" (trial judge, at para. 26).

17 An interlocutory injunction against construction of the winter road was issued by the Federal Court, Trial Division on August 27, 2001.

II. Relevant Enactments

18 *Constitution Act, 1982*

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

III. Judicial History

A. *Federal Court, Trial Division* ((2001), 214 F.T.R. 48, 2001 FCT 1426)

19 Hansen J. held that the lands included in Wood Buffalo National Park were not “taken up” by the Crown within the meaning of Treaty 8 because the use of the lands as a national park did not constitute a “visible use” incompatible with the existing rights to hunt and trap (*R. v. Badger*, [1996] 1 S.C.R. 771; *R. v. Sioui*, [1990] 1 S.C.R. 1025). The proposed winter road and its 200-metre “[no] firearm” corridor would adversely impact the Mikisew’s treaty rights. These rights received constitutional protection in 1982, and any infringements must be justified in accordance with the test in *R. v. Sparrow*, [1990] 1 S.C.R. 1075. In Hansen J.’s view, the Minister’s decision to approve the road infringed the Mikisew’s Treaty 8 rights and could not be justified under the *Sparrow* test.

20 In particular, the trial judge held that the standard public notices and open houses which were given were not sufficient. The Mikisew were entitled to a distinct consultation process. She stated at paras. 170-71:

The applicant complains that the mitigation measures attached to the Minister’s decision were not developed in consultation with Mikisew and were not designed to minimize impacts on Mikisew’s rights. I agree. Even the realignment, apparently adopted in response to Mikisew’s objections, was not developed in consultation with Mikisew. The evidence does not establish that any consideration was given to whether the new route would minimize impacts on Mikisew’s treaty rights. The evidence of Chief George Poitras highlighted an air of secrecy surrounding the realignment, a process that should have included a transparent consideration of Mikisew’s concerns.

Parks Canada admitted it did not consult with Mikisew about the route for the realignment, nor did it consider the impacts of the realignment on Mikisew trappers' rights.

21 Accordingly, the trial judge allowed the application for judicial review and quashed the Minister's approval.

B. *Federal Court of Appeal* ([2004] 3 F.C.R. 436, 2004 FCA 66)

22 Rothstein J.A., with whom Sexton J.A. agreed, allowed the appeal and restored the Minister's approval. He did so on the basis of an argument brought forward by the Attorney General of Alberta as an intervener on the appeal. The argument was that Treaty 8 expressly contemplated the "taking up" of surrendered lands for various purposes, including roads. The winter road was more properly seen as a "taking up" pursuant to the Treaty rather than an infringement of it. As Rothstein J.A. held:

Where a limitation expressly provided for by a treaty applies, there is no infringement of the treaty and thus no infringement of section 35. This is to be contrasted with the case where the limitations provided by the treaty do not apply but the government nevertheless seeks to limit the treaty right. In such a case, the *Sparrow* test must be satisfied in order for the infringement to be constitutionally permissible. [para. 21]

Rothstein J.A. also held that there was no obligation on the Minister to consult with the Mikisew about the road, although to do so would be "good practice" (para. 24). (This opinion was delivered before the release of this Court's decisions in *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73, and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550, 2004 SCC 74.)

23 Sharlow J.A., in dissenting reasons, agreed with the trial judge that the winter road approval was itself a *prima facie* infringement of the Treaty 8 rights and that the infringement had not been justified under the *Sparrow* test. The Crown's obligation as a fiduciary must be considered. The failure of the Minister's staff at Parks Canada to engage in meaningful consultation was fatal to the Crown's attempt at justification. She wrote:

In this case, there is no evidence of any good faith effort on the part of the Minister to understand or address the concerns of Mikisew Cree First Nation about the possible effect of the road on the exercise of their Treaty 8 hunting and trapping rights. It is significant, in my view, that Mikisew Cree First Nation was not even told about the realignment of the road corridor to avoid the Peace Point Reserve until after it had been determined that the realignment was possible and reasonable, in terms of environmental impact, and after the road was approved. That invites the inference that the responsible Crown officials believed that as long as the winter road did not cross the Peace Point Reserve, any further objections of the Mikisew Cree First Nation could be disregarded. Far from meaningful consultation, that indicates a complete disregard for the concerns of Mikisew Cree First Nation about the breach of their Treaty 8 rights. [para. 152]

Sharlow J.A. would have dismissed the appeal.

IV. Analysis

24 The post-Confederation numbered treaties were designed to open up the Canadian west and northwest to settlement and development. Treaty 8 itself recites that "the said Indians have been notified and informed by Her Majesty's said Commission that it is Her desire to open for settlement, immigration, trade, travel, mining, lumbering and such other purposes as to Her Majesty may seem meet". This stated purpose is reflected in a corresponding limitation on the Treaty 8 hunting, fishing and trapping rights to exclude such "tracts as may be required or taken up from

time to time for settlement, mining, lumbering, trading or other purposes”. The “other purposes” would be at least as broad as the purposes listed in the recital, mentioned above, including “travel”.

25 There was thus from the outset an uneasy tension between the First Nations’ essential demand that they continue to be as free to live off the land after the treaty as before and the Crown’s expectation of increasing numbers of non-aboriginal people moving into the surrendered territory. It was seen from the beginning as an ongoing relationship that would be difficult to manage, as the Commissioners acknowledged at an early Treaty 8 negotiation at Lesser Slave Lake in June 1899:

The white man is bound to come in and open up the country, and we come before him to explain the relations that must exist between you, and thus prevent any trouble.

(C. Mair, *Through the Mackenzie Basin: A Narrative of the Athabasca and Peace River Treaty Expedition of 1899*, at p. 61)

As Cory J. explained in *Badger*, at para. 57, “[t]he Indians understood that land would be taken up for homesteads, farming, prospecting and mining and that they would not be able to hunt in these areas or to shoot at the settlers’ farm animals or buildings”.

26 The hunting, fishing and trapping rights were not solely for the benefit of First Nations people. It was in the Crown’s interest to keep the aboriginal people living off the land, as the Commissioners themselves acknowledged in their Report on Treaty 8 dated September 22, 1899:

We pointed out that the Government could not undertake to maintain Indians in idleness; that the same means of earning a livelihood would

continue after the treaty as existed before it, and that the Indians would be expected to make use of them. [p. 5]

27 Thus none of the parties in 1899 expected that Treaty 8 constituted a finished land use blueprint. Treaty 8 signalled the advancing dawn of a period of transition. The key, as the Commissioners pointed out, was to “explain the relations” that would govern future interaction “and thus prevent any trouble” (Mair, at p. 61).

A. Interpretation of the Treaty

28 The interpretation of the treaty “must be realistic and reflect the intention[s] of both parties, not just that of the [First Nation]” (*Sioui*, at p. 1069). As a majority of the Court stated in *R. v. Marshall*, [1999] 3 S.C.R. 456, at para. 14:

The Indian parties did not, for all practical purposes, have the opportunity to create their own written record of the negotiations. Certain assumptions are therefore made about the Crown’s approach to treaty making (honourable) which the Court acts upon in its approach to treaty interpretation (flexible) as to the existence of a treaty . . . the completeness of any written record . . . and the interpretation of treaty terms once found to exist. The bottom line is the Court’s obligation is to “choose from among the various possible interpretations of the *common* intention [at the time the treaty was made] the one which best reconciles” the [First Nation] interests and those of the Crown. [Emphasis in original; citations omitted.]

See also *R. v. Marshall*, [2005] 2 S.C.R. 220, 2005 SCC 43, *per* McLachlin C.J. at paras. 22-24, and *per* LeBel J. at para. 115.

29 The Minister is therefore correct to insist that the clause governing hunting, fishing and trapping cannot be isolated from the treaty as a whole, but must

be read in the context of its underlying purpose, as intended by both the Crown and the First Nations peoples. Within that framework, as Cory J. pointed out in *Badger*,

the words in the treaty must not be interpreted in their strict technical sense nor subjected to rigid modern rules of construction. Rather, they must be interpreted in the sense that they would naturally have been understood by the Indians at the time of the signing. [para. 52]

30 In the case of Treaty 8, it was contemplated by all parties that “from time to time” portions of the surrendered land would be “taken up” and transferred from the inventory of lands over which the First Nations had treaty rights to hunt, fish and trap, and placed in the inventory of lands where they did not. Treaty 8 lands lie to the north of Canada and are largely unsuitable for agriculture. The Commissioners who negotiated Treaty 8 could therefore express confidence to the First Nations that, as previously mentioned, “the same means of earning a livelihood would continue after the treaty as existed before it” (p. 5).

31 I agree with Rothstein J.A. that not every subsequent “taking up” by the Crown constituted an infringement of Treaty 8 that must be justified according to the test set out in *Sparrow*. In *Sparrow*, it will be remembered, the federal government’s fisheries regulations infringed the aboriginal fishing right, and had to be strictly justified. This is not the same situation as we have here, where the aboriginal rights have been surrendered and extinguished, and the Treaty 8 rights are expressly limited to lands not “required or taken up from time to time for settlement, mining, lumbering, trading or other purposes” (emphasis added). The language of the treaty could not be clearer in foreshadowing change. Nevertheless the Crown was and is expected to manage the change honourably.

32 It follows that I do not accept the *Sparrow*-oriented approach adopted in this case by the trial judge, who relied in this respect on *Halfway River First Nation v. British Columbia (Ministry of Forests)* (1999), 178 D.L.R. (4th) 666, 1999 BCCA 470. In that case, a majority of the British Columbia Court of Appeal held that the government's right to take up land was "by its very nature limited" (para. 138) and "that any interference with the right to hunt is a *prima facie* infringement of the Indians' treaty right as protected by s. 35 of the *Constitution Act, 1982*" (para. 144 (emphasis in original)) which must be justified under the *Sparrow* test. The Mikisew strongly support the *Halfway River First Nation* test but, with respect, to the extent the Mikisew interpret *Halfway River* as fixing in 1899 the geographic boundaries of the Treaty 8 hunting right, and holding that any post-1899 encroachment on these geographic limits requires a *Sparrow*-type justification, I cannot agree. The Mikisew argument presupposes that Treaty 8 promised continuity of nineteenth century patterns of land use. It did not, as is made clear both by the historical context in which Treaty 8 was concluded and the period of transition it foreshadowed.

B. *The Process of Treaty Implementation*

33 Both the historical context and the inevitable tensions underlying implementation of Treaty 8 demand a *process* by which lands may be transferred from the one category (where the First Nations retain rights to hunt, fish and trap) to the other category (where they do not). The content of the process is dictated by the duty of the Crown to act honourably. Although *Haida Nation* was not a treaty case, McLachlin C.J. pointed out, at paras. 19 and 35:

The honour of the Crown also infuses the processes of treaty making and treaty interpretation. In making and applying treaties, the Crown must

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

...

But, when precisely does a duty to consult arise? The foundation of the duty in the Crown’s honour and the goal of reconciliation suggest that the duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it.

34 In the case of a treaty the Crown, as a party, will always have notice of its contents. The question in each case will therefore be to determine the degree to which conduct contemplated by the Crown would adversely affect those rights so as to trigger the duty to consult. *Haida Nation* and *Taku River* set a low threshold. The flexibility lies not in the trigger (“might adversely affect it”) but in the variable content of the duty once triggered. At the low end, “the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice” (*Haida Nation*, at para. 43). The Mikisew say that even the low end content was not satisfied in this case.

C. *The Mikisew Legal Submission*

35 The appellant, the Mikisew, essentially reminded the Court of what was said in *Haida Nation* and *Taku River*. This case, the Mikisew say, is stronger. In those cases, unlike here, the aboriginal interest to the lands was asserted but not yet proven. In this case, the aboriginal interests are protected by Treaty 8. They are established legal facts. As in *Haida Nation*, the trial judge found the aboriginal interest was threatened by the proposed development. If a duty to consult was found to exist in

Haida Nation and *Taku River*, then, *a fortiori*, the Mikisew argue, it must arise here and the majority judgment of the Federal Court of Appeal was quite wrong to characterise consultation between governments and aboriginal peoples as nothing more than a “good practice” (para. 24).

D. *The Minister’s Response*

36 The respondent Minister seeks to distinguish *Haida Nation* and *Taku River*. Her counsel advances three broad propositions in support of the Minister’s approval of the proposed winter road.

1. In “taking up” the 23 square kilometres for the winter road, the Crown was doing no more than Treaty 8 entitled it to do. The Crown as well as First Nations have rights under Treaty 8. The exercise by the Crown of *its* Treaty right to “take up” land is not an infringement of the Treaty but the performance of it.
2. The Crown went through extensive consultations with First Nations in 1899 at the time Treaty 8 was negotiated. Whatever duty of accommodation was owed to First Nations was discharged at that time. The terms of the Treaty do not contemplate further consultations whenever a “taking up” occurs.
3. In the event further consultation was required, the process followed by the Minister through Parks Canada in this case was sufficient.

37 For the reasons that follow, I believe that each of these propositions must
be rejected.

(1) In “taking up” Land for the Winter Road the Crown Was Doing No
More Than It Was Entitled To Do Under the Treaty

38 The majority judgment in the Federal Court of Appeal held that “[w]ith the
exceptions of cases where the Crown has taken up land in bad faith or has taken up so
much land that no meaningful right to hunt remains, taking up land for a purpose
express or necessarily implied in the treaty itself cannot be considered an infringement
of the treaty right to hunt” (para. 19).

39 The “Crown rights” argument was initially put forward in the Federal
Court of Appeal by the Attorney General of Alberta as an intervener. The respondent
Minister advised the Federal Court of Appeal that, while she did not dispute the
argument, “[she] was simply not relying on it” (para. 3). As a preliminary objection,
the Mikisew say that an intervener is not permitted “to widen or add to the points in
issue”: *R. v. Morgentaler*, [1993] 1 S.C.R. 462, at p. 463. Therefore it was not open
to the Federal Court of Appeal (or this Court) to decide the case on this basis.

(a) *Preliminary Objection: Did the Attorney General of Alberta Overstep
the Proper Role of an Intervener?*

40 This branch of the Mikisew argument is, with respect, misconceived. In
their application for judicial review, the Mikisew argued that the Minister’s approval
of the winter road infringed Treaty 8. The infringement issue has been central to the
proceedings. It is always open to an intervener to put forward any legal argument in
support of what it submits is the correct legal conclusion on an issue properly before

the Court, provided that in doing so its legal argument does not require additional facts, not proven in evidence at trial or raise an argument that is otherwise unfair to one of the parties. An intervener is in no worse a position than a party who belatedly discovers some legal argument that it ought to have raised earlier in the proceedings but did not, as in *Lamb v. Kincaid* (1907), 38 S.C.R. 516, where Duff J. stated, at p. 539:

A court of appeal, I think, should not give effect to such a point taken for the first time in appeal, unless it be clear that, had the question been raised at the proper time, no further light could have been thrown upon it.

See also *Athey v. Leonati*, [1996] 3 S.C.R. 458, at paras. 51-52.

41 Even granting that the Mikisew can fairly say the Attorney General of Alberta frames the non-infringement argument differently than was done by the federal Minister at trial, the Mikisew have still not identified any prejudice. Had the argument been similarly formulated at trial, how could “further light” have been thrown on it by additional evidence? The historical record was fully explored at trial. At this point the issue is one of the rules of treaty interpretation, not evidence. It thus comes within the rule stated in *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, [2002] 1 S.C.R. 678, 2002 SCC 19, that “[t]he Court is free to consider a new issue of law on the appeal where it is able to do so without procedural prejudice to the opposing party and where the refusal to do so would risk an injustice” (para. 33). Here the Attorney General of Alberta took the factual record as he found it. The issue of treaty infringement has always been central to the case. Alberta’s legal argument is not one that should have taken the Mikisew by surprise. In these circumstances it would be intolerable if the courts were precluded from giving effect to a correct legal

analysis just because it came later rather than sooner and from an intervener rather than a party. To close our eyes to the argument would be to “risk an injustice”.

(b) *The Content of Treaty 8*

42 The “hunting, trapping and fishing clause” of Treaty 8 was extensively reviewed by this Court in *Badger*. In that case Cory J. pointed out that “even by the terms of Treaty No. 8, the Indians’ right to hunt for food was circumscribed by both geographical limitations and by specific forms of government regulation” (para. 37). The members of the First Nations, he continued, “would have understood that land had been ‘required or taken up’ when it was being put to a [visible] use which was incompatible with the exercise of the right to hunt” (para. 53).

[T]he oral promises made by the Crown’s representatives and the Indians’ own oral history indicate that it was understood that land would be taken up and occupied in a way which precluded hunting when it was put to a visible use that was incompatible with hunting. Turning to the case law, it is clear that the courts have also accepted this interpretation and have concluded that whether or not land has been taken up or occupied is a question of fact that must be resolved on a case-by-case basis. [para. 58]

43 While *Badger* noted the “geographic limitation” to hunting, fishing and trapping rights, it did not (as it did not need to) discuss the process by which “from time to time” land would be “taken up” and thereby excluded from the exercise of those rights. The actual holding in *Badger* was that the Alberta licensing regime sought to be imposed on all aboriginal hunters within the Alberta portion of Treaty 8 lands infringed Treaty 8, even though the treaty right was expressly made subject to “regulations as may from time to time be made by the government”. The Alberta licensing scheme denied to “holders of treaty rights as modified by the [*Natural*

Resources Transfer Agreement, 1930] the very means of exercising those rights” (para. 94). It was thus an attempted exercise of regulatory power that went beyond what was reasonably within the contemplation of the parties to the treaty in 1899. (I note parenthetically that the *Natural Resources Transfer Agreement* is not at issue in this case as the Mikisew reserve is vested in Her Majesty in Right of Canada. Paragraph 10 of the Agreement provides that after-created reserves “shall thereafter be administered by Canada in the same way in all respects as if they had never passed to the Province under the provisions hereof”.)

44 The Federal Court of Appeal purported to follow *Badger* in holding that the hunting, fishing and trapping rights would be infringed only “where the Crown has taken up land in bad faith or has taken up so much land that no meaningful right to hunt remains” (para. 18). With respect, I cannot agree with this implied rejection of the Mikisew procedural rights. At this stage the winter road is no more than a contemplated change of use. The proposed use would, if carried into execution, reduce the territory over which the Mikisew would be entitled to exercise their Treaty 8 rights. Apart from everything else, there would be no hunting at all within the 200-metre road corridor. More broadly, as found by the trial judge, the road would injuriously affect the exercise of these rights in the surrounding bush. As the Parks Canada witness, Josie Weninger, acknowledged in cross-examination:

Q: But roads, in effect, change the pattern of moose and other wildlife within the Park and that’s been what Parks Canada observed in the past with regards to other roads, correct?

A: It is documented that roads do impact. I would be foolish if I said they didn’t.

The Draft Environmental Assessment Report acknowledged the road could potentially result in a diminution in quantity of the Mikisew harvest of wildlife, as fewer furbearers (including fisher, muskrat, marten, wolverine and lynx) will be caught in their traps. Second, in qualitative terms, the more lucrative or rare species of furbearers may decline in population. Other potential impacts include fragmentation of wildlife habitat, disruption of migration patterns, loss of vegetation, increased poaching because of easier motor vehicle access to the area and increased wildlife mortality due to motor vehicle collisions. While *Haida Nation* was decided after the release of the Federal Court of Appeal reasons in this case, it is apparent that the proposed road will adversely affect the existing Mikisew hunting and trapping rights, and therefore that the “trigger” to the duty to consult identified in *Haida Nation* is satisfied.

45 The Minister seeks to extend the *dictum* of Rothstein J.A. by asserting, at para. 96 of her factum, that the test ought to be “whether, after the taking up, it still remains reasonably practicable, within the Province as a whole, for the Indians to hunt, fish and trap for food [to] the extent that they choose to do so” (emphasis added). This cannot be correct. It suggests that a prohibition on hunting at Peace Point would be acceptable so long as decent hunting was still available in the Treaty 8 area north of Jasper, about 800 kilometres distant across the province, equivalent to a commute between Toronto and Quebec City (809 kilometres) or Edmonton and Regina (785 kilometres). One might as plausibly invite the truffle diggers of southern France to try their luck in the Austrian Alps, about the same distance as the journey across Alberta deemed by the Minister to be an acceptable fulfilment of the promises of Treaty 8.

46 The Attorney General of Alberta tries a slightly different argument, at para. 49 of his factum, adding a *de minimus* element to the treaty-wide approach:

In this case the amount of land to be taken up to construct the winter road is 23 square kilometres out of 44,807 square kilometres of Wood Buffalo National Park and out of 840,000 square kilometres encompassed by Treaty No. 8. As Rothstein J.A. found, this is not a case where a meaningful right to hunt no longer remains.

47 The arguments of the federal and Alberta Crowns simply ignore the significance and practicalities of a First Nation's traditional territory. Alberta's 23 square kilometre argument flies in the face of the injurious affection of surrounding lands as found by the trial judge. More significantly for aboriginal people, as for non-aboriginal people, location is important. Twenty-three square kilometres alone is serious if it includes the claimants' hunting ground or trapline. While the Mikisew may have rights under Treaty 8 to hunt, fish and trap throughout the Treaty 8 area, it makes no sense from a practical point of view to tell the Mikisew hunters and trappers that, while their own hunting territory and traplines would now be compromised, they are entitled to invade the traditional territories of other First Nations distant from their home turf (a suggestion that would have been all the more impractical in 1899). The Chipewyan negotiators in 1899 were intensely practical people, as the Treaty 8 Commissioners noted in their report (at p. 5):

The Chipewyans confined themselves to asking questions and making brief arguments. They appeared to be more adept at cross-examination than at speech-making, and the Chief at Fort Chipewyan displayed considerable keenness of intellect and much practical sense in pressing the claims of his band.

Badger recorded that a large element of the Treaty 8 negotiations were the assurances of *continuity* in traditional patterns of economic activity. Continuity respects traditional patterns of activity and occupation. The Crown promised that the Indians' rights to hunt, fish and trap would continue "after the treaty as existed before it" (p. 5). This promise is not honoured by dispatching the Mikisew to territories far from their traditional hunting grounds and traplines.

48 What Rothstein J.A. actually said at para. 18 is as follows:

With the exceptions of cases where the Crown has taken up land in bad faith or has taken up so much land that no meaningful right to hunt remains, taking up land for a purpose express or necessarily implied in the treaty itself cannot be considered an infringement of the treaty right to hunt. [Emphasis added.]

The "meaningful right to hunt" is not ascertained on a treaty-wide basis (all 840,000 square kilometres of it) but in relation to the territories over which a First Nation traditionally hunted, fished and trapped, and continues to do so today. If the time comes that in the case of a particular Treaty 8 First Nation "no meaningful right to hunt" remains over *its* traditional territories, the significance of the oral promise that "the same means of earning a livelihood would continue after the treaty as existed before it" would clearly be in question, and a potential action for treaty infringement, including the demand for a *Sparrow* justification, would be a legitimate First Nation response.

(c) *Unilateral Crown Action*

49 There is in the Minister’s argument a strong advocacy of unilateral Crown action (a sort of “this is surrendered land and we can do with it what we like” approach) which not only ignores the mutual promises of the treaty, both written and oral, but also is the antithesis of reconciliation and mutual respect. It is all the more extraordinary given the Minister’s acknowledgment at para. 41 of her factum that “[i]n many if not all cases the government will not be able to appreciate the effect a proposed taking up will have on the Indians’ exercise of hunting, fishing and trapping rights without consultation”.

50 The Attorney General of Alberta denies that a duty of consultation can be an implied term of Treaty 8. He argues:

Given that a consultation obligation would mean that the Crown would be required to engage in meaningful consultations with any and all affected Indians, being nomadic individuals scattered across a vast expanse of land, every time it wished to utilize an individual plot of land or change the use of the plot, such a requirement would not be within the range of possibilities of the common intention of the parties.

The parties *did* in fact contemplate a difficult period of transition and sought to soften its impact as much as possible, and any administrative inconvenience incidental to managing the process was rejected as a defence in *Haida Nation* and *Taku River*. There is no need to repeat here what was said in those cases about the overarching objective of reconciliation rather than confrontation.

(d) *Honour of the Crown*

51 The duty to consult is grounded in the honour of the Crown, and it is not necessary for present purposes to invoke fiduciary duties. The honour of the Crown is itself a fundamental concept governing treaty interpretation and application that was referred to by Gwynne J. of this Court *as a treaty obligation* as far back as 1895, four years before Treaty 8 was concluded: *Province of Ontario v. Dominion of Canada* (1895), 25 S.C.R. 434, at pp. 511-12 *per* Gwynne J. (dissenting). While he was in the minority in his view that the treaty obligation to pay Indian annuities imposed a trust on provincial lands, nothing was said by the majority in that case to doubt that the honour of the Crown was pledged to the fulfilment of its obligations to the Indians. This had been the Crown’s policy as far back as the *Royal Proclamation* of 1763, and is manifest in the promises recorded in the report of the Commissioners. The honour of the Crown exists as a source of obligation independently of treaties as well, of course. In *Sparrow, Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010, *Haida Nation* and *Taku River*, the “honour of the Crown” was invoked as a central principle in resolving aboriginal claims to consultation despite the absence of any treaty.

52 It is not as though the Treaty 8 First Nations did not pay dearly for their entitlement to honourable conduct on the part of the Crown; surrender of the aboriginal interest in an area larger than France is a hefty purchase price.

(2) Did the Extensive Consultations with First Nations Undertaken in 1899 at the Time Treaty 8 Was Negotiated Discharge the Crown’s Duty of Consultation and Accommodation?

53 The Crown’s second broad answer to the Mikisew claim is that whatever had to be done was done in 1899. The Minister contends:

While the government should consider the impact on the treaty right, there is no duty to accommodate in this context. The treaty itself constitutes the accommodation of the aboriginal interest; taking up lands, as defined above, leaves intact the essential ability of the Indians to continue to hunt, fish and trap. As long as that promise is honoured, the treaty is not breached and no separate duty to accommodate arises. [Emphasis added.]

54 This is not correct. Consultation that excludes from the outset any form of accommodation would be meaningless. The contemplated process is not simply one of giving the Mikisew an opportunity to blow off steam before the Minister proceeds to do what she intended to do all along. Treaty making is an important stage in the long process of reconciliation, but it is only a stage. What occurred at Fort Chipewyan in 1899 was not the complete discharge of the duty arising from the honour of the Crown, but a rededication of it.

55 The Crown has a treaty right to “take up” surrendered lands for regional transportation purposes, but the Crown is nevertheless under an obligation to inform itself of the impact its project will have on the exercise by the Mikisew of their hunting and trapping rights, and to communicate its findings to the Mikisew. The Crown must then attempt to deal with the Mikisew “in good faith, and with the intention of substantially addressing” Mikisew concerns (*Delgamuukw*, at para. 168). This does not mean that whenever a government proposes to do anything in the Treaty 8 surrendered lands it must consult with all signatory First Nations, no matter how remote or unsubstantial the impact. The duty to consult is, as stated in *Haida Nation*, triggered at a low threshold, but adverse impact is a matter of degree, as is the extent of the Crown’s duty. Here the impacts were clear, established and demonstrably adverse to the continued exercise of the Mikisew hunting and trapping rights over the lands in question.

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

57 As stated at the outset, the honour of the Crown infuses every treaty and the performance of every treaty obligation. Treaty 8 therefore gives rise to Mikisew procedural rights (e.g. consultation) as well as substantive rights (e.g. hunting, fishing and trapping rights). Were the Crown to have barrelled ahead with implementation of the winter road without adequate consultation, it would have been in violation of its *procedural* obligations, quite apart from whether or not the Mikisew could have established that the winter road breached the Crown's *substantive* treaty obligations as well.

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

Crown did here complied with its obligation to consult honourably with the Mikisew First Nation.

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

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

60 I should state at the outset that the winter road proposed by the Minister was a permissible purpose for “taking up” lands under Treaty 8. It is obvious that the listed purposes of “settlement, mining, lumbering” and “trading” all require suitable transportation. The treaty does not spell out permissible “other purposes” but the term should not be read restrictively: *R. v. Smith*, [1935] 2 W.W.R. 433, (Sask. C.A.), at pp. 440-41. In any event, as noted earlier, the opening recital of Treaty 8 refers to “travel”.

61 The question is whether the Minister and her staff pursued the permitted purpose of regional transportation needs in accordance with the Crown’s duty to consult. The answer turns on the particulars of that duty shaped by the circumstances

here. In *Delgamuukw*, the Court considered the duty to consult and accommodate in the context of an infringement of aboriginal title (at para. 168):

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

62 In *Haida Nation*, the Court pursued the kinds of duties that may arise in pre-proof claim situations, and McLachlin C.J. used the concept of a spectrum to frame her analysis (at paras. 43-45):

At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice. . . .

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

Between these two extremes of the spectrum just described, will lie other situations. Every case must be approached individually. Each must also be approached flexibly, since the level of consultation required may change as the process goes on and new information comes to light. The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake. . . . [Emphasis added.]

63 The determination of the content of the duty to consult will, as *Haida* suggests, be governed by the context. One variable will be the specificity of the promises made. Where, for example, a treaty calls for certain supplies, or Crown payment of treaty monies, or a modern land claims settlement imposes specific obligations on aboriginal peoples with respect to identified resources, the role of consultation may be quite limited. If the respective obligations are clear the parties should get on with performance. Another contextual factor will be the seriousness of the impact on the aboriginal people of the Crown's proposed course of action. The more serious the impact the more important will be the role of consultation. Another factor in a non-treaty case, as *Haida* points out, will be the strength of the aboriginal claim. The history of dealings between the Crown and a particular First Nation may also be significant. Here, the most important contextual factor is that Treaty 8 provides a framework within which to manage the continuing changes in land use already foreseen in 1899 and expected, even now, to continue well into the future. In that context, consultation is key to achievement of the overall objective of the modern law of treaty and aboriginal rights, namely reconciliation.

64 The duty here has both informational and response components. In this case, given that the Crown is proposing to build a fairly minor winter road on *surrendered* lands where the Mikisew hunting, fishing and trapping rights are expressly subject to the "taking up" limitation, I believe the Crown's duty lies at the lower end of the spectrum. The Crown was required to provide notice to the Mikisew and to engage directly with them (and not, as seems to have been the case here, as an afterthought to a general public consultation with Park users). This engagement ought to have included the provision of information about the project addressing what the

Crown knew to be Mikisew interests and what the Crown anticipated might be the potential adverse impact on those interests. The Crown was required to solicit and to listen carefully to the Mikisew concerns, and to attempt to minimize adverse impacts on the Mikisew hunting, fishing and trapping rights. The Crown did not discharge this obligation when it unilaterally declared the road realignment would be shifted from the reserve itself to a track along its boundary. I agree on this point with what Finch J.A. (now C.J.B.C.) said in *Halfway River First Nation* at paras. 159-60.

The fact that adequate notice of an intended decision may have been given does not mean that the requirement for adequate consultation has also been met.

The Crown's duty to consult imposes on it a positive obligation to reasonably ensure that aboriginal peoples are provided with all necessary information in a timely way so that they have an opportunity to express their interests and concerns, and to ensure that their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action. [Emphasis added.]

65 It is true, as the Minister argues, that there is some reciprocal onus on the Mikisew to carry their end of the consultation, to make their concerns known, to respond to the government's attempt to meet their concerns and suggestions, and to try to reach some mutually satisfactory solution. In this case, however, consultation never reached that stage. It never got off the ground.

66 Had the consultation process gone ahead, it would not have given the Mikisew a veto over the alignment of the road. As emphasized in *Haida Nation*, consultation will not always lead to accommodation, and accommodation may or may not result in an agreement. There could, however, be changes in the road alignment or construction that would go a long way towards satisfying the Mikisew objections.

We do not know, and the Minister cannot know in the absence of consultation, what such changes might be.

67 The trial judge’s findings of fact make it clear that the Crown failed to demonstrate an “intention of substantially addressing [Aboriginal] concerns’ . . . through a meaningful process of consultation” (*Haida Nation*, at para. 42). On the contrary, the trial judge held that

[i]n the present case, at the very least, this [duty to consult] would have entailed a response to Mikisew’s October 10, 2000 letter, and a meeting with them to ensure that their concerns were addressed early in the planning stages of the project. At the meetings that were finally held between Parks Canada and Mikisew, a decision had essentially been made, therefore, the meeting could not have been conducted with the genuine intention of allowing Mikisew’s concerns to be integrated with the proposal. [para. 154]

The trial judge also wrote:

. . . it is not consistent with the honour of the Crown, in its capacity as fiduciary, for it to fail to consult with a First Nation prior to making a decision that infringes on constitutionally protected treaty rights. [para. 157]

68 I agree, as did Sharlow J.A., dissenting in the Federal Court of Appeal. She declared that the mitigation measures were adopted through a process that was “fundamentally flawed” (para. 153).

69 In the result I would allow the appeal, quash the Minister’s approval order, and remit the winter road project to the Minister to be dealt with in accordance with these reasons.

V. Conclusion

70 Costs are sought by the Mikisew on a solicitor and client basis but there are no exceptional circumstances to justify such an award. The appeal is therefore allowed and the decision of the Court of Appeal is set aside, all with costs against the respondent Minister in this Court and in the Federal Court of Appeal on a party and party basis. The costs in the Trial Division remain as ordered by the trial judge.

Appeal allowed with costs.

Solicitors for the appellant: Rath & Co., Priddis, Alberta.

Solicitor for the respondent Sheila Copps, Minister of Canadian Heritage: Attorney General of Canada, Edmonton.

Solicitors for the respondent the Thebacha Road Society: Ackroyd Piasta Roth & Day, Edmonton.

Solicitor for the intervener the Attorney General for Saskatchewan: Attorney General for Saskatchewan, Regina.

Solicitor for the intervener the Attorney General of Alberta: Attorney General of Alberta, Edmonton.

Solicitors for the intervener the Big Island Lake Cree Nation: Woloshyn & Co., Saskatoon.

Solicitors for the intervener the Lesser Slave Lake Indian Regional Council: Donovan & Co., Vancouver.

Solicitors for the intervener the Treaty 8 First Nations of Alberta: Cook Roberts, Victoria.

Solicitors for the intervener the Treaty 8 Tribal Association: Woodward & Co., Victoria.

Solicitors for the intervener the Blueberry River First Nations: Thomas R. Berger, Vancouver.

Solicitors for the intervener the Assembly of First Nations: Pitblado, Winnipeg.

Quebec (Attorney General) v. Canada (National Energy Board), [1994] 1 S.C.R.

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**The Grand Council of the Crees (of Quebec)
and the Cree Regional Authority**

Appellants

v.

**The Attorney General of Canada, the Attorney
General of Quebec, Hydro-Québec and the
National Energy Board**

Respondents

and

**Sierra Legal Defence Fund, Canadian
Environmental Law Association, Cultural
Survival (Canada), Friends of the Earth
and Sierra Club of Canada**

Interveners

Indexed as: Quebec (Attorney General) v. Canada (National Energy Board)

File No.: 22705.

1993: October 13; 1994: February 24.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory,
McLachlin, Iacobucci and Major JJ.

on appeal from the federal court of appeal

Public utilities -- Electricity -- Licences -- National Energy Board granting licences for export of electrical power to U.S. -- Licences granted subject to environmental assessments of future generating facilities -- Whether Board erred in granting licences -- National Energy Board Act, R.S.C., 1985, c. N-7 -- Environmental Assessment and Review Process Guidelines Order, SOR/84-467.

Following lengthy public hearings at which the appellants made numerous submissions, the National Energy Board granted Hydro-Québec licences for the export of electrical power to the states of New York and Vermont. At the time the licence applications were filed, the Board was required to satisfy itself both that the power sought to be exported was not needed to meet reasonably foreseeable Canadian requirements and that the price to be charged by the power authority was just and reasonable in relation to the public interest. After the hearings but prior to the Board's ruling, these two explicit criteria were removed from the *National Energy Board Act*, leaving only the requirement that the Board is to have regard to all conditions that appear to it to be relevant. In evaluating the environmental impact of the applications, the Board considered itself bound by both its own Act as amended and the *Environmental Assessment and Review Process Guidelines Order*. The licences were granted subject to two conditions relating to the successful completion of environmental assessments of future generating facilities. The Federal Court of Appeal rejected the appellants' argument that the Board erred in several respects in granting the licences, but allowed the appeal by Hydro-Québec and the Attorney General of Quebec, concluding that the Board had exceeded its jurisdiction in imposing the environmental assessment conditions. It severed these two conditions and allowed the licences to stand. This appeal is to

determine (1) whether the Board properly conducted the required social cost-benefit review; (2) whether the Board's failure to require that Hydro-Québec disclose in full the assumptions and methodologies on which its cost-benefit review was based breached the requirements of procedural fairness; (3) whether the Board owed the appellants a fiduciary duty in the exercise of its decision-making power, and, if so, whether the requirements of this duty were fulfilled; (4) whether the Board's decision affects the appellants' aboriginal rights; and (5) whether the Board failed to follow the requirements of its own Act and of the Guidelines Order in conducting its environmental impact assessment.

Held: The appeal should be allowed and the order of the Board restored.

Hydro-Québec provided evidence on which the Board could reasonably conclude that the consideration of cost recoverability was satisfied. The Board did not err in considering relevant to this issue the fact that the export contracts had received the approval of the province. Also, as this was only one of the factors considered, the Board did not improperly delegate its decision-making responsibility. It has not been shown that the Board's discretion to determine what evidence is relevant to its decision was improperly exercised in this case so as to result in inadequate disclosure to the appellants. The Board had sufficient evidence before it to make a valid finding that all costs would be recovered, and the appellants were given access to all the material before the Board. While there is a fiduciary relationship between the federal Crown and the aboriginal peoples of Canada, the function of the Board

in deciding whether to grant an export licence is quasi-judicial and inherently inconsistent with the imposition of a relationship of utmost good faith between the Board and a party appearing before it. The fiduciary relationship between the Crown and the appellants thus does not impose a duty on the Board to make its decisions in the appellants' best interests, or to change its hearing process so as to impose superadded requirements of disclosure. Moreover, even assuming that the Board should have taken into account the existence of the fiduciary relationship between the Crown and the appellants, the Board's actions in this case would have met the requirements of such a duty. The appellants had access to all the evidence that was before the Board, were able to make submissions and argument in reply, and were entitled to cross-examine the witnesses called by Hydro-Québec. On the issue of whether the Board's decision will have a negative impact on the appellants' aboriginal rights, it is not possible to evaluate realistically the impact of the Board's decision on the appellants' rights without reference to the James Bay Agreement, on which the appellants disavowed reliance. Moreover, even assuming that the Board's decision is one that has, *prima facie*, an impact on the appellants' aboriginal rights, and that for the Board to justify its interference it must at the very least conduct a rigorous, thorough, and proper cost-benefit review, the review carried out in this case was not wanting in this respect.

The Board did not exceed its jurisdiction under the *National Energy Board Act* in considering the environmental effects of the construction of future generating facilities as they related to the proposed export, an area of federal responsibility. The Court of Appeal erred in limiting the scope of the Board's environmental inquiry to the effects on the environment of the transmission of

power by a line of wire across the border. Even though the Board found that the new facilities contemplated would have to be built in any event to supply increasing domestic needs, if the construction of new facilities is required to serve the demands of the export contract, among other needs, then the environmental effects of the construction of such facilities are related to the export. In these circumstances, it becomes appropriate for the Board to consider the source of the electrical power to be exported, and the environmental costs that are associated with the generation of that power. In defining the jurisdictional limits of the Board, this Court must be careful to ensure that the Board's authority is truly limited to matters of federal concern, but the scope of its inquiry must not be narrowed to such a degree that the function of the Board is rendered meaningless or ineffective. The Board met its obligations under the Guidelines Order in attaching to the licence the two impugned conditions. Having concluded that the environmental effects of the construction and operation of the planned facilities were unknown, the Board was required by s. 12(d) of the Order to see either that the proposal was subjected to further study and subsequent rescreening, or that it was submitted to a public review. The conditions imposed by the Board meet in substance this obligation. They do not amount to an improper delegation of the Board's responsibility under the Guidelines Order, but rather are an attempt to avoid the duplication warned against in the Order, while continuing the Board's jurisdiction over this matter.

Cases Cited

Referred to: *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *Bell Canada v. Canada (Canadian Radio-television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722; *In re Canadian Radio-Television Commission and in re London Cable TV Ltd.*, [1976] 2 F.C. 621; *Parke, Davis & Co. v. Fine Chemicals of Canada Ltd.*, [1959] S.C.R. 219; *Martineau v. Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602; *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643; *Lakeside Colony of Hutterian Brethren v. Hofer*, [1992] 3 S.C.R. 165; *Guerin v. The Queen*, [1984] 2 S.C.R. 335; *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574; *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369; *Gitludahl v. Minister of Forests*, B.C.S.C., Vancouver A922935, August 13, 1992; *Dick v. The Queen*, F.C.T.D., T-951-89, June 3, 1992; *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3; *Canadian Wildlife Federation Inc. v. Canada (Minister of the Environment)* (1989), 4 C.E.L.R. (N.S.) 201 (F.C.T.D.), aff'd [1991] 1 F.C. 641 (C.A.); *Friends of the Island Inc. v. Canada (Minister of Public Works)*, [1993] 2 F.C. 229.

Statutes and Regulations Cited

Act to amend the National Energy Board Act and to repeal certain enactments in consequence thereof, S.C. 1990, c. 7, s. 32.

Constitution Act, 1867, s. 91(2).

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

Environmental Assessment and Review Process Guidelines Order, SOR/84-467, ss. 2, 3, 4(1), 5(1), 6, 8, 10(2), 12.

Hydro-Québec Act, R.S.Q., c. H-5, s. 24.

James Bay and Northern Quebec Native Claims Settlement Act, S.C. 1976-77, c. 32.

National Energy Board Act, R.S.C., 1985, c. N-7 [am. 1990, c. 7], ss. 2, 22(1), 24, 118, 119.02, 119.03, 119.06(2), 119.07, 119.08, 119.09, 119.093.

National Energy Board Part VI Regulations, C.R.C. 1978, c. 1056, ss. 6, 15(m).

Authors Cited

Canada. Energy, Mines and Resources Canada. *Canadian Electricity Policy*. Ottawa: Energy, Mines and Resources Canada, 1988.

Canada. National Energy Board. *The Regulation of Electricity Exports: Report of an Inquiry By a Panel of the National Energy Board Following a Hearing in November and December 1986*. Ottawa: The Board, 1987.

APPEAL from a judgment of the Federal Court of Appeal, [1991] 3 F.C. 443, 83 D.L.R. (4th) 146, 7 C.E.L.R. (N.S.) 315, 132 N.R. 214, severing conditions from licences granted by the National Energy Board, [1991] 2 C.N.L.R. 70, and allowing the licences to stand. Appeal allowed.

Robert Mainville, Peter W. Hutchins and Johanne Mainville, for the appellants.

Jean-Marc Aubry, Q.C., and René LeBlanc, for the respondent the Attorney General of Canada.

Pierre Lachance and Jean Robitaille, for the respondent the Attorney General of Quebec.

Pierre Bienvenu, Jean G. Bertrand and Bernard Roy, for the respondent Hydro-Québec.

Judith B. Hanebury, for the respondent the National Energy Board.

Gregory J. McDade and Stewart A. G. Elgie, for the interveners.

The judgment of the Court was delivered by

IACOBUCCI J. -- This appeal arises from the decision of the respondent National Energy Board ("the Board") to grant to the respondent Hydro-Québec licences for the export of electrical power to the states of New York and Vermont. This decision followed lengthy public hearings at which the Grand Council of the Crees (of Quebec) and the Cree Regional Authority ("the appellants"), along with other concerned groups, made numerous submissions.

The Attorneys General of Quebec and of Canada appeared as respondents to this appeal, as did the Board. The Court also heard the joint submissions of the Sierra Legal Defence Fund, the Canadian Environmental Law Association, Cultural Survival (Canada), Friends of the Earth and the Sierra Club of Canada ("the interveners").

The appellants argued before the Federal Court of Appeal that the Board erred in several respects in granting the licences. The respondents Hydro-Québec and the Attorney General of Quebec claimed that the Board erred in

making the granting of the licences conditional on the successful completion of environmental assessments of the power generation facilities contemplated by Hydro-Québec for future construction. The Federal Court of Appeal rejected the argument of the appellants, and concluded that the Board had erred in imposing the conditions impugned by the respondents. The Court of Appeal severed these conditions, and allowed the licences to stand. The appellants now appeal to this Court.

I. Facts

On July 28, 1989, Hydro-Québec applied to the Board for licences to export blocks of power to New York and Vermont. These applications involved nine blocks of power which were to be provided over periods ranging from five to twenty-two years, pursuant to two agreements signed with the U.S. power companies that covered a total of 1 450 MW of power and were projected to generate nearly \$25 billion in income for Hydro-Québec. The purpose of the export was to raise sufficient revenue such that Hydro-Québec would be able to implement its development plan for expansion to meet the constantly rising demand for the provision of electrical services within the province.

The Board held public hearings during the months of February and March of 1990 on the application for licences for export. A number of interested parties, including the appellants, took part. At the time the applications were filed, the Board was required by s. 118 of the *National Energy Board Act*, R.S.C., 1985, c. N-7, to satisfy itself both that the power sought to be exported was not needed to meet reasonably foreseeable Canadian requirements

at the relevant times, and that the price to be charged by the power authority was just and reasonable. After the hearings but prior to the Board's ruling, s. 118 was modified by the *Act to amend the National Energy Board Act and to repeal certain enactments in consequence thereof*, S.C. 1990, c. 7 ("Bill C-23"). These two explicit criteria were removed from the statute, leaving only the requirement that the Board is to have regard to all conditions that appear to it to be relevant. The parties made submissions before the Board on the effect of these amendments.

On September 27, 1990, the Board granted the export licences, subject to a list of conditions. The appellants appealed the Board's decision to grant the licences to the Federal Court of Appeal. The respondents Hydro-Québec and the Attorney General of Quebec also appealed the decision of the Board, challenging the validity of the imposition of two of the conditions to the licences, which related to environmental assessment of future generating facilities. The Federal Court of Appeal unanimously dismissed the appellants' appeal and allowed the appeal of Hydro-Québec and the Attorney General of Quebec. The Court of Appeal severed the two conditions but otherwise allowed the licences to stand.

II. Relevant Statutory Provisions

National Energy Board Act, R.S.C., 1985, c. N-7 (as amended by S.C. 1990, c. 7):

2. In this Act,

...

"export" means, with reference to

(a) electricity, to send from Canada by a line of wire or other conductor electricity produced in Canada,

...

22. (1) An appeal lies from a decision or order of the Board to the Federal Court of Appeal on a question of law or of jurisdiction, after leave to appeal is obtained from that Court.

24. (1). . . hearings before the Board with respect to the issuance, revocation or suspension of certificates or of licences for the exportation of gas or electricity or the importation of gas or for leave to abandon the operation of a pipeline shall be public.

119.02 No person shall export any electricity except under and in accordance with a permit issued under section 119.03 or a licence issued under section 119.08.

119.03 (1) Except in the case of an application designated by order of the Governor in Council under section 119.07, the Board shall, on application to it and without holding a public hearing, issue a permit authorizing the exportation of electricity.

(2) The application must be accompanied by the information that under the regulations is to be furnished in connection with the application.

119.06 (1) The Board may make a recommendation to the Minister, which it shall make public, that an application for exportation of electricity be designated by order of the Governor in Council under section 119.07, and may delay issuing a permit during such period as is necessary for the purpose of making such an order.

(2) In determining whether to make a recommendation, the Board shall seek to avoid the duplication of measures taken in respect of the exportation by the applicant and the government of the province from which the electricity is exported, and shall have regard to all considerations that appear to it to be relevant, including

...

(b) the impact of the exportation on the environment;

...

(d) such considerations as may be specified in the regulations.

119.07 (1) The Governor in Council may make orders

(a) designating an application for exportation of electricity as an application in respect of which section 119.08 applies; and

(b) revoking any permit issued in respect of the exportation.

...

(3) Where an order is made under subsection (1),

(a) no permit shall be issued in respect of the application; and

(b) any application in respect of the exportation shall be dealt with as an application for a licence.

119.08 (1) The Board may, subject to section 24 and to the approval of the Governor in Council, issue a licence for the exportation of electricity in relation to which an order made under section 119.07 is in force.

(2) In deciding whether to issue a licence, the Board shall have regard to all considerations that appear to it to be relevant.

119.09 (1) The Board may, on the issuance of a permit, make the permit subject to such terms and conditions respecting the matters prescribed by the regulations as the Board considers necessary or desirable in the public interest.

(2) The Board may, on the issuance of a licence, make the licence subject to such terms and conditions as the Board may impose.

119.093 (1) The Board may revoke or suspend a permit or licence issued in respect of the exportation of electricity

...

(b) where a holder of the permit or licence has contravened or failed to comply with a term or condition of the permit or licence.

National Energy Board Part VI Regulations, C.R.C. 1978, c. 1056:

6. (1) Every applicant for a licence for the exportation of power shall furnish to the Board such information as the Board may require.

(2) Without restricting the generality of subsection (1), the information required to be furnished by any applicant described in subsection (1) shall, unless otherwise authorized by the Board, include

...

(y) evidence that the applicant has obtained any licence, permit or other form of approval required under any law of Canada or a province respecting the electric power proposed to be exported;

(z) evidence to demonstrate that the price to be charged by the applicant for electric power and energy exported by him is just and reasonable in relation to the public interest, and in particular that the export price

(i) would recover its appropriate share of the costs incurred in Canada,

(ii) would not be less than the price to Canadians for equivalent service in related areas, and

(iii) would not result in prices in the country to which the power is exported being materially less than the least cost alternative for power and energy at the same location within that country; and

(aa) evidence on any environmental impact that would result from the generation of the power for export.

15. Every licence for the export of electric power and energy is subject to such terms and conditions as the Board may prescribe and, without restricting the generality of the foregoing, is subject to every statement set out by the Board in the licence respecting

...

(m) the requirements for environmental protection.

Environmental Assessment and Review Process Guidelines Order, SOR/84-467:

2. In these Guidelines,

...

"proposal" includes any initiative, undertaking or activity for which the Government of Canada has a decision making responsibility.

3. The Process shall be a self assessment process under which the initiating department shall, as early in the planning process as possible and before irrevocable decisions are taken, ensure that the environmental implications of all proposals for which it is the decision making authority are fully considered and where the implications are significant, refer the proposal to the Minister for public review by a Panel.

4. (1) An initiating department shall include in its consideration of a proposal pursuant to section 3

(a) the potential environmental effects of the proposal and the social effects directly related to those environmental effects, including any effects that are external to Canadian territory; and

(b) the concerns of the public regarding the proposal and its potential environmental effects.

5. (1) Where a proposal is subject to environmental regulation, independently of the Process, duplication in terms of public reviews is to be avoided.

(2) For the purpose of avoiding the duplication referred to in subsection (1), the initiating department shall use a public review under the Process as a planning tool at the earliest stages of development of the proposal rather than as a regulatory mechanism and make the results of the public review available for use in any regulatory deliberations respecting the proposal.

6. These Guidelines shall apply to any proposal

...

(b) that may have an environmental effect on an area of federal responsibility;

8. Where a board or an agency of the Government of Canada or a regulatory body has a regulatory function in respect of a proposal, these Guidelines shall apply to that board, agency or body only if there is no legal impediment to or duplication resulting from the application of these Guidelines.

10. (1) Every initiating department shall ensure that each proposal for which it is the decision making authority shall be subject to an environmental screening or initial assessment to determine whether,

and the extent to which, there may be any potentially adverse environmental effects from the proposal.

(2) Any decisions to be made as a result of the environmental screening or initial assessment referred to in subsection (1) shall be made by the initiating department and not delegated to any other body.

12. Every initiating department shall screen or assess each proposal for which it is the decision making authority to determine if

(a) the proposal is of a type identified by the list described under paragraph 11(a) [one that would not produce any adverse environmental effects], in which case the proposal may automatically proceed;

(b) the proposal is of a type identified by the list under paragraph 11(b) [one that would produce significant adverse environmental effects], in which case the proposal shall be referred to the Minister for public review by a Panel;

(c) the potentially adverse environmental effects that may be caused by the proposal are insignificant or mitigable with known technology, in which case the proposal may proceed or proceed with the mitigation, as the case may be;

(d) the potentially adverse environmental effects that may be caused by the proposal are unknown, in which case the proposal shall either require further study and subsequent rescreening or reassessment or be referred to the Minister for public review by a Panel;

(e) the potentially adverse environmental effects that may be caused by the proposal are significant, as determined in accordance with criteria developed by the Office in cooperation with the initiating department, in which case the proposal shall be referred to the Minister for public review by a Panel; or

(f) the potentially adverse environmental effects that may be caused by the proposal are unacceptable, in which case the proposal shall either be modified and subsequently rescreened or reassessed or be abandoned.

III. Judgments Below

A. *National Energy Board*, Decision No. EH-3-89, August 1990 (Fredette, Gilmour and Bélanger, members)

The Board wrote lengthy reasons for its decision, which set out in some detail the status of the applicant, Hydro-Québec, the nature of the licences for which Hydro-Québec was applying, and the evidence of the applicant as it related to surplus, price, and fair market access, the three criteria expressly set out in the former provisions of the *National Energy Board Act*. The Board also considered the nature of the export markets, the reliability of the system proposed for implementing the export contracts, and the environmental impact of the exports for which the applications were made.

The Board noted that, were the licences to be granted, sufficient power could be generated to service the contracts by the combined use of the existing facilities of Hydro-Québec as well as those contemplated by its development plan. In other words, the exports did not require the use of facilities other than those existing, or already planned. However, the Board found that some of the facilities contemplated by the development plan for future construction would need to be built earlier than if no power were to be exported. The Board then examined the submissions of the various interveners, along with those of the appellants, as to the advisability of granting the licences.

In its disposition of the application, the Board noted that the amendments to the *National Energy Board Act* had removed the express requirement that the Board satisfy itself that the power to be exported was surplus to reasonably foreseeable Canadian requirements, and that the price to be charged was just and reasonable in the public interest. Nonetheless, there was nothing in the amended Act which would preclude the Board from taking these factors into account. The Board therefore explicitly considered the issues of cost recovery and whether pricing was

competitive to rates charged within Canada. On the issue of cost recovery, the Board concluded (at p. 30):

The Board notes that Hydro-Québec did provide information on the magnitude of the revenues expected to be generated by the proposed export sales and that these would be significant, totalling more than \$24 billion. . . . In addition, Hydro-Québec provided some details on the methodology used in carrying out its feasibility study as well as on the economic, financial and other relevant assumptions underlying that analysis. The Board has examined this information and finds that the methodology and assumptions described are reasonable.

The Board was accordingly persuaded that the export price charged would provide for recovery of the applicable costs incurred in Canada.

In evaluating the environmental impact of the application, the Board considered itself bound by both its own Act and by the *Environmental Assessment and Review Process Guidelines Order*, SOR/84-467 ("the *EARP Guidelines Order*").

The Board held (at pp. 37-38):

The Board recognizes that when electric utilities negotiate long-term system-to-system firm sales agreements, there can be circumstances in such arrangements that require capacity to come from generating facilities to be built at some future date and for which the necessary detailed environmental assessments have not been completed at the time of the export application. The proposed export contracts now before the Board have been negotiated on this basis. Nonetheless, for the Board to reach its decision on Hydro-Québec's applications, and at the same time meet its obligations under the Act and *EARP Guidelines Order*, it must take into account the environmental impacts arising from the construction of such future facilities.

The Board granted the applications subject to several conditions. In particular, in order to satisfy itself that the electricity to be exported would originate from

facilities that had been subjected to the appropriate environmental reviews, the Board attached to the licence the following two conditions:

10. This licence remains valid to the extent that
 - (a) any production facility required by Hydro-Québec to supply the exports authorized herein, for which construction had not yet been authorized pursuant to the evidence presented to the Board at the EH-3-89 hearing that ended on 5 March 1990, will have been subjected, prior to its construction, to the appropriate environmental assessment and review procedures as well as to the applicable environmental standards and guidelines in accordance with federal government laws and regulations.
 - (b) Hydro-Québec, following any of the environmental assessment and review procedures mentioned in subcondition (a), will have filed with the Board
 - i) a summary of all environmental impact assessments and reports on the conclusions and recommendations arising from the said assessment and review procedures;
 - ii) governmental authorizations received; and
 - iii) a statement of the measures that Hydro-Québec intends to take to minimize the negative environmental impacts.
11. The generation of thermal energy to be exported hereunder shall not contravene relevant federal environmental standards or guidelines.

B. *Federal Court of Appeal*, [1991] 3 F.C. 443 (Pratte, Marceau and Desjardins J.J.A.)

Writing for the Federal Court of Appeal, Marceau J.A. dealt first with the validity of conditions 10 and 11 to the licence. He noted that the Board had imposed those conditions so as to meet its perceived mandate under the *EARP Guidelines Order*. In his view, this raised the questions of the application of this

Order to the Board, and to Hydro-Québec as an agent of the Crown in right of the Province, as well as the question of the constitutional validity of the Order itself.

However, Marceau J.A. held that he did not have to deal with these concerns, since it was clear that, in this case, the imposition by the Board of the conditions to the licence emanated from its concerns as to the potential effects of the eventual construction of the production facilities planned to meet the increased demand for electrical power. Marceau J.A. held that the Board had no jurisdiction to make the granting of a licence to export certain goods subject to conditions which pertained to their production. He stated (at pp. 450-51):

The factors which may be relevant in considering an application for leave to export electricity and the conditions which the Board may place on its leave clearly cannot relate to anything but the export of electricity. Section 2 of the Act defines what is meant by export (in French "*exportation*") in the case of electricity:

2. ...

"export" means, with reference to

(a) power, to send from Canada by a line of wire or other conductor power produced in Canada...

It seems clear that, as it is understood in the Act with respect to electricity, export does not cover production itself, and it is only reasonable that this should be so. Of course, anyone wishing to export a good must produce it or arrange for it to be produced elsewhere, but when he produces it or arranges for its production elsewhere he is not exporting it, and when he is exporting it he is not producing it.

I do not think anyone would dispute for a moment that in considering an application for leave to export electricity, the Board must be concerned about the environmental consequences, since the public interest is involved. . . . However, the only question can be as to the environmental consequences of the export, namely the consequences for the environment of "[sending] from Canada . . . power produced in Canada".

Marceau J.A. held that the Board had therefore exceeded its jurisdiction in affixing to the licence conditions 10 and 11. That did not mean, however, that the entire decision was vitiated. Marceau J.A. found the two sections to be severable from the remainder of the licence.

Marceau J.A. then considered the contention of the appellants that the Board erred in its decision to grant the licences. The appellants argued that the Board erred in taking into account the amendments to the *National Energy Board Act* which came into force while its decision was reserved. In the version of the Act in force at the time of the application, and at the time of the subsequent hearing, applicants for licences were required to satisfy the Board that the export price charged would recover the appropriate share of the costs incurred in Canada. This condition was deleted from the version of the Act in force at the time that the decision was rendered. The appellants argued that, in following the new provisions, the Board applied the requirement of cost recovery incorrectly.

Marceau J.A. noted that the new Act was designed to deregulate and simplify the licence application process. The express requirement of cost recovery had been deleted. The new provisions simply required the Board to take into consideration all factors which appeared to it to be relevant. Marceau J.A. held that the Board was correct in considering itself bound by the new provisions of the Act. Nonetheless, he found that, even if he was incorrect in so concluding, the argument of the appellants did not lead anywhere. The Board chose, despite the amendments, to analyze the application in light of the former price criteria.

The appellants argued in the alternative that, if the Board did consider the issue of cost recovery, it could not have concluded that this requirement was met, since there was no direct evidence before the Board on this point. Marceau J.A. agreed that the evidence on this point was not direct in all respects. In particular, the financial data relating to proposed production facilities was reviewed by an accountant, who then testified as to its veracity. He held, however, that nothing required the Board to decide this point on direct evidence. There was persuasive indirect evidence before it. To reevaluate the weight of this evidence was not a task for the courts, since appeals from decisions of the Board were limited by s. 22 of the *National Energy Board Act* to questions of law or jurisdiction.

IV. Issues on Appeal

Although the parties to this appeal have made numerous specific allegations of error on the part of the Board and of the Court of Appeal, discussed individually below, the issues in this appeal can be reduced to the following three questions:

1. Did the Federal Court of Appeal err in holding that the National Energy Board acted within its jurisdiction in granting the export licences to the respondent Hydro-Québec?
2. Did the Federal Court of Appeal err in holding that the National Energy Board erred in the exercise of its jurisdiction in its imposition of conditions 10 and 11 of the licences?

3. If the Federal Court of Appeal was not in error with respect to these two findings, did it nonetheless err in holding that conditions 10 and 11 were severable from the rest of the licences?

V. Analysis

The appellants challenge on a number of grounds the validity of the decision of the Board to grant the export licences. First, the appellants argue that the Board did not properly conduct the required social cost-benefit review. Second, they argue that the failure of the Board to require that Hydro-Québec disclose in full the assumptions and methodologies on which its cost-benefit review was based breached the requirements of procedural fairness by depriving the appellants of the opportunity for full participation in the review process. Third, the appellants argue that the Board owed them a fiduciary duty in the exercise of its decision-making power, and that the requirements of this duty were not fulfilled. Fourth, the appellants assert that the decision of the Board affects their aboriginal rights, and that the Board is therefore required to meet the justification test set out by this Court in *R. v. Sparrow*, [1990] 1 S.C.R. 1075. Finally, the appellants submit that the Board failed to follow the requirements of its own Act and of the *EARP Guidelines Order* in conducting its environmental impact assessment. I will consider each of these arguments in turn.

A. *Social Cost-Benefit Review*

The appellants argue that the Board was required to carry out a social cost-benefit review which would consider all direct and indirect costs, including

economic and social costs, arising from the exports for which the licences were sought. The appellants claim that, in relying on solely the indirect evidence of Hydro-Québec and the fact that the proposal had been approved by the government of Quebec, the Board failed to carry out this review properly. The duty to carry out such a review is ostensibly found in the *National Energy Board Part VI Regulations*, s. 6(2)(z)(i), which states:

6. (1) Every applicant for a licence for the exportation of power shall furnish to the Board such information as the Board may require.

(2) Without restricting the generality of subsection (1), the information required to be furnished by any applicant described in subsection (1) shall, unless otherwise authorized by the Board, include

...

(z) evidence to demonstrate that the price to be charged by the applicant for electric power and energy exported by him is just and reasonable in relation to the public interest, and in particular that the export price

(i) would recover its appropriate share of the costs incurred in Canada,

It appears that both the *Canadian Electricity Policy*, September 1988, and the Board's own internal report, entitled *The Regulation of Electricity Exports*, June 1987, interpret this requirement to mean that all direct and indirect costs, including environmental, land use, and economic costs ("social costs"), should be considered. However, I need express no opinion on the correctness of these interpretations or on whether the requirement in the regulations that the applicant for a licence furnish such evidence also means that the Board is required to consider it, especially in light of s. 119.08(2) of the Act, which gives the Board the

discretion to determine which considerations are relevant to its decision, and of the terms of s. 6(2) itself, which gives the Board the authority to dispense with proof of any of the items specifically enumerated thereafter. In this case, it is clear that the Board considered that evidence of the nature and recoverability of such costs was relevant to its decision (reasons of the Board, at p. 29).

While the respondents are correct in asserting that the principle of curial deference applies to the weighing of the evidence by the Board in the exercise of its discretion, this principle cannot be invoked to save a decision for which there is no foundation in the evidence or that is based on irrelevant considerations. Once the Board decides that a particular factor is relevant to its decision, there must be some evidence to support the conclusion reached relating to it. The Board must not act unreasonably in evaluating the evidence it requests to make its decision: *Bell Canada v. Canada (Canadian Radio-television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722.

However, in this appeal, it cannot be said that the Board was without evidence on which it could reasonably have concluded that the consideration of cost recoverability was satisfied. The Board, in its decision, summarized the evidence given by Hydro-Québec on this point as follows (at p. 13):

Hydro-Québec did not supply the Board with copies of the cost-benefit analyses for the advancement of facilities required to meet its obligations under the two contracts. Nevertheless it did provide information on the methodology, assumptions and the revenues used in the private and social cost-benefit analyses. It also underlined that the costs and benefits associated with the environmental impacts of the advancement of production facilities had been considered, including the funds necessary to compensate, if required, the economic losses

resulting from impacts on forests, trapping regions or even agricultural lands.

The Applicant provided additional proof to demonstrate that the export price would allow recovery of the appropriate costs in Canada while maintaining the confidentiality of certain of its financial information. To that end, Hydro-Québec hired a chartered accountant whose mandate was to undertake verification of the accuracy of the assessment. . . .

The accountant testified before the Board and was cross-examined by the appellants.

It is, of course, insufficient for Hydro-Québec to ask the Board simply to accept a bare assertion that all costs will be recovered. However, that is not what happened in this case. Hydro-Québec provided evidence on which the Board could reasonably conclude that the requirement in s. 6(2)(z)(i) was met. This is evident from the conclusions of the Board, which state (at pp. 30-31):

The Board notes that Hydro-Québec did provide information on the magnitude of the revenues expected to be generated by the proposed export sales and that these would be significant, totalling more than \$24 billion. . . . In addition, Hydro-Québec provided some details on the methodology used in carrying out its feasibility study as well as on the economic, financial and other relevant assumptions underlying that analysis. The Board has examined this information and finds that the methodology and assumptions described are reasonable. . . . The fact that the provincial government has concurred with Hydro-Québec by approving the export contracts. . . suggests to the Board that the exports are projected to yield net benefits to Québec.

Intervenors raised concerns with regard to potential adverse environmental impacts outside of Québec but any specific costs that might be associated with such impacts were not identified. There were no other identified costs. . . .

Finally, the Board is convinced that the parties to these contracts have negotiated at arm's length and under free market conditions. The Board

thus has no reason to believe that there would not be net benefits accruing from the proposed exports.

The interveners argued that the final sentence in this passage shows that the Board made its decision in the absence of positive evidence on cost recovery. When the sentence is read in context, however, it indicates rather that the Board was satisfied on the evidence before it that the relevant costs would be recovered. The Board cannot simply rely on the conclusions of the respondent as to cost recovery without evaluating their validity, but that does not appear to have been the situation here. Moreover, a prohibition on the reliance on the unsubstantiated affirmations of the applicant should not be transformed into a duty on the Board to conduct its own independent analysis where such an undertaking is unnecessary.

The Board did consider relevant to the issue of cost recovery, in addition to the evidence presented by Hydro-Québec, the fact that the export contracts had received the approval of the province. Evidence of such approval is expressly referred to in s. 6(2)(y) of the *Part VI Regulations* as a factor which the Board may wish to consider. The appellants contend, however, that this approval is irrelevant to the s. 6(2)(z)(i) cost-benefit analysis, as the orders-in-council pursuant to the *Hydro-Québec Act*, R.S.Q., c. H-5, under which provincial approval was given, require only that the contracts be consistent with sound financial management, not that they be in the public interest. Section 24 of the *Hydro-Québec Act* requires Hydro-Québec to maintain the rates charged for power at a sufficient level to defray operating expenditures and interest on its debt. In my view, sound financial management of a public utility is part of the public interest. While such a factor is obviously only one of the many relevant considerations in such a determination,

it cannot be said that evidence of governmental approval is wholly irrelevant in the context of cost recovery, such that the Board committed a jurisdictional error in considering it.

I also reject the appellants' argument that the mere fact that all contracts in Quebec require such approval renders consideration of this factor by the Board an improper delegation of its decision-making power. The Board must, of course, make its own decision as to whether the cost-benefit requirement is satisfied. It cannot delegate that responsibility to the Government of Quebec or to any other body. In this case, for such a delegation to have occurred, the Board would have had to treat the mere existence of government approval as sufficient in and of itself to satisfy the cost-benefit requirement, without any independent consideration of the issue. But that was not the case here. Therefore, it cannot be said that there was any jurisdictional error committed by the Board in this aspect of its decision.

B. *Opportunity for Fair Participation in the Review Process*

Given my conclusions on the nature and scope of the cost-benefit review undertaken by the Board, the appellants' arguments relating to procedural fairness can be dispensed with rather simply. The appellants argue that the Board breached the requirements of procedural fairness in failing to require disclosure to the appellants by Hydro-Québec of all information pertinent to the issue of cost recovery. In particular, they point to the failure of the Board to require Hydro-Québec to reveal in full the assumptions and methodologies on which its cost-benefit analysis was based.

In general, included in the requirements of procedural fairness is the right to disclosure by the administrative decision-maker of sufficient information to permit meaningful participation in the hearing process: *In re Canadian Radio-Television Commission and in re London Cable TV Ltd.*, [1976] 2 F.C. 621 (C.A.), at pp. 624-25. The extent of the disclosure required to meet the dictates of natural justice will vary with the facts of the case, and in particular with the type of decision to be made, and the nature of the hearing to which the affected parties are entitled.

The issue in this case, then, is not the sufficiency of the disclosure made by Hydro-Québec. That relates to the question, discussed above, of whether there was evidence before the decision-maker on which it could reasonably have reached the decision which it did: *Parke, Davis & Co. v. Fine Chemicals of Canada Ltd.*, [1959] S.C.R. 219, at p. 223, *per* Rand J. Rather, the issue is whether the Board provided to the appellants disclosure sufficient for their meaningful participation in the hearing, such that they were treated fairly in all the circumstances: *Martineau v. Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602, at pp. 630-31; *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643, at p. 654; *Lakeside Colony of Hutterian Brethren v. Hofer*, [1992] 3 S.C.R. 165, at p. 226, *per* McLachlin J. (dissenting on another ground).

In carrying out its decision-making function, the Board has the discretion to determine what evidence is relevant to its decision. It has not been shown that, in this case, the discretion was improperly exercised so as to result in inadequate disclosure to the appellants. As noted above, the Board had sufficient evidence before it to make a valid finding that all costs would be recovered. The appellants were given access to all the material that was before the Board. The Board

specifically found that the appellants themselves presented no evidence of added social costs, and did not call into question the veracity of Hydro-Québec's report. Therefore, it cannot be said that, on this basis, the Board erred in its decision to grant the licences.

C. *Fiduciary Duty*

The appellants claim that, by virtue of their status as aboriginal peoples, the Board owes them a fiduciary duty extending to the decision-making process used in considering applications for export licences. The appellants' argument is that the fiduciary duty owed to aboriginal peoples by the Crown, as recognized by this Court in *R. v. Sparrow, supra*, extends to the Board, as an agent of government and creation of Parliament, in the exercise of its delegated powers. The duty applies whenever the decision made pursuant to a federal regulatory process is likely to affect aboriginal rights.

The appellants characterize the scope of this duty as twofold. They argue that it includes the duty to ensure the full and fair participation of the appellants in the hearing process, as well as the duty to take into account their best interests when making decisions. The appellants argue that such an obligation imports with it rights that go beyond those created by the dictates of natural justice, and that in this case, at a minimum, the Board should have required disclosure to the appellants of all information necessary to the making of their case against the applications. The respondents to this appeal, on the other hand, dispute both the existence of a duty, and, if it does exist, that the Board failed to meet it.

It is now well settled that there is a fiduciary relationship between the federal Crown and the aboriginal peoples of Canada: *Guerin v. The Queen*, [1984] 2 S.C.R. 335. Nonetheless, it must be remembered that not every aspect of the relationship between fiduciary and beneficiary takes the form of a fiduciary obligation: *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574. The nature of the relationship between the parties defines the scope, and the limits, of the duties that will be imposed. The courts must be careful not to compromise the independence of quasi-judicial tribunals and decision-making agencies by imposing upon them fiduciary obligations which require that their decisions be made in accordance with a fiduciary duty.

Counsel for the appellants conceded in oral argument that it could not be said that such a duty should apply to the courts, as a creation of government, in the exercise of their judicial function. In my view, the considerations which apply in evaluating whether such an obligation is impressed on the process by which the Board decides whether to grant a licence for export differ little from those applying to the courts. The function of the Board in this regard is quasi-judicial: *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, at p. 385. While this characterization may not carry with it all the procedural and other requirements identical to those applicable to a court, it is inherently inconsistent with the imposition of a relationship of utmost good faith between the Board and a party appearing before it.

It is for this reason that I do not find helpful the authorities cited to me by the appellants as indicative of this evolving trend: *Gitludahl v. Minister of Forests*, B.C.S.C., August 13, 1992, Vancouver A922935, unreported, and *Dick v. The*

Queen, F.C.T.D., June 3, 1992, Ottawa T-951-89, unreported. Those cases were concerned, respectively, with the decision-making of the Minister of Forests, and the conduct of the Crown when adverse in interest to aboriginal peoples in litigation. The considerations which may animate the application of a fiduciary duty in these contexts are far different from those raised in the context of a licence application before an independent decision-making body operating at arm's length from government.

Therefore, I conclude that the fiduciary relationship between the Crown and the appellants does not impose a duty on the Board to make its decisions in the best interests of the appellants, or to change its hearing process so as to impose superadded requirements of disclosure. When the duty is defined in this manner, such tribunals no more owe this sort of fiduciary duty than do the courts. Consequently, no such duty existed in relation to the decision-making function of the Board.

Moreover, even if this Court were to assume that the Board, in conducting its review, should have taken into account the existence of the fiduciary relationship between the Crown and the appellants, I am satisfied that, for the reasons set out above relating to the procedure followed by the Board, its actions in this case would have met the requirements of such a duty. There is no indication that the appellants were given anything less than the fullest opportunity to be heard. They had access to all the evidence that was before the Board, were able to make submissions and argument in reply, and were entitled to cross-examine the witnesses called by the respondent Hydro-Québec. This argument must therefore

fail for the same reasons as the arguments relating to the nature of the review conducted by the Board.

D. *Aboriginal Rights*

This Court, in *R. v. Sparrow, supra*, recognized the interrelationship between the recognition and affirmation of aboriginal rights constitutionally enshrined in s. 35(1) of the *Constitution Act, 1982*, and the fiduciary relationship which has historically existed between the Crown and aboriginal peoples. It is this relationship that indicates that the exercise of sovereign power may be limited or restrained when it amounts to an unjustifiable interference with aboriginal rights. In this appeal, the appellants argue that the decision of the Board to grant the licences will have a negative impact on their aboriginal rights, and that the Board was therefore required to meet the test of justification as set out in *Sparrow*.

It is obvious that the Board must exercise its decision-making function, including the interpretation and application of its governing legislation, in accordance with the dictates of the Constitution, including s. 35(1) of the *Constitution Act, 1982*. Therefore, it must first be determined whether this particular decision of the Board, made pursuant to s. 119.08(1) of the *National Energy Board Act*, could have the effect of interfering with the existing aboriginal rights of the appellants so as to amount to a *prima facie* infringement of s. 35(1).

The respondents in this appeal argue that it cannot. They assert that, with the signing by the appellants of the James Bay and Northern Quebec Agreement,

incorporated in the *James Bay and Northern Quebec Native Claims Settlement Act*, S.C. 1976-77, c. 32 ("the *James Bay Act*"), the appellants ceded and renounced all aboriginal rights except as set out in the Agreement. Since the act of granting a licence neither requires nor permits the construction of the new production facilities which the appellants claim will interfere with their rights, and since the Agreement itself provides for a participatory review process to authorize the construction of such facilities, Hydro-Québec and the Attorney General of Quebec argue that no *prima facie* infringement results from the decision of the Board.

The evaluation of these competing arguments requires an examination and interpretation of the Agreement as embodied in the *James Bay Act*. The appellants, however, requested that this question be determined without reference to the Agreement or to the Act, since its interpretation and application form the subject of other legal proceedings involving the parties to this appeal. The appellants accordingly placed no reliance on this document in their assertion of a breach of aboriginal rights.

In my view, it is not possible to evaluate realistically the impact of the decision of the Board on the rights of the appellants without reference to the *James Bay Act*. The respondents assert that the rights of the appellants are limited to those set out in this document. The validity of this assertion cannot be tested without construing the provisions of the Agreement.

Moreover, even assuming that the decision of the Board is one that has, *prima facie*, an impact on the aboriginal rights of the appellants, and that the appellants are correct in arguing that, for the Board to justify its interference, it must, at a

minimum, conduct a rigorous, thorough, and proper cost-benefit review, I find, for the reasons expressed above, that the review carried out in this case was not wanting in this respect.

E. *Environmental Impact Assessment*

Given that the social cost-benefit analysis appears to have been reasonable, the sole remaining ground on which the decision of the Board can be impugned relates to the environmental impact assessment carried out by the Board. It must be determined both whether the Board followed the procedures for such an assessment set out in the *National Energy Board Act* and in the *EARP Guidelines Order*, and whether the imposition of conditions 10 and 11 was a valid mechanism for fulfilling these requirements. If it is found that the conditions imposed by the Board caused it to exceed, or alternately to fail to exercise, its jurisdiction, it must also be determined whether the conditions are severable, and the order of the Board nonetheless remains valid.

(a) *The National Energy Board Act*

It is clear, and indeed it does not appear to have been seriously contested by the parties that, while the Board in making its decision was bound by the Act as amended, it was nonetheless entitled to require evidence of the factors listed in the former Act, since s. 119.08(2) of the amended Act gives to the Board the mandate to consider any matters which it deems relevant in the circumstances.

The proper interpretation of the scope of the Board's inquiry is found by looking at the procedural framework created by the Act as a whole. The procedure for the issuing of permits for the export of electricity is set out in Division II of Part VI of the Act. In the version of the Act in force at the time that the initial application was made by Hydro-Québec, each applicant was required to apply for a licence, and the factors which the Board was to consider in its determination whether to grant the licence were explicitly listed.

By the terms of the Act as amended by Bill C-23, the Board is in general now required, on application and without a public hearing, to issue permits for export (s. 119.03). However, the Board may recommend to the Minister that the granting be delayed and that an inquiry be held. Section 119.06(2) provides that, in determining whether to make such a recommendation:

... the Board shall seek to avoid the duplication of measures taken in respect of the exportation by the applicant and the government of the province from which the electricity is exported, and shall have regard to all considerations that appear to it to be relevant, including

...
(b) the impact of the exportation on the environment:

...

(d) such considerations as may be specified in the regulations.

If the Minister accepts this recommendation, the application is designated as one to which s. 119.08 applies, and a licence is required rather than a permit. The enumerated factors which the Board was required to take into account at this stage, in considering whether a licence should be granted, were eliminated by the amendments to the Act. Now, the section simply provides:

119.08 . . .

(2) In deciding whether to issue a licence, the Board shall have regard to all considerations that appear to it to be relevant.

Section 6 of the *Part VI Regulations* governs the information that must be furnished to the Board in an application for a licence. The section gives the Board the power both to request any information that it might require, and to dispense with the provision of any evidence that it deems unnecessary. However, s. 6(2) nonetheless sets out a long list of factors that must be furnished by the applicant unless the Board otherwise authorizes. The subsections relevant to this appeal are ss. 6(2)(z) and 6(2)(aa), which require:

(z) evidence to demonstrate that the price to be charged by the applicant for electric power and energy exported by him is just and reasonable in relation to the public interest, and in particular that the export price

(i) would recover its appropriate share of the costs incurred in Canada,

(ii) would not be less than the price to Canadians for equivalent service in related areas...

(aa) evidence on any environmental impact that would result from the generation of the power for export.

In this case, the Board considered the environmental effects of the actual transmission of the electricity to the United States, and the resulting effects on the U.S. environment, and found them to be either neutral or beneficial. The real area of concern for negative environmental impact, as raised by the appellants and other parties appearing at the public hearing, was the future construction of production facilities, as contemplated by the development plan, to meet increased needs for power. The Board specifically found that these planned facilities would have to

be built to meet the projected increase in the domestic demand for electrical power even if the licences were not approved. The Board also found that, if the licences were granted, the construction of some of these contemplated facilities would take place earlier than would otherwise be necessary. Finally, the Board held that the additional environmental effects occurring solely as a result of the acceleration of construction would be negligible.

However, the Board found that the potential environmental effects of the actual construction of these future facilities were not known with certainty. It therefore imposed conditions 10 and 11 to the licences, which require compliance with federal standards, and successful completion of existing review processes. In this appeal, the prime dispute in the area of environmental impact is whether the Board was entitled to consider, as relevant to its decision to grant the licences sought, the environmental impact of the construction by Hydro-Québec of these future facilities.

The Court of Appeal in this case found that, in deciding whether to grant a licence, the Board was limited solely to the consideration of the environmental effects of export as that term is defined in the *National Energy Board Act*. As noted above, s. 2 of the Act provides:

"export" means, with reference to

(a) electricity, to send from Canada by a line of wire or other conductor electricity produced in Canada,....

As mentioned above, the Court of Appeal (at pp. 450-51) interpreted the section to mean that

. . . the Board's jurisdiction still is and has always been the granting of leave to export electricity. The factors which may be relevant in considering an application for leave to export electricity and the conditions which the Board may place on its leave clearly cannot relate to anything but the export of electricity. . . .

It seems clear that, as it is understood in the Act with respect to electricity, export does not cover production itself, and it is only reasonable that this should be so. Of course, anyone wishing to export a good must produce it or arrange for it to be produced elsewhere, but when he produces it or arranges for its production elsewhere he is not exporting it, and when he is exporting it he is not producing it.

I do not think anyone would dispute for a moment that in considering an application for leave to export electricity, the Board must be concerned about the environmental consequences, since the public interest is involved. The Board's function in this respect is in any case confirmed in several enactments. However, the only question can be as to the environmental consequences of the export, namely the consequences for the environment of "[sending] from Canada . . . power produced in Canada".

The Board is specifically permitted by s. 119.06(2) of the *National Energy Board Act* to take into consideration, in its decision whether to recommend to the Minister that the matter proceed by way of a licence application with a public review rather than by the issuance of a permit, both the environmental effects of the exportation of the electricity, and, as specified in the Regulations, the effects on the environment of the generation of the power for export. Once a licence application review process is instituted, s. 119.08(2) of the Act gives to the Board the power to consider all factors which appear to it to be relevant. In my opinion, given that the Board is permitted at the earlier stage to take such factors into

account, it would be inconsistent to prohibit the Board from having regard to such factors at this later stage, although such concerns continue to be relevant.

I am of the view that the Court of Appeal erred in limiting the scope of the Board's environmental inquiry to the effects on the environment of the transmission of power by a line of wire across the border. To limit the effects considered to those resulting from the physical act of transmission is an unduly narrow interpretation of the activity contemplated by the arrangements in question. The narrowness of this view of the Board's inquiry is emphasized by the detailed regulatory process that has been created. I would find it surprising that such an elaborate review process would be created for such a limited inquiry. As the Court of Appeal in this case recognized, electricity must be produced, either through existing facilities or the construction of new ones, in order for an export contract to be fulfilled. Ultimately, it is proper for the Board to consider in its decision-making process the overall environmental costs of granting the licence sought.

However, such a task is particularly difficult in this case, given the Board's finding that, although existing facilities were not sufficient to service the contracts, the new facilities contemplated would have to be built in any event to supply increasing domestic needs. The approval of the application for the licences would therefore simply have the effect of accelerating construction of these facilities, and the environmental effects of the acceleration alone were found not to be significant. Nevertheless, in my opinion, the Board did not err in giving some weight to the environmental effects of the construction of the planned facilities. To say that such effects cannot be considered unless the Board finds that, but for

the export contracts, the facilities would not be constructed, is to create a situation in which the construction of a generating facility may be contemplated solely for the purpose of fulfilling the demands of a number of export contracts, but because no one export contract can be said to be the cause of the facility's construction, its environmental effects will never be considered.

A better approach is simply to ask whether the construction of new facilities is required to serve, among other needs, the demands of the export contract. If this question is answered in the affirmative, then the environmental effects of the construction of such facilities are related to the export. In these circumstances, it becomes appropriate for the Board to consider the source of the electrical power to be exported, and the environmental costs that are associated with the generation of that power.

The respondents expressed concern that giving such a scope to the inquiry of the Board might then bring into its contemplation areas which are more properly the subject of provincial regulation and control. I hasten to add that no constitutional question was raised in this appeal, and I expressly refrain from making any determinations relating to the interpretation of the provisions of the *Constitution Act, 1867*. However, it is nonetheless important that the jurisdiction of the Board be delineated in a manner that respects these concerns. Obviously, while matters relating to export clearly fall within federal jurisdiction according to s. 91(2) of the *Constitution Act, 1867*, as part of the federal government power over matters relating to trade and commerce, it is undeniable that a proposal for export may have ramifications for the operation of provincial undertakings or other matters under provincial jurisdiction.

In defining the jurisdictional limits of the Board, then, this Court must be careful to ensure that the Board's authority is truly limited to matters of federal concern. At the same time, however, the scope of its inquiry must not be narrowed to such a degree that the function of the Board is rendered meaningless or ineffective. In this regard, I find helpful the reasons of this Court in *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, a decision released after the Federal Court of Appeal had rendered judgment in this case.

In *Oldman River* this Court considered, among other issues, the constitutional validity of the *EARP Guidelines Order*. La Forest J., for the majority, concluded, in words I find apposite to this appeal (at p. 64):

It must be recognized that the environment is not an independent matter of legislation under the *Constitution Act, 1867* and that it is a constitutionally abstruse matter which does not comfortably fit within the existing division of powers without considerable overlap and uncertainty.

Therefore (at p. 65):

. . . the solution to this case can more readily be found by looking first at the catalogue of powers in the *Constitution Act, 1867* and considering how they may be employed to meet or avoid environmental concerns. When viewed in this manner it will be seen that in exercising their respective legislative powers, both levels of government may affect the environment, either by acting or not acting.

As noted earlier, the *vires* of the *National Energy Board Act* is not in dispute in this appeal. If in applying this Act the Board finds environmental effects within a province relevant to its decision to grant an export licence, a matter of federal jurisdiction, it is entitled to consider those effects. So too may the province have, within its proper contemplation, the environmental effects of the provincially

regulated aspects of such a project. This co-existence of responsibility is neither unusual nor unworkable. While duplication and contradiction of directives should of course be minimized, it is precisely this dilemma that the *EARP Guidelines Order*, specifically ss. 5 and 8, is designed to avoid, and that the Board attempted to reduce with the imposition of conditions 10 and 11 to the licences.

It is also worth noting that the Board is the forum in which the environmental impact attributable solely to the export, that is, to the impact of the increase in power output needed to service the export contracts, will be considered. A focused assessment of these effects may be lost if subsumed in a comprehensive evaluation by the province of the environmental effects of the projects in their totality. In this way, both levels of government have a unique sphere in which to contribute to environmental impact assessment.

I conclude, therefore, that the Board did not exceed its jurisdiction under the *National Energy Board Act* in considering the environmental effects of the construction of future generating facilities as they related to the proposed export, an area of federal responsibility. The Board is permitted by s. 15 of the Regulations to the Act to attach conditions to the licences which it grants, including conditions relating to environmental protection: s. 15(m). The only issue that remains, then, is whether in imposing conditions 10 and 11, the Board failed to meet its obligations under the *EARP Guidelines Order*.

- (b) The *EARP Guidelines Order* and the Validity of Conditions 10 and 11

That the *EARP Guidelines Order* applied to the Board in its decision whether to grant the export licences does not appear to be in serious dispute. The *EARP Guidelines Order* applies to all "initiating department[s]", defined in s. 2 as "any department that is, on behalf of the Government of Canada, the decision making authority for a proposal". "Proposal" is also defined in s. 2, as "any initiative, undertaking or activity for which the Government of Canada has a decision making responsibility".

The key feature to be extracted from these somewhat circular definitions is that the application of the *EARP Guidelines Order* to the Board relates to the aspect of Hydro-Québec's undertakings for which it has decision-making authority, that is, the decision to grant a licence permitting export. That does not artificially limit the scope of the inquiry to the environmental ramifications of the transmission of power by a line of wire, but it equally does not permit a wholesale review of the entire operational plan of Hydro-Québec. Section 6(b) of the *EARP Guidelines Order* makes it clear that "[t]hese Guidelines shall apply to any proposal . . . that may have an environmental effect on an area of federal responsibility". As will be evident from the reasons which follow, I am of the view that the Board in its decision struck an appropriate balance between these two extremes.

The main goal of the Process created by the *EARP Guidelines Order* is that "the initiating department shall, as early in the planning process as possible and before irrevocable decisions are taken, ensure that the environmental implications of all proposals for which it is the decision-making authority are fully considered and where the implications are significant, refer the proposal to the Minister for public review by a Panel" (s. 3). The overarching purpose of the *EARP Guidelines Order*

is to avoid, in situations in which multiple regulatory steps impinge on an undertaking or proposal, disregard for the fundamentally important matter of the protection of the environment.

The *EARP Guidelines Order* also notes explicitly, as mentioned above, that duplication in review is to be avoided (ss. 5(1) and 8), although the initiating department is prohibited from delegating its task of environmental screening or initial assessment to any other body: s. 10(2). The Board in this case was therefore required by s. 12 of the *EARP Guidelines Order* to determine whether the export proposal would not produce any adverse environmental effects, would produce significant adverse environmental effects, would produce effects which were insignificant or mitigable with known technology, or would produce effects which were unknown. In the words of the Board (at pp. 34-35):

In conducting a screening of electricity export proposals, the Board examines the potential environmental and corresponding social effects in and outside of Canada, of the production, transmission, and end use of the electricity proposed to be exported. The purpose of such a screening is to enable the Board to reach one of the conclusions required in section 12 of the *EARP Guidelines Order*.

The Board noted that Hydro-Québec had provided information that approval of the export arrangements would mean that the facilities contemplated by its general development plan would be built two to six years earlier than anticipated. Hydro-Québec took the position that the effect of permitting the exports on the environmental impact of the implementation of the plan would be insignificant. As a result, it did not provide information on the overall impact of the construction and operation of the planned facilities. The Board noted (at pp. 37-38):

Hydro-Québec argued only that the early construction and operation of facilities to serve the exports would not result in significant environmental impacts and consequently it provided no evidence on this point. Specifically, Hydro-Québec did not provide a comprehensive environmental assessment of the impact of the construction and operation of facilities required to support the proposed exports. In this regard, the Board is of the view that the issue of environmental impact does not hinge on whether or not it should consider the impact of the construction and operation of facilities or only the impact of their advancement. Sufficient evidence was provided indicating that major hydro-electric facilities such as those required to meet the proposed exports do have environmental effects. Hydro-Québec itself did not deny this. The issue rather is whether, on balance, the environmental consequences are acceptable or mitigable. This, the Board does not know at this time.

The Board recognizes that when electric utilities negotiate long-term system-to-system firm sales agreements, there can be circumstances in such arrangements that require capacity to come from generating facilities to be built at some future date and for which the necessary detailed environmental assessments have not been completed at the time of the export application. The proposed export contracts now before the Board have been negotiated on this basis. Nonetheless, for the Board to reach its decision on Hydro-Québec's applications, and at the same time meet its obligations under the Act and *EARP Guidelines Order*, it must take into account the environmental impacts arising from the construction of such future facilities.

However, it was apparent that all the facilities in issue would be subject at later dates either to provincial review under the James Bay Agreement or to review by other federal departments under the *EARP Guidelines Order* or other enactments. Therefore, the Board held (at pp. 39-40):

The Board is also of the view that, to the extent that Hydro-Québec's future facilities are subjected to the *EARP Guidelines Order* review process, or any equivalent review process, and are subsequently accepted for construction, the environmental and social impacts of these projects, as well as the related public concerns, will have been adequately addressed. . . . The Board is therefore satisfied that to the extent that such reviews take place and the facilities are accepted for construction, then the environmental impact of the construction and operation of the facilities required to support the proposed exports will be known and mitigable with known technology.

In order to satisfy itself that these reviews would be carried out, the Board attached conditions 10 and 11 to the licences.

The respondents challenge the validity of conditions 10 and 11 on the grounds that the jurisdiction of the Board in considering an application for an export licence does not extend to the environmental effects of the construction and operation of facilities which will generate the power to be exported. As noted above, I am of the view that the jurisdiction of the Board can properly encompass such a review. The appellants, however, also challenge the validity of these conditions. They argue that to approve the Board's transfer of the responsibility for environmental review to these future processes is to permit the Board to avoid its responsibilities under the *EARP Guidelines Order*.

The conclusion of the Board in this case appears to have been, not surprisingly, that the environmental effects of the construction and operation of the planned facilities were unknown. The Board is therefore required by s. 12(d) of the *EARP Guidelines Order* to see either that the proposal is subjected to further study and subsequent rescreening, or that it is submitted to a public review. In my view, the conditions imposed by the Board meet in substance this obligation. They do not amount to an improper delegation of the Board's responsibility under the *EARP Guidelines Order*. Rather, they are an attempt to avoid the duplication warned against in the Order, while continuing the jurisdiction of the Board over this matter.

In the same way that the *EARP Guidelines Order* does not require an initiating department to wait for the results of a public review before proceeding with a

proposal (see *Canadian Wildlife Federation Inc. v. Canada (Minister of the Environment)* (1989), 4 C.E.L.R. (N.S.) 201 (F.C.T.D.), aff'd [1991] 1 F.C. 641 (C.A.)), it does not require the Board to suspend its decision-making until the environmental assessment of all future generating facilities is completed. In this appeal, it is presently unclear exactly when and to what extent these contemplated facilities will be used to fulfil the requirements of the export contracts. This will not be known with certainty until those portions of the contract arise for completion. It is not unreasonable for the Board to exert some control over the timing of this process, while at the same time waiting for the results of environmental reviews which will be tailored to the specifications of the facilities as they are actually constructed.

This case appears to me to be just such a situation where the nature of the proposal means that the flexibility of the process set out in the *EARP Guidelines Order* is helpful. In this regard, I adopt the words of Reed J. of the Trial Division of the Federal Court in *Friends of the Island Inc. v. Canada (Minister of Public Works)*, [1993] 2 F.C. 229, where she stated (at p. 264):

It is not disputed that it is preferable to identify potential environmental concerns relating to a project before private sector developers (or public sector developers for that matter) proceed to a final design. It is also desirable to use the process as a planning tool and to avoid duplication. I am not convinced however that it is useful to consider whether the Guidelines Order requires the assessment of [a] proposal at the concept stage or at a more specific design stage. What is required may very well depend on the type of project being reviewed. What does seem clear is that the assessment is required to take place at a stage when the environmental implications can be fully considered (s. 3) and when it can be determined whether there may be any potentially adverse environmental effects (s. 10(1)). [Emphasis in original.]

The Board retains the power, through s. 119.093(1) of the *National Energy Board Act*, to revoke the licences if the conditions are not fulfilled. The conditions relate to contemplated environmental review and regulation in the federal sphere. By proceeding in this way, the full environmental effects of the proposals are known to the Board before the construction is to proceed, and before the decision to grant the licences is irrevocable. At the same time, duplication is minimized and Hydro-Québec is not required to provide concrete evidence of the effects of proposals for future construction still some years away. The Board has thus fulfilled its mandate under the *EARP Guidelines Order* in a manner which, I would add, is not unreasonable in the circumstances.

VI. Conclusion and Disposition

At issue in this appeal are jurisdictional facts. While it is the proper function of this Court to determine whether the Board erred in the exercise of its jurisdiction, this Court will not interfere with the factual findings of the Board on which it bases that exercise, where there is some evidence to support its findings. I conclude that the appellants were given a full and fair opportunity to be heard before the Board, and that the Board had sufficient evidence to reach the conclusions which it did. In particular, I find that the order as set out by the Board neither exceeded nor avoided the scope of the Board's review in the area of the environmental impact of the proposed exports.

The reinstatement of the order as made by the Board is not the result sought by either the appellants or the respondents Hydro-Québec and the Attorney General of Quebec. This does not mean, however, that such a result is beyond the

jurisdiction of this Court. Both the appellants and the respondents appealed the decision of the Board to the Federal Court of Appeal. These appeals were consolidated, and the court ruled that the appeal of the present appellants should be dismissed, and the appeal of the respondents allowed. It is this decision, *in toto*, that the appellants appeal to this Court.

I am of the view that the Court of Appeal erred in allowing the appeal of the respondents, and that it should have dismissed both appeals. This Court has jurisdiction to make the order that the court below should have made. Accordingly, the appeal is allowed, the judgment of the Federal Court of Appeal is set aside, and the order of the Board restored. Given the nature of the result, each party will bear its own costs here and in the court below.

Appeal allowed.

Solicitors for the appellants: Robert Mainville & Associés, Montréal.

Solicitor for the respondent the Attorney General of Canada: Jean-Marc Aubry, Ottawa.

Solicitors for the respondent the Attorney General of Quebec: Pierre Lachance and Jean Bouchard, Ste-Foy.

Solicitors for the respondent Hydro-Québec: Ogilvy Renault, Montréal.

Solicitor for the respondent the National Energy Board: Judith B. Hanebury, Calgary.

Solicitor for the interveners: Gregory J. McDade, Vancouver.

COURT OF APPEAL FOR BRITISH COLUMBIA

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

Date: 20090218
Docket: CA035715; CA035791

Between:

The Carrier Sekani Tribal Council

Appellant
(Applicant/Intervenor)

And

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

Respondents
(Respondents)

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

G. J. McDade, Q.C. Counsel for the Appellant

C. W. Sanderson, Q.C. and K. B. Bergner Counsel for the Respondent, British
Columbia Hydro and Power Authority

D. W. Bursey and R. D. W. Dalziel Counsel for the Respondent,
Rio Tinto Alcan Inc.

P. E. Yearwood and J. J. Oliphant Counsel for the Respondent,
Attorney General of British Columbia

Place and Date of Hearing: Vancouver, British Columbia
November 24 and 25, 2008

Place and Date of Judgment: Vancouver, British Columbia
February 18, 2009

Written Reasons by:
The Honourable Mr. Justice Donald

Concurred in by:
The Honourable Madam Justice Huddart
The Honourable Mr. Justice Bauman

Reasons for Judgment of the Honourable Mr. Justice Donald:

Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Factual Background

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

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

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

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

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

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

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

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

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

objective' to grant the water to Alcan (in 1950) for the production of aluminum, that objective is no longer operative under this agreement. A new 'objective' requires further consultation.);

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

[Emphasis in original.]

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

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

The CSTC submits:

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

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

Relevant Enactments

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

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

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

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

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

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

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

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

* * *

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

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

* * *

71 ...

- (2.1) In determining under subsection (2) whether an energy supply contract is in the public interest, the commission must consider
- (a) the government's energy objectives, ...

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

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

* * *

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

* * *

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

* * *

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

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

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

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

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

* * *

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

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

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

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

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

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

Issues

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Discussion

A. The Power and Duty to Decide

1. The Power

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

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

(a) Competency

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

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

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

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

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

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

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

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

(b) Construction of Section 71

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

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

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

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

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

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

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

[Emphasis added.]

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

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

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

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

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

(c) Capacity to decide

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

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

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

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

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

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

2. The Duty to Decide

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

[52] The process of consultation envisaged in *Haida* requires discussion at an early stage of a government plan that may impact Aboriginal interests, before matters crystallize, so that First Nations do not have to deal with a plan that has become an accomplished fact. *Haida* said this on the question of timing, at para. 35:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. Standard of Review

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

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

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

2. Reasoning Error

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

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

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

[Emphasis added.]

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

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

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

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

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

[66] In reviewing the history of the duty to consult, the Court in *Haida* said, at para. 24:

The Court's seminal decision in *Delgamuukw*, *supra*, at para. 168, in the context of a claim for title to land and resources,

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

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

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

[Emphasis added.]

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

Remedy

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

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

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

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

“The Honourable Mr. Justice Donald”

I agree:

“The Honourable Madam Justice Huddart”

I agree:

“The Honourable Mr. Justice Bauman”



IN THE MATTER OF

BRITISH COLUMBIA TRANSMISSION CORPORATION

AND

**AN APPLICATION FOR APPROVAL OF A
TRANSMISSION SYSTEM CAPITAL PLAN F2010 AND F2011**

DECISION

July 13, 2009

Before:

**Liisa A. O'Hara, Commissioner and Panel Chair
Dennis A. Cote, Commissioner**

1.0 INTRODUCTION

1.1 Application

On November 21, 2008 the British Columbia Transmission Corporation (“BCTC”) filed its latest Transmission System Capital Plan (“Capital Plan”) F2010 and F2011 with the British Columbia Utilities Commission (“Commission,” “BCUC”). Regulatory approval of the F2010 Capital Plan is requested under sections 44.2 and 45 (6) of the Utilities Commission Act (“Act”). This Application is BCTC’s fifth application since the F2005 Capital Plan approved under Order G-103-04. The F2009 Capital Plan, the last one filed by BCTC, was approved under Order G-107-08.

In the current Application BCTC has requested approval for capital project funding in the amount of \$324.7 million including Emergency, Third Party funded projects and Third Party requested projects. This is broken into three categories: Growth Capital projects, Sustaining Capital projects and BCTC Capital projects as shown in the table below. Growth Project amounts reflect the BCTC portion of joint projects with British Columbia Hydro and Power Authority (“BC Hydro”). These projects in this category require an additional \$88.9 million for Substation Distribution Assets (“SDA”) which as per Master Agreement between BC Hydro and BCTC remain with BC Hydro.

Portfolio	Total Funding Requested (\$'000)	Prior Years (\$'000)	F2010 (\$'000)	F2011 (\$'000)	F2012 (\$'000)	F2013 (\$'000)
Growth ¹	57,581	1,609	19,198	18,999	16,450	1,325
Sustain	241,315		119,045	122,271		
BCTC	25,823	-	13,579	12,244		
TOTAL	324,719	1,609	151,821	153,514	16,450	1,325

Note 1: Approval for the Growth Portfolio is requested on a project basis and not just for two fiscal years. As a result, the total cash flow by year is shown for all projects requested in the F2010 Capital Plan.

(Exhibit B-6, BCUC 1.1.1)

1.2 Orders Sought

In the Application BCTC is seeking the following orders to be issued by the Commission:

- In accordance with section 44.2(3) of the *Act* the proposed projects and expenditures for approval in Growth, Sustaining and BCTC Capital portfolios are in the public interest as well as the emergency capital expenditures for F2008 and F2009.
- BCTC's F2010 Capital Plan meets the requirements of section 45(6) of the *Act*.
- BCTC is relieved of certain Commission Directives under sections 88(2) and/or 99 of the *Act*.

1.3 Context

Since BCTC's last Capital Plan there have been a number of events and occurrences which will have a significant impact on and directly affect the utility business and regulatory landscape. Chief among these are the following:

(i) Turbulent Economic Times

In the past year the world has slipped into what has been described as the worst recession since the Second World War. The size and scope of the economic problems being faced are global in nature and have impacted all nations. Both Canada and the United States have faced major economic downturns which have severely impacted the pace of business and growth forecasts for the period which lies ahead. Both countries have taken steps to stimulate the economy but it is still too early to determine whether the bottom has been hit and when the recovery will begin.

With this difficult economic backdrop, utilities must continue to move forward and undertake projects to ensure the needs of customers will be met in the future. The challenge facing each will be to plan projects in a manner which will not result in overcapacity but at the same time, ensure there is sufficient development to ensure the needs of customers are being met in the future. This

challenge will be most felt in the development of load forecasts which will be required to take into account the current situation while addressing the anticipated recovery (BCTC Argument, pp. 11-12).

(ii) First Nation Consultation

The recent British Columbia Court of Appeal decisions with respect to *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)*, 2009 BCCA 67 (“*Carrier Sekani*”) and *Kwikwetlem First Nation v. British Columbia (Utilities Commission)*, 2009 BCCA 68 (“*Kwikwetlem*”) confirmed the Commission has the obligation to assess the adequacy of Crown consultation within the scheme of its regulation. The Commission, as a quasi-judicial tribunal, does not itself have a duty to consult (*Carrier Sekani*, para. 56). Rather, it is the Crown who has a legal duty to consult with aboriginal people when making decisions that may affect aboriginal rights. In fulfilling its role, the Commission will need to develop tools to assess the adequacy of Crown consultation with First Nations. This will undoubtedly have an impact not only on this Application but also the type of information that must be included in future applications.

(iii) Amendments to the Utilities Commission Act

A number of amendments affecting regulatory requirements have been made to the *Act* by the Utilities Commission Amendment Act, 2008 which received Royal Assent on May 1, 2008. With respect to these amendments, subsections 45(6.1) and 45(6.2) were repealed, sections 44.1 and 44.2 were added and additional provisions were added to section 5. Of significance to this Application is the subsection 44.2(1)(b) which states a utility may file an expenditure schedule containing “a statement of public expenditures that the public utility has made or anticipates making during the period addressed by the schedule.” This is similar to what was formally covered under subsection 45(6.1) of the *Act* with the exception that this is no longer a mandatory requirement. A utility is still bound by subsection 45(6) of the *Act* which requires a utility to file a statement (as prescribed by the Commission) of the extensions to its facilities it plans to construct at least once a year. Similarly, section 44.2 of the *Act* is not a major departure from the former

The Minister of National Revenue *Appellant*;

and

Coopers and Lybrand *Respondent*.

1978: June 23; 1978: November 21.

Present: Martland, Ritchie, Pigeon, Dickson, Beetz, Estey and Pratte JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Income tax — Jurisdiction — Authorization for entry, search and seizure approved by judge of a superior or a county court — Review by Federal Court of Appeal — Income Tax Act, s. 231(4)(5) — Federal Court Act, R.S.C. 1970, 2nd Supp., c. 10 — B.N.A. Act, 1867, s. 96.

Coopers and Lybrand, chartered accountants, brought a s. 28 application to the Federal Court of Appeal for an order reviewing and setting aside the decision or order of the Director-General, Special Investigations Directorate, Department of National Revenue, Taxation, and Carl Zalev, Co. Ct. J., authorizing the entry and search of the Coopers and Lybrand offices and the seizure of certain documents in their possession. Section 231 of the *Income Tax Act* in subs. (4) and (5), prescribes two prerequisites for authorization of any such entry, search or seizure, namely (i) belief by the Minister of National Revenue on reasonable and probable grounds that a violation of the *Income Tax Act*, or a regulation thereunder, has been committed, or is likely to be committed, and (ii) approval by a judge of a superior or county court upon an application (which may be *ex parte*), supported by evidence on oath establishing the facts on which the application is based. The supporting affidavits indicated that a client company of Coopers and Lybrand, Collavino, had built a private residence for B the President of K.M. Ltd. at a cost of \$90,397 but charged B, pursuant to a written contract, only \$43,000, allegedly adding the shortfall of \$47,397 to the cost of a plant addition being constructed for K.M. Ltd. The result of this was to confer on B an undeclared benefit while enabling K.M. Ltd. to claim capital cost allowance on an amount greater than that to which it would have been otherwise entitled. There was no suggestion that Coopers and Lybrand were in any way implicated in any violation of the *Income Tax Act*, if indeed there was such a violation. Further the respondent did not dispute that the affidavits filed gave the Minister reasonable and probable grounds for belief that a violation of the Act had been committed by B and by K.M. Ltd. The contention was that the authorization was unduly broad

Le ministre du Revenu national *Appelant*;

et

Coopers and Lybrand *Intimée*.

1978: 23 juin; 1978: 21 novembre.

Présents: Les juges Martland, Ritchie, Pigeon, Dickson, Beetz, Estey et Pratte.

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Impôt sur le revenu — Compétence — Autorisation d'entrer, de chercher et de saisir accordée par un juge d'une cour supérieure ou de comté — Examen par la Cour d'appel fédérale — Loi de l'impôt sur le revenu, par. 231(4) et (5) — Loi sur la Cour fédérale, S.R.C. 1970, 2^e Supp., chap. 10 — A.A.N.B., 1867, art. 96.

Coopers and Lybrand, des experts-comptables, ont présenté à la Cour d'appel fédérale une demande en vertu de l'art. 28 en vue d'obtenir l'examen et l'annulation de la décision ou ordonnance du Directeur général de la Division des enquêtes spéciales du ministère du Revenu national, Impôt, et du juge Carl Zalev de la Cour de comté, permettant d'entrer dans les bureaux de Coopers and Lybrand, d'y faire une perquisition et de saisir des documents en leur possession. Les paragraphes 231(4) et (5) de la *Loi de l'impôt sur le revenu* subordonnent l'autorisation d'entrer, de chercher et de saisir à deux conditions préalables, soit (i) que le ministre du Revenu national ait des motifs raisonnables pour croire qu'une infraction à la *Loi de l'impôt sur le revenu* ou à un règlement a été commise ou sera probablement commise et (ii) qu'un juge d'une cour supérieure ou d'une cour de comté donne son agrément sur présentation d'une demande (qui peut être *ex parte*) appuyée d'une preuve fournie sous serment et établissant la véracité des faits sur lesquels est fondée la demande. Les affidavits présentés à l'appui de la demande indiquent qu'un client de Coopers and Lybrand, Collavino, a construit, au coût de \$90,397, une résidence pour B, président de K.M. Ltd., mais, aux termes d'un contrat écrit, ne lui a facturé que \$43,000; il est allégué que la différence de \$47,397 a été ajoutée au coût de l'agrandissement de l'usine de K.M. Ltd. Par suite de ces transactions, B a touché un bénéfice non déclaré et K.M. Ltd. était ainsi en mesure de réclamer une allocation du coût en capital sur un montant plus élevé que celui auquel elle aurait eu droit. Il n'est aucunement suggéré que Coopers and Lybrand est impliquée de quelque façon dans une infraction à la *Loi de l'impôt sur le revenu*, si tant est qu'il y en ait une. L'intimée ne conteste pas que, compte tenu des affidavits déposés, le Ministre pouvait avoir des

and should have been limited to seizure of documents relating to the dealings of respondent's client Collavino with B and K.M. Ltd. concerning the construction of B's residence and the addition to the K.M. Ltd. plant. The Federal Court of Appeal agreed and referred the matter back to the Director-General and Judge Zalev for the issuance of a limited authorization. In the Supreme Court of Canada the prime consideration was not the breadth of the authorization but whether the Federal Court of Appeal had jurisdiction to entertain the application.

Held: The appeal should be allowed.

The actions of the Minister under s. 231(4) of the *Income Tax Act* are actions of an administrative nature. No obligation rested on him to act either on a judicial or quasi-judicial basis. The ministerial decision was not therefore within s. 28 of the *Federal Court Act* and was not subject to review by the Federal Court of Appeal.

The judicial function envisaged by s. 231(4) of the *Income Tax Act* serves as the control on the Minister's decision and any further recourse to the courts is in review of the judge's decision. The judge in this situation exercises a normal judicial function and he should not be regarded as acting *persona designata* merely through the exercise of powers conferred by a statute other than the provincial *Judicature Act* or its counterpart. The definition of federal board, commission or other tribunal in s. 2 of the *Federal Court Act* expressly excludes persons appointed under s. 96 of the *B.N.A. Act*, i.e. judges of a superior or county court. Section 28 of the *Federal Court Act* cannot therefore apply to the case at bar in which the Federal Court of Appeal did not have a right of review.

The questions of whether an appeal lies to the provincial courts or whether recourse lies to replevin or to one of the prerogative writs should be reserved for another occasion.

Guay v. Lafleur, [1965] S.C.R. 12; *R. v. Randolph* (1966), 56 D.L.R. (2d) 283; *Wiseman v. Borneman*, [1971] A.C. 297 (H.L.); *Pearlberg v. Varty (Inspector of Taxes)*, [1972] 1 W.L.R. 534 (H.L.); *Cooper v. Wandsworth Board of Works* (1863), 14 C.B. (N.S.) 180; *Russell v. Duke of Norfolk*, [1949] 1 All E.R. 109 (C.A.); *Howarth v. National Parole Board*, [1976] 1 S.C.R. 453; *Martineau and Butters v. Matsqui Institution Inmate Disciplinary Board*, [1978] 1 S.C.R. 118;

motifs raisonnables de croire que B et K.M. Ltd. avaient violé cette loi. Elle prétend que l'autorisation est trop générale et aurait dû être limitée à la saisie des documents relatifs aux opérations entre Collavino, B et K.M. Ltd. quant à la construction de la résidence de B et aux travaux d'agrandissement de l'usine de K.M. Ltd. La Cour d'appel fédérale a accueilli cette prétention et renvoyé le dossier au Directeur général et au juge Zalev pour qu'ils accordent une autorisation limitée. En Cour suprême du Canada, la considération principale n'était pas l'étendue de l'autorisation mais plutôt la question de savoir si la Cour d'appel fédérale avait le pouvoir de connaître de la demande.

Arrêt: Le pourvoi doit être accueilli.

La décision du Ministre en vertu du par. 231(4) de la *Loi de l'impôt sur le revenu* est de nature administrative. Il n'a aucune obligation d'agir de façon judiciaire ou quasi judiciaire. En conséquence, la décision du Ministre ne tombe pas sous le coup de l'art. 28 de la *Loi sur la Cour fédérale* et n'est pas sujette à examen par la Cour d'appel fédérale.

La fonction judiciaire envisagée au par. 231(4) de la *Loi de l'impôt sur le revenu* est un moyen de contrôle de la décision du Ministre et tout autre recours devant un tribunal permet d'examiner celle du juge. Dans ce cas, le juge exerce une fonction judiciaire normale et ne doit pas être considéré comme une *persona designata* du simple fait qu'il exerce des pouvoirs conférés par une loi autre que la loi provinciale régissant la magistrature ou son équivalent. La définition de office, commission ou autre tribunal fédéral à l'art. 2 de la *Loi sur la Cour fédérale* exclut expressément les personnes nommées en vertu de l'art. 96 de l'*A.A.N.B.*, c.-à-d. les juges d'une cour supérieure ou de comté. L'article 28 de la *Loi sur la Cour fédérale* ne s'applique donc pas en l'espèce et, en conséquence, la Cour d'appel fédérale n'avait pas de droit d'examen.

Les questions de savoir si un appel peut être interjeté devant les cours provinciales ou si l'on peut recourir à une demande de mainlevée ou à l'un des brefs de prérogative devront être tranchées en une autre occasion.

Jurisprudence: *Guay c. Lafleur*, [1965] R.C.S. 12; *R. v. Randolph* (1966), 56 D.L.R. (2d) 283; *Wiseman v. Borneman*, [1971] A.C. 297 (H.L.); *Pearlberg v. Varty (Inspector of Taxes)*, [1972] 1 W.L.R. 534 (H.L.); *Cooper v. Wandsworth Board of Works* (1863), 14 C.B. (N.S.) 180; *Russell v. Duke of Norfolk*, [1949] 1 All E.R. 109 (C.A.); *Howarth c. Commission des libérations conditionnelles*, [1976] 1 R.C.S. 453; *Martineau et Butters c. Comité de discipline des détenus de l'Insti-*

Durayappah v. Fernando, [1967] 2 A.C. 337 (P.C.); *Ridge v. Baldwin*, [1964] A.C. 40 (H.L.); *Herman v. Dep. A.G. (Can.)*, [1979] 1 S.C.R. 729 referred to.

APPEAL from a judgment of the Federal Court of Appeal, allowing an application for review under s. 28 of the Federal Court Act, from a decision or order of the Director-General, Special Investigations Directorate, Department of National Revenue, Taxation, and Judge Carl Zalev. Appeal allowed, judgment of the Federal Court of Appeal set aside for lack of jurisdiction.

G. W. Ainslie, Q.C., and *March Jewett*, for the appellant.

Robert E. Barnes, Q.C., and *K. W. Cheung*, for the respondent.

The judgment of the Court was delivered by

DICKSON J.—Coopers and Lybrand, chartered accountants, brought a s. 28 application to the Federal Court of Appeal for an order reviewing and setting aside the decision or order of the Director-General, Special Investigations Directorate, Department of National Revenue, Taxation, and His Honour Judge Carl Zalev, Judge of the County Court of the County of Essex. The impugned decision or order authorized the entry and search of offices of Coopers and Lybrand and seizure of certain documents in possession of that firm. The authorization was issued pursuant to s. 231(4) and (5) of the *Income Tax Act, 1970-71-72 (Can.)*, c. 63, as amended, which read as follows:

(4) Where the Minister has reasonable and probable grounds to believe that a violation of this Act or a regulation has been committed or is likely to be committed, he may, with the approval of a judge of a superior or county court, which approval the judge is hereby empowered to give on *ex parte* application, authorize in writing any officer of the Department of National Revenue, together with such members of the Royal Canadian Mounted Police or other peace officers as he calls on to assist him and such other persons as may be named therein, to enter and search, if necessary by force, any building, receptacle or place for documents, books,

tution de Matsqui, [1978] 1 R.C.S. 118; *Durayappah v. Fernando*, [1967] 2 A.C. 337 (P.C.); *Ridge v. Baldwin*, [1964] A.C. 40 (H.L.); *Herman c. Sous-procureur général du Canada*, [1979] 1 R.C.S. 729.

POURVOI à l'encontre d'un arrêt de la Cour d'appel fédérale qui a accueilli une demande d'examen présentée en vertu de l'art. 28 de la *Loi sur la Cour fédérale* d'une décision ou ordonnance du Directeur général de la Division des enquêtes spéciales du ministère du Revenu national, Impôt, et du juge Carl Zalev. Pourvoi accueilli, l'arrêt de la Cour d'appel fédérale est infirmé pour défaut de compétence.

G. W. Ainslie, c.r., et *March Jewett*, pour l'appellant.

Robert E. Barnes, c.r., et *K. W. Cheung*, pour l'intimée.

Le jugement de la Cour a été rendu par

LE JUGE DICKSON—Coopers and Lybrand, des experts-comptables, ont présenté à la Cour d'appel fédérale une demande en vertu de l'art. 28 en vue d'obtenir l'examen et l'annulation de la décision ou ordonnance du Directeur général de la Division des enquêtes spéciales du ministère du Revenu national, Impôt, et de M. le juge Carl Zalev de la Cour de comté d'Essex. La décision ou ordonnance contestée permet d'entrer dans les bureaux de Coopers and Lybrand, d'y faire une perquisition et de saisir des documents en leur possession. L'autorisation a été accordée conformément aux par. 231(4) et (5) de la *Loi de l'impôt sur le revenu, 1970-71-72 (Can.)*, chap. 63, et ses modifications, qui se lisent ainsi:

(4) Lorsque le Ministre a des motifs raisonnables pour croire qu'une infraction à cette loi ou à un règlement a été commise ou sera probablement commise, il peut, avec l'agrément d'un juge d'une cour supérieure ou d'une cour de comté, agrément que le juge est investi par ce paragraphe du pouvoir de donner sur la présentation d'une demande *ex parte*, autoriser par écrit tout fonctionnaire du ministère du Revenu national ainsi que tout membre de la Gendarmerie royale du Canada ou tout autre agent de la paix à l'assistance desquels il fait appel et toute autre personne qui peut y être nommée, à entrer et à chercher, usant de la force s'il le faut, dans tout

records, papers or things that may afford evidence as to the violation of any provision of this Act or a regulation and to seize and take away any such documents, books, records, papers or things and retain them until they are produced in any court proceedings.

(5) An application to a judge under subsection (4) shall be supported by evidence on oath establishing the facts upon which the application is based.

It will be noted that in enacting s. 231(4) and (5) Parliament prescribed two conditions which must be satisfied prior to authorization of any entry, search or seizure, namely: (i) belief by the Minister of National Revenue on reasonable and probable grounds that a violation of the *Income Tax Act*, or a regulation thereunder, has been committed, or is likely to be committed; and (ii) approval by a judge of a superior or county court upon an application (which may be *ex parte*), supported by evidence on oath establishing the facts upon which the application is based.

According to the supporting affidavits, Collavino Brothers Construction Company Limited built a private residence for one Dan Bryan at a cost of \$90,397, but charged Bryan, pursuant to a written contract, only \$43,000. It is alleged that the shortfall of \$47,397 was added to the cost of a plant addition which Collavino was constructing for Kendan Manufacturing Limited, a company of which Mr. Bryan was President and substantial shareholder. The position of the Minister is that as a result of the undercharge and overcharge, an undeclared benefit was conferred by Kendan on a shareholder, Bryan, and, at the same time, Kendan was placed in the position of being able to claim capital cost allowance on an amount greater than that to which Kendan would otherwise have been entitled.

Two points should be noted here. Firstly, Coopers and Lybrand is a well-known and reputable firm of chartered accountants, and there is no suggestion that the firm is in any way implicated in a violation of the *Income Tax Act* if, indeed, there was a violation. Secondly, Coopers and Lybrand do not dispute that, upon the evidence

bâtiment, contenant ou endroit en vue de découvrir les documents, livres, registres, pièces ou choses qui peuvent servir de preuve au sujet de l'infraction de toute disposition de la présente loi ou d'un règlement et à saisir et à emporter ces documents, livres, registres, pièces ou choses et à les retenir jusqu'à ce qu'ils soient produits devant la cour.

(5) Une demande faite à un juge en vertu du paragraphe (4) sera appuyée d'une preuve fournie sous serment et établissant la véracité des faits sur lesquels est fondée la demande.

On notera qu'en édictant les par. 231(4) et (5), le Parlement subordonne l'autorisation d'entrer, de chercher et de saisir à deux conditions préalables, soit (i) que le ministre du Revenu national ait des motifs raisonnables pour croire qu'une infraction à la *Loi de l'impôt sur le revenu* ou à un règlement a été commise ou sera probablement commise et (ii) qu'un juge d'une cour supérieure ou d'une cour de comté donne son agrément sur présentation d'une demande (qui peut être *ex parte*) appuyée d'une preuve fournie sous serment et établissant la véracité des faits sur lesquels est fondée la demande.

Selon les affidavits présentés à l'appui de la demande, Collavino Brothers Construction Company Limited a construit, au coût de \$90,397, une résidence pour un nommé Dan Bryan, mais, aux termes d'un contrat écrit, ne lui a facturé que \$43,000. Il est allégué que la différence de \$47,397 a été ajoutée au coût de l'agrandissement que Collavino a construit à l'usine de Kendan Manufacturing Limited, une compagnie dont M. Bryan était le président et le principal actionnaire. Le Ministre soutient que, par suite du rabais ou de la majoration, Kendan a accordé à un actionnaire, Bryan, un bénéfice non déclaré et était en même temps en mesure de réclamer une allocation du coût en capital sur un montant plus élevé que celui auquel elle aurait eu droit.

Il convient, à ce stade, de souligner deux points. Premièrement, Coopers and Lybrand est une société d'experts-comptables bien connue et de bonne réputation et il n'est aucunement suggéré qu'elle est impliquée de quelque façon dans une infraction à la *Loi de l'impôt sur le revenu*, si tant est qu'il y en ait une. Deuxièmement, Coopers and

disclosed in the affidavits filed in support of the application to Judge Zalev, there were reasonable and probable grounds for belief on the part of the Minister that a violation of the *Income Tax Act* had been committed by Bryan and by Kendan. The complaint is that the form of authorization, although conforming precisely to the wording of the latter part of s. 231(4), was so broad as to authorize seizure of *all* documents, of whatever nature, in the possession of Coopers and Lybrand, related to the affairs of their client, Collavino. It is urged that the form of authorization should have been limited to seizure of documents which might afford evidence as to the violation which formed the basis of the application for approval of the authorization, *viz.* documents related to the dealings between Collavino, Dan Bryan, and Kendan concerning the construction of the Bryan residence and the construction of the addition to the plant of Kendan. That contention was accepted by a majority of the Federal Court of Appeal, who set aside the authorization, and referred the matter back to the Director-General and to Judge Zalev for the issuance of a limited authorization.

In this Court argument centred, not upon whether the authorization should have been so limited, but upon the more fundamental question of Federal Court jurisdiction and whether the Federal Court of Appeal was empowered to entertain the s. 28 application brought by Coopers and Lybrand.

Section 28 jurisdiction to hear and determine an application to review and set aside extends only to:

... a decision or order other than a decision or order of an administrative nature not required by law to be made on a judicial or quasi-judicial basis, made in the course of proceedings before a federal board, commission or other tribunal.

The convoluted language of s. 28 of the *Federal Court Act* has presented many difficulties, as the cases attest, but it would seem clear that jurisdiction of the Federal Court of Appeal under that section depends upon an affirmative answer to each of four questions:

Lybrand ne conteste pas que, compte tenu de la preuve faite par les affidavits déposés à l'appui de la demande présentée au juge Zalev, le Ministre pouvait avoir des motifs raisonnables de croire que Bryan et Kendan avaient violé cette loi. L'attaque découle de ce que l'autorisation, bien que conforme à la dernière partie du par. 231(4), est si générale qu'elle permet la saisie de *tous* les documents, quels qu'ils soient, qui se rattachent aux affaires de son client Collavino et en sa possession. On fait valoir que l'autorisation aurait dû être limitée à la saisie des documents qui pouvaient fournir une preuve de l'infraction à l'origine de la demande d'approbation de l'autorisation, c'est-à-dire les documents relatifs aux opérations entre Collavino, Dan Bryan et Kendan quant à la construction de la résidence de Bryan et aux travaux d'agrandissement de l'usine de Kendan. La Cour d'appel fédérale a accueilli cette prétention à la majorité, a annulé l'autorisation et renvoyé le dossier au Directeur général et au juge Zalev pour qu'ils accordent une autorisation limitée.

Devant cette Cour, l'argumentation a porté non pas sur la question de savoir si l'autorisation aurait dû être limitée mais sur la question plus fondamentale de la compétence de la Cour fédérale et sur celle de savoir si la Cour d'appel fédérale avait le pouvoir de connaître de la demande présentée en vertu de l'art. 28 par Coopers and Lybrand.

La compétence conférée par l'art. 28 à l'égard d'une demande d'examen et d'annulation ne vaut que dans le cas:

... d'une décision ou ordonnance, autre qu'une décision ou ordonnance de nature administrative qui n'est pas légalement soumis à un processus judiciaire ou quasi judiciaire, rendue par un office, une commission ou un autre tribunal fédéral ou à l'occasion de procédures devant un office, une commission ou un autre tribunal fédéral...

Le texte compliqué de l'art. 28 de la *Loi sur la Cour fédérale* a soulevé de nombreuses difficultés, comme en témoigne la jurisprudence, mais il semble clair que la Cour d'appel fédérale est compétente en vertu de cet article si l'on peut répondre affirmativement à chacune de ces quatre questions:

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| <p>(1) Is that which is under attack a “decision or order” in the relevant sense?</p> <p>(2) If so, does it fit outside the excluded class, i.e. is it “<i>other than</i> a decision or order of an administrative nature not required by law to be made on a judicial or quasi-judicial basis”?</p> <p>(3) Was the decision or order made in the course of “proceedings”?</p> <p>(4) Was the person or body whose decision or order is challenged a “federal board, commission or other tribunal” as broadly defined in s. 2 of the <i>Federal Court Act</i>?</p> | <p>(1) Est-ce que l’objet de la contestation est une «décision ou ordonnance» au sens pertinent?</p> <p>(2) Si c’est le cas, tombe-t-elle à l’extérieur de la catégorie exclue, c’est-à-dire s’agit-il d’une décision ou d’une ordonnance «<i>autre qu’une</i> décision ou ordonnance de nature administrative qui n’est pas légalement soumise à un processus judiciaire ou quasi judiciaire»?</p> <p>(3) La décision ou ordonnance a-t-elle été rendue à l’occasion de «procédures»?</p> <p>(4) L’organisme, ou la personne, dont la décision ou ordonnance est contestée est-il un «office, commission ou autre tribunal fédéral» au sens de l’art. 2 de la <i>Loi sur la Cour fédérale</i>?</p> |
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In determining jurisdiction in the case at bar, one must consider separately the decision of the Minister and the order of the judge. In respect of the Minister’s decision, the crucial question is question (2) and, in respect of the judge’s order, question (4).

Traditionally, decisions of a judicial nature and decisions of an administrative nature have been seen as antithetic, judicial decisions being those made by the courts, and administrative decisions being those made by other than courts, such as government departments and officials. Traditionally, the courts have taken the position that decisions were reviewable if they were made by judicial persons or bodies, or by quasi-judicial boards or tribunals, *i.e.* analogous to courts. The growth of *certiorari* led naturally from control of inferior courts to control of administrative agencies.

Government ministries and agencies carry out a different form of work than that done by the courts. They do not simply take on closely analogous functions. Their primary concern is with policy objectives, rather than adjudication *inter partes*, in regulating relations between individuals and government in the distribution of benefits. The dichotomy between judicial and administrative is still reasonably easy to discern but the great growth of government at all levels, the proliferation of government agencies, and increased govern-

Pour statuer sur la compétence en l’espèce, il faut examiner séparément la décision du Ministre et l’ordonnance du juge. Pour la décision du Ministre, la 2^e question est cruciale et pour l’ordonnance du juge, c’est la 4^e.

Traditionnellement, les décisions de nature judiciaire et celles de nature administrative ont été considérées comme des catégories opposées; les décisions judiciaires sont celles des tribunaux et les décisions administratives, celles qui sont rendues par d’autres corps, comme, par exemple, les ministères et les fonctionnaires. Traditionnellement, les tribunaux ont adopté le principe que les décisions rendues par des juges ou des organismes judiciaires ou par des offices ou des tribunaux quasi judiciaires, c’est-à-dire assimilables à des tribunaux, peuvent donner lieu à révision. L’évolution du *certiorari* a naturellement mené du contrôle des tribunaux inférieurs au contrôle des organismes administratifs.

La tâche des ministères et des organismes gouvernementaux diffère de celle des tribunaux. Ils ne remplissent pas simplement des fonctions analogues. Leur principal souci est de régler les relations entre les individus et le gouvernement en matière de répartition des avantages en fonction d’objectifs gouvernementaux plutôt que de juger des litiges entre parties. La dichotomie entre les décisions judiciaires et administratives est encore assez facile à percevoir, mais l’expansion considérable de l’activité du gouvernement à tous les

ment involvement in social and economic affairs have all tended to render classification more difficult. There is much overlap. Administrative decisions and orders frequently subsume the judicial and quasi-judicial. Section 28 of the *Federal Court Act* expressly recognizes that some decisions or orders of an administrative nature are required by law to be made on a judicial or quasi-judicial basis; superimposed upon the administrative and institutional decision-making process of an official may be the duty to act judicially.

Accordingly, administrative decisions must be divided between those which are reviewable, by *certiorari* or by s. 28 application or otherwise, and those which are nonreviewable. The former are conveniently labelled "decisions or orders of an administrative nature required by law to be made on a judicial or quasi-judicial basis", the latter "decisions or orders not required by law to be made on a judicial or quasi-judicial basis." It is not only the decision to which attention must be directed, but also the process by which the decision is reached.

Before considering the criteria which, in my view, serve to identify a judicial or quasi-judicial act, reference may be made to two cases decided in this Court and to one case decided in the English courts. The first is *Guay v. Lafleur*¹, in which an officer of the Department of National Revenue was authorized by the Deputy Minister, pursuant to s. 126(4) of the *Income Tax Act*, R.S.C. 1952, c. 148, to make an inquiry into the affairs of the respondent and others. The respondent was denied the right to be present and represented by counsel during the examination of persons summoned by the investigator. The refusal was upheld in this Court. The Court, in effect, held that no judicial power was being exercised against those under investigation. Mr. Justice Abbott, who delivered the judgment of six members of the Court, held that the investigation was a purely administrative

¹ [1965] S.C.R. 12.

niveaux, la prolifération des organismes gouvernementaux et l'intervention accrue du gouvernement dans les affaires sociales et économiques ont contribué à rendre la classification plus difficile. Les deux domaines chevauchent. Des décisions et ordonnances administratives prennent fréquemment des caractéristiques judiciaires et quasi judiciaires. L'article 28 de la *Loi sur la Cour fédérale* reconnaît expressément que certaines décisions ou ordonnances de nature administrative sont légalement soumises à un processus judiciaire ou quasi judiciaire; le devoir d'agir judiciairement peut s'ajouter au processus de décision administrative d'un fonctionnaire.

En conséquence, il y a deux sortes de décisions administratives, celles qui peuvent être contrôlées, par *certiorari* ou à la suite d'une demande en vertu de l'art. 28 ou autrement, et celles qui ne le peuvent pas. Les premières sont commodément désignées comme «décisions ou ordonnances de nature administrative qui sont légalement soumises à un processus judiciaire ou quasi judiciaire» et les dernières comme «décisions ou ordonnances de nature administrative qui ne sont pas légalement soumises à un processus judiciaire ou quasi judiciaire». Il ne faut pas uniquement scruter la décision mais également le processus qui y conduit.

Avant d'examiner les critères qui, selon moi, servent à identifier un acte judiciaire ou quasi judiciaire, il convient de citer deux arrêts de cette Cour et une décision des tribunaux anglais. Le premier est *Guay c. Lafleur*¹, où le sous-ministre, conformément au par. 126(4) de la *Loi de l'impôt sur le revenu*, S.R.C. 1952, chap. 148, avait autorisé un fonctionnaire du ministère du Revenu national à tenir une enquête sur les affaires de l'intimé et d'autres personnes. L'intimé s'est vu refuser le droit d'être présent et d'être représenté par un avocat au cours de l'interrogatoire des personnes citées par l'enquêteur. Cette Cour a confirmé ce refus. La Cour a en effet statué qu'aucun pouvoir judiciaire n'était exercé contre ceux sur qui on enquêtait. Le juge Abbott, qui a rendu le jugement au nom de six membres de la Cour, a jugé que l'enquête était de nature pure-

¹ [1965] R.C.S. 12.

matter which could neither decide nor adjudicate upon anything. He further held that it was not a judicial or quasi-judicial inquiry, but a private investigation at which the respondent was not entitled to be present or represented by counsel. He had this to say, at pp. 16-17:

The power given to the Minister under s. 126(4) to authorize an enquiry to be made on his behalf, is only one of a number of similar powers of enquiry granted to the Minister under the *Act*. These powers are granted to enable the Minister to obtain the facts which he considers necessary to enable him to discharge the duty imposed on him of assessing and collecting the taxes payable under the *Act*. The taxpayer's right is not affected until an assessment is made. Then all the appeal provisions mentioned in the *Act* are open to him.

Mr. Justice Cartwright said, at p. 17:

The function of the appellant under the terms of his appointment is simply to gather information; his duties are administrative, they are neither judicial nor quasi-judicial.

There are, of course, many administrative bodies which are bound by the maxim "*audi alteram partem*" but the condition of their being so bound is that they have power to give a decision which affects the rights of, or imposes liabilities upon, others.

Mr. Justice Hall, although in dissent, agreed (at p. 19) that the investigator was not acting in a judicial capacity, or performing a judicial function.

In *R. v. Randolph*², this Court held that the power to suspend mail services, exercisable upon suspicion of criminal activity, pending a final determination, did not attract the rules of natural justice.

In *Wiseman v. Borneman*³, it was decided that a tribunal established for the purposes of s. 28 of the *Finance Act, 1960*, was not bound to observe the rules of natural justice, nor to give the taxpayer the right to see and comment upon material adverse to the taxpayer placed before the tribunal by the Commissioners of Inland Revenue. In the course of his speech, Lord Reid had this to say, at p. 308:

ment administrative et ne pouvait trancher ni décider quoi que ce soit. Il a en outre conclu qu'il ne s'agissait pas d'une enquête judiciaire ou quasi judiciaire mais d'une enquête privée à laquelle l'intimé n'avait pas le droit d'être présent ni d'être représenté par un avocat. Il a dit (aux pp. 16 et 17):

[TRADUCTION] Le pouvoir, conféré au Ministre par le par. 126(4), de permettre une enquête en son nom n'est qu'un des nombreux pouvoirs d'enquête accordés au Ministre par la *Loi*. Ces pouvoirs lui sont accordés pour lui permettre de recueillir des données susceptibles de l'aider à remplir le devoir qui lui est imposé d'établir et de percevoir les impôts payables en vertu de la *Loi*. Le droit du contribuable n'est en cause que lorsqu'une cotisation est établie. Alors, il peut se prévaloir de tous les recours mentionnés dans la *Loi*.

Le juge Cartwright a dit (à la p. 17):

[TRADUCTION] Aux termes de son mandat, l'appelant doit simplement recueillir des renseignements; ses fonctions sont administratives, elles ne sont ni judiciaires, ni quasi judiciaires.

De nombreux organismes administratifs sont liés par la maxime "*audi alteram partem*" mais, s'ils le sont, c'est seulement dans le cas où ils ont le pouvoir de prendre une décision qui porte atteinte aux droits des autres ou qui leur impose des obligations.

Le juge Hall, bien que dissident, a convenu (à la p. 19) que l'enquêteur n'agissait pas à titre judiciaire et ne remplissait pas de fonction judiciaire.

Dans l'arrêt *R. v. Randolph*², cette Cour a jugé que le pouvoir de suspendre le service postal en attendant une décision finale, pouvoir qui peut être exercé lorsqu'il y a lieu de croire que le service est utilisé à une fin criminelle, n'entraîne pas l'application des règles de justice naturelle.

Dans l'arrêt *Wiseman v. Borneman*³, on a jugé qu'un tribunal établi aux fins de l'art. 28 de la *Finance Act, 1960*, n'est pas tenu d'observer les règles de justice naturelle ni de permettre au contribuable de voir et de commenter les documents incriminants déposés par les représentants du fisc devant le tribunal. Dans ses motifs, lord Reid a dit (à la p. 308):

² (1966), 56 D.L.R. (2d) 283.

³ [1971] A.C. 297 (H.L.)

² (1966), 56 D.L.R. (2d) 283.

³ [1971] A.C. 297 (H.L.)

It is, I think, not entirely irrelevant to have in mind that it is very unusual for there to be a judicial determination of the question whether there is a *prima facie* case. Every public officer who has to decide whether to prosecute or raise proceedings ought first to decide whether there is a *prima facie* case, but no one supposes that justice requires that he should first seek the comments of the accused or the defendant on the material before him. So there is nothing inherently unjust in reaching such a decision in the absence of the other party.

The quoted passage was adopted in the later income tax case of *Pearlberg v. Varty (Inspector of Taxes)*⁴, at p. 539. In neither case was the function of the official classed as judicial. It was administrative to the extent that the taxpayer had no right to be present or to be heard.

Whether an administrative decision or order is one required by law to be made on a judicial or non-judicial basis will depend in large measure upon the legislative intention. If Parliament has made it clear that the person or body is required to act judicially, in the sense of being required to afford an opportunity to be heard, the courts must give effect to that intention. But silence in this respect is not conclusive. At common law the courts have supplied the legislative omission—see Byles J. in *Cooper v. Wandsworth Board of Works*⁵, at p. 194—in order to give such procedural protection as will achieve justice and equity without frustrating parliamentary will as reflected in the legislation.

As Tucker L.J. observed in *Russell v. Duke of Norfolk*⁶, at p. 118:

There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with, and so forth.

⁴ [1972] 1 W.L.R. 534 (H.L.).

⁵ (1863), 14 C.B. (N.S.) 180.

⁶ [1949] 1 All E.R. 109 (C.A.).

[TRANSLATION] Je crois qu'il peut être bon de rappeler qu'il est très inhabituel de décider judiciairement s'il y a, à première vue, matière à procès. Tout fonctionnaire public qui doit décider d'engager des poursuites ou d'intenter des procédures doit d'abord décider s'il y a, à première vue, matière à procès, mais cela ne signifie pas que la justice exige qu'il doive d'abord solliciter les observations de l'accusé ou défendeur sur les documents en main. Il n'y a donc rien d'intrinsèquement injuste à prendre une telle décision en l'absence de l'autre partie.

Le passage cité a été adopté dans une affaire fiscale plus récente, *Pearlberg v. Varty (Inspector of Taxes)*⁴, à la p. 539. Dans aucun de ces cas, le rôle du fonctionnaire n'a été qualifié de judiciaire. Il est de nature administrative dans la mesure où le contribuable n'a pas le droit d'être présent ou entendu.

La question de savoir si une décision ou ordonnance de nature administrative est légalement soumise à un processus judiciaire ou quasi judiciaire dépend dans une large mesure de l'intention du législateur. Si le Parlement énonce clairement que la personne ou l'organisme est tenu d'agir judiciairement, c'est-à-dire de fournir une occasion d'être entendu, les tribunaux doivent donner effet à cette intention. Mais le silence sur ce point n'est pas concluant. En *common law*, les tribunaux ont suppléé à cette omission du législateur—voir le juge Byles dans *Cooper v. Wandsworth Board of Works*⁵, à la p. 194—afin d'accorder dans la procédure les garanties voulues pour assurer la justice et l'équité sans aller à l'encontre de la volonté du Parlement exprimée dans la législation.

Comme l'a fait remarquer le lord juge Tucker dans l'arrêt *Russell v. Duke of Norfolk*⁶, à la p. 118:

[TRANSLATION] Il n'existe pas à mon avis un principe qui s'applique universellement à tous les genres d'enquêtes et de tribunaux internes. Les exigences de la justice naturelle doivent varier selon les circonstances de l'affaire, la nature de l'enquête, les règles qui régissent le tribunal, la question traitée, etc.

⁴ [1972] 1 W.L.R. 534 (H.L.).

⁵ (1863), 14 C.B. (N.S.) 180.

⁶ [1949] 1 All E.R. 109 (C.A.).

It is possible, I think, to formulate several criteria for determining whether a decision or order is one required by law to be made on a judicial or quasi-judicial basis. The list is not intended to be exhaustive.

(1) Is there anything in the language in which the function is conferred or in the general context in which it is exercised which suggests that a hearing is contemplated before a decision is reached?

(2) Does the decision or order directly or indirectly affect the rights and obligations of persons?

(3) Is the adversary process involved?

(4) Is there an obligation to apply substantive rules to many individual cases rather than, for example, the obligation to implement social and economic policy in a broad sense?

These are all factors to be weighed and evaluated, no one of which is necessarily determinative. Thus, as to (1), the absence of express language mandating a hearing does not necessarily preclude a duty to afford a hearing at common law. As to (2), the nature and severity of the manner, if any, in which individual rights are affected, and whether or not the decision or order is final, will be important, but the fact that rights are affected does not necessarily carry with it an obligation to act judicially. In *Howarth v. National Parole Board*⁷, a majority of this Court rejected the notion of a right to natural justice in a parole suspension and revocation situation. See also *Martineau and Butters v. Matsqui Institution Inmate Disciplinary Board*⁸.

In more general terms, one must have regard to the subject matter of the power, the nature of the issue to be decided, and the importance of the determination upon those directly or indirectly affected thereby: see *Durayappah v. Fernando*⁹. The more important the issue and the more serious the sanctions, the stronger the claim that the power be subject in its exercise to judicial or quasi-judicial process.

⁷ [1976] 1 S.C.R. 453.

⁸ [1978] 1 S.C.R. 118.

⁹ [1967] 2 A.C. 337 (P.C.).

J'estime qu'il est possible de formuler plusieurs critères pour déterminer si une décision ou ordonnance est légalement soumise à un processus judiciaire ou quasi judiciaire. Il ne s'agit pas d'une liste exhaustive.

(1) Les termes utilisés pour conférer la fonction ou le contexte général dans lequel cette fonction est exercée donnent-ils à entendre que l'on envisage la tenue d'une audience avant qu'une décision soit prise?

(2) La décision ou l'ordonnance porte-t-elle directement ou indirectement atteinte aux droits et obligations de quelqu'un?

(3) S'agit-il d'une procédure contradictoire?

(4) S'agit-il d'une obligation d'appliquer les règles de fond à plusieurs cas individuels plutôt que, par exemple, de l'obligation d'appliquer une politique sociale et économique au sens large?

Tous ces facteurs doivent être soupesés et évalués et aucun d'entre eux n'est nécessairement déterminant. Ainsi, au par. (1), l'absence de termes exprès prescrivant la tenue d'une audience n'exclut pas nécessairement l'obligation en *common law* d'en tenir une. Quant au par. (2), la nature et la gravité, le cas échéant, de l'atteinte aux droits individuels, et la question de savoir si la décision ou ordonnance est finale sont importantes, mais le fait que des droits soient touchés n'entraîne pas nécessairement l'obligation d'agir judiciairement. Dans l'arrêt *Howarth c. Commission des libérations conditionnelles*⁷, la majorité de cette Cour a rejeté l'idée d'un droit à la justice naturelle dans le cas d'une suspension ou d'une révocation de libération conditionnelle. Voir également l'arrêt *Martineau et Butters c. Comité de discipline des détenus de l'Institution de Matsqui*⁸.

En termes plus généraux, il faut tenir compte de l'objet du pouvoir, de la nature de la question à trancher et de l'importance de la décision sur ceux qui sont directement ou indirectement touchés par elle: voir l'arrêt *Durayappah v. Fernando*⁹. Plus la question est importante et les sanctions sérieuses, plus on est justifié de demander que l'exercice du pouvoir soit soumis au processus judiciaire ou quasi judiciaire.

⁷ [1976] 1 R.C.S. 453.

⁸ [1978] 1 R.C.S. 118.

⁹ [1967] 2 A.C. 337 (P.C.).

The existence of something in the nature of a *lis inter partes* and the presence of procedures, functions and happenings approximating those of a court add weight to (3). But, again, the absence of procedural rules analogous to those of courts will not be fatal to the presence of a duty to act judicially.

Administrative decision does not lend itself to rigid classification of function. Instead, one finds realistically a continuum. As paradigms, at one end of the spectrum are rent tribunals, labour boards and the like, the decisions of which are eligible for judicial review. At the other end are such matters as the appointment of the head of a Crown corporation, or the decision to purchase a battleship, determinations inappropriate to judicial intervention. The examples at either end of the spectrum are easy to resolve, but as one approaches the middle the task becomes less so. One must weigh the factors for and against the conclusion that the decision must be made on a judicial basis. Reasonable men balancing the same factors may differ, but this does not connote uncertainty or *ad hoc* adjudication; it merely reflects the myriad administrative decision-making situations which may be encountered to which the reasonably well-defined principles must be applied.

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Professor D. J. Mullan expressed the matter in the following language in a thoughtful article "Fairness: the New Natural Justice?" (1975), 25 U.T.L.J. 280, 300:

Why not deal with problems of fairness and natural justice simply on the basis that, the nearer one is to the type of function requiring straight law/fact determinations and resulting in serious consequences to individuals, the greater is the legitimacy of the demand for procedural protection but as one moves through the spectrum of decision-making functions to the broad, policy-oriented decisions exercised typically by a minister of the crown, the content of procedural fairness gradually disappears into nothingness, the emphasis being on a gradual disappearance not one punctuated by the unrealistic impression of clear cut divisions presented by the classification process?

L'existence d'un élément assimilable à un *lis inter partes* et la présence de procédures, fonctions et actes équivalents à ceux d'un tribunal ajoutent du poids au par. (3). Mais encore une fois, l'absence de règles de procédure analogues à celles des tribunaux ne sera pas fatale à l'existence d'une obligation d'agir judiciairement.

La décision de nature administrative ne se prête pas à une classification rigide de fonctions. Au contraire, on découvre en réalité un continuum. En paradigmes, à un bout du spectre, se trouvent les régies des loyers, commissions des relations du travail et autres dont les décisions sont susceptibles d'examen judiciaire. A l'autre bout, on trouve des choses comme la nomination du président d'une société de la Couronne ou la décision d'acheter un cuirassé qui ne peuvent faire l'objet d'une intervention judiciaire. Les cas qui se situent à l'une ou l'autre extrémité du spectre sont faciles à résoudre mais à mesure qu'on s'approche du centre, la tâche se complique. Il faut soupeser ce qui prêche pour ou contre la conclusion que la décision doit être soumise à un processus judiciaire. Des hommes raisonnables pesant les mêmes facteurs peuvent différer d'opinion, ce qui ne traduit pas l'incertitude ou le jugement *ad hoc*; cela reflète simplement la multitude de situations qui donnent ouverture aux décisions de nature administrative auxquelles doivent s'appliquer des principes raisonnablement bien définis.

Le professeur D. J. Mullan s'est exprimé sur ce point dans un article fouillé «*Fairness: the New Natural Justice?*» (1975), 25 U.T.L.J. 280, 300:

[TRADUCTION] Pourquoi ne pas traiter les problèmes d'impartialité et de justice naturelle de la façon suivante: plus l'on se rapproche du type de fonction qui exige de simples déterminations droit/fait et qui a de lourdes conséquences pour les personnes, plus l'exigence de protection par la procédure est justifiée, mais à mesure que l'on s'en éloigne pour s'approcher de décisions d'ordre général visant l'application de politiques, ordinairement du ressort d'un ministre du gouvernement, l'accent sur la procédure impartiale vient graduellement à disparaître. Cette disparition n'est toutefois pas marquée de frontières précises auxquelles pourrait aboutir un processus de classification irréaliste.

I should like now to evaluate each of the four criteria, which I have outlined, in relation to the decision of the Minister of National Revenue to authorize search and seizure pursuant to s. 231(4) of the *Income Tax Act*:

(1) There is nothing in the language in which the Minister's functions are conferred or in the general context which indicates a duty to notify the taxpayer or any other person, or to hold a hearing, before seeking approval of authorization to enter, search and seize. On the contrary, Parliament substituted for the rules of natural justice the objective test that the Minister, before acting, have reasonable cause to believe that a violation of the *Act* or regulation had been committed or was likely to be committed. See Lord Reid in *Ridge v. Baldwin*, [1964] A.C. 40 (H.L.), 78.

Recognizing that a right of search is in derogation of the principles of the common law, and open to abuse, Parliament also built into the legislation an immediate review of the ministerial decision by interposing a judge between the revenue and the taxpayer. The judge sits to scrutinize [with utmost care] the intended exercise of ministerial discretion. Lacking judicial approval the ministerial decision is without effect. Indication of parliamentary intention to deny the taxpayer the right to be heard at this stage, is the statement in s. 231 (4) that the judge is empowered to give approval on an *ex parte* application.

I take it that Parliament concluded, perhaps not unreasonably, that the imposition of procedural steps additional to those spelled out in s. 231(4) would frustrate the object of the section conferring the power and obstruct the taking of effective investigatory action. It obviously considered the public interest entailed in enforcement and the private interest affected by search and seizure, and concluded that procedural fairness was achieved by the section as drafted. For myself, I do not know what additional procedural protection could be given without frustrating parliamentary intent.

(2) The ministerial decision does affect rights even though such decision requires confirmation. It is wrong in my opinion to say that because a decision requires confirmation, rights therefore are not affected. Rights are affected when premises are entered and documents seized even though the Minister does not make any final determination of rights or duties.

(3) The decision of the Minister does not involve the adversary process. It is not the "triangular" case of A

J'aimerais maintenant procéder à l'évaluation de chacun des quatre critères que j'ai énoncés par rapport à la décision du ministre du Revenu national d'autoriser la perquisition et la saisie conformément au par. 231(4) de la *Loi de l'impôt sur le revenu*:

(1) Rien dans les termes utilisés dans la définition des fonctions du Ministre ou dans le contexte général n'indique une obligation d'informer le contribuable ou une autre personne ou de tenir une audience avant de faire approuver l'autorisation d'entrer, de chercher et de saisir. Au contraire, le Parlement a substitué aux règles de justice naturelle le critère objectif selon lequel le Ministre, avant d'agir, doit avoir des motifs raisonnables pour croire qu'une infraction à la *Loi* ou à un règlement a été commise ou sera probablement commise. Voir lord Reid dans l'arrêt *Ridge v. Baldwin*, [1964] A.C. 40 (H.L.), 78.

Reconnaissant qu'un droit de perquisition déroge aux principes de la *common law* et donne ouverture à des abus, le Parlement a également introduit dans la loi un examen immédiat de la décision du Ministre en faisant intervenir un juge entre le fisc et le contribuable. Le juge doit scruter [avec le plus grand soin] l'exercice envisagé du pouvoir discrétionnaire ministériel. A défaut d'approbation judiciaire, la décision ministérielle n'a aucun effet. Le texte du par. 231(4), selon lequel le juge a le pouvoir de donner son agrément sur présentation d'une demande *ex parte*, indique bien l'intention du Parlement de ne pas accorder au contribuable le droit d'être entendu à ce stade des procédures.

Selon moi, le Parlement a conclu, peut-être non sans raison, que l'imposition de procédures en sus de celles énoncées au par. 231(4) aurait pour effet de frustrer l'objectif de l'article qui accorde le pouvoir et d'empêcher une enquête efficace. Il a évidemment tenu compte de l'intérêt public qui requiert les sanctions et des intérêts privés touchés par la perquisition et la saisie et il a conclu que par sa rédaction, l'article assure la justice des procédures. Pour ma part, je ne vois pas comment une protection procédurale supplémentaire pourrait être ajoutée sans frustrer l'intention du Parlement.

(2) La décision du Ministre touche effectivement à des droits même si elle doit être confirmée. A mon avis, il est erroné de dire qu'aucun droit n'est touché parce qu'une telle décision exige une confirmation. Il y a atteinte à des droits dès que quelqu'un entre dans les lieux et saisit les documents même si le Ministre ne rend aucune décision finale sur des droits ou obligations.

(3) La décision du Ministre n'implique pas de procédure contradictoire. Il ne s'agit pas de la situation

being called upon to resolve a dispute between B and C. There is a dispute but not in an adversarial sense. The analogy of a court is entirely inappropriate. There are no curial procedural rules imposed by the legislation.

(4) The governing legislation is silent as to substantive rules to be observed in individual cases.

When one places in the balance the responses to the four questions, the result is a modified "yes" to question (2) and a "nil" return to each of the other three criteria, leading to the conclusion that the Minister's administrative and executive decision is not required to be made on a judicial or quasi-judicial basis.

Viewed from the broader perspectives of power, issue, and sanctions, it is difficult to conceive that the conclusion could be otherwise. The Minister is not exercising judicial power. I did not understand counsel for Coopers and Lybrand to argue for more procedural protection than that provided by s. 236(4), or to urge that the affected taxpayers should have been consulted before the Minister sought judicial approval of the authorization to enter. The argument was made that the ministerial decision, and the judicial approval, were based upon the same material, the latter being a judicial act, so also the former. Superficially, this argument is attractive, but I do not think it can prevail.

«triangulaire», où A est appelé à résoudre un différend entre B et C. Il y a un différend mais pas au sens de débat contradictoire. On ne peut faire aucune analogie avec un tribunal. La Loi n'impose aucune règle de procédure judiciaire.

(4) La loi applicable ne contient aucune règle de fond qui doit être observée dans les cas individuels.

Lorsqu'on met en regard les réponses aux quatre questions, on obtient un «oui» mitigé à la 2^e question et un «non» aux trois autres critères, ce qui amène à conclure que la décision de nature administrative du Ministre n'est pas soumise à un processus judiciaire ou quasi judiciaire.

Dans la perspective plus large du pouvoir, du litige et des sanctions, il est difficile de concevoir que la conclusion puisse être différente. Le Ministre n'exerce pas un pouvoir judiciaire. Je ne m'explique pas pourquoi l'avocat de Coopers and Lybrand plaide en faveur d'une meilleure protection procédurale que celle prévue par le par. 236(4) ou fait valoir que les contribuables visés auraient dû être consultés avant que le Ministre ne cherche à faire approuver judiciairement l'autorisation d'entrer. L'argument est que la décision du Ministre et l'approbation judiciaire sont fondées sur les mêmes documents et que puisque cette dernière est de nature judiciaire, il en est de même pour la première. A première vue, cet argument est séduisant, mais je ne pense pas qu'il puisse prévaloir.

The functions and powers of the Minister, and those of the judge, are entirely different. In carrying out the responsibilities with which he is entrusted under the *Income Tax Act*, the Minister discharges duties which are fundamentally administrative. He is invested with investigatory powers, including the right to audit, to request information and production of documents, and the right to authorize the conduct of an inquiry. Additional to these rights is the right conferred by s. 231(4) to authorize the entry and search of buildings. The power he exercises under s. 231(4) is properly characterized as investigatory, rather than adjudicatory. He will collect material and advice from many sources. In deciding whether to exercise the right last mentioned, he will be gov-

Les fonctions et pouvoirs du Ministre diffèrent entièrement de ceux du juge. En s'acquittant des responsabilités qui lui sont confiées par la *Loi de l'impôt sur le revenu*, le Ministre remplit des obligations qui sont fondamentalement de nature administrative. Il jouit de pouvoirs d'enquête, y compris le droit de vérifier les comptes, d'exiger des renseignements et la production de documents et le droit d'autoriser la tenue d'une enquête. A ces droits, s'ajoute celui qui est conféré par le par. 231(4) d'accorder l'autorisation d'entrer et de perquisitionner dans des bâtiments. On peut qualifier à bon droit le pouvoir qu'il exerce en vertu du par. 231(4) de pouvoir d'enquête plutôt que de décision. Il recueille des documents et des informations de multiples sources. Sa décision d'exercer le droit

erned by many considerations, dominant among which is the public interest and his duty as an executive officer of the government to administer the Act to the best of his ability. The decision to seek authority to enter and search will be guided by public policy and expediency, having regard to all the circumstances. The powers which the judge exercises are judicial when in review of ministerial administrative discretion.

It would be unusual to have available a review procedure prior to the application to the judge, because, in the absence of judge's approval, any decision on the part of the Minister to authorize seizure of documents is manifestly without effect. The judge's approval is the control on the Minister's decision, while any further recourse to the courts is to serve as a control on the judge's decision. This would appear to be a sensible reading of s. 231(4).

I am satisfied that in giving an authorization under s. 231(4) of the *Income Tax Act*, the Minister's actions are of an administrative nature, and that no obligation rests at law upon the Minister to act on a judicial or quasi-judicial basis. Hence the ministerial decision falls outside s. 28 of the *Federal Court Act* and is not subject to review by that court.

Jurisdiction in respect of the decision of the judge stands on a different footing. Acting pursuant to s. 231 of the *Income Tax Act*, he is discharging his institutional role as an impartial arbiter according to the stylized procedures and restraints of a court. The definition of "federal board, commission or other tribunal" in s. 2 of the *Federal Court Act* expressly excludes persons appointed under s. 96 of the *British North America Act, 1867*. Judge Zalev is such a judge. The vexing problem of whether a s. 96 judge is acting under the relevant legislation in the capacity of judge, or as *persona designata*, arose in *Herman v. Deputy Attorney General of Canada*. In reasons for judgment in *Herman*, recently delivered, I sought to canvass the governing authorities, which I will not again attempt. Upon the authorities, I concluded that a judge acts as *persona designata*

mentionné en dernier sera influencée par bien des considérations dont les principales sont l'intérêt public et son devoir d'agent du pouvoir exécutif d'appliquer la Loi de son mieux. La décision de chercher à obtenir l'autorisation de perquisitionner sera commandée par l'intérêt public et l'opportunité, compte tenu de toutes les circonstances. Les pouvoirs exercés par le juge sont judiciaires lorsqu'il examine la décision administrative discrétionnaire du Ministre.

Il serait curieux d'avoir une procédure d'examen avant la présentation d'une demande au juge puisque sans son approbation, toute décision du Ministre d'autoriser la saisie de documents est manifestement sans effet. L'approbation du juge est un moyen de contrôle de la décision du Ministre, tandis que tout autre recours devant un tribunal permet d'examiner celle du juge. C'est à mon avis une interprétation raisonnable du par. 231(4).

Je suis convaincu que la décision du Ministre d'accorder une autorisation en vertu du par. 231(4) de la *Loi de l'impôt sur le revenu* est de nature administrative et qu'en droit, le Ministre n'a aucune obligation d'agir de façon judiciaire ou quasi judiciaire. En conséquence, la décision du Ministre ne tombe pas sous le coup de l'art. 28 de la *Loi sur la Cour fédérale* et n'est pas sujette à examen par cette cour-là.

La question de compétence en ce qui concerne la décision du juge se pose de façon différente. Lorsqu'il agit aux termes de l'art. 231 de la *Loi de l'impôt sur le revenu*, il s'acquitte de son rôle institutionnel en sa qualité d'arbitre impartial conformément aux procédures et contraintes applicables à un tribunal. La définition de «office, commission ou autre tribunal fédéral» à l'art. 2 de la *Loi sur la Cour fédérale* exclut expressément les personnes nommées en vertu de l'art. 96 de l'*Acte de l'Amérique du Nord britannique, 1867*. Le juge Zalev tombe dans cette catégorie. La question controversée de savoir si un juge nommé en vertu de l'art. 96 agit en vertu de la loi pertinente en sa qualité de juge ou de *persona designata* a été soulevée dans l'arrêt *Herman c. Sous-procureur général du Canada*. Dans cet arrêt, rendu récemment, j'ai passé en revue la jurisprudence applica-

only if "exercising a peculiar, and distinct, and exceptional jurisdiction, separate from and unrelated to the tasks which he performs from day-to-day as a judge, and having nothing in common with the Court of which he is a member." A judge does not become *persona designata* merely through the exercise of powers conferred by a statute other than the provincial *Judicature Act* or its counterpart. Given its widest sweep, s. 28 could make subject to review by the Federal Court of Appeal, decisions or orders of provincial federally-appointed judges, pursuant to such federal enactments as the *Criminal Code*, the *Divorce Act*, or the *Bills of Exchange Act*. That could not have been intended.

It would seem to have been the will of Parliament, in enacting the concluding words of the relevant paragraph of s. 2 of the *Federal Court Act*, that ordinarily the acts of federally-appointed provincial judges, pursuant to authority given to them by federal statutes, will not be subject to supervision by the Federal Court of Appeal.

In *Herman*, the order under attack was one made by a s. 96 judge, pursuant to s. 232 of the *Income Tax Act*, and related to solicitor-client privilege. The Court concluded that the judge was acting *qua* judge, and not as *persona designata*. Although there are obvious points of difference, much of the reasoning in *Herman* applies with equal force in the present case leading to the conclusion that Judge Zalev was not a "federal board, commission or other tribunal."

The close functional relation between s. 231 and s. 232 of the *Income Tax Act*, and the decision in *Herman* as to s. 232, suggest that the same result should be reached in respect of the judge acting under s. 231.

In my opinion, the Federal Court of Appeal did not have a right of review in the case at bar. Whether an appeal lies to the provincial courts

ble, ce que je ne vais pas refaire. Me fondant sur la jurisprudence, je suis arrivé à la conclusion qu'un juge agit à titre de *persona designata* seulement s'il exerce «une compétence particulière, distincte, exceptionnelle et indépendante de ses tâches quotidiennes de juge, et qui n'a aucun rapport avec la cour dont il est membre». Un juge ne devient pas *persona designata* du simple fait qu'il exerce des pouvoirs conférés par une loi autre que la loi provinciale régissant la magistrature ou son équivalent. Si l'on donnait à l'art. 28 la portée la plus large, les décisions ou ordonnances de juges provinciaux nommés par le fédéral, rendues conformément à des lois fédérales comme le *Code criminel*, la *Loi sur le divorce* ou la *Loi sur les lettres de change*, seraient soumises à l'examen de la Cour d'appel fédérale. Ce ne peut être le but de cet article.

Il semble qu'en édictant les derniers mots de l'alinéa pertinent de l'art. 2 de la *Loi sur la Cour fédérale*, le Parlement ait voulu qu'ordinairement, les actes des juges provinciaux nommés par le fédéral, conformément aux pouvoirs qui leur sont conférés par des lois fédérales, soient soustraits au pouvoir de surveillance de la Cour d'appel fédérale.

Dans l'affaire *Herman*, l'ordonnance contestée avait été rendue par un juge nommé en vertu de l'art. 96, conformément à l'art. 232 de la *Loi de l'impôt sur le revenu* et avait trait au privilège des communications entre client et avocat. La Cour a jugé que le juge agissait à titre de juge et non de *persona designata*. Malgré des différences évidentes, une grande partie du raisonnement tenu dans l'arrêt *Herman* s'applique en l'espèce et conduit à la conclusion que le juge Zalev n'est pas un «office, commission ou autre tribunal fédéral.»

L'étroite relation fonctionnelle qui existe entre les art. 231 et 232 de la *Loi de l'impôt sur le revenu* et la décision rendue dans l'affaire *Herman* relativement à l'art. 232 suggèrent qu'il faut parvenir au même résultat en ce qui concerne un juge qui agit aux termes de l'art. 231.

A mon avis, la Cour d'appel fédérale n'avait pas de droit d'examen en l'espèce. Je préfère ne pas me prononcer sur la question de savoir si l'autorisation

from the authorization of the Minister and approval of a judge, pursuant to s. 231(4) of the *Income Tax Act*, is a question I would wish to leave open as it does not arise for decision in the present appeal. I would equally wish to leave for another occasion the question whether recourse could be had to replevin, or to one of the prerogative writs.

I would allow the appeal, set aside the judgment of the Federal Court of Appeal, dismiss the respondent's application with costs and restore the decision or order of the Director-General, Special Investigations Directorate, Department of National Revenue, Taxation, and Judge Carl Zalev. Pursuant to the terms upon which leave to appeal to this Court was granted, the costs of the application for leave to appeal, and of the appeal, should be paid by the appellant to the respondent on a solicitor and client basis.

Appeal allowed.

Solicitor for the appellant: R. Tassé, Ottawa.

Solicitors for the respondent: Wilson, Barnes, Walker, Montello, Beach & Morga, Windsor.

du Ministre et l'approbation d'un juge, conformément au par. 231(4) de la *Loi de l'impôt sur le revenu*, peuvent faire l'objet d'un appel devant les cours provinciales, car cette question n'est pas soulevée par ce pourvoi. Je préfère également que soit tranchée en une autre occasion la question de savoir si l'on peut recourir à une demande de mainlevée ou à l'un des brefs de prérogative.

Je suis d'avis d'accueillir l'appel, d'infirmier l'arrêt de la Cour d'appel fédérale, de rejeter avec dépens la demande de l'intimée et de rétablir la décision ou ordonnance du Directeur général de la Direction des enquêtes spéciales du ministère du Revenu national, Impôt, et du juge Carl Zalev. Conformément aux conditions de l'autorisation d'interjeter appel devant cette Cour, l'appelant paiera les dépens de l'intimée pour la requête en autorisation d'appel et ceux de l'appel en cette Cour, comme entre avocat et client.

Pourvoi accueilli.

Procureur de l'appelant: R. Tassé, Ottawa.

Procureurs de l'intimée: Wilson, Barnes, Walker, Montello, Beach & Morga, Windsor.

IN THE SUPREME COURT OF BRITISH COLUMBIA

In the Matter of the *Judicial Review Procedure Act*, R.S.B.C. 1996, Chap. 241 and in the Matter of the decision of Celia Francis, in her capacity as a delegate of the Information and Privacy Commissioner of British Columbia, dated March 31, 2003 (Order No. 03-14), made under the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, Chap. 165

Citation: ***British Columbia (Attorney General) v. British Columbia (Information and Privacy Commissioner) et al.***,
2004 BCSC 1597

Date: 20041203
Docket: L031378
Registry: Vancouver

Between:

The Attorney General of British Columbia

Petitioner

And:

**Information and Privacy Commissioner of British Columbia,
Ted Hayes, Robert C. Simson, Cary Corbeil, Steven Greenaway,
Brian Smith, Barry Kelsey, Thomas Venner, E.H. Hintz**

Respondents

Docket: L031340, L031346,
L031349, L031350, L031353,
L031355, L031356, L031388
Registry: Vancouver

Between:

**Robert C. Simson, Richard Macintosh, Steven Greenaway,
Brian Smith, Barry W. Kelsey, Thomas S. Venner,
Carey Corbeil and Al Hintz**

Petitioners

And:

**Information and Privacy Commissioner,
Minister of Management Services
and Royal British Columbia Museum**

Respondents

Before: The Honourable Mr. Justice Paris

Reasons for Judgment

Counsel for the Attorney General:

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and J. Tuck

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Counsel for the Petitioner, Corbeil:

P.C.M. Freeman, Q.C.
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Counsel for the Petitioner, Simson:

F. Falzon

Counsel for the Petitioner Smith and Greenaway:

D.N. Lyon

Counsel for the Information and Privacy
Commissioner of British Columbia:

A.R. Westmacott

Date and Place of Trial/Hearing:

October 12-15 and 19, 2004
Vancouver, B.C.

Introduction:

[1] In these proceedings there are applications by several persons (including the Attorney General of British Columbia) for an order pursuant to the **Judicial Review Procedure Act**, R.S.B.C. 1996, c. 241 to set aside an order made March 31, 2003 by a delegate of the Information and Privacy Commissioner for British Columbia. The delegate ordered the British Columbia Archives to process a request made pursuant to the **Freedom of Information and Protection of Privacy Act** R.S.B.C. 1996, c. 165 (FIPP Act) by a member of the public, Mr. Ted Hayes, for production of the incomplete draft report of the Smith Commission of Inquiry into the affairs of the Nanaimo Commonwealth Holding Society (NCHS). Mr. Hayes' request had been denied by the BC Archives and the delegate made the order pursuant to a review of that denial launched by Mr. Hayes pursuant to s. 52(1) of the **Act**.

[2] The petitioners (apart from the Attorney General) are persons referred to in various ways in the draft report and to whom "Notices of Adverse Interest Finding" had been delivered by the Commission, giving them an opportunity to respond to the proposed conclusions about them set out in the Notices and contained in the draft report. However, before that could be accomplished, the Commission was rescinded by Order-in-Council on June 22, 2001.

The History of the Smith Commission of Inquiry:

[3] The Smith Commission was created by provincial Order-in-Council on April 24, 1996. It came about as a result of information that had come to the attention of provincial government authorities that a society called the Nanaimo Commonwealth Holding Society had over the course of many years diverted proceeds from bingo games which it conducted to legally non-permitted uses. By the combination of the provisions of the **Criminal Code** related to gaming and provincial government regulations in British Columbia, 25 percent of the gross proceeds of such gaming had to be paid out for charitable purposes. A forensic audit conducted at the instance of the provincial government by Mr. Ron Parks

disclosed that, during the 1980s in particular, over 80 percent of the funds that should have been paid out to charities were diverted back to NCHS and used mainly to pay off debts arising from two real estate ventures, as well as for some other non-legitimate purposes.

[4] The terms of reference of the Commission were as follows:

1. To inquire into and report on the adequacy of past and present rules and restrictions governing the use of proceeds from licensed gaming and without restricting the generality of the foregoing to examine the use of proceeds from gaming for political purposes.
2. To inquire into and report on existing legislation including the **Society Act**, R.S.B.C. 1979, c. 390 and other rules and regulations governing the use of assets of societies and to make recommendations concerning any inadequacies found to exist so as to improve the supervision of directors and officers and the transparency of financial dealings of those societies.
3. To give particular attention under sections 1 and 2 above to the activities of the Nanaimo Commonwealth Holding Society and related entities and any other politically-linked organization in the Province of British Columbia.
4. To inquire into and report generally on the handling of matters related to the Nanaimo Commonwealth Holding Society and related entities by public bodies or officials since bingo licences were first issued in 1970.
5. To make recommendations for the better regulation of the matters referred to above including the form and content of legislation and administrative measures that may be necessary to implement these recommendations.
6. To ensure that the Inquiry is conducted in a manner that, in the opinion of the Commissioner, does not compromise any criminal investigation or the prosecution of any organization or individual.
7. To deliver a final written report of the Commissioner on or before March 31, 1997.

[5] In early 1997 because of ill health, the original Commissioner, Nathan T. Nemetz (previously the Chief Justice of British Columbia) was replaced by

Mr. Murray Smith, who had been legal counsel to the Commission. The original due date for the filing of the report of the Commission (March 31, 1997) was extended a total of six times, the last extension being to August 31, 2001. The Commission commenced public hearings in 1999. As mentioned, the Order-in-Council rescinding the Commission was issued on June 22, 2001 and on the same day, the Attorney General issued a statement which said in part the following:

This has been a long process, and it's time to bring the Smith Commission of Inquiry to an end. I don't think we'll learn anything more about gaming in B.C. by giving the commission more time and money.

The cost of the commission to date is about \$6 million, and another \$2 million could well be spent by year's end, including publicly funded legal fees for some of the people who received adverse findings from the commission. I do not believe the taxpayers would be well served by this additional expenditure and delay.

It's simply not in the interests of the public, or the public purse, to continue with this inquiry. It's time to close the book on the long nightmare of the Nanaimo Commonwealth Holding Society and move forward.

[6] In the following year, substantial changes were made to the legal framework of the gaming industry in British Columbia.

[7] The Order-in-Council establishing the Commission recites that it was established pursuant to s. 8 of the ***Inquiry Act*** R.S.B.C. 1996, c. 224, the relevant part of which reads:

8 Whenever the Lieutenant Governor in Council thinks it expedient, the Lieutenant Governor in Council may by commission titled in the matter of this Act, and issued under the Great Seal, appoint commissioners to inquire into the following:

...

(b) any matter connected with the good government of British Columbia, or the conduct of any part of the public business of it, including all matters municipal, or the administration of justice in British Columbia.

[8] The **Act** is an amalgamation of two older **Acts** and has been criticized as being obsolete. Section 8 is contained in Part 2 of the **Act**. Part 1 contains the following provisions:

- 1 The minister presiding over any ministry of the public service of British Columbia may at any time, under authority of an order of the Lieutenant Governor in Council, appoint one or more commissioners to inquire into and to report on
 - (a) the state and management of the business, or any part of the business, of that ministry, or of any branch or institution of the executive government of British Columbia named in the order, whether inside or outside that ministry, and
 - (b) the conduct of any person in the service of that ministry or of the branch or institution named, so far as it relates to the person's official duties.
- ...
- 4 (1) The commissioner or commissioners may allow a person whose conduct is being investigated under this Part, and must allow a person against whom any charge is made in the course of an inquiry, to be represented by counsel.
 - (2) A report must not be made under this Part against a person until the person
 - (a) has been given reasonable notice of the charge of misconduct alleged against the person, and
 - (b) has been allowed full opportunity to be heard in person or by counsel.

[9] It can be seen that investigations into conduct and charges of misconduct are specifically mentioned in s. 4 of Part 1 of the **Act**. No specific such language appears in Part 2. In **Rigaux v. British Columbia (Commission of Inquiry into the death of Vaudreuil-Gove Inquiry)** (1998) 155 D.L.R. (4th) 716 (B.C.S.C.), Allan J. of this Court, having found that the terms of reference of that Commission did not authorize findings of misconduct, said at para. 36:

Part II, which governed the Gove Inquiry, does not contemplate findings of misconduct and provides no procedural protections in the event that such findings are made. One important question, which was argued but must remain unanswered in these reasons, is whether it is open to a Commissioner to make findings of misconduct in a Part II inquiry; if so, do the statutory protections of notice, counsel and the right to be heard contained in Part I apply or, in the alternative, are common law principles or Charter rights available? A revision of the Act would eliminate these foreseeable difficulties.

[Emphasis mine]

[10] However the case of **Consortium Developments (Clearwater) Ltd. v. Sarnia (City)** [1998] 3 S.C.R. 3 should be noted. On November 23, 1992 the council of Sarnia, Ontario passed a resolution pursuant to s. 100(1) of the **Municipal Act**, R.S.O. 1990 c. M45 asking for a judicial inquiry into certain real estate transactions involving the municipality. Section 100(1) as reproduced in part at page 12 of the Judgment of the Supreme Court of Canada reads as follows:

100. — (1) Where the council of a municipality passes a resolution requesting a judge of the Ontario Court (General Division) to investigate [*the first branch*] any matter relating to a supposed malfeasance, breach of trust or other misconduct on the part of a member of the council, or an officer or employee of the corporation, or of any person having a contract with it, in regard to the duties or obligations of the member, officer, employee or other person to the corporation, or [*the second branch*] to inquire into or concerning any matter connected with the good government of the municipality or the conduct of any part of its public business, including any business conducted by a commission appointed by the municipal council or elected by the electors

In that passage the bracketed words “the first branch” and “the second branch” are the words of the Supreme Court itself.

[11] In dealing with concerns about procedural protections, the Court said at paragraph 29:

That having been said, the s. 100 Resolution is not a pleading, much less is it a bill of indictment. It creates a jurisdiction, but in the exercise of that jurisdiction the Commissioner is limited by the principles of procedural fairness, irrespective of whether or not these limits are

spelled out in the s. 100 Resolution. The application of these principles will, of course, depend upon the subject matter of the inquiry and the varying interests of those who appear to give evidence or who are otherwise caught up in the proceedings. The need for flexibility in the application of procedural fairness is evident in the spectrum of matters which are referred to in s. 100 itself. Witnesses who appear at a general policy inquiry to give expert evidence about, for example, municipal finances will likely have little need of procedural protection. An inquiry into a particular item of "public business", such as a tendering mishap, is more likely to impact on individual rights, and the procedure will be more strictly controlled in consequence. At the most sensitive end of the spectrum, where misconduct is alleged that may have the potential of civil or criminal liability (irrespective of whether the inquiry is a first branch inquiry or a second branch inquiry), the full strictures of natural justice will protect those who are reasonably seen as potential targets.

[Emphasis Mine]

[12] In the last sentence of that passage the Supreme Court seems to acknowledge virtually explicitly that findings of misconduct are permitted even under a general inquiry under s. 100(1) and that in such circumstances "the full strictures of natural justice" will be called for.

[13] In any event, it is clear what the view of Commissioner Smith was as to these questions. In September 1999, he published Rules of Procedure for the Commission hearings, paragraph 1 of which was as follows:

The Commissioner will inquire into those matters set out in the terms of reference. On the basis of oral and documentary evidence tendered during the hearings, the Commissioner will make findings of fact and may draw appropriate conclusions as to whether there has been misconduct and who appears to be responsible for it. The Commissioner's findings of fact and conclusions they contain cannot be taken as findings of criminal or civil liability.

[14] Presumably he relied on the third and especially the fourth terms of reference of the Order-in-Council establishing the Commission.

[15] In August 2000, counsel for the Commission issued "Notices of Adverse Interest Finding" to 22 persons. The petitioners in these proceedings (apart from the

Attorney General) are persons who were government officials in various capacities during the period with which the Commission was concerned. Each Notice set out proposed findings of fact and misconduct about that person and each person was invited to address the Commission with respect thereto by way of evidence and submissions. By a subsequent ruling on December 8, 2000, the Commissioner agreed that the contents of the Notices should be kept private until his final report was published (which remains the case to the present) and that he would hear such evidence and submissions under a publication ban. He also said:

The Commission of Inquiry's final report will be divided into two sections. The first section will contain a thorough chronology of events respecting NCHS since it received its first gaming licences in 1970. Based on the evidentiary record, I will make findings of fact. Where the evidence on a particular matter is in dispute I intend to resolve the controversy by making findings of fact or I will state it is not possible on the evidence available to resolve the fact in issue. Where I conclude that an individual has misconducted himself or herself, and that misconduct is directly related to the Terms of Reference, I intend to draw conclusions about that conduct. These conclusions may adversely affect the individual involved.

[16] And further:

I am intensely aware that some of my findings and conclusions may adversely affect the reputation of individuals and that for most people their reputation is their most highly prized attribute.

[17] And further:

It seems clear to me that it would be unfair, at this stage in the Inquiry's proceedings, to the Commission to say or do anything publicly that would imply that I have made a determination that an identified individual misconducted himself in the execution of public duties. In other words, I should not prejudge any individual's conduct, before all the evidence and submissions have been received and carefully considered.

[18] On May 4, 2001, in a ruling refusing a request for adjournment of the rebuttal hearings the Commissioner said:

On April 20, 2001 I released a 41 page set of written Reasons, addressing numerous jurisdictional arguments raised by counsel for eight present or former public servants (“the Applicants”), who received Notices of Adverse Interest Finding. I concluded that I have jurisdiction to make adverse findings, when required to carry out the mandate of the Inquiry, provided that the procedures adopted are fair to the individual involved. I also concluded that no action taken by the Inquiry has resulted in loss of jurisdiction to make adverse findings.

[19] At the time that the Commission was rescinded and its work brought to an end it had produced a substantial but incomplete draft report of its findings. The draft report, including the “Notices of Adverse Interest Finding”, were subsequently transferred to the British Columbia Archives.

[20] On October 12, 2001, the Archives received the above-mentioned request of Mr. Hayes for access to the draft report. By letter to Mr. Hayes dated December 12, 2001, the Ministry of Management Services refused the request advising him that the draft report was outside the scope of the **FIPP Act** by virtue of s. 3(1)(b) thereof which reads as follows:

Scope of this Act

3 (1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:

(b) a personal note, communication or draft decision of a person acting in a judicial or quasi-judicial capacity.

[21] As mentioned, Mr. Hayes asked for a review of that decision and pursuant to the **Act**, the Information and Privacy Commissioner (IPC) delegated the conduct of the review to Ms. Celia Francis.

The Delegate's Decision:

[22] The delegate was provided with a copy of the draft report which she described as “clearly an unfinished product, a draft”. Mr. Hayes, who was not represented by counsel, and counsel on behalf of the B.C. Archives made their submissions in writing to the delegate in May 2002. Counsel had a copy of the report. Mr. Hayes, of course, did not. It is, incidentally, 670 pages in length including the Notices of Adverse Interest Finding, although a number of those pages are copies of emails, heading pages, lists of names and the like. The parties to whom the Notices had been delivered were not given the opportunity to make submissions to the delegate, either personally or by counsel. The delegate delivered her order by way of written Reasons on March 31, 2003.

[23] The principal thrust of the delegate's Reasons was to find that in the conduct of the Inquiry the Commissioner had not been “acting in a judicial or quasi-judicial capacity” nor was the draft report a “draft decision” for the purposes of s. 3(1)(b) of the **FIPP Act**. It, therefore, did come within the scope of the **Act** and she ordered the B.C. Archives to process the applicant's request. This meant that the IPC would then have had to proceed to consider the request and determine whether, considering all the other provisions of the **Act**, the applicant was entitled to a copy of the report.

[24] I shall return later to the delegate's Reasons in more detail.

The History of these Proceedings:

[25] As mentioned, the petitioners seek an order pursuant to the **Judicial Review Procedure Act** quashing the delegate's order requiring the B.C. Archives to process Mr. Hayes' request for the production of the draft report. I have received a copy of the report and of the Notices of Adverse Interest Finding. On February 26, 2004 I ordered that counsel for the petitioners also be provided with copies thereof upon giving their undertakings to the Court that they would not disclose the contents of the report to anyone, including their own clients. The courts in Ontario have made such

orders in similar circumstances. Mr. Hayes is still not represented by counsel and I observed that if he had been, his counsel would also have been given copies of the draft report and Notices upon giving the same undertaking. I was advised by counsel that Mr. Hayes did not wish to appear before me on the hearing of these applications, although he did appear on the hearing of the application in February 2004. Counsel for the IPC appeared on these applications and defended the delegate's order.

Standard of Review of the Delegate's Order

[26] The jurisprudence from the Supreme Court of Canada has established that there is a spectrum of standards which the Courts must apply in exercising their review or appellate functions. It ranges from correctness of the decision in question, through reasonableness *simpliciter* to patent unreasonableness, depending on the legislative framework applicable. The position of the Attorney General and the other petitioners is that the strictest standard, i.e. correctness, is the standard that should be applied by the court in reviewing the delegate's interpretation of s. 3(1)(b) of the **FIPP Act**. Counsel for the IPC submitted that reasonableness applies in this case.

[27] I note parenthetically that the recently proclaimed **Administrative Tribunals Act**, S.B.C. 2004, c. 45, which evidently is intended as a codification of standards of review with respect to certain tribunals, does not apply in the circumstances of this case and does not affect the following analysis.

[28] Starting with **U.E.S. 298 v. Bibeault** [1988] 2 S.C.R. 1048, a series of judgments of the Supreme Court of Canada has established that to determine the appropriate standard of review in any given case a pragmatic and functional approach must be used. That approach has been defined by the Supreme Court as the weighing by the reviewing court of four factors:

- (a) the existence or non existence of a privative clause or a statutory right of appeal;
- (b) the expertise of the administrative body or decision maker;

- (c) the purpose of the legislation pursuant to which the latter operates; and in particular, the specific provision involved; and
- (d) the nature of the problem, that is, whether law or fact.

[29] The principal focus of the delegate's decision involved her interpretation of the words in s. 3(1)(b) cited above which limit the scope of the statute's operation. The heading of section 3, although of course not part of the operative words of the **Act**, is "Scope of this Act". Such an interpretation, it is submitted by the petitioners, involves a determination of law alone (given that the facts are not in dispute) and in this case the determination of law goes to the issue of the jurisdiction of the IPC himself.

[30] When such tribunals or bodies are called upon to interpret the words of a statute defining their own jurisdiction the reviewing courts have applied the standard of correctness. The most recent case in that regard referred to me by counsel is **Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services) et al.** (2004) 242 D.L.R. (4th) 193 (S.C.C.). Furthermore it was pointed out that previous cases in this province reviewing decisions under this **Act** and s. 3 in particular, have always applied the standard of correctness, although admittedly sometimes the issue of standard of review was conceded by counsel. (**Neilsen v. British Columbia (Information and Privacy Commissioner)** [1998] B.C.J. No. 1640 (B.C.S.C.); **Greater Vancouver Mental Health Service Society v. British Columbia (Information and Privacy Commissioner)** [1999] B.C.J. No. 198 (B.C.S.C.); **British Columbia (Ministry of Small Business, Tourism and Culture) v. British Columbia (Information and Privacy Commissioner)** [2000] B.C.J. No. 1494 (B.C.S.C.); and **Aquasource Ltd. v. British Columbia (Information and Privacy Commissioner)** (1998) 58 B.C.L.R. (3d) 61 (C.A.)).

[31] Counsel for the IPC submits, however, that that approach to jurisdictional questions and the last cited cases must be re-evaluated in the light of more recent judgments of the Supreme Court of Canada. It is said that they establish the "primacy" of the pragmatic and functional approach and make its use mandatory in

all cases of judicial review. (*Pushpanathan v. Canada (Minister of Employment and Immigration)* [1998] 1 S.C.R. 982; *Law Society of New Brunswick v. Ryan* [2003] 1 S.C.R. 247; and *Dr. Q. v. College of Physicians and Surgeons of British Columbia* [2003] 1 S.C.R. 226.)

[32] The older “categorical” approach is to be eschewed. At paragraph 22 of *Dr. Q.* the Court said:

To determine standard of review on the pragmatic and functional approach, it is not enough for a reviewing court to interpret an isolated statutory provision relating to judicial review. Nor is it sufficient merely to identify a categorical or nominate error, such as bad faith, error on collateral or preliminary matters, ulterior or improper purpose, no evidence, or the consideration of an irrelevant factor. Rather, the pragmatic and functional approach calls upon the court to weigh a series of factors in an effort to discern whether a particular issue before the administrative body should receive exacting review by a court, undergo “significant searching or testing” (*Southam, supra*, at para. 57), or be left to the near exclusive determination of the decision-maker. These various postures of deference correspond, respectively, to the standards of correctness, reasonableness *simpliciter*, and patent unreasonableness.

[33] And at paragraph 24:

The nominate grounds, language of jurisdiction, and ossified interpretations of statutory formulae, while still useful as familiar landmarks, no longer dictate the journey.

[34] And at paragraph 25:

For this reason, it is no longer sufficient to slot a particular issue into a pigeon hole of judicial review and, on this basis, demand correctness from the decision-maker.

[35] Counsel for the IPC submits that when the four factors of the pragmatic and functional approach (to which I shall return) are considered with respect to the circumstances in this case, particularly with respect to the somewhat amorphous concept of “quasi-judicial” action, a greater degree of deference by the court is called for and that the correct standard of review to be applied is reasonableness.

Applying that standard, it cannot be said that the delegate's Reasons and order were unreasonable and they must therefore be sustained.

[36] It is countered by the petitioners, however, that the ascendancy of the pragmatic and functional approach does not mean that considerations of proper statutory interpretation and jurisdiction *per se* are now entirely irrelevant. In **Pushpanathan**, the Court said at page 1005:

Although the language and approach of the "preliminary", "collateral" or "jurisdictional" question has been replaced by this pragmatic and functional approach, the focus of the inquiry is still on the particular, individual provision being invoked and interpreted by the tribunal. Some provisions within the same Act may require greater curial deference than others, depending on the factors which will be described in more detail below. To this extent, it is still appropriate and helpful to speak of "jurisdictional questions" which must be answered correctly by the tribunal in order to be acting *intra vires*. But it should be understood that a question which "goes to jurisdiction" is simply descriptive of a provision for which the proper standard of review is correctness, based upon the outcome of the pragmatic and functional analysis. In other words, "jurisdictional error" is simply an error on an issue with respect to which, according to the outcome of the pragmatic and functional analysis, the tribunal must make a correct interpretation and to which no deference will be shown.

[37] In subsequent decisions the Supreme Court of Canada has reinforced the position that on questions of pure law and the jurisdiction of municipal bodies, at least, correctness is the appropriate standard of review without need to engage in the pragmatic and functional analysis: **(Nanaimo) City v. Rascal Trucking Ltd.** [2000] 1 S.C.R. 342; **United Taxi Drivers' Fellowship of Southern Alberta v. Calgary** [2004] 1 S.C.R. 484)

[38] It is fundamental that, to use the words of counsel, "statutory bodies cannot incorrectly assume jurisdiction they do not have".

[39] I note also that the Supreme Court of Canada in *Dr. Q.*, while clearly putting paid to the pure categorical approach, did observe at paragraph 24:

Just as the categorical exceptions to the hearsay rule may converge with the result reached by the Smith analysis, the categorical and nominate approaches to judicial review may conform to the result of a pragmatic and functional analysis. For this reason, the wisdom of past administrative law jurisprudence need not be wholly discarded.

[40] In my view, whether jurisdictional issues are an exception to the pragmatic and functional approach, or whether it is that when the pragmatic and functional approach has been applied heretofore to jurisdictional questions the resulting standard of review has always been correctness, is academic in this case. That is so because the fundamental issue that had to be resolved in this case by the delegate was jurisdictional and I conclude that if the pragmatic and functional approach is followed the appropriate standard of review of her decision is correctness.

[41] I must note at this point that as to the process I must follow in that regard the decision of the Court of Appeal in the *Aquasource* case seems almost entirely on point and is extremely helpful, if not binding. In that case the standard of review of a decision of the IPC was determined to be correctness. The only difference is that in that case it was the application of s. 12 of the *Act* which was in issue rather than that of s. 3(1)(b). That difference, if anything, only serves to make the case more persuasive because the application of s. 3(1)(b) is even more clearly a jurisdictional issue than is that of s. 12 (which is in the part of the *Act* setting out exceptions to the right of access to public records).

1. Privative Clause:

[42] That there is no privative clause is now generally considered to be a neutral factor. However, at the very least, it can be said in this regard that there is no explicit direction from the legislature that a high degree of deference must be given as to the interpretation of s. 3(1)(b).

2. Expertise of the Decision Maker:

[43] A relatively greater degree of curial deference will be afforded to a tribunal of special expertise as the question involved approaches more closely to the heart of that expertise. What is involved here is not the specialized expertise required of and accumulated by the IPC in the operation of the **Act** generally. What is involved is a threshold question, namely the interpretation of terms defining his jurisdiction (“quasi-judicial” and “decision”). Ascertaining their meaning requires considerable legal analysis (cf. the delegate’s reasons) and there is nothing to indicate that the IPC is better equipped to do that than the Court.

3. The Purpose of the **Act** as a Whole, the Provision in Particular:

[44] The IPC’s delegate was required to resolve a dispute between the applicant and the public body concerning the proper interpretation of the **Act**. The Court of Appeal said in **Aquasource** that that “conflict resolution” was much more “bipolar” (between parties) than “polycentric” (resolving policy issues) and, therefore, the greater degree of deference called for by the latter is not appropriate here.

4. The Nature of the Problem: Law or Fact?

[45] The issue here involves one of virtually pure law. There is no dispute as to the terms of reference, what the Commission did or the contents of the draft report and Notices of Adverse Interest Finding. Again I note, as with regard to the second factor above, the terms required to be interpreted by the delegate did not relate to any special expertise of the IPC. The Court is in as good a position to resolve the legal questions at stake as was the IPC. Furthermore, that the terms “quasi-judicial” and “decision” may be somewhat vague does not make the process of determining their meaning in the context of this case any less an issue of law.

[46] I think that I should also take into account that the decision of this Court or of appellate courts in this case as to whether commissions of inquiry can be quasi-judicial in function could have significant precedential impact and entrain significant

implications as to the conduct of future commissions of inquiry. Again, in my view, it is better that such decisions be left to the courts.

[47] In sum, considering the nature of the questions the delegate had to resolve, the directions of the Supreme Court of Canada as to the primacy of the pragmatic and functional approach in matters of curial deference to decision making bodies, and that according to the Supreme Court of Canada “the central inquiry in determining the standard of review is the legislative intent of the statute creating the tribunal whose decision is being reviewed” (*Pushpanathan*, page 1004), I am completely satisfied that the standard of review that must be applied in this case is correctness.

“Acting in a Judicial or Quasi-Judicial Capacity”

[48] The delegate’s task, as mentioned, was to determine whether pursuant to s. 3(1)(b) of the *FIPP Act*, the draft report of the Commission was excluded from the scope of the *Act* because it was: (a) “a draft decision”; (b) “of a person acting in a ... quasi-judicial capacity”. I shall deal firstly with the second issue set out because that is the order in which the delegate dealt with them and that is how all the submissions of counsel were made to me.

[49] The difficulty that is manifest immediately is the determination of the meaning of, giving content to, the term “quasi-judicial” and to measure the activities of the Smith Commission against that definition. Evidently the term has a difficult history but it is generally used to describe administrative bodies and decision makers, as opposed to courts, from which the law will require some measure of judicial procedural conduct. But what determines whether such bodies or their activities can be characterized as “quasi-judicial” and can that characterization (or when does it, if ever) apply to the activities of a public inquiry?

[50] In the case of *Canada (M.N.R.) v. Coopers and Lybrand Ltd.*, [1979] 1 S.C.R. 495, the Supreme Court of Canada established certain guidelines for this

analysis. The core of the decision in this regard is, it seems to me, a “spectrum” analysis. At page 505 the Court says:

Administrative decision does not lend itself to rigid classification of function. Instead, one finds realistically a continuum. As paradigms, at one end of the spectrum are rent tribunals, labour boards and the like, the decisions of which are eligible for judicial review. At the other end are such matters as the appointment of the head of a Crown corporation, or the decision to purchase a battleship, determinations inappropriate to judicial intervention. The examples at either end of the spectrum are easy to resolve, but as one approaches the middle the task becomes less so. One must weigh the factors for and against the conclusion that the decision must be made on a judicial basis.

[51] The Court also formulated certain criteria at page 504 which have often been referred to since to assist courts in this determination:

It is possible, I think, to formulate several criteria for determining whether a decision or order is one required by law to be made on a judicial or quasi-judicial basis. The list is not intended to be exhaustive.

- (1) Is there anything in the language in which the function is conferred or in the general context in which it is exercised which suggests that a hearing is contemplated before a decision is reached?
- (2) Does the decision or order directly or indirectly affect the rights and obligations of persons?
- (3) Is the adversary process involved?
- (4) Is there an obligation to apply substantive rules to many individual cases rather than, for example, the obligation to implement social and economic policy in a broad sense?

These are all factors to be weighed and evaluated, no one of which is necessarily determinative.

[52] It is essential to note that the Court stated that the list is not exhaustive nor is the presence or absence of any of the criteria in any particular case necessarily determinative.

[53] In her analysis of this issue the delegate first concluded, considering the provisions of the *Inquiry Act* and the *Rigaux* case, that the Commission was not empowered to inquire into the conduct of individuals. She then reviewed the four criteria of *Coopers and Lybrand* and considered whether, in her view, they apply to the circumstances in this case. As to whether hearings were “contemplated” she held that the Commissioner was not “required” to hold hearings and “could have received submissions only in writing, had he chosen” and therefore “Commissioner Smith did not ... necessarily hold hearings within the sense intended in *Coopers and Lybrand*’. She next found that no rights would be affected by the publication of the findings of misconduct reflected in the draft report because reputation is not a right in the sense contemplated by *Coopers and Lybrand*. “One’s reputation is an aspect of one character or how one is perceived”, not a “legal right”. She held that the adversarial process was not involved because “the Smith Commission was acting in an investigative capacity. There were no allegations or charges to answer or prove”. The fourth criterion did not apply because even if the Commission had “an obligation to be procedurally fair, its role was ‘to inquire and report’ but not to apply substantive rules to individual cases.” Finally, she reiterated her view that the Commission was of the second of the “two major categories of Commissions of Inquiry” that is, one whose function is “to research and to formulate ... policy” rather than examine the conduct of public officials. She concluded:

In my view, a person acting in a judicial or quasi-judicial capacity is someone who is acting in a capacity to hear and decide legal rights, most frequently by issuing an adjudicative determination that resolves the legal interests of opposing parties. Commissioner Smith was not, for the above reasons, acting in either of these capacities.

[54] At this point it is useful to consider a later decision of the Supreme Court of Canada in **2747-3174 Québec Inc. v. Quebec (Régie des permis d’alcool)**, [1996] 3 S.C.R. 919. In that case the court said at paragraphs 22 and 23:

That being the case, it is now necessary to identify the tests for distinguishing functions that are quasi-judicial from those that are not. The debate surrounding this distinction was for a long time of great

importance in administrative law and resulted in numerous judicial decisions. Thus, the superior courts, owing inter alia to enactments requiring them to do so, relied on the distinction in order to determine what acts were subject to judicial review. The scope of the rules of natural justice then depended to a large extent on the characterization of the process by which the agency in question made its decision. However, this Court gradually abandoned that rigid classification by establishing that the content of the rules a tribunal must follow depends on all the circumstances in which it operates, and not on a characterization of its functions... As Sopinka J. noted in ***Syndicat des employés de production du Québec et de l'Acadie v. Canada (Canadian Human Rights Commission)***, [1989] 2 S.C.R. 879, at pp. 895-96:

Both the rules of natural justice and the duty of fairness are variable standards. Their content will depend on the circumstances of the case, the statutory provisions and the nature of the matter to be decided. The distinction between them therefore becomes blurred as one approaches the lower end of the scale of judicial or quasi-judicial tribunals and the high end of the scale with respect to administrative or executive tribunals. Accordingly, the content of the rules to be followed by a tribunal is now not determined by attempting to classify them as judicial, quasi-judicial, administrative or executive. Instead, the court decides the content of these rules by reference to all the circumstances under which the tribunal operates.

The distinction, which was often a source of confusion, is thus now less relevant. It is no longer applied unless a statute so requires. That was the case for a long time with the ***Federal Court Act***, R.S.C., 1985, c. F-7, and is still the case with s. 56 of the ***Charter***. The judgments of this Court based on the ***Federal Court Act*** thus continue to be important, as do the more general considerations relating to the quasi-judicial process put forward in other contexts.

[Emphasis Mine]

[55] And further at paragraph 25:

... a restrictive enumeration of the characteristics of a quasi-judicial decision is risky. As a general rule, no factor considered in isolation can lead to a conclusion that a quasi-judicial process is involved. Such a finding will instead be justified by the conjunction of a series of relevant factors in light of all the circumstances.

[56] It seems to me that Gonthier J. is there saying (as well as was alluded to in the “spectrum” analysis in **Coopers and Lybrand**) that to attempt a strict characterization as “quasi-judicial” in the abstract is not as important as deciding if in the given circumstances the rules of natural justice should apply. This approach of course blurs the boundaries between what is quasi-judicial and what is not, and may even make such a characterization unnecessary. But the fact remains that I have to determine what the word means in the **FIPP Act**. If I cannot fix upon a definition that is universally applicable then I must at least determine what it means for the purposes of this case.

[57] Firstly, I am afraid I must disagree in good measure with the delegate’s analysis of the applicability of the **Coopers and Lybrand** criteria.

Hearings:

[58] Commissioner Smith held 87 days of public hearings wherein 70 witnesses testified under oath. Such hearings are common at inquiries and, at the very least, “contemplated” by the **Inquiry Act** even if not absolutely required in every instance. If something closer to an adjudicative hearing was what the delegate meant was required, I note that the Commissioner did give the persons to whom Notices had been sent the right to be heard, to call rebuttal evidence and to cross-examine witnesses. I am satisfied that there were and would have been further hearings within the meaning of **Coopers and Lybrand**.

Rights Affected Directly or Indirectly

[59] One does have the legal right to a good reputation, assuming, of course, that it is merited. It is enforceable, as witness the common law action of defamation. If what the delegate had in mind was that there is no remedy for its breach against judges and inquiry commissioners for what they express in the course of their duties, my analysis would be that the right subsists, but, exceptionally, it is not enforceable against those specific individuals with respect to those specific statements. Furthermore, given that all the jurisprudence establishes that public inquiries

engaged in fault-finding must afford the benefit of the rules of procedural fairness to those involved, it must be that substantive legal rights as contemplated by the **Coopers and Lybrand** test are engaged in some way, most obviously, of course, the right to reputation.

Adversarial Process:

[60] Certainly the procedure of the Commission as a whole was not of the traditional common law model where opposing parties present their versions of the truth to an arbiter who then decides accordingly. But when it arrived at the stage with which we are concerned, of specific allegations of misconduct being delivered by Commission counsel to persons who were then invited to respond, it did develop an adversarial character or (if I may be forgiven) a quasi-adversarial character.

Substantive Rules to Individual Cases:

[61] The process of a public inquiry generally does not involve the usual judicial intellectual process of applying rules of general application to particular facts. But once embarked upon his review of the conduct of individuals, it is apparent from a perusal of the report that the Commissioner drew certain conclusions of legal misconduct as well as conclusions of violations of more general norms of behaviour.

[62] Next I observe that even if the enabling Order-in-Council recited that the Commission was constituted pursuant to Part 2 (s. 8) of the **Inquiry Act**, the fourth term of reference explicitly authorizes it to “inquire into ... the handling of matters related to the NCHS and related entities by public bodies or officials ...”. In my view that is a quite explicit mandate to inquire into the conduct of such persons with respect to the execution of their duties. So I must find, contrary to the delegate, that the Commissioner was not acting only “in an investigative or inquisitorial capacity” with respect to general policy matters, but also had the authority pursuant to the terms of reference to make findings and judgements of misconduct. Certainly he thought so, as is evident from his various rulings. I see no reason why an inquiry, this one in particular, cannot with respect to certain of its functions be policy oriented

or “poly-centric”, but with respect to others be something closer to or similar to a judicial body.

[63] I note here that in the *Rigaux* case, which concerned an inquiry into the policies and practices of the provincial Ministry of Social Services, but without any terms of reference authorizing findings of misconduct such as exist in this case, Allan J. nevertheless remarked that the Inquiry had a “quasi-judicial flavour”, noting the Commissioner’s own view that he was in fact conducting a quasi-judicial proceeding.

[64] I deal next with what is in my view probably the most compelling factor as to this issue. All counsel for the petitioners urged that I must consider, as well as what the Commissioner may or may not have been by law authorized or empowered to do pursuant to his terms of reference and the provisions of the *Inquiry Act*, but also the actions he actually took. It is said that given the consequences to the petitioners (and others) of the course which the Commissioner pursued, the words “acting in a ... quasi-judicial capacity” must be interpreted so as to require the court to take into account the manner in which he acted. I agree.

[65] From the passages from his various rulings which I have cited above it is obvious that the Commissioner intended to act in a judicial-like capacity. Presumably acting pursuant to the third and fourth terms of reference he explicitly set out to pass judgments on the conduct of individuals and in fact proceeded to weigh evidence, make findings of credibility and to pass such judgment on a good number of people. Twenty-two Notices of Adverse Interest Finding were sent out drawing conclusions and making statements—sometimes in forceful language—as to unlawful and unethical conduct. Undoubtedly alive to the consequences of such proposed findings to those concerned, he very fairly established extensive procedural safeguards—the right to cross-examine, to respond, to legal representation and publication bans. Some procedures he adopted and rulings he made were similar to those in court proceedings, including various rulings of law.

Under the **Inquiry Act** he had most of the powers and legal privileges of a Supreme Court judge.

[66] In a word, with respect to the issue of findings of misconduct, the Commissioner certainly acted and proposed to act “like” or “similarly” to a judge.

[67] Section 8 of the **Interpretation Act**, R.S.B.C. 1996, c. 238 reads:

Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

[68] The Supreme Court of Canada has reiterated the established approach to statutory interpretation in the **Monsanto** case at page 205, citing Driedger:

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.

[69] Counsel for the IPC submits that a purposive approach to statutory interpretation cannot override plain language read in context. I agree. However the problem here, as all acknowledged, is the vagueness of the term “quasi-judicial”.

[70] All are agreed that the purpose of s. 3(1)(b) is the protection of deliberative secrecy. One aspect of that is the need to protect the ability of those exercising judicial or quasi-judicial functions to express preliminary and tentative remarks and conclusions that might later have to be changed. The risk of their being published could have a constraining effect on the creative process. That consideration would apply to commissions of inquiry reviewing the propriety of conduct of individuals.

[71] However, deliberative secrecy is meant also to protect individuals who could be affected by the publication of such preliminary and tentative remarks. I am sure that any judge would acknowledge having made notes, comments or observations in memoranda, bench books or similar such places which subsequently turn out to be unsupportable and which should not be published, not just to avoid embarrassment

to the judge, but also because of the unfairness to third parties involved. That too would apply to commissions of inquiry engaged in judging the conduct of individuals. It seems to me to be especially so of the Smith Commission draft report which contains extensive but not final judgments of misconduct of many individuals who did not have, as the Commissioner intended, a full opportunity to defend themselves.

[72] For the above reasons, therefore, I conclude that in paragraph 61 of her reasons cited above the delegate ascribed too narrow a meaning to the words “acting in a ... quasi-judicial capacity” in s. 3(1)(b) of the **FIPP Act** and I conclude that the actions of the Commissioner in this case do come within the ambit of those words.

Draft Decision:

[73] The word “decision” on its face seems to be broad in scope, having different meanings in different contexts. The sixth edition of Black’s Law Dictionary defines it as follows:

Decision. A determination arrived at after consideration of facts, and, in legal context, law. A popular rather than technical or legal word; a comprehensive term having no fixed, legal meaning. It may be employed as referring to ministerial acts as well as to those that are judicial or of a judicial character.

[74] The eighth edition of Black’s, however, defines it somewhat more narrowly:

Decision, 1. A judicial or agency determination after consideration of the facts and the law; esp., a ruling, order, or judgment pronounced by a court when considering or disposing of a case. See JUDGMENT (1); OPINION (1). – **decisional**, adj.

[75] The delegate gave the word a fairly strict or narrow interpretation. Following is her conclusion in that regard:

I consider that a "decision" in the context of s. 3(1)(b) means a decision affecting someone's legal rights. It must actually decide or resolve something and *includes*, in my view, a decision, order,

adjudication or judgement in which, after hearing from the parties to a dispute, a decision-maker disposes of or adjudicates the matter by deciding the matter in favour of or against someone. The record in dispute in this case is not, in my view, a decision so understood and is not otherwise a "decision". Commissioner Smith's draft report was not deciding or determining anything to which the principle of deliberative secrecy would apply and which is the purpose behind the exclusion in s. 3(1)(b) of the Act. It is, in my view, a draft report following Commissioner Smith's investigation and hearings.

[76] Although she used the word "includes" in the second sentence of that passage (the italics are hers) the net effect of the language and her decision on the subject was to virtually identify the word with a purely adjudicative decision.

[77] The submission of counsel for the IPC was essentially that the report of the Commission would not be a decision as contemplated by s. 3(1)(b) because it would have no civil or legal consequences and therefore would effect no one's legal rights. The case of *Morneault v. Canada (Attorney General)* (2000) 189 D.L.R. (4th) 96 (S.C.R.) was referred to in which the Federal Court of Appeal expressed "difficulty" in viewing the findings of misconduct of the Somalia Inquiry as "decisions" for the purposes of s. 18.1(4)(d) of the *Federal Court Act* (powers of review). The trial court judge was firmly of the opinion that they were. The Court of Appeal's view in this regard is essentially *obiter dicta* because it found another section of the *Act* which provided for curial review. Furthermore the relevant passage must be considered in full:

I must confess to some difficulty in viewing the findings in issue as "decisions" within the meaning of the section. The decision in *Krever, supra*, suggests that the contrary may be true for, as has been seen, the findings of a commissioner under the *Inquiries Act* "are simply findings of fact and statements of opinion" that carry "no legal consequences", are "not enforceable" and "do not bind courts considering the same subject matter". In an earlier case, *R. v. Nenn*, [1981] 1 S.C.R. 631 at 636, 122 D.L.R. (3d) 577, it was held that the "opinion" required of the Public Service Commission under paragraph 21(b) of the *Public Service Employment Act*, R.S.C. 1970, c. P-32, was not a "decision or order" that was amenable to judicial review by this Court under section 28 [*Federal Court Act*, R.S.C. 1970, c. 10 (2nd Supp.)]. I must, however, acknowledge the force of the argument the other way, that the

review of findings like those in issue is available on the ground afforded by paragraph 18.1(4)(d) despite their nature as non-binding opinions, because of the serious harm that might be caused to reputation by findings that lack support in the record.

(Emphasis Mine]

[78] I find that the considerations concerning the meaning of “quasi-judicial” in s. 3(1)(b) apply very much to the determination of the meaning of the words “draft decision”.

[79] I note again the course which the Commissioner took. He was firmly of the opinion (apparently correctly) that he was empowered to make findings of misconduct. He did in fact draw conclusions and make judgments—legal and moral—about people’s conduct. To publish those findings would affect the reputations of those involved. Again, a purposive approach to legislative intention is called for to resolve any ambiguity which may exist (and which does exist in this instance). Contrary to what the delegate concluded, my view is that the contents of the draft report as to its findings of misconduct fall within the type of decision and decision-making process that the principle of deliberate secrecy as reflected in s. 3(1)(b) was meant to apply.

[80] The draft report was a draft decision for the purposes of s. 3(1)(b).

Conclusion:

[81] If one asks the question whether it was the purpose of s. (3)(1)(b) to exclude from the scope of the **FIPP Act**, the unfinished work of a rescinded public inquiry which was in the course of making findings of misconduct against various individuals as to serious matters, such individuals not having had the opportunity to respond fully, the answer, in my view, must be in the affirmative. One could ask, if the Commissioner had been persuaded that some or any of his preliminary opinions as to misconduct were wrong and if the Commission had proceeded to its conclusion and he had deleted those preliminary findings from his final report, could they

nevertheless be the subject of an application for access under the **Act**. That would not seem right.

[82] To summarize, I am completely satisfied that the incomplete draft report of the Smith Commission is excluded from the scope of the **Freedom of Information and Protection of Privacy Act** by virtue of s. 3(1)(b) because it is a draft decision of a person acting in a quasi-judicial capacity.

[83] Given my Reasons, I do not have to rule on the argument made by counsel that because the Commission has been “rescinded” and therefore must be considered as never having existed, it is not a public body for the purposes of the **Act**, and records emanating from it do not come within its ambit.

[84] The delegate’s order is set aside. The BC Archives need act no further on the applicant’s request for access to the draft report.

[85] I order that the *in camera* affidavit of Maria Dupuis to which are annexed the draft report and Notices of Adverse Interest Findings be sealed and it is to be unsealed only by order of a judge of this Court or a judge of the Court of Appeal.

“R.M.P. Paris, J.”
The Honourable Mr. Justice R.M.P. Paris

Taku River Tlingit First Nation v. British Columbia (Project Assessment Director),
[2004] 3 S.C.R. 550, 2004 SCC 74

Norm Ringstad, in his capacity as the Project Assessment Director of the Tulsequah Chief Mine Project, Sheila Wynn, in her capacity as the Executive Director, Environmental Assessment Office, the Minister of Environment, Lands and Parks, and the Minister of Energy and Mines and Minister Responsible for Northern Development

Appellants

v.

Taku River Tlingit First Nation and Melvin Jack, on behalf of himself and all other members of the Taku River Tlingit First Nation, Redfern Resources Ltd., and Redcorp Ventures Ltd. formerly known as Redfern Resources Ltd.

Respondents

and

Attorney General of Canada, Attorney General of Quebec, Attorney General of Alberta, Business Council of British Columbia, British Columbia and Yukon Chamber of Mines, British Columbia Chamber of Commerce, British Columbia Wildlife Federation, Council of Forest Industries, Mining Association of British Columbia, Aggregate Producers Association of British Columbia, Doig River First Nation, First Nations Summit, and Union of British Columbia Indian Chiefs

Interveners

Indexed as: Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)

Neutral citation: 2004 SCC 74.

File No.: 29146.

2004: March 24; 2004: November 18.

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

on appeal from the court of appeal for british columbia

Crown — Honour of Crown — Duty to consult and accommodate Aboriginal peoples — Whether Crown has duty to consult and accommodate Aboriginal peoples prior to making decisions that might adversely affect their as yet unproven Aboriginal rights and title claims — If so, whether consultation and accommodation engaged in by Province prior to issuing project approval certificate was adequate to satisfy honour of Crown.

Since 1994, a mining company has sought permission from the British Columbia government to re-open an old mine. The Taku River Tlingit First Nation (“TRTFN”), which participated in the environmental assessment process engaged in by the Province under the *Environmental Assessment Act*, objected to the company’s plan to build a road through a portion of the TRTFN’s traditional territory. The Province granted the project approval certificate in 1998. The TRTFN brought a petition to quash the decision on grounds based on administrative law and on its Aboriginal rights and title. The chambers judge concluded that the decision makers had not been sufficiently careful during the final months of the assessment process to ensure that they had effectively addressed the substance of the TRTFN’s concerns. She set aside the decision and directed a reconsideration. The majority of the Court of Appeal upheld the decision, finding that the Province had failed to meet its duty to consult with and accommodate the TRTFN.

Held: The appeal should be allowed.

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

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

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

Cases Cited

Applied: *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73; **referred to:** *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *R. v. Nikal*, [1996] 1 S.C.R. 1013; *R. v. Gladstone*, [1996] 2 S.C.R. 723; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010.

Statutes and Regulations Cited

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

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

Judicial Review Procedure Act, R.S.B.C. 1996, c. 241.

Mine Development Assessment Act, S.B.C. 1990, c. 55.

APPEAL from a judgment of the British Columbia Court of Appeal (2002), 211 D.L.R. (4th) 89, [2002] 4 W.W.R. 19, 163 B.C.A.C. 164, 267 W.A.C. 164, 98 B.C.L.R. (3d) 16, 42 C.E.L.R. (N.S.) 169, [2002] 2 C.N.L.R. 312, 91 C.R.R. (2d) 260, [2002] B.C.J. No. 155 (QL), 2002 BCCA 59, affirming a decision of the British Columbia Supreme Court (2000), 77 B.C.L.R. (3d) 310, 34 C.E.L.R. (N.S.) 209, [2000] B.C.J. No. 1301 (QL), 2000 BCSC 1001. Appeal allowed.

Paul J. Pearlman, Q.C., and Kathryn L. Kickbush, for the appellants.

Arthur C. Pape, Jean Teillet and Richard B. Salter, for the respondents Taku River Tlingit First Nation and Melvin Jack, on behalf of himself and all other members of the Taku River Tlingit First Nation.

Randy J. Kaardal and Lisa Hynes, for the respondents Redfern Resources Ltd. and Redcorp Ventures Ltd. formerly known as Redfern Resources Ltd.

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

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

Kurt J. W. Sandstrom and Stan Rutwind, for the intervener the Attorney General of Alberta.

Charles F. Willms and Kevin G. O'Callaghan, for the interveners Business Council of British Columbia, British Columbia and Yukon Chamber of Mines, British

Columbia Chamber of Commerce, British Columbia Wildlife Federation, Council of Forest Industries, Mining Association of British Columbia and Aggregate Producers Association of British Columbia.

Jeffrey R. W. Rath and Allisun Rana, for the intervener Doig River First Nation.

Hugh M. G. Braker, Q.C., and Anja Brown, for the intervener First Nations Summit.

Robert J. M. Janes and Dominique Nouvet, for the intervener Union of British Columbia Indian Chiefs.

The judgment of the Court was delivered by

THE CHIEF JUSTICE —

I. Introduction

1 This case raises the issue of the limits of the Crown’s duty to consult with and accommodate Aboriginal peoples when making decisions that may adversely affect as yet unproven Aboriginal rights and title claims. The Taku River Tlingit First Nation (“TRTFN”) participated in a three-and-a-half-year environmental assessment process related to the efforts of Redfern Resources Ltd. (“Redfern”) to reopen an old mine. Ultimately, the TRTFN found itself disappointed in the process and in the result.

2 I conclude that the Province was required to consult meaningfully with the TRTFN in the decision-making process surrounding Redfern's project approval application. The TRTFN's role in the environmental assessment was, however, sufficient to uphold the Province's honour and meet the requirements of its duty. Where consultation is meaningful, there is no ultimate duty to reach agreement. Rather, accommodation requires that Aboriginal concerns be balanced reasonably with the potential impact of the particular decision on those concerns and with competing societal concerns. Compromise is inherent to the reconciliation process. In this case, the Province accommodated TRTFN concerns by adapting the environmental assessment process and the requirements made of Redfern in order to gain project approval. I find, therefore, that the Province met the requirements of its duty toward the TRTFN.

II. Facts and Decisions Below

3 The Tulsequah Chief Mine, operated in the 1950s by Cominco Ltd., lies in a remote and pristine area of northwestern British Columbia, at the confluence of the Taku and Tulsequah Rivers. Since 1994, Redfern has sought permission from the British Columbia government to reopen the mine, first under the *Mine Development Assessment Act*, S.B.C. 1990, c. 55, and then, following its enactment in 1995, under the *Environmental Assessment Act*, R.S.B.C. 1996, c. 119. During the environmental assessment process, access to the mine emerged as a point of contention. The members of the TRTFN, who participated in the assessment as Project Committee members, objected to Redfern's plan to build a 160-km road from the mine to the town of Atlin through a portion of their traditional territory. However, after a lengthy process, project approval was granted on March 19, 1998 by the Minister of Environment, Lands and Parks and the Minister of Energy and Mines ("Ministers").

4 The Redfern proposal was assessed in accordance with British Columbia’s *Environmental Assessment Act*. The environmental assessment process is distinct from both the land use planning process and the treaty negotiation process, although these latter processes may necessarily have an impact on the assessment of individual proposals. The following provisions are relevant to this matter.

5 Section 2 sets out the purposes of the Act, which are:

- (a) to promote sustainability by protecting the environment and fostering a sound economy and social well-being,
 - (b) to provide for the thorough, timely and integrated assessment of the environmental, economic, social, cultural, heritage and health effects of reviewable projects,
 - (c) to prevent or mitigate adverse effects of reviewable projects,
 - (d) to provide an open, accountable and neutrally administered process for the assessment
 - (i) of reviewable projects, and
- . . .
- (e) to provide for participation, in an assessment under this Act, by the public, proponents, first nations, municipalities and regional districts, the government and its agencies, the government of Canada and its agencies and British Columbia’s neighbouring jurisdictions.

6 “The proponent of a reviewable project may apply for a project approval certificate” under s. 7 of the Act, providing a “preliminary overview of the reviewable project, including” potential effects and proposed mitigation measures. If the project is accepted for review, “the executive director must establish a project committee” for the project (s. 9(1)). The executive director must invite a number of groups to nominate members to the committee, including “any first nation whose traditional

territory includes the site of the project or is in the vicinity of the project” (s. 9(2)(d)). Under s. 9(6), the committee “may determine its own procedure, and provide for the conduct of its meetings”.

7 Redfern’s proposal was accepted for review under the former *Mine Development Assessment Act*, and a project committee was established in November 1994. Invited to participate were the TRTFN, the British Columbia, federal, Yukon, United States, and Alaskan governments, as well as the Atlin Advisory Planning Commission. When the *Environmental Assessment Act* was instituted, the Project Committee was formally constituted under s. 9. Working groups and technical sub-committees were formed, including a group to deal with Aboriginal concerns and a group to deal with issues around transportation options. The TRTFN participated in both of these groups. A number of studies were commissioned and provided to the Project Committee during the assessment process.

8 The project committee becomes the primary engine driving the assessment process. It must act in accordance with the purposes of a project committee, set out in s. 10 as:

- (a) to provide to the executive director, the minister and the responsible minister expertise, advice, analysis and recommendations, and
- (b) to analyze and advise the executive director, the minister and the responsible minister as to,
 - (i) the comments received in response to an invitation for comments under this Act,
 - (ii) the advice and recommendations of the public advisory committee, if any, established for that reviewable project,
 - (iii) the potential effects, and
 - (iv) the prevention or mitigation of adverse effects.

9 The proponent of the project is required to engage in public consultation and distribution of information about the proposal (ss. 14-18). After the period for receipt of comments has expired, the executive director must either “refer the application to the [Ministers] . . . for a decision . . . or order that a project report be prepared . . . and that the project undergo further review” (s. 19(1)). If a project report is to be prepared, the executive director must prepare draft project report specifications indicating what information, analysis, plans or other records are relevant to an effective assessment, on the recommendation of the project committee (s. 21(a)). Sections 22 and 23 set out a non-exhaustive list of what matters may be included in a project report. These specifications are provided to the proponent (s. 21(b)).

10 In this case, Redfern was required to produce a project report, and draft project report specifications were provided to it. Additional time was granted to allow the executive director and Project Committee to prepare specifications.

11 When the proponent submits a project report, the project committee makes a recommendation to the executive director, whether to accept the report for review or to withhold acceptance if the report does not meet the specifications. Redfern submitted a multiple volume project report in November 1996. A time limit extension was granted to allow extra time to complete the review of the report. In January 1997, the Project Committee concluded that the report was deficient in certain areas, and Redfern was required to address the deficiencies.

12 Through the environmental assessment process, the TRTFN’s concerns with the road proposal became apparent. Its concerns crystallized around the potential effect on wildlife and traditional land use, as well as the lack of adequate baseline

information by which to measure subsequent effects. It was the TRTFN's position that the road ought not to be approved in the absence of a land use planning strategy and away from the treaty negotiation table. The environmental assessment process was unable to address these broader concerns directly, but the project assessment director facilitated the TRTFN's access to other provincial agencies and decision makers. For example, the Province approved funding for wildlife monitoring programs as desired by the TRTFN (the Grizzly Bear Long-term Cumulative Effects Assessment and Ungulate Monitoring Program). The TRTFN also expressed interest in TRTFN jurisdiction to approve permits for the project, revenue sharing, and TRTFN control of the use of the access road by third parties. It was informed that these issues were outside the ambit of the certification process and could only be the subject of later negotiation with the government.

13 While Redfern undertook to address other deficiencies, the Environmental Assessment Office's project assessment director engaged a consultant acceptable to the TRTFN, Mr. Lindsay Staples, to perform traditional land use studies and address issues raised by the TRTFN. Redfern submitted its upgraded report in July 1997, but was requested to await receipt of the Staples Report. The Staples Report, prepared by August 1997, was provided for inclusion in the Project Report. The Project Report was distributed for review in September 1997, with public comments received for a 60-day period thereafter. However, the TRTFN, upon reviewing the Staples Report, voiced additional concerns. In response, the Environmental Assessment Office engaged Staples to prepare an addendum to his report, which was completed in December 1997 and also included in the Project Report from that time forward.

14 Under the Act, the executive director, upon accepting a project report, may refer the application for a project approval certificate to the Ministers for a decision

(s. 29). “In making a referral . . . the executive director must take into account the application, the project report and any comments received about them” (s. 29(1)). “A referral . . . may be accompanied by recommendations of the project committee” (s. 29(4)). There is no requirement under the Act that a project committee prepare a written recommendations report.

15 In this case, the staff of the Environmental Assessment Office prepared a written Project Committee Recommendations Report, the major part of which was provided to committee members for review in early January 1998. The final 18 pages were provided as part of a complete draft on March 3, 1998. The majority of the committee members agreed to refer the application to the Ministers and to recommend approval for the project subject to certain recommendations and conditions. The TRTFN did not agree with the Recommendations Report, and instead prepared a minority report stating their concerns with the process and the proposal.

16 After a referral under s. 29 is made, “the ministers must consider the application and any recommendations of the project committee” (s. 30(1)(a)), in order to either “issue a project approval certificate”, “refuse to issue the . . . certificate”, or “refer the application to the Environmental Assessment Board for [a] public hearing” (s. 30(1)(b)). Written reasons are required (s. 30(1)(c)).

17 The executive director referred Redfern’s application to the Ministers on March 12, 1998. The referral included the Project Committee Recommendations Report, the Project Approval Certificate in the form that it was ultimately signed, and the TRTFN Report (A.R., vol. V, p. 858). In addition, the Recommendations Report explicitly identified TRTFN concerns and points of disagreement throughout, as well as suggested mitigation measures. The Ministers issued the Project Approval

Certificate on March 19, 1998, approving the proposal subject to detailed terms and conditions.

18 Issuance of project approval certification does not constitute a comprehensive “go-ahead” for all aspects of a project. An extensive “permitting” process precedes each aspect of construction, which may involve more detailed substantive and information requirements being placed on the developer. Part 6 of the Project Committee’s Recommendations Report summarized the requirements for licences, permits and approvals that would follow project approval in this case. In addition, the Recommendations Report made prospective recommendations about what ought to happen at the permit stage, as a condition of certification. The Report stated that Redfern would develop more detailed baseline information and analysis at the permit stage, with continued TRTFN participation, and that adjustments might be required to the road route in response. The majority also recommended creation of a resource management zone along the access corridor, to be in place until completion of a future land use plan; the use of regulations to control access to the road; and creation of a Joint Management Committee for the road with the TRTFN. It recommended that Redfern’s future Special Use Permit application for the road be referred to the proposed Joint Management Committee.

19 The TRTFN brought a petition in February 1999 under the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, to quash the Ministers’ decision to issue the Project Approval Certificate on administrative law grounds and on grounds based on its Aboriginal rights and title. Determination of its rights and title was severed from the judicial review proceedings and referred to the trial list, on the Province’s application. The chambers judge on the judicial review proceedings, Kirkpatrick J., concluded that the Ministers should have been mindful of the possibility that their

decision might infringe Aboriginal rights, and that they had not been sufficiently careful during the final months of the assessment process to ensure that they had effectively addressed the substance of the TRTFN's concerns ((2000), 77 B.C.L.R. (3d) 310, 2000 BCSC 1001). She also found in the TRTFN's favour on administrative law grounds. She set aside the decision to issue the Project Approval Certificate and directed a reconsideration, for which she later issued directions.

20 The majority of the British Columbia Court of Appeal dismissed the Province's appeal, finding (*per* Rowles J.A.) that the Province had failed to meet its duty to consult with and accommodate the TRTFN ((2002), 98 B.C.L.R. (3d) 16, 2002 BCCA 59). Southin J.A., dissenting, would have found that the consultation undertaken was adequate on the facts. Both the majority and the dissent appear to conclude that the decision complied with administrative law principles. The Province has appealed to this Court, arguing that no duty to consult exists outside common law administrative principles, prior to proof of an Aboriginal claim. If such a duty does exist, the Province argues, it was met on the facts of this case.

III. Analysis

21 In *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73, heard concurrently with this case, this Court has confirmed the existence of the Crown's duty to consult and, where indicated, to accommodate Aboriginal peoples prior to proof of rights or title claims. The Crown's obligation to consult the TRTFN was engaged in this case. The Province was aware of the TRTFN's claims through its involvement in the treaty negotiation process, and knew that the decision to reopen the Tulsequah Chief Mine had the potential to adversely affect the substance of the TRTFN's claims.

22 On the principles discussed in *Haida*, these facts mean that the honour of the Crown placed the Province under a duty to consult with the TRTFN in making the decision to reopen the Tulsequah Chief Mine. In this case, the process engaged in by the Province under the *Environmental Assessment Act* fulfilled the requirements of its duty. The TRTFN was part of the Project Committee, participating fully in the environmental review process. It was disappointed when, after three and a half years, the review was concluded at the direction of the Environmental Assessment Office. However, its views were put before the Ministers, and the final project approval contained measures designed to address both its immediate and long-term concerns. The Province was under a duty to consult. It did so, and proceeded to make accommodations. The Province was not under a duty to reach agreement with the TRTFN, and its failure to do so did not breach the obligations of good faith that it owed the TRTFN.

A. *Did the Province Have a Duty to Consult and if Indicated Accommodate the TRTFN?*

23 The Province argues that, before the determination of rights through litigation or conclusion of a treaty, it owes only a common law “duty of fair dealing” to Aboriginal peoples whose claims may be affected by government decisions. It argues that a duty to consult could arise after rights have been determined, through what it terms a “justificatory fiduciary duty”. Alternatively, it submits, a fiduciary duty may arise where the Crown has undertaken to act only in the best interests of an Aboriginal people. The Province submits that it owes the TRTFN no duty outside of these specific situations.

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

25 As discussed in *Haida*, what the honour of the Crown requires varies with the circumstances. It may require the Crown to consult with and accommodate Aboriginal peoples prior to taking decisions: *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at p. 1119; *R. v. Nikal*, [1996] 1 S.C.R. 1013; *R. v. Gladstone*, [1996] 2 S.C.R. 723; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para. 168. The obligation to consult does not arise only upon proof of an Aboriginal claim, in order to justify infringement. That understanding of consultation would deny the significance of the historical roots of the honour of the Crown, and deprive it of its role in the reconciliation process. Although determining the required extent of consultation and accommodation before a final settlement is challenging, it is essential to the process mandated by s. 35(1). The duty to consult arises when a Crown actor has knowledge, real or constructive, of the potential existence of Aboriginal rights or title and contemplates conduct that might adversely affect them. This in turn may lead to a duty

to change government plans or policy to accommodate Aboriginal concerns. Responsiveness is a key requirement of both consultation and accommodation.

26 The federal government announced a comprehensive land claims policy in 1981, under which Aboriginal land claims were to be negotiated. The TRTFN submitted its land claim to the Minister of Indian Affairs in 1983. The claim was accepted for negotiation in 1984, based on the TRTFN's traditional use and occupancy of the land. No negotiation ever took place under the federal policy; however, the TRTFN later began negotiation of its land claim under the treaty process established by the B.C. Treaty Commission in 1993. As of 1999, the TRTFN had signed a Protocol Agreement and a Framework Agreement, and was working towards an Agreement in Principle. The Province clearly had knowledge of the TRTFN's title and rights claims.

27 When Redfern applied for project approval, in its efforts to reopen the Tulsequah Chief Mine, it was apparent that the decision could adversely affect the TRTFN's asserted rights and title. The TRTFN claim Aboriginal title over a large portion of northwestern British Columbia, including the territory covered by the access road considered during the approval process. It also claims Aboriginal hunting, fishing, gathering, and other traditional land use activity rights which stood to be affected by a road through an area in which these rights are exercised. The contemplated decision thus had the potential to impact adversely the rights and title asserted by the TRTFN.

28 The Province was aware of the claims, and contemplated a decision with the potential to affect the TRTFN's asserted rights and title negatively. It follows that the honour of the Crown required it to consult and if indicated accommodate the

TRTFN in making the decision whether to grant project approval to Redfern, and on what terms.

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

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

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

claim for negotiation establishes a *prima facie* case in support of its Aboriginal rights and title.

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

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

circumstances, and to a level of responsiveness to its concerns that can be characterized as accommodation.

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

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

34 The question is whether this duty was fulfilled in this case. A useful framework of events up to August 1st, 2000 is provided by Southin J.A. at para. 28 of her dissent in this case at the Court of Appeal. Members of the TRTFN were invited to participate in the Project Committee to coordinate review of the project proposal in November 1994 and were given the original two-volume submission for review and comment: Southin J.A., at para. 39. They participated fully as Project Committee members, with the exception of a period of time from February to August of 1995, when they opted out of the process, wishing instead to address the issue through treaty talks and development of a land use policy.

35 The Final Project Report Specifications (“Specifications”) detail a number of meetings between the TRTFN, review agency staff and company representatives in TRTFN communities prior to February 1996: Southin J.A., at para. 41. Redfern and TRTFN met directly several times between June 1993 and February 1995 to discuss Redfern’s exploration activities and TRTFN’s concerns and information requirements. Redfern also contracted an independent consultant to conduct

archaeological and ethnographic studies with input from the TRTFN to identify possible effects of the proposed project on the TRTFN's traditional way of life: Southin J.A., at para. 41. The Specifications document TRTFN's written and oral requirements for information from Redfern concerning effects on wildlife, fisheries, terrain sensitivity, and the impact of the proposed access road, of barging and of mine development activities: Southin J.A., at para. 41.

36 The TRTFN declined to participate in the Road Access Subcommittee until January 26, 1998. The Environmental Assessment Office appreciated the dilemma faced by the TRTFN, which wished to have its concerns addressed on a broader scale than that which is provided for under the Act. The TRTFN was informed that not all of its concerns could be dealt with at the certification stage or through the environmental assessment process, and assistance was provided to it in liaising with relevant decision makers and politicians.

37 With financial assistance the TRTFN participated in many Project Committee meetings. Its concerns with the level of information provided by Redfern about impacts on Aboriginal land use led the Environmental Assessment Office to commission a study on traditional land use by an expert approved by the TRTFN, under the auspices of an Aboriginal study steering group. When the first Staples Report failed to allay the TRTFN's concerns, the Environmental Assessment Office commissioned an addendum. The TRTFN notes that the Staples Addendum Report was not specifically referred to in the Recommendations Report eventually submitted to the Ministers. However, it did form part of Redfern's Project Report.

38 While acknowledging its participation in the consultation process, the TRTFN argues that the rapid conclusion to the assessment deprived it of meaningful

consultation. After more than three years, numerous studies and meetings, and extensions of statutory time periods, the assessment process was brought to a close in early 1998. The Environmental Assessment Office stated on February 26 that consultation must end by March 4, citing its work load. The Project Committee was directed to review and sign off on the Recommendations Report on March 3, the same day that it received the last 18 pages of the report. Appendix C to the Recommendations Report notes that the TRTFN disagreed with the Recommendations Report because of certain “information deficiencies”: Southin J.A., at para. 46. Thus, the TRTFN prepared a minority report that was submitted with the majority report to the Ministers on March 12. Shortly thereafter, the project approval certification was issued.

39 It is clear that the process of project approval ended more hastily than it began. But was the consultation provided by the Province nonetheless adequate? On the findings of the courts below, I conclude that it was.

40 The chambers judge was satisfied that any duty to consult was satisfied until December 1997, because the members of the TRTFN were full participants in the assessment process (para. 132). I would agree. The Province was not required to develop special consultation measures to address TRTFN’s concerns, outside of the process provided for by the *Environmental Assessment Act*, which specifically set out a scheme that required consultation with affected Aboriginal peoples.

41 The Act permitted the Committee to set its own procedure, which in this case involved the formation of working groups and subcommittees, the commissioning of studies, and the preparation of a written recommendations report. The TRTFN was at the heart of decisions to set up a steering group to deal with

Aboriginal issues and a subcommittee on the road access proposal. The information and analysis required of Redfern were clearly shaped by TRTFN's concerns. By the time that the assessment was concluded, more than one extension of statutory time limits had been granted, and in the opinion of the project assessment director, "the positions of all of the Project Committee members, including the TRTFN had crystallized" (Affidavit of Norman Ringstad, at para. 82 (quoted at para. 57 of the Court of Appeal's judgment)). The concerns of the TRTFN were well understood as reflected in the Recommendations Report and Project Report, and had been meaningfully discussed. The Province had thoroughly fulfilled its duty to consult.

42 As discussed in *Haida*, the process of consultation may lead to a duty to accommodate Aboriginal concerns by adapting decisions or policies in response. The purpose of s. 35(1) of the *Constitution Act, 1982* is to facilitate the ultimate reconciliation of prior Aboriginal occupation with *de facto* Crown sovereignty. Pending settlement, the Crown is bound by its honour to balance societal and Aboriginal interests in making decisions that may affect Aboriginal claims. The Crown may be required to make decisions in the face of disagreement as to the adequacy of its response to Aboriginal concerns. Balance and compromise will then be necessary.

43 The TRTFN in this case disputes the adequacy of the accommodation ultimately provided by the terms of the Project Approval Certificate. It argues that the Certificate should not have been issued until its concerns were addressed to its satisfaction, particularly with regard to the establishment of baseline information.

44 With respect, I disagree. Within the terms of the process provided for project approval certification under the Act, TRTFN concerns were adequately

accommodated. In addition to the discussion in the minority report, the majority report thoroughly identified the TRTFN's concerns and recommended mitigation strategies, which were adopted into the terms and conditions of certification. These mitigation strategies included further directions to Redfern to develop baseline information, and recommendations regarding future management and closure of the road.

45 Project approval certification is simply one stage in the process by which a development moves forward. In *Haida*, the Province argued that although no consultation occurred at all at the disputed, "strategic" stage, opportunities existed for Haida input at a future "operational" level. That can be distinguished from the situation in this case, in which the TRTFN was consulted throughout the certification process and its concerns accommodated.

46 The Project Committee concluded that some outstanding TRTFN concerns could be more effectively considered at the permit stage or at the broader stage of treaty negotiations or land use strategy planning. The majority report and terms and conditions of the Certificate make it clear that the subsequent permitting process will require further information and analysis of Redfern, and that consultation and negotiation with the TRTFN may continue to yield accommodation in response. For example, more detailed baseline information will be required of Redfern at the permit stage, which may lead to adjustments in the road's course. Further socio-economic studies will be undertaken. It was recommended that a joint management authority be established. It was also recommended that the TRTFN's concerns be further addressed through negotiation with the Province and through the use of the Province's regulatory powers. The Project Committee, and by extension the Ministers, therefore clearly addressed the issue of what accommodation of the TRTFN's concerns was

warranted at this stage of the project, and what other venues would also be appropriate for the TRTFN's continued input. It is expected that, throughout the permitting, approval and licensing process, as well as in the development of a land use strategy, the Crown will continue to fulfill its honourable duty to consult and, if indicated, accommodate the TRTFN.

IV. Conclusion

47 In summary, I conclude that the consultation and accommodation engaged in by the Province prior to issuing the Project Approval Certificate for the Tulsequah Chief Mine were adequate to satisfy the honour of the Crown. The appeal is allowed. Leave to appeal was granted on terms that the appellants pay the party and party costs of the respondents TRTFN and Melvin Jack for the application for leave to appeal and for the appeal in any event of the cause. There will be no order as to costs with respect to the respondents Redfern Resources Ltd. and Redcorp Ventures Ltd.

Appeal allowed.

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Solicitors for the respondents Redfern Resources Ltd. and Redcorp Ventures Ltd. formerly known as Redfern Resources Ltd.: Blake Cassels & Graydon, Vancouver.

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

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

Solicitor for the intervener the Attorney General of Alberta: Alberta Justice, Edmonton.

Solicitors for the interveners Business Council of British Columbia, British Columbia and Yukon Chamber of Mines, British Columbia Chamber of Commerce, British Columbia Wildlife Federation, Council of Forest Industries, Mining Association of British Columbia and Aggregate Producers Association of British Columbia: Fasken Martineau DuMoulin, Vancouver.

Solicitors for the intervener Doig River First Nation: Rath & Company, Priddis, Alberta.

Solicitors for the intervener First Nations Summit: Braker & Company, Port Alberni, British Columbia.

Solicitors for the intervener Union of British Columbia Indian Chiefs: Cook Roberts, Victoria.

Indexed as:

**Kelly Lake Cree Nation v. Canada (Minister of Energy and
Mines)**

**Re: The decision of The Ministry of Energy and Mines to permit
the use and occupation of Crown Land for the purpose of
constructing a well site, access road and associated camp site
and to conduct drilling operations (the "Amoco Marathon
Monteith" Application) Rendered July 23, 1998, And The Master
Licence #M00072 To Cut And Cutting Permit #1 Rendered August
27, 1998 (the "Amoco Monteith Cutting Permit")
AND S. 2(2)(a) and (b) Of The Judicial Review Procedure Act,
R.S.B.C., 1996, c.241**

Between

**Chief Cliff Calliou, on his own behalf and on behalf of all
other members of the Kelly Lake Cree Nation and the Kelly Lake
Cree Nation, petitioners, and**

**Ministry of Energy and Mines, Ministry of Forests and Amoco
Canada Petroleum Company Ltd., respondents,**

And between

**Chief Stewart Cameron, on his own behalf and on behalf of all
other Members of the Sauleau First Nations and the Sauleau
First Nations, petitioners, and**

**Ministry of Energy and Mines, Ministry of Forests and Amoco
Canada Petroleum Company Ltd., respondents**

[1998] B.C.J. No. 2471

[1999] 3 C.N.L.R. 126

83 A.C.W.S. (3d) 158

Vancouver Registry Nos. A982279 and A982280

British Columbia Supreme Court
Vancouver, British Columbia

Taylor J.

Heard: September 21-25, and September 28-30, 1998.

Judgment: filed October 23, 1998.

(101 pp.)

Indians, Inuit and Metis -- Duty owed to Indians by Crown -- Effect of Constitution Act -- Lands -- Protection of Indian rights -- Licence agreements -- Civil rights -- Freedom of conscience and religion -- Infringement of -- What constitutes.

Application by two First Nations groups for judicial review of the decision of the Ministry of Energy and Mines (MEM) and the Ministry of Forests to permit the use and occupation of crown land for gas well development. MEM granted a permit to Amoco to develop an exploratory gas well, while the Ministry of Forests granted a cutting permit for the development of an access trail to the well site. The First Nations took the position that the exploration activities would impact on their aboriginal, treaty and constitutional rights and that the Ministries breached a duty owed to the First Nations to consult with them in a meaningful way prior to making the decisions. The Ministries contended that a process of consultation did occur. An ethnic historical study was undertaken by certain First Nations groups with the agreement of MEM prior to the approval of the Amoco application. The report was discussed at a meeting that included First Nations and government representatives. An advisory committee consisting of representatives of the participants was struck and meetings, information sessions and trilateral discussions involving the First Nations, Amoco and the government occurred. Independent of the government consultation process with aboriginal peoples, Amoco developed a dialogue with the First Nations affected. Two of the First Nations groups concluded consultation agreements with the government. One of the First Nations, SFN, did not participate in the discussions and refused to complete an agreement indicating that the consultation process had not been meaningful. At issue was whether there had been procedural fairness in the decision making process and whether the issuance of the permit affected the First Nations' religious freedom because the permit had been granted in an area considered spiritually sacrosanct.

HELD: Application dismissed. The level of procedural fairness to be applied to the process depended upon the nature of the decision to be made, the relationship between decision maker and the party whose rights are affected, and the actual effect of the decision on the rights affected. The decision respected an area that had spiritual significance for the First Nations. The SFN had failed to respond to inquiries for information and simply demanded further studies. Consultation was a two-way process and given SFN's non-participation in the process, the government had determined that further consultation would not alter SFN's position and its decision to proceed was not unfair. The sanctity of the area to aboriginal people was a significant consideration and further studies would not likely have changed the significance of that consideration. There was no breach of procedural fairness. Nor was there any bias in the decision making process. There was no statutory requirement or duty imposed on the Crown to inform the First Nations as to who would make the

decision. While the decision was ultimately passed on to more senior bureaucrats, this did not constitute bias. There was no breach of the First Nations's constitutional right of freedom of religion. There was a dearth of evidence as to the carrying out of any religious practice in the vicinity of the well site. Section 2(a) of the Canadian Charter of Rights and Freedoms, 1982 did not protect the concept of stewardship of a place of worship under the protection of religious freedom. The conditions attached to the permits minimized the impact on the exercise of religious freedoms. The decision maker had not made any errors of fact or law.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, ss. 2(a), 7. Forest Act, s. 51.
Petroleum and Natural Gas Act, R.S.B.C. 1996, c. 361, s. 93.

Counsel:

S.B. Armstrong and L.A. Lacasse, for Amoco Canada Petroleum Company Ltd.
A. Donovan, for Chief S. Cameron and Sauteau First Nations.
P. Kennedy, for Chief C. Calliou and the Kelly Lake Cree Nation.
J. Hunter, Q.C. and C. Cheng, for the Minister of Energy and Mines & Minister of Forests.
L. Fast, for the West Moberly First Nation.

1 TAYLOR J.:-- This matter is respecting two applications for judicial review, pursuant to the Judicial Review Procedure Act, R.S.B.C. 1996, c. 241, brought by Two First Nations groups and their respective Chiefs, the Sauteau First Nations with Chief Cameron and the Kelly Lake Cree Nations with Chief Calliou.

2 These applications are for review of decisions made by Gerald German and Paul Gevatkoff. Mr. German, an acting assistant Deputy Minister and Director of the Petroleum Lands Branch at the Ministry of Energy and Mines, authorized development of an exploratory gas well near Mt. Monteith in north eastern British Columbia on July 28th, 1998. Mr. Gevatkoff, the acting District Manager and Operations Manager of the Dawson Creek Forest District of the Ministry of Forests, authorized a master licence to cut on August 23rd, 1998, and a cutting permit on August 27th, 1998, by which he authorized the felling of timber necessary for the development of a winter trail to provide access to a proposed gas well site.

3 The respondents are the respective two Ministries, being the Ministry of Energy and Mines (MEM) and the Ministry of Forests (MOF) and Amoco Canada Petroleum Company Limited (Amoco). Amoco was the applicant for the aforementioned authorizations and permits to drill an exploratory gas well on the slopes of Mt. Monteith.

4 Pursuant to orders made at the outset of these proceedings, these two applications for judicial review were heard together. The reason for this is that whilst there are some differences in underlying facts between the Saulteau First Nations (SFN) and the Kelly Lake Cree Nation (KLCN), there is also much common ground between the two applications.

5 The applications are singular in purpose. Both seek orders setting aside the two decisions made by the MEM and MOF, for further orders requiring the respondent Ministries to consult further with the applicants before any new decision is made regarding Amoco's application to develop an exploratory gas well as well as the necessary cutting permits to provide access to that wellsite.

6 Additional to the applicants, a third First Nation, the West Moberly First Nation (WM), sought and by consent of all parties obtained intervenor status. As I shall later observe in more detail, their position is not one of support for the applicants but rather to express a satisfaction with the processes that led to the granting of the authorization and permits. The parties to this matter all agree that the decision of Gerald German of MEM is the focal point for discussion and that the decision of Paul Gevatkoff of MOF is ancillary and should stand or fall with the German decision. This is because the Gevatkoff decision relied in large part upon that which was taken into account by German in approaching his decision making and, thus, governed by the same considerations that will be determinative of the German decision.

7 The position of the SFN and KLCN is that the exploration activities contemplated by this exploratory well authorized by the MEM decision will impact upon their aboriginal, treaty and constitutional rights. As a result, there was a duty upon those charged with the decision making responsibility to consult with them in a meaningful matter prior to making a decision. Meaningful consultation, it is argued, was not done.

8 Alternatively, it is argued that there has been an infringement of their constitutional rights under s. 2(a) and 7 of the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, which cannot be not justified.

9 The position of the respondents supported by Amoco and the intervenor, is that they have consulted with the applicants, the SFN, in a meaningful manner prior to any decision being made. With respect to the KLCN, the respondents state that there was no duty to consult.

10 It is upon that basis I now intend to review some of the historical and factual matrix upon which these judicial reviews should be determined.

11 Given the plethora of materials it is not possible in any detailed way to refer to the panalogy of discussions, correspondence and documentation that has been generated in this process. This review of this factual background is intended only to provide a general understanding of the extent or lack of any consultations that occurred prior to the dates of the decisions.

12 Amoco is a gas and oil exploratory company. It believes it has identified an area in north

eastern British Columbia that has possible natural gas deposits worthy of expenditures of substantial sums of money to determine whether, in fact, such deposits exist. That area lies approximately 50 miles to the west of a line drawn between Hudson Hope on the north and Chetwynd in the south.

13 A specific drill site lies between two mountains. The first is Mt. Monteith, which has an altitude of approximately 7,500 feet. The second is known by many names. Named by those unfamiliar with indigenous culture as the Beattie Peaks, they are also known by a more traditional name as the "The Mountains That Sit Together". These peaks are commonly known by both aboriginal and non-aboriginal peoples as the Twin Sisters and stand 6,855 feet in height. A proposed wellsite lies between these two mountains in a flattened area at approximately the 4,600 foot level. The wellsite is 3.8 kilometers from the closest of the two peaks of the Twin Sisters.

14 This is an area of undeveloped splendour. What human activity it has "seen" is confined to uses by aboriginal people for purposes that I shall later describe in more detail, but which involve hunting, fishing and the treatment of the area as an sanctuary. There is also the occasional non-aboriginal hunter or trapper who visits the area.

15 The John Hart Highway lies 30 kilometers to the south of this area and the closest human population is the WM First Nation reserve some 50 kilometers to the east. The nearest human activity with the effect of altering the original aspects of this area is approximately 14 kilometers to the east where a forest fire once occurred and where there has been some logging in the past. Access to this area is possible by Johnston Creek Road, a road maintained by the B.C. Forest Service and then Ranfire Road, a road built to gain access to the area of the fire and logging activity. Over the years, Ranfire Road has fallen to disrepair.

16 Access to the exploratory wellsite is proposed to be gained by the rehabilitation of Ranfire Road which extends 21 kilometers from Johnston Creek Road, and then from the end of Ranfire Road by the construction of a winter trail around 14 kilometers in length. That winter trail is to be constructed once the snow creates a base by cutting a swath through the forest site. The use of such road is thus seasonal and the theory is that, once there is no longer use for this road, it will be rehabilitated so that only a swath through the forest will be left where the road passed through it.

17 The area of the Twin Sisters and its surrounding terrain has been the subject of prophesy and mythology amongst aboriginal peoples. In order to understand the significance of this area to those who may be affected by its development, it is necessary to review the history of such prophesy. The lands surrounding the Twin Sisters have been occupied for many centuries by the Deneza aboriginal people. Other aboriginal peoples, in particular the Cree and the Saulteau, came to these lands over time and have intermingled and intermarried. The West Moberly (WM) First Nation members reside on a reserve at the west end of Moberly Lake. They are a First Nation of direct descendants from the Deneza people. A second First Nation, which is not a party or intervenor to these proceedings, but which will be affected by the decision is the Halfway First Nation, also formed of descendants of the Deneza First Nation people. They reside on a reserve on the Halfway River some

50 km north of Hudson Hope.

18 The SFN is a amalgam of Saulteau who came to this area in the late nineteenth century descending from Cree and Deneza people. Its members reside at the east end of Moberly Lake.

19 The KLCN assert that they are the descendants of the Iroquois, Cree and Dunne-Za. I am satisfied from the evidence filed in these proceedings that the Deneza and Dunne-Za are one and the same in terms of antecedents.

20 As evidenced by litigation in the Federal Court No. T1685/96, there is some division between the First Nations people who reside at Kelly Lake, which is 85 kilometers to the east of Moberly Lake. Members of the Kelly Lake Cree Nation (KLCN) formed this nation in 1996 following a separation from the Kelly Lake First Nation. That litigation in the Federal Court involves an assertion of Treaty 8 rights and is still before the Federal Court. It involves, inter alia, the question of who should advance the plaintiff's case and there remains an outstanding issue as to whether the KLCN or the Kelly Lake First Nation are the appropriate parties to this litigation.

21 The members of the KLCN which include some descendants of the Deneza assert that they have never "adhered" to the Treaty No. 8 and claims as part of their traditional land the Twin Sisters area. It is said that their oral history identifies Twin Sisters as an area of "utmost spiritual significance".

22 The Deneza custom, according to hereditary Chief Desjarlais of the WM First Nation of the original descendants of what he referred to as the Hudson Hope Band (the other being the Halfway River First Nation), is that the Deneza people are charged by a prophesy from their leader Matchecha to be stewards of the two mountains that sit together as a place of spiritual refuge. Chief Desjarlais also referred to the two peaks as the Twin Sisters.

23 There is some difference between the Deneza descendants as to whether hunting is permitted in the area of the Twin Sisters. According to the Saulteau version of the prophesy, hunting is permitted. However, it is not permitted in the West Moberly version of the prophesy. It is nevertheless clear on the evidence that this general area surrounding the Twin Sisters has a significant spirituality about it to First Nations people.

24 The Saulteau people moved from the Prairies to the area east of the Twin Sisters prior to the turn of the century. According to the affidavit evidence of various SFN members and elders, this was because of a vision of a prophet-like leader, Kakagoogenis. He led his people from Manitoba to the area known as "The Mountains That Sit Together" because of visions he had of this sanctuary and how to provide for his people in times of need.

25 Whether this prophesy is of more recent origin as suggested by the Saulteau history, or of more antiquity as suggested by the Deneza history is of little importance. Indeed, whether there has been a meshing of oral histories with the passage of time is also not of importance to these

proceedings. What is significant is that each aboriginal group has a history of spiritual reverence towards the area known as the Twin Sisters mountains and the surrounding area, however, the confines of that might be defined.

26 In 1898, the Federal government entered into treaties with a large number of geographic expired Indian bands. That document is known as Treaty No. 8. The SFN, the WM and the Halfway First Nations all recognize they are descendants of the signatories to that treaty. The KLCN does not.

27 Early in these proceedings in considering the admissibility of extrinsic evidence as to the determination of the treaty terms and interpretation of those terms, I ruled that this judicial review was not the place to determine the existence, limitation or extinguishment of any of the following rights: those existing under the treaty either in its written form or any oral form that it may have taken, aboriginal rights existing independent of treaty rights, nor the extent to which practices followed by various groups amounted to religious practice. I did so because the scope of the judicial review is inadequate for such determinations which must be made on the basis of evidence that has been exposed through the discovery process. Thus, apart from the determination of such rights as made in previous litigation where evidence was led, such as in *R. v. Badger*, [1996] 2 C.N.L.R. 77 (S.C.C.), or in *R. v. Sparrow*, [1990] 1 S.C.R. 1075, [1990] 3 C.N.L.R. 160, no determination of rights can be made here.

28 The simple issue to be determined in this review is where asserted rights may be affected by the decision, was there a duty to consult with either or both of the applicants before the decisions were made, and if so, whether there fulfillment of that duty.

29 The position of the Crown is that the duty to consult arises only in respect of aboriginal or treaty rights that have been established either through determination by the courts or by the acknowledgment of the Crown as to their existence. With respect to the SFN, the Crown accepts the SFN has treaty rights under Treaty No. 8, and that being so there is a duty on the Crown to engage in consultation with First Nations who may be affected by the decisions sought by Amoco.

30 The position of the Crown is that it does not accept that the filing of a treaty land entitlement claim, as permitted under the Treaty, requires the fulfilment of the duty to consult.

31 Under the guise of procedural fairness in the decision-making process and independent of the duty to consult, the SFN argues that being an entity affected by the decision, it was entitled to expect the process by which the decisions were made to be in good faith and without any basis for any apprehension of bias.

32 The Crown submits that this process is subsumed into the requirement to consult in a meaningful way, and that any consideration of administrative law requirements as to procedural fairness merely duplicates that which is to be considered under the duty to consult. The Crown's position, supported by Amoco, is that on any basis the process followed was a model of

consultation. While supporting that view, the WM urged that no template for consultation be set by this court given the need for flexibility in these types of situations which vary from decision to decision.

33 I now turn to consider what in fact was done in the process that led up to the decisions being made.

34 In 1987, Dome Petroleum and another oil company were granted a drilling license in the general area in which the Twin Sisters are located. Dome Petroleum was acquired in 1988 by Amoco. From time to time that drilling license was extended and it currently is scheduled to expire in May of 1999.

35 Non-drilling exploratory work has been undertaken by Amoco in the Twin Sisters - Monteith Mountain areas. By 1991, Amoco believed that it had identified certain anomalies indicative of the existence of a substantial deposit of gas. It applied to MEM that same year for permission to drill an exploratory gas well on the slopes of the Twin Sisters. This application to drill triggered a process by which aboriginal interests were required to be considered.

36 At times in the correspondence and memoranda, reference is made to both the Ministry of Employment and Investment (MEI) and the Ministry of Energy and Mines (MEM). As the process of consultation involved both of these Ministries on an interchangeable basis, MEI can be treated as an adjunct to MEM in this process given the decision was ultimately made by an official in MEM. I will simply make reference to involvement by either MEI or MEM by reference to MEM.

37 In the northeast portion of this Province there exists an association of Indian tribes/bands that are the descendants of the original parties to Treaty No. 8. This association is known as Treaty 8 Tribal Association (T8TA). It was with T8TA that MEM agreed that there should be an ethnic historical study undertaken prior to any approval of Amoco's application being considered. Thus, in 1992 this study was undertaken. By December of 1992, a report entitled "The Two Mountains that Sit Together, and Ethno Historical Overview" was completed. That report, some 132 pages in size with appendices amounting to a further 70 pages, was a study undertaken under the auspices of T8TA to assess the "traditional, cultural resources in the immediate and surrounding areas of the "Two Mountains That Sit Together". The area covered by the report encompassed an area that included the Twin Sisters, Mt. Monteith, McAllister and Mount Frank Roy, an area that according to the maps would cover a minimum of 150 square miles.

38 According to the executive summary, it involved elders, leaders and community members of three tribal groups who had cultural interests in the area, being the Dunne-za, Saulteau and Cree. Also among those who were consulted were such people as Madeleine Davis who filed an affidavit in these proceedings. While this report identified and involved the SFN, the WM and the Halfway First Nation people, it made no reference to the aboriginal people of Kelly Lake.

39 The report provides a detailed history, both archeological and modern, and includes the

migration of the Saulteau people begun in the 1870s to this area of the Twin Sisters. Much of the report concerns itself with the visions and prophecies that surround the Twin Sisters, and the importance of the area to aboriginal people along with their need to insure its preservation. The report chronicles concerns of elders of all three First Nations over any industrial development in this area.

40 The study identified as significant the shared beliefs of dreamers and/or prophets of the Dunn-za and Saulteau people as to the importance of the Twin Sisters to these aboriginal peoples. The report also made certain recommendations to the governments of British Columbia and Canada. As described on page 121 of the report these were broad in their implications and would involve further study. Underlying these proposals was the recommendation for a "moratorium in further industrial activity in the Upper Moberly/Carbon Water sheds [which] should help to minimize the potential for serious conflict and provide an opportunity to develop a mechanism for upholding the obligations assumed by the government and First Nations of Treaty 8."

41 The report was made public but the source material in large part and transcripts of interviews remained with the T8TA.

42 On December 17, 1993, a meeting was convened near Hudson Hope at which the Ethno historical study was discussed. That meeting involved the SFN including Chief Cameron, the WM, the Halfway River First Nation and the Assistant Deputy Minister from MEM. It was facilitated by the Arctic Institute of North America, a recognized facilitator in discussions between the Crown and aboriginal first nations peoples.

43 From the discussion of that meeting was formed the Co-Management Advisory Committee (CMAC). This committee had as its members two representatives from each of the SFN, the WM and the Halfway, officials from MEM and a representative from Amoco. The Chair was Mike Robinson of the Arctic Institute of North America. The minutes of the CMAC meetings over the next year show the slow development of an understanding between the participants. In a report to the Minister Ann Edwards dated the 4th of November, 1994, Mr. Robinson outlined his progress and at page 4 observed that the First Nations and Amoco "are desirous of trying out another well project in a less contentious area".

44 A reading of the CMAC report, dated November 4th, 1994, clearly evidences that each of the participants in this process not only had the opportunity but clearly did express their respective points of view. That progress included on site overnight visits by the participants. The SFN was represented at different times by two Chiefs, initially Chief Cameron who was one of the applicants in this judicial review, and latterly Chief Napoleon who succeeded him in an election.

45 The affidavit of Teresa Morris, one of the MEM participants, establishes that at no time was there any reference to the Kelly Lake people.

46 The immediate result of this CMAC report and its acceptance by the Ministry was that Amoco

would not be permitted to drill in the slopes of the Twin Sisters. Instead, Amoco would have to meet and conduct further meetings with the SFN and the other two First Nations. The Minister invited further discussions on ways to continue the discussions and addressed the concerns about the Twin Sisters area.

47 The government as a part of the broader resource management program funded the attendance of two T8TA representatives at a symposium on land use decision making in October of 1994. At that time correspondence between the Ministry and T8TA was addressed to Chief Cameron of the SFN.

48 As well, in late 1994, the government began a series of meetings with T8TA members on improvement in the consultation process and as a consequence of learning of a similar move initiated by private industry, encouraged T8TA representatives to meet with industry and government.

49 On March 13, 1995, the first trilateral discussions occurred involving First Nations, the government and Amoco. The SFN were represented at that meeting. Similar meetings also occurred later in 1995 with the expenses of T8TA representatives being funded by government. All was not well in this process and the active involvement of some of the First Nations declined. On July 20, 1995, the SFN representative did not attend and on that day it became clear that there was dissension between the objectives of the T8TA and individual First Nations. By a letter dated the 26th of July 1994 T8TA notified MEM of a suspension of discussions.

50 In May of 1995, MEM informed the SFN and the WM that a company had applied for petroleum and gas rights within the area covered by the CMAC report and that a public bidding would occur for the exclusive right to develop a well in the area. Chief Napoleon, then Chief for the SFN, by a letter dated the 17th of July 1995 addressed to Mr. German, informed MEM that it would be "without our approval of the posting" and gave a number of reasons, including concerns about "protection of our treaty resource use rights". The Chief also expressed the need for further impact evaluations.

51 On the 18th of July, 1995, Chief Napoleon wrote to the Minister in a broad but similar vein and summarized the position of the SFN, WM and Halfway as being "that the sacred and sustenance values of the Twin Sisters wilderness must be protected through immediate resolution of the above outstanding issues." He demanded direct meetings with the Minister.

52 MEM responded by asking the SFN for its comments as to the traditional activities practiced over the area and the potential conflicts oil and gas development would have upon these activities.

53 On August 9, 1995 at a meeting with MEM and Chief Napoleon with his council, Chief Napoleon informed MEM that T8TA did not speak for the SFN regarding the sacred area. It was suggested by MEM officials that the SFN should work within the land and resource management planning process through which special management zones were being developed providing areas

of low density development.

54 In October of 1995, MEM engaged an archeologist, Mr. Wilson. He, with the assistance of SFN members, Amoco and MEM recommended certain caveats be attached to the postings for oil and gas exploration sales.

55 Thereafter began a series of meetings which ran from October of 1995 to May of 1996 between the SFN representatives including Chief Napoleon, MEM and oil company representatives. These discussions contemplated a traditional use study of the area of the Twin Peaks and the terms of reference for such a study. The traditional use study (TUS) was undertaken in the period after January, 1996. Upon the government entering into a contribution agreement by which MEM and the MOF agreed to contribute some \$44,869, Phases I and II were undertaken.

56 There appears to have been some delay over the question of funding Phases III and IV while the government sought funds from the Forest Renewal B.C. Those phases, however, were never undertaken due to the inability of the SFN and the government to conclude a sub-agreement relating to information sharing. The reasons for this are in conflict. What is however of some import is that during the course of these discussions on this subject, Chief Napoleon was replaced by Chief Cameron in an election.

57 The reasons for this conflict regarding the information sharing agreement arose out of a misunderstanding between MEM and the SFN as to the effects of the information sharing agreement. The view of the government was that the agreements were political agreements or protocols between governments. From the perspective of the SFN, they provided a legal binding right and information acquired during the TUS that would remain solely with the SFN. In essence what MEM sought was a protocol. What the SFN sought was an agreement that preserved information and the title over information to itself.

58 By early 1997, the differences remained irreconcilable in terms of the completion of the information sharing agreement and thus the TUS did not proceed beyond Phase II.

59 In the fall of 1997, a broader TUS was undertaken between the government and T8TA. This study, which would incorporate that which was originally sought to be studied in respect of the SFN TUS superseded the need as far as the government was concerned to continue with the earlier SFN TUS. As noted in Ms. Morris's affidavit there was no need to fund two separate studies to acquire the same information. The Province had agreed with T8TA to contribute up to \$1,090,452 for this TUS. That study is presently underway and will render its report in 1999. As of December, 1997, the SFN had indicated to T8TA and their study staff their wish to participate in this TUS.

60 On January 17, 1996, MEM in a memorandum from Dave Johnson, manager of its field operations, committed to the SFN that, given the problems in the discussions surrounding the information sharing agreement, it would require as an interim step that all gas and oil companies consult with the SFN on all activities to be carried out in this general area including the areas

known as the Twin Sisters as defined in the CMAC report. Attached to that memorandum was a map identifying the area as "Priority A area" and referring to that area as a Saulneau First Nations Resource Management Area.

61 Parallel to the SFN TUS and prior to the failure to reach an agreement on information sharing precipitating its demise other consultations occurred between the government and the SFN. In April of 1996, MEI held a seminar for members of the SFN entitled "Everything You Have Ever Wanted to Know About the Oil and Gas Industry". The object of this seminar was to inform SFN members about the industry, land use and the need for consultation. As observed by Chief Napoleon, the then Chief of the SFN, it was "a must for all sides to learn about each other and as a start to forming a working relationship".

62 Then in June of 1996, Chief Napoleon and a resource consultant for the SFN, Chris Bazant, attended a seminar on aboriginal issues in northeastern British Columbia held for the benefit of industry representatives.

63 The Twin Sisters Management Committee (TSSMC) was established in April of 1997 following CMAC Report which identified the Twin Sisters areas one of uniqueness in terms of aboriginal history, cultural and spiritually. The purpose of the TSSMC was to make recommendations later to be incorporated into a larger resource management plan for the Dawson Creek area. The process by which the Committee developed its report and recommendations filed eventually in October of 1997 included the involvement of the three First Nations, various government ministries, two forest companies and Amoco. Its purpose in terms of the Twin Sisters area was to provide direction to all parties as to how this area as defined in the CMAC Report was to be handled in terms of the conflicting values involved. The Report also recognized the potential of natural resources in the area as had the broader CMAC Report.

64 The SFN, along with the other First Nations, were invited to attend the first meeting which occurred between the 14th and 17th of April, 1997. SFN did not attend by reason of conflicts which had occurred within the SFN itself.

65 On April 21st, the TSSMC's initial draft recommendations for land usage were discussed among the participants by a teleconference, attended by Chief Napoleon of the SFN. Subject to minor amendments that were eventually made, Chief Napoleon and other participants approved the draft Report.

66 The Report refers to various areas within the general region of the Twin Sisters that had been identified in the CMAC Report. The first was a protected area that was defined as an area immediately surrounding the Twin Peaks. On a map found on Exhibit B to the Affidavit of Mr. Laing, it is an area bounded in red and referred to as the "protected area". A second larger area outside the protected area is bounded in green and is referred to as Level 1 Special Management Area. The third area is referred to as Level 2 Special Management Area and encompasses the first two areas. It is bounded in blue and is the original area identified in the CMAC Report.

67 Following the April 21st, 1997 telephone conference on the draft TSSMC Report, Chief Napoleon informed Mr. Laing of Amoco that he would obtain comments about the recommendations from the members of the SFN, its land use committee and band council. Nothing further was heard from the SFN. Thereafter the SFN ceased in any form to participate in the TSSMC discussions. Ultimately those discussions were formulated into a report that was signed on October 31st, 1997 by all of the original participants except for the SFN.

68 The TSSMC Report recommended certain usages for various lands, which have been proposed to be incorporated into the Dawson Creek land use resource management plan.

69 Throughout the submissions of counsel, the term the "Twin Sisters area" was often used without specific description. It is clear from the affidavit evidence that the area referred to as the Twin Sisters when used by the SFN refers to that contained in the original CMAC Report, being the area encompassed by the Level 2 or blue bound area on the map attached to Mr. Laing's affidavit. For those who participated in the TSSMC discussions, a more precise reference to the area is used in which differentiations occur between the protected area, Level 1 and 2 management areas.

70 In the summer of 1996, Amoco proposed to drill close to Mt. Monteith, away from its earlier choice of the Twin Sisters slopes and began the process of formulating its application for a permit to drill and cut timber to provide access to the proposed wellsite.

71 On March 3rd, 1997, MEM wrote to each of the three first nations and in particular Chief Napoleon of the SFN to inform them of the fact that Amoco was preparing an application that would trigger a review process in which the issue of the spirituality and environment of the Twin Sisters would be of major concern.

72 On February 19th, 1997, the president of Amoco wrote to the three First Nation Chiefs informing them of Amoco's intended application and invited their participation in what he then described as the Carbon Creek Interagency Projects Committee. This Committee was later to become the Mt. Monteith Interagency Projects Committee (MMIPC). This Committee was to be made up of MEM staff to ensure that issues facing Amoco were addressed prior to its application being submitted. By May 20th, 1997, the Committee had defined its terms of reference and its membership was to include staff from the four Ministries and Amoco. It also assigned to MEM the responsibility of leading consultations with the First Nations. In addition, MMIPC was to seek input from other community groups who had an interest in this area.

73 Much criticism is leveled by the SFN at this Committee by reason of the exclusion of first nations from its membership notwithstanding the letter of February 19th, 1997. According to Mr. Ouellette, a planning officer with MEM, this committee was a technical committee of government agencies and for that reason was never intended to involve the First Nations directly. The participation of Amoco was confined to what was described as an "information receiver and provider". Others, including First Nations were to be invited and present their views upon the application.

74 MMIPC did in fact meet with various First Nation representatives. On October 14th, 1997 a meeting was held in which the three First Nations, T8TA and other users of the area as well as government officials and Amoco attended. Chief Cameron asserts that he was not invited but only came because he had incidentally heard of it. That is not borne up by a letter of invitation sent to him by fax on two occasions dated October 7th, 1997, extending an invitation to him. The Minutes of that meeting reveal a mistrust and misunderstanding of the purposes of MMIPC by the various First Nations. Complaints expressed during those Minutes range from a complaint of insensitivity regarding First Nation issues to such specific concerns as the trap line operated by Chief Cameron's brothers.

75 Prior to this meeting, however, Amoco had undertaken various studies from 1994 through to 1997. For example, Amoco had retained and funded an environmental assessment a study of large mammals and the effect the winter trail would have upon them. An archeological impact study was also performed.

76 Representatives of the SFN were invited in June of 1997 to participate in the archeological study funded by Amoco by providing monitors regarding the impact of the winter trail upon the environment. They declined to respond and monitoring was then done by the WM on behalf of themselves and the Halfway River First Nations.

77 Amoco also funded a study at a cost of some \$5,000 to consider a proposed study by Chief Cameron's brothers, Sandy and Dwayne. This was done through the auspices of the T8TA for the purposes of assessing the effect of this proposed development upon their trap lines.

78 Further funding of the proposed study came to nought when it became apparent that, quite apart from the issue of compensation, the dates of the study would extend far beyond a time line envisioned by Amoco for its completion. It was not an unrealistic inference. The purpose of this extended completion date was a tactic designed to stall the process as undertaken leading up to the point in time when a decision would be made. Reinforcing my view of this is the fact that, when asked to provide particulars of their trap lines and catches, the two brothers' response was that they could not do so because they kept no records as they did not have to pay income tax. While that in itself is a true statement it would be a rare day that a trapper would not know which trap on which day or days caught which animals. Such information is essential to the efficient functioning of a trap line.

79 On April 9th, 1997, Amoco had provided the SFN and others with a draft of its intended application. By April 25th, 1997, Gary Miltenberger, a manager with MEM, had been apprised of the impending application. In a letter to him of that day, Mr. Dryer of the Ministry of Forests informed him that the KLCN had filed a lawsuit in the Federal Court regarding land claims issues.

80 On June 4th, 1997, Amoco filed its application for authorization of a drill and exploratory well below Mt. Monteith. On the 27th and 29th of September, 1997, supplements to this application were also filed.

81 Copies of this application were delivered to the SFN on June 25th, 1997, and the supplements were delivered to the SFN on the same dates that they were sent to MEM, the West Moberly and Halfway First Nations being September 27 and 29, 1997.

82 Independent of the government consultation process with aboriginal peoples, it is the practice of the government to require direct consultations between the potentially affected First Nations and natural resource developers. Thus, exclusive of any consultation with government, Amoco developed a dialogue with the SFN and the other First Nations involved.

83 Following the filing of the application on June 4th, 1997, Amoco wrote to the SFN seeking its comments about the application and on July 25th, 1997, a two day meeting was held with Chief Cameron, four other SFN representatives and three Amoco representatives. The Minutes of that meeting record and reflect a well-expressed concern about the location of the drill operation relative to the Twin Sisters.

84 The subject was again revisited at a similar meeting that took place in September of 1997 at the Muskitt Learning Centre at the SFN Reserve on Moberly Lake and again on September 9th, 1997, where all three First Nation Chiefs representatives gathered together.

85 Amoco further discussed the matter with the SFN itself on September 19th, 1997. The transcript of that meeting evidences two recurrent themes from Amoco's perspective: the concern over the TSSMC process, and the need to consult with the SFN people. This indicated to Amoco that it and the government needed to know SFN's concerns in a more particular way and where the SFN felt that it not had a sufficient consultation regarding those concerns.

86 It is not without some significance that on September 11th, 1997, Chief Desjarlais wrote to Amoco as follows:

Please accept this letter as formal acknowledgement that in respect of the Mt. Monteith planning and exploration stage consultation process between yourselves and the West Moberly First Nations consultation has now been successfully completed. In keeping with the terms and conditions of the Cooperation Agreement between the West Moberly First Nations and Amoco, a level of dialogue has occurred that assures West Moberly First Nations that the pre- exploration issues have been addressed.

We would like to thank you and your staff for the understanding and patience in achieving resolution to such an important concern for this Nation.

Could you please inform your team that have worked so hard for Amoco on this project that their diligence and honesty has resulted in this acknowledgement and

that this is the first time any oil company has ever successfully completed a process that allows us to formally ratify a consultation process.

We recognize that this is only the beginning of what we feel must be ongoing communication within the scope of this project to ensure the proper protection and respect to the Twin Sisters mountains.

87 On October 22nd, 1997, Mr. Laing of Amoco reported to MEM the extent of its consultation with the First Nations on the Monteith project. That report summarizes the meetings held with the three potentially affected First Nations, namely the SFN, WM and Halfway. The report observed that the SFN leadership, as distinct from those of the other two First Nations, as being "very uncomfortable with the consultation process" and with the then ongoing TSSMC process that had been started sometime ago. It also chronicles a history of meetings, information sessions, work done with various First Nations and consultations that have occurred since 1991.

88 Despite the SFN's participation in various meetings with Amoco efforts to have the SFN meet with MEM officials (in particular, Mr. Ouellette), and to provide information in a specific sense as to how the Monteith Mountain Project might affect their members met with little response from Chief Cameron.

89 A fax on July 25th, 1997 to Chief Cameron seeking a meeting on trap lines went unresponded to. Later, on August 6th, 1997, Mr. Ouellette attended at the SFN office and spoke with Band Councillor, Vern Lalonde, and sought their participation with MEM in discussions about the Monteith Well Project. Again, he received no response. By September 9th, 1997, Mr. Ouellette had met with elders and members of the Halfway First Nation and the SFN to discuss the TSSMC Report and the Monteith Mountain Project. Apart from the general concerns raised previously with Amoco the issue of revenue sharing was raised for the first time. Following that meeting, Chief Cameron agreed to meet on September 22nd with Mr. Ouellette, Mr. Miltenberger, and Band Councillors. Notes taken by Mr. Ouellette revealed a concern about the size of the protected area set out in the TSSMC Report.

90 The concerns of Chief Cameron were that the SFN did not have sufficient resources to participate in a consultant process. He raised the issue of the trapline study and that the SFN did not "have enough information about the Amoco project." Chief Cameron was asked to provide a written articulation of the concerns of his people. No such correspondence was ever received. Mr. Ouellette had declined to fund a consultant to advise on the consultation process, but offer to make available to the SFN a member of his staff to advise on the technical aspect of the project, an offer not taken up by the SFN at anytime prior to Chief Cameron's attendance at the MMIPC on October 14th, 1997.

91 On October 24th, 1997, despite the absence of the requested letter from the SFN, Mr. Miltenberger compiled a list of what he believed to be the specific concerns expressed by SFN's

members over the past month. That letter to Chief Cameron contained some 13 specific matters that Mr. Miltenberger had sent to Amoco on October 20th and whose response he incorporated into that letter.

92 Mr. Miltenberger's letter was followed by another dated November 7th, 1997, in which he summarized what had happened between 1991 and 1997. That letter, in my opinion, provides an accurate summary of the plethora of memorandum, letters, minutes of meetings and discussions that had occurred between the government and the SFN in that timeframe. It does not include what directly occurred between the SFN and Amoco. Miltenberger concluded his letter as follows;

To date, MEI has not received a written response to articulate your concerns or to answer the questions MEI left with you during our September 22 meeting. For your convenience, page 5 of this letter details the questions provided to you during that meeting, and I ask you to provide me with a written response within ten days (by November 17, 1997). Alternatively, or in addition to your written response, if you would prefer a face-to-face meeting, my staff and I are willing to meet with you and your council, or a designate, within this ten day frame (by November 17, 1997), to discuss these questions and your response.

MEI believes that First Nations have had an opportunity to provide input into a well proposed on Amoco's tenure (Drilling Licence 181) since 1991, the year Amoco first proposed a wellsite (not the same wellsite location proposed in Amoco's Mt. Monteith well authorization application), and that First Nations, including the Sauteau have been presented with opportunities to provide specific input into Amoco's Mt. Monteith application. Given these facts, MEI believes it will be in a position to make a decision about Amoco's Mt. Monteith well authorization application shortly after November 17, 1997.

93 A letter in a similar vein was sent to the two brothers of Chief Cameron as to the state of information regarding how the project would affect them.

94 Chief Cameron responded by letter dated November 14th, 1997. The letter has an assertive tone and clearly expresses SFN's opposition to this project. In particular, it expresses disagreement over the project and the area set aside as a protected area. It did, however, provide responses to seven questions posed in a September 22nd letter of Mr. Miltenberger's and sought a deferment of the decision on the authorization.

95 Mr. Miltenberger responded on December 4th, 1997 to concerns expressed in that letter when he set forth the information that had been provided to the SFN and other First Nations in respect of the seven areas. In the penultimate paragraph of that letter, he reiterated that the SFN had been presented with several opportunities to provide specific input into the application. Miltenberger sought a response by December 18th.

96 Chief Cameron responded by letter dated December 17th. That letter followed the delivery by the Supreme Court of Canada with reasons for judgment in *Delgamuukw v. The Queen*, [1997] 3 S.C.R. 1010 and expressed two conflicting themes. The first was a rejection of the idea there had been meaningful consultation to that point, but that with such consultation "matters can be resolved", and the second that the Twin Sisters area defined in the CMAC Report was sacrosanct. It is clear from that letter that the SFN rejected the proposals and consensus with respect to the development of those areas contained within the TSSMC Report. Chief Cameron in that letter also complains of a lack of consultation and the fact the SFN had "only just recently reviewed the Supreme Court of Canada's judgment and required some weeks to do so."

97 This letter of December 17th, 1997, also asserts bad faith, bias and that there had only been "an attempt at mere consultation".

98 Given that both the WM and Halfway First Nations in 1995 and 1996 had each concluded consultation agreements with the Province of British Columbia, the cause for the absence of such an agreement with the SFN lies I find in a fundamentally different approach held by the SFN from the other First Nations, not with respect to any approach by the Province.

99 As observed by Chief Desjarlais of the WM, because of fundamental differences and values, the WM had terminated joint discussions with the SFN and Amoco in favour of separate negotiations with Amoco alone. Such was the basis of the relationship with the Province in December, 1997.

100 Having absented themselves from the consultative process involving the government, WM and Halfway, the SFN continued to press their fundamentally different approach one of adamant resistance to any development.

101 Despite this view with respect to the government, the SFN had, however, continued to meet directly with Amoco up until mid-September of 1997.

102 Miltenberger did not respond to this letter until March 20th, 1998. By then, the period of time sought in Chief Cameron's letter of at least four weeks had long since passed, sufficient to permit a response to Miltenberger's earlier correspondence of December 4th. As of March 20th, 1998, there still had been no response and again he sought SFN input when he wrote:

As we have indicated to you in previous correspondence, MEI has undertaken a number of attempts and initiatives to gain your First Nations input into the specific Amoco well application. The proposed application includes construction of 14 kilometres of new temporary winter access. A total of approximately 1.5 kilometres of new winter road is within the Cameron trapline. Full reclamation of the winter access will take place in the event the well is non-commercial. Monitors from the SFN and West Moberly First Nations assisted in the preliminary alignment route selection of the winter road in order to avoid

_____ [word missing] and trapping areas, traditional use areas, and important wildlife areas. The Archeological Impact Assessment conducted on the proposed access route and wellsite concluded no archeological sites were in conflict with the proposed route. Three traditional use sites were identified in the vicinity. Two were not impacted. The proposed access has been re-routed to avoid the third site. These sites were not located within the Cameron Trapline.

MEI has asked the SFN to define treaty rights impacts, in specific terms, which you see occurring as a result of this proposed project. To date, the SFN has not identified any specific treaty rights impacts to consider in this application. As you know, in our joint February 6, 1998 Letter of Agreement, MEI and T8TA and its member First Nations agreed:

- (e) to identify and process on a priority basis those projects which are of particular importance to either party.

MEI views this project being of particular interest to the Province. As result, please notify us immediately of any specific treaty rights impacts of this project. Otherwise, the information which has been gathered through various processes will be used to make a decision on this application in the near future. You will, of course, be notified of the decision that is made.

103 In late 1997, because of the importance of this project, Cheryl Brooks as Assistant Deputy Minister of Economic Development with MEM began to involve herself in discussions with the First Nations. Following a meeting of November 26th, 1997 with the T8TA members of which SFN was a participant, Ms. Brooks met with the SFN and some of its members at Moberly Lake on January 17th, 1998.

104 Opposition to this project was clearly evident. Ms. Brooks offered the SFN access to any information they still required to assess the Monteith Project's potential for impact upon treaty rights. Under an agreement reached February 6th, 1998, the Province paid \$195,695.00 to the SFN to fund a gas and oil referral officer and reimburse Chief Cameron and others for work done. On March 24th, Brooks met again with Chief Cameron at a ceremony to sign the February 6th agreement. She reiterated at that time the need for the SFN to consider the Monteith Project and that the Province wanted to make a decision by June of 1998.

105 On April 20th, 1998, a meeting occurred between Brooks and Chief Cameron and in a telephone discussion, Brooks invited the SFN oil and gas referral officer to attend at a MEM regional office to review the Ministry's files. There is no evidence that this ever occurred, but on April 29th at a T8TA meeting, Brooks again undertook to provide the SFN with any documents that

it required to determine the potential impact of the Mt. Monteith Project upon its treaty rights.

106 This topic was again revisited during a May 6th meeting between MEM, the SFN and Amoco. In that meeting, SFN representatives did not request documentation nor provide any such information as was being sought by Ms. Brooks, but continued to express opposition to the project.

107 The offer to provide documentation and information was further extended in a meeting between Ms. Brooks and Chief Cameron on May 21st and 22nd, at which other subjects were discussed. Chief Cameron informed Ms. Brooks that he would advise her if the SFN required any further information. Nothing further was heard from the SFN.

108 Finally on June 8th, Ms. Brooks prepared a list of documents relating to the Mt. Monteith Project and forwarded this to Chief Cameron and Chief Maas of the T8TA.

109 On June 13th Chief Cameron wrote to Premier Clark and Minister Stewart of the Federal Indian and Northern Affairs. That letter referred to a treaty land entitlement claim (TLE) filed the previous year. It mentioned to the Twin Sisters and enclosed a outlined map based upon the original CMAC identification of the Twin Sisters area. It demanded that there be no disposition pending resolution of the TLE. Its opposition to any development in the outlined areas was clear and unequivocal.

110 On the same day, a letter with a similar message was sent to Miltenberger. Page 3 of that letter recognizes the government's discretion in terms of approval: "...In the event you exercise your discretion to reject Amoco's application, Amoco has little or no legal recourse against the Crown."

111 On June 15th, Chief Cameron requested all the documents referred to in Ms. Brooks' June 8th letter and these were sent to him by June 18th. Coincidental with that, Laurel O'Neal of the T8TA attended at the MEM regional office to review its files with respect to the Monteith application.

112 Ms. Brooks deposes to her being informed by Chris Bazant, a former SFN employee, that there had been a meeting some years prior between the SFN and the WM in which the major interests of the SFN were said to lie to the east of its Reserve and those of West Moberly to the west of the SFN Reserve. This discussion is disputed by Mr. Bazant, whose denial is asserted in terms of his not being an employee of the SFN at the time and, as such, he had no authority to speak on behalf of SFN issues. He denies as well as ever having had such a conversation. The significance of this is a passing reference in the decision by Gerald German to the "subordination of interests", a matter that he later observed had little importance to his decision. I will revisit this issue later in my reasons.

113 Much of the correspondence that followed June 13th, 1998 can be described as postulating positions as to whether or not there had been meaningful consultation. By then it was clear that the SFN, regardless of how West Moberly and Halfway had regarded the consultation process, it was

opposed to any development anywhere within the CMAC outlined area. In order to stall the making of any decision other than rejection of the application, the SFN continued to demand further consultation and complained of a lack of it on the part of the Government in the past. It continued to demand a traditional use study that it felt grew out of the 1992 ethno-historic study and which had been abandoned after Phases I and II, the failure to effect the information sharing agreement, and the commencement of the T8TA TUS.

114 The Government's view, as personified by Ms. Brooks, was that it had fulfilled its obligation to consult. It had been frustrated by what it saw as a lack of participation by the SFN, and the time was soon approaching, if not already arrived for a decision to be made. It saw the SFN as wishing to have the power of a veto as opposed to wishing to participate in consultations as done with the other two First Nations.

115 Mr. Miltenberger, who is the only person not have filed an affidavit in these proceedings, continued to discuss matters at the local level. Despite Ms. Brooks involvement, Mr. Miltenberger was viewed by the SFN and the T8TA as the person who would decide on the application.

116 Laurel O'Neal was obviously aware of the impending decision given the earlier deadline set by Ms. Brooks for the SFN to let her know of what documents were required in her letter of June 8, 1998. Laurel O'Neal sought to confirm a conversation she had on July 3rd, 1998 with Mr. Miltenberger when she wrote on July 7th:

I am writing today to confirm my understanding of the telephone conversation you and I had on Friday July 3, 1998.

You indicated no decision regarding the afore- mentioned wellsite and access road had yet been made by you as you are in need of more information with respect to First Nations' consultation. This information is to be derived from further discussions between Cheryl Brooks and Saulteau First Nations; of which you have, or will, formally request to be present at the final discussions so as to be absolutely certain on the validity of the resulting documentation. You were firm your position that no decision regarding this wellsite would be made until these necessary discussions are much further along (i.e. completed?).

117 Whatever impression sought to be established by that correspondence, it is clear that, by a letter dated July 15th, 1998 from Brooks to Chief Cameron, such an impression was incorrect. At page three, Ms. Brooks wrote and replied to Chief Cameron's letter of June 30th as follows:

Your perception the Provincial staff did not believe sufficient information was available for Gary Miltenberger to make an informed decision is simply that - your perception. I have no idea how you would come to that conclusion that I thought there was insufficient information from Mr. Miltenberger to reach a

decision. At no time did I or my staff make a comment of that nature. It is our belief that the SFN has not availed itself of repeated opportunities to provide the Province with the specific concerns you have with the proposed project. Consultation is a two-way process and also requires the First Nation to deal with the Province and industry in good faith.

Thus, even though that letter was written in response to a letter that misperceives the purported O'Neal/Miltenberger conversation of July 3rd, the position of the Crown was clearly expressed. A time for a decision was at hand.

118 In the affidavit of Peter Havlik, references were made to various comments made by Provincial officials, in particular, the May 6th, 1998 meeting to which I have earlier referred. Those included comments by MEM employee, Mr. Curtis, on March 25th, 1998 as to his concerns about MEM people "not being able to figure out the spiritually stuff." It also referred to Mr. Miltenberger's expressed intention to make a decision before June 15th, and Mr. Sumbot's comments that if the decision were his to make, he would not make it, and that Mr. Miltenberger had had grave reservations. In my view, these comments were often removed from the context of the broader discussions in which they occurred. They do not suggest to a lack of consultation but rather concerns over perceived paucity of information sought from the SFN.

119 The decision of MEM was made on July 23rd, 1998, by Mr. German pursuant to s.93 of the Petroleum and Natural Gas Act, R.S.B.C. 1996, c. 361. It is clear that Mr. German, who was the superior of both Sumbot and Miltenberger, had the authority to do so. He had been the Director of the Petroleum Lands Branch for some 10 years and on March 11th, 1998, was appointed Acting ADM of the Energy Resource division of MEM.

120 While the expectation of the SFN and undoubtedly others was that Miltenberger would make the decision, s. 93 placed the responsibility to decide either upon the Director himself, or permitted him to appoint someone else to make the decision. Mr. German in his affidavit deposes to the fact that, given the many issues to be considered he deemed it appropriate to remove the decision from Mr. Miltenberger and place it upon himself. The decision was made while Mr. Miltenberger was on holidays and by a person who had no direct involvement in the process leading up to the decision.

121 It must not be forgotten that many Provincial officials participated in the process of consultation. Whatever their extent, while Mr. Miltenberger was one who was more visible, he was still but one. In the period following October, 1997, Ms. Brooks had played a significant role in dealing with the SFN. Other First Nations had dealt earlier with Mr. Miltenberger.

122 In my view, there is a presumption of regularity that the knowledge regardless of how it was obtained and the processes involved collects within a single entity of the Province and thus is available to the decision-maker in its entirety.

123 I find that the MEM decision, while not referring to each aspect of information or each step

along the way, when read as a whole can only lead to the conclusion that the decision-makers was aware of the knowledge gained and the process undertaken.

124 The decision is also in reference to a single well. It recognizes that should this one well be successful in an economic sense and further wells are sought to be drilled, these would be the subject of further consultations with First Nations.

125 The decision also refers to the consultative process involving First Nations and the specific plan developed firstly through CMAC and then under the TSSMC to provide for protected and special management zones in the Twin Sisters area. It acknowledges the acceptance of the TSSMC's report by the West Moberly and Halfway and the fact that the SFN did not sign it. Significantly, the decision refers to the position of the SFN, its desire to delay the decision, and the consequences of such delay given seasonal aspect of this work.

126 In the concluding paragraph on the portion of the decision relating to First Nations consultation, the decision refers to the Bazant/Brooks controversy as to the alleged division of interest between the West Moberly and the Sauleau First Nations. It is referred to as anecdotal and that interests "may" be subordinate. As evidenced in his affidavit, Mr. German attributed little weight to this anecdotal evidence of a division of rights and interests. More significantly, as a part of the consultative process, he was aware of the position taken by the SFN as opposed to that expressed by the West Moberly and Halfway. I find there is nothing to suggest Mr. German was not fully informed. Rather to the contrary, I find that he was.

127 There is no question that one of the considerations taken into account was that of the scheduling of Amoco. It is not to be forgotten that MEM officials delayed the decision from November, 1997 when they expressed a view that they had not only sufficient evidence and information, but had fulfilled their obligation to consult having obtained the agreements of West Moberly in 1996 and Halfway in October of 1997. As to their satisfaction on the consultative process, to permit the SFN to engage in a further process of consultation, it became less of a process of discussion in which SFN sought to participate and much more of a process in which sought to delay the decision. Delays were sought through a variety of tactics, including the SFN TUS done through the auspices of the T8TA which was mirrored by the TUS of the area that involved not only the SFN but other First Nations as well.

128 The MOF's decision followed upon that of the MEM. As I earlier observed, it stands or falls with the MEM decision but still must be considered on its own. Paul Gevatkoff is the operations manager of the Dawson Creek Forest District for the MOF. In August of 1998, he was acting District Manager in the absence of Terry Dryer. Amoco had applied to MOF for a master licence and cutting permit as a necessary adjunct to the application to MEM. The purpose was to permit the falling of timber for the construction of a winter trail to the proposed wellsite. Such licence and permit would logically follow upon, not precede the authorization to drill granted by MEM.

129 Mr. Gevatkoff disposes that in his consideration of the application he did not rely upon the

fact that MEM had approved the drilling, but rather considered the basis upon which Amoco had applied to MEM. This was a road design that had also been submitted to the MOF. Indeed, an earlier winter trail design had been rejected in April, 1997 as being too substantial in its impact.

130 The Forest Act, R.S.B.C. 1996, c. 157 requires the decision maker to take into account not only the requirements of the Act but also the Forest Practices Code of British Columbia, and thus any aboriginal or treaty rights of First Nations. Mr. Gevatkoff also took into account the information that had been received by MOF as to the consultation that occurred with MEM and other agencies of the Government. He considered the logging or operational plan proposed for the cutting of trees to permit the access and the site for the well. In this respect, he considered the impact of logging upon the economy, the environment and the specific interests of not only First Nations but also other users of the area.

131 The decision also referred to Amoco's consultation with First Nations in respect of the well authorization to which I have earlier referred. In particular, he was aware of the high degree of spiritual significance that the area surrounding the Twin Sisters had to First Nations people, and specifically the assertion that any activity would interfere with the treaty rights and claimed aboriginal rights of the Saulteau First Nation. He had no information as to any specific concerns of any First Nation apart from the overall view that the area was sacred to all First Nations.

132 Mr. Gevatkoff relied upon the consultations which occurred between the MOF and MEM with the First Nations in terms of the Amoco proposed road building and drilling activity.

133 He did not himself contact any First Nations before making the decision as he relied upon the earlier consultations to which I have referred. He was unaware of any asserted interest by the KLCN. The master licence issued as part of his decision contain the following provisions:

7.00 INTERFERENCE WITH ABORIGINAL OR TREATY RIGHTS:

7.01

Notwithstanding any other provision of this Licence, if a court of competent jurisdiction

- (a) determines that activities or operations under or associated with this Licence are interfering or may interfere with an aboriginal or treaty right,
- (b) grants an injunction further to a determination referred to in subparagraph (a), or,
- (c) grants an injunction pending a determination of whether activities or operations under or associated with this Licence are interfering or may interfere with an aboriginal or treaty right, the District Manager,

in a notice given to the Licensee, may vary, refuse to issue, or suspend a cutting permit issued under this Licence, in whole or in part, to the extent necessary to ensure that there is no interference or no further interference with the aboriginal or treaty right or the alleged or treaty right, having regard to any determination of the court and the terms of any injunction granted by the court.

134 The Kelly Lake First Nation and Chief Cliff Calliou commenced proceedings in the Court of Queens Bench in Alberta and filed a statement of claim on the 15th of March, 1996. That action was brought to obtain benefits for the people of the Kelly Lake First Nation and para. 2 of the Statement of Claim reads as follows:

The Plaintiff Cliff Calliou acts on his own behalf and as a representative of and on behalf of all of the other members of the Kelly Lake First Nation all of whom have the same interest in these proceedings.

135 It is clear from the evidence that in the spring of 1996, there was dissension within the Kelly Lake First Nation. On April 1st, 1996, Mr. Justice Wilson of this Court made an order restraining Clare Gauthier from holding a meeting of the Kelly Lake First Nation Society prior to a scheduled meeting of that society to be held on April 21st, 1996. On April 21st, an election was held for the Office of Chief of the Kelly Lake First Nation and for President of the Kelly Lake First Nation Society. The positions apparently go in tandem and Clare Gauthier won that election.

136 On July 11, 1996, the Kelly Lake Cree Nation Society was formed. One of its directors was Chief Calliou; other directors included candidates who had stood for election as directors of the Kelly Lake First Nation Society and who had been defeated in the April 21st, 1996 election.

137 The Kelly Lake Cree Nation Society commenced proceedings on the 15th of July, 1996 in the Federal Court claiming substantially the same relief as had been claimed in the Court of Queen's Bench action.

138 On July 25th, 1996, Ms. Kennedy, acting for the Kelly Lake Cree Nation in these proceedings, filed a notice of discontinuance of the Queen's Bench action. The present chief of the Kelly Lake First Nation, Mr. Clare Gauthier, deposes in the Federal Court action that the Kelly Lake First Nation did not authorize discontinuance of the Queen's Bench action and the first notice that it had of that action was rendering of an account by Ms. Kennedy's firm to the Kelly Lake First Nation.

139 The dispute over who and what society of First Nations represents the interests of the people of the aboriginal community of Kelly Lake remains unresolved in the Federal Court. Indeed, it was a matter of continuing concern to the Minister of Aboriginal Affairs from British Columbia, Mr. Lovick, who, on March 3rd, 1998 wrote to Ms. Kennedy pointing out that, despite the fact that the Kelly Lake community did not have band status under the Indian Act, R.S.C. 1985, c.I-5 his

government recognized the community as an aboriginal community. He also pointed out the difficulty his government had in ensuring adequate consultation with two registered societies in a "community whose leaders have both asserted authority to speak on behalf of the entire community".

140 Mr. Clare Gauthier was cross-examined on July 27th, 1998, on an affidavit he had filed in the Federal Court proceedings for leave to intervene in the action. A copy of his cross-examination was filed on this judicial review, and a reading of that affidavit raises a very real question of who represents the interests of the people of Kelly Lake as there appears to be a substantial schism in the community following the April 21st, 1996 elections.

141 There is nothing to suggest that any of the discussions that occurred between 1991 and 1995 involved any reference to the Kelly Lake Cree or First Nation as having any interest in the areas known as the Twin Sisters. In 1995 the T8TA informed Ms. Morris of MEM that the chiefs of the T8TA were still discussing whether the Kelly Lake First Nation should be involved in the post-CMAC discussions. At no time thereafter was anything heard from the T8TA as to whether Kelly Lake First Nation or the Kelly Lake Cree Nation should be involved in those discussions.

142 On October 24th, 1996, Ms. Kennedy, again as counsel for the Kelly Lake Cree Nation, wrote the Peace River Regional District to inform it of the dissension among the residents of the aboriginal community of Kelly Lake. Mr. Ouellette met with members of the newly-formed Kelly Lake Cree Nation on December 5th, 1996, at which time they informed him of the area that was regarded as being of traditional usage by the members of the Kelly Lake Cree Nation.

143 On February 7th, 1997, Peter Osteguard, an Assistant Deputy Minister with MEM, wrote to Chief Calliou to confirm discussions which occurred on December 5th, 1996. Attached to his letter was a map that covered an area that ranged from the Alberta-British Columbia border westwards and appears to include the area of traditional usage by the SFN and WM.

144 The Ministry of Forests sent to Mr. Miltenberger a letter on April 25th, 1997 informing them that Kelly Lake Cree Nation had commenced an action against the federal government and that this action included claims that the traditional land extended to the area of the Twin Sisters.

145 In June of 1997, Chief Calliou met with Mr. Laing and in the course of discussions on other matters, Chief Calliou asked to see the Mt. Monteith application. On June 9th, 1997, Mr. Brown of Amoco mailed this as requested to Chief Calliou at an address that Calliou had specifically requested to be other than of Kelly Lake. The letter enclosed the application, maps and sought his comments either directly to Amoco or if he preferred to Mr. Ouellette. He further requested that these comments be made prior to June 30th, 1997. That letter and the enclosures were sent by registered mail to the specific address requested by Chief Calliou and were in fact signed as being received by Chief Calliou. Nothing was heard thereafter in respect of the Twin Sisters or Mt. Monteith project. Chief Calliou in an affidavit acknowledges that he received the letter and signed for it but says the letter was not addressed to him but rather to Clare Gauthier. He said that he set

the letter aside but does not explain what if anything he did with it, particularly in terms of ensuring its delivery if in fact it was addressed to Clare Gauthier.

146 What Chief Calliou says in his affidavit is frankly beyond belief. The envelope was addressed to him and that was what he signed for as recipient. Mr. Brown's record of the letter shows that it was addressed to Chief Calliou. It was sent to an address specifically directed by Chief Calliou, outside of the community of Kelly Lake. Mr. Calliou now asserts that it was addressed to Gauthier. Chief Calliou was aware of the application to drill on Mt. Monteith. The letter, in fact, refers to that area specifically discussed between himself and Mr. Laing. Further, the area was said to have much significance to First Nations people generally. Given all of this, even if I were to accept his explanation, which I do not, one would have to have surely expected that a drill site in an area of such spiritual significance would have spurred him to do other than what he asserts, simply leaving telephone messages of Mr. Laing as unresponded to. Further, there was no evidence provided of what counsel informed me were purported cellular phone calls by Chief Calliou in response.

147 I am satisfied that Chief Calliou received Brown's letter and the enclosures and for reasons unexplained simply did nothing. The responsibility for any lack of discussion after June of 1997 lies with Chief Calliou and no one else.

THE LAW

148 This is a judicial review and thus the basis for any challenge to the decisions must be founded upon a jurisdictional error. The challenge brought by the SFN is based upon a multitude of alleged errors each of which it is argued goes to the question of jurisdiction.

149 These are divided into the following areas:

- A) administrative law
 - 1) reasonable apprehension of bias;
 - i) change of persona of the decision maker without notice;
 - ii) unfairness of the process;
 - iii) "subordinated rights";
 - iv) loss of confidence by the industry;
 - v) allegation of refusal to provide specific information;
 - vi) predetermination.
 - 2) errors of fact
 - i) the sacred area;
 - ii) subordinate rights;
 - iii) additional errors
 - 3) failure to take relevant considerations into account;
 - 4) fettered decision;

- 5) duty of fairness and rights to be heard;
- 6) error of law.
- B. Infringement of treaty rights guaranteed by treaty no. 8.
- C. Freedom of religion.

150 The KLCN raises similar arguments which are summarized in its written brief as follows:

- A. Administrative procedural fairness.
- B. Constitutional duty to consult.
 - 1) aboriginal and treaty rights of interest other than through the province in public lands.
- C. Charter Rights and Freedoms, s. 2(a) and s. 7.

151 Each applicant seeks order setting aside the decisions and requiring the decision-makers to fulfil a constitutional and fiduciary duty to consult with them prior to any further decision being made. They seek as well ancillary orders that this court retain jurisdiction to determine any further issues as to the consultation process.

152 The respondent Ministry, supported by Amoco, say that all of these issues come under the single roof of consultation being whether there is a duty to consult, and if so, whether that duty has been fulfilled.

153 The respondent Ministry rely upon two vital facts which they say are determinative of all of the issues raised by the applicants. These are:

- 1) that pursuant to the TSSMC report that developed out of the CMAC process, the Twin Sisters area was divided into three areas: a protected area where no activity would be permitted, and two special management areas being Level I and Level II where controlled activities as defined in the TSSMC report were to be permitted; and
- 2) that the process by which the TSSMC report was prepared involved consultations with the appropriate groups First Nations of which two, the West Moberly and the Halfway, have expressed satisfaction with the process, and the third, the SFN, declined to fully participate.

154 There is no question that there is a duty on government to consult with First Nation people before making decisions that will affect rights either established through litigation or recognized by government as existing. I have set forth the factual matrix upon which decisions were made in some detail. It is my view that a consideration of the question of consultation must be taken into account not only the aspects of direct consultation between First Nations people and the provincial government whose officials were charged with responsibility to decide upon these applications, but also the consultations between First Nations people and Amoco that were known to the government to have occurred. The process of consultation cannot be viewed in a vacuum and must take into

account the general process by which government deals with First Nations people, including any discussions between resource developers such as Amoco and First Nations people.

155 Many of the submissions made on behalf of the Saulteau First Nation are in common with those of the Kelly Lake Cree Nation. Where that is the case, I shall simply refer to my reasons in respect of the KLCN with any additional brief comments that pertain particularly to the SFN. The arguments raised generally are those that relate to the question of a duty to consult. It is under this general heading that specific complaints of violations of the principles of administrative law and violation of constitutional rights are enunciated by the SFN and the KLCN.

I. COMPLAINTS OF THE KELLY LAKE CREE NATION

156 I turn first to the specific complaints of the Kelly Lake Cree Nation. The KLCN argues based upon aboriginal law and administrative law principles as applicable to judicial review and the Charter of Rights and Freedoms, under ss. 2(a) and 7.

(a) Duty to Consult

157 The respondents accept that there is a legal duty on the Crown to consult First Nations before authorizing activities that may infringe upon either aboriginal or treaty rights, and accepts the obligation placed upon it by *R. v. Sparrow*, [1990] 3 C.N.L.R. 160 (S.C.C.). *R. v. Sparrow* was a case in which there had been a trial where the aboriginal rights allegedly infringed by the State had been, in fact, already determined. Chief Justice Lamer commented on the position of the Crown before the Court when it sought to challenge the findings made with respect to the existence of the right, and said at p. 172 as follows:

But the evidence was not disputed or contradicted on the courts below and there is evidence of sufficient continuity of the right to support the Court of Appeal's finding, and we would not disturb it.

158 The focus of the Court's decision in *Sparrow*, supra, was upon whether there had been a justifiable infringement of that established right, as observed by Chief Justice Lamer at p. 180:

Legislation that affects the exercise of aboriginal rights will nonetheless be valid, if it meets the test for justifying an interference with a right recognized and affirmed under s. 35(1).

The Supreme Court then postulated the test by enunciating a two-stage examination involving a series of questions.

159 In *Delgamuukw v. The Queen*, supra, at 1079, the Court developed a two-part examination. The first was an examination of how aboriginal rights or title may be established. The Court did not establish rights or title but rather set forth the process by which they could, in fact, be established. It

was on that basis that the matter was returned to trial. The second set forth what was required for the State to validly infringe upon aboriginal title.

160 It is in respect of that second aspect that the fulfillment of consultation before infringement of established or affirmed rights occur. It is likewise in the context of this second aspect that the concept of the honour of the Crown comes to play in terms of the manner of that consultation.

161 Here, the KLCN does not point to any established or affirmed rights in the context of aboriginal rights or title. The assertion of the freedom of religious practice is a discrete issue that relates to all Canadian citizens.

162 The question of the duty to be consulted over established or affirmed rights does not preclude the Crown as a matter of policy of consulting with First Nations who assert such rights or title. That is, in fact, a policy followed in many cases. The invoking of that policy however involves an assessment by the Crown of whether the asserted right has some factual underpinning that would, if established, require fulfillment of its honour by the undertaking of meaningful consultation as to possible infringements upon the asserted right or title by the affects of a proposed activity.

163 Here the Crown's position is that, given the close proximity of the Halfway, West Moberly and Sauteau First Nation, it was bound by its honour to consult with each of them before making any decision that may affect either established rights for which it has a legal duty to consult, or asserted right for which it had the ethical obligation to consult pursuant to its policy.

164 The position of the Crown with respect to the KLCN is that they are not one of those First Nations to whom a duty to consult is a legal or policy requirement. The KLCN currently occupy an area of some distance from the Twin Sisters area. While members of this group include Deneza people, at no time prior to 1995 did this group ever assert a claim in respect of this area and when it did, it was in relation to Treaty No. 8. The opportunity to do so was presented again once they were apprised of the Monteith Mountain Project, however they chose not to do so. Chief Justice Williams of the B.C. Supreme Court made some relevant observations in *Cheslatta Carrier Nation v. British Columbia (Environmental Assessment Act, Project Assessment Director)*, [1998] B.C.J. No. 178 (QL), a decision that involved a statutory requirement of consultation with First Nations in respect of matters that involve environmental assessments. In paragraphs 71-73 he concluded that the obligation to consult invoked a corollary obligation to participate which if not undertaken does not permit the latter to complain about the fulfilment of the Crown's duty to consult or a lack of it.

165 I find that there was no duty to consult with the KLCN given the remoteness of the KLCN to the area in question and the claims of the SFN, WM and the Halfway First Nation. However, given the lack of response to the Brown correspondence and the Laing discussions of 1997, even if the Crown had a duty to consult on the basis of an asserted right, that obligation was fulfilled when KLCN as represented by Chief Calliou failed to express any interest in the proposed Monteith Mountain project.

(b) Administrative Procedural Fairness

166 In addition to its argument of a duty to consult, the KLCN raises a claim upon an application of administrative law principles that the decision-makers failed to act fairly, and that they breached the requirements for a fair hearing without an appearance of reasonable apprehension of bias and without considering relevant considerations. These arguments are in essence based upon its assertion of the failure to consult but advanced in a parallel manner to the duty to consult in respect of aboriginal issues.

167 The nature of the duty that arises under administrative law is governed by three factors, as was observed and reiterated in *Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202 at 224, being:

- (1) the nature of the decision to be made;
- (2) the relationship between the decision maker and the party who asserts its right will be affected by the decision; and
- (3) the actual effect of the decision upon those rights.

168 The decision here is not one made by a tribunal that decides upon evidence tendered before it, but rather by a statutory authority charged with the responsibility of issuing permits for forms of economic activity pursuant to the provisions of the Petroleum and Natural Gas Act, *supra*, in respect of MEM and the Forest Act, *supra*, with respect to MOF.

169 The KLCN is an assembly of individuals formed out of a dispute within a community at Kelly Lake. It asserts claims not established as treaty rights and as such is not a "party" as that term would be used in a more conventional form of litigation. It is at best an interested person. Its standing before this court on that basis was conceded by the respondents.

170 Interested parties, whether they be the KLCN, Amoco or the Chetwynd Environmental Society, are not entitled to a hearing under the relevant acts because this was not a process of a tribunal that would hear evidence, submissions and then make a determination. It was a process of administrative decision-making established under a statutory scheme. There were no litigants and no hearing.

171 Nevertheless the process requires procedural fairness. The extent of that will be determined by the nature of the decision making process that arises under the statute. As observed in *Lakeside Colony of Hutterian Brethren v. Hofer*, [1992] 3 S.C.R. 165, the content of the principles of natural justice is flexible and depends upon the circumstances that give rise to the issue raised. Thus the concept of procedural fairness will range from a requirement of notice and a hearing in instances such as where disciplinary expulsion from a public body would occur (see *Lakeside Colony*, *supra*), to simply giving the opportunity to make written representation without a hearing where an interest may be affected (see *Mobil Oil*, *supra*).

172 Counsel for KLCN urged the view adopted by Madam Justice Dorgan in *Halfway River First Nation v. B.C. Ministry of Forest*, [1997] 4 C.N.L.R. 45 (B.C.S.C.) at 59, that the decisions being made with respect to a cutting permit by officials of the Ministry of Forest resulted in the Halfway River First Nation being viewed as a party.

173 That decision, presently under appeal, was decided upon a much different factual basis than this case which affected the consideration of the three factors discussed in *Mobil*, supra, and *Knight v. Indian Head School No. 19*, [1990] 1 S.C.R. 653. The evidence before her was that the area in dispute was used for traditional purposes including hunting, gathering plants, food and medicinal purposes, and spiritual purposes. She concluded at p. 59 that logging operations "could significantly affect Halfway's very way of life".

174 The evidence in this case is that the area is of spiritual significance but not that it is used, rather that it is simply preserved by those who claim a spiritual significance. The evidence does not establish a physical use other than occasionally. Rather it is simply preserved by those who claim a spiritual significance. There is no evidence that the effect of the decision would have the same impact upon members of the KLCN or indeed others included in the three First Nations who did participate in the consultative process to the extent that the decision by the official of Ministry of Forests would have in *Halfway River First Nation*, supra.

175 The KLCN did not become a party in the sense of requiring a hearing as a part of the administrative tribunal anymore than I find that the other First Nations became "parties". Processes under both acts and the nature of the relationship between the decision-makers and particularly the KLCN do not raise them to the status of "parties" requiring a hearing before such a statutory decision-maker.

176 I also bear in mind the Supreme Court of Canada's decision in *Delgamuukw*, supra, which was rendered following Madam Justice Dorgan's judgment. Thus she was bereft from the principles enunciated in that decision which in my view bear heavily upon the duty to consult in such matters affecting the administrative law requirements that might otherwise be argued. Here, not only the KLCN but others had the opportunity as interested persons to make representation either in person or by correspondence. Specifically, the KLCN as I have earlier observed was notified of the process to be followed before a decision was made through Mr. Brown's letter and the earlier discussions with Mr. Laing. With respect to Mr. Brown's letter, the KLCN failed to pursue that opportunity either with Amoco or with the government representative, Mr. Ouellette. With respect to the discussions with Mr. Laing, although aware of the Mount Monteith project and notwithstanding Chief Calliou's assertion of never having received the letter (an assertion which for reasons which I have already expressed I do not accept), the matter was simply never raised again with Mr. Laing.

177 The KLCN argues that there was a bias. No evidence was led of bias, and I find that KLCN had simply fallen into the unacceptable practice of making such allegations without there being any basis in the evidence to do so, an approach that was so deprecated in *Adams v. B.C. (W.C.B.)*

(1989), 42 B.C.L.R. (2d) 228 (C.A.), at 231-232.

178 It was also submitted that the decision-makers fettered their discretion by complying with the government policy to ignore land claims when considering applications of this nature. There is simply no evidence to support this assertion. However, Mr. German, operating under the Petroleum and Natural Gas Act, *supra*, was required to follow certain directions contained in the Oil and Gas Handbook, portions of which were produced in the Kelly Lake First Nation material. In particular, I refer to paragraph 3.52.5 in respect of aboriginal issues. That handbook illustrates just the opposite to the KLCN assertion. In terms of the MOF decision, similar requirements existed in respect of Mr. Gevatkoff's decision given the requirement that, in addition to the provisions of the Forest Act, *supra*, he was also to follow the procedure set under the Forest Practices Code of British Columbia, *supra*.

179 At paragraph 25 of their written submissions, the Kelly Lake Cree Nation further submits that the decision-makers were fettered by a need for a quick decision. Again, the evidence indicates the contrary. While Miltenberger informed the SFN he believed he would be in a position to make the decision in November of 1997 after the Halfway and West Moberly First Nations agreed the process of consultation with them had been satisfactory, he nevertheless shifted that date to accommodate the SFN. The decisions in fact were made some eight months following November of 1997. It was the SFN who failed to respond to inquiries for information and demanded further studies with the object of delay for purposes unrelated to the consultation process, despite the extension of time provided as requested in Chief Cameron's letter in order to consider the Delgamuukw decision. As well, the process in which the interests of the aboriginal First Nations people were considered had been ongoing since 1991.

180 The KLCN also argued that the decision makers took into account irrelevant considerations. They point to the taking into account of the need to make a quick decision by complying with government policy, and to ignore land claims so that industry would not think that B.C. could not resolve issues involving aboriginals. A similar submission was also made by the SFN as to Mr. German's reference to "the anecdotal evidence".

181 While the taking into account of irrelevant matters may well be a basis to find an absence of procedural fairness, that will only be so when it can be demonstrated that the decision is founded upon such a consideration and without that factor, could not be made. That question requires an examination of whether the decision was in fact made upon relevant considerations in addition to the alleged irrelevant considerations which by themselves would sustain a decision.

182 Here, Mr. German raised these factors in the context of what I find was a justifiable concern that further delay would directly impact upon the applicant given the winter based nature of its proposed well. Continued delay would also impact in a broader sense upon investment by a loss of confidence in industry in the "ability of the Province to resolve First Nation issues".

183 Mr. German's comment must be taken in the context of a seven year process that had

occurred during which the ultimate focus was the drilling of an exploratory gas well in the area of the Twin Sisters Mountain. It must also be taken in light of the schemes developed for protection and management for the immediate and adjoining areas respectively around the Twin Sisters which arose through consultation with various First Nations, among others.

184 Given the detailed process, some of which I have outlined in these reasons, such considerations by the decision-makers were relevant in my opinion. It was not in my view a question of the quickness of the decision but rather that the time had come for the decision to be made. It is clear on the evidence that the singular and fundamental issue was the sanctity of this area to aboriginal First Nation people. The reasons for decision clearly establish it was a significant consideration undertaken by Mr. German and it is inconceivable that any additional studies would have varied the import of the utmost spiritual significance this area held for First Nations.

185 While the reference to "subordinate interests" may be the subject matter of the dispute between Ms. Brooks and Mr. Bazant, a dispute unknown to German, the significance of that observation even if incorrect is minimal given the singular view of all First Nations as to the sacredness of the Twin Sisters area. The observation by German was made in a context of his reference to the absence of the SFN from the consultative process and did not in any way diminish the view of the SFN of this area which was consistent with those of the West Moberly and Halfway.

186 I therefore find that there has been no breach by the respondents of administrative law principles, as I have set out above.

(c) Charter of Rights and Freedoms, s. 2(a) and s. 7

187 The KLCN allege that the decisions breached their Charter rights under ss. 2(a) and 7. This argument is advanced not as an aboriginal people but rather as Canadians whose freedom of religion has been infringed. The KLCN argue that the decisions affect an area of "utmost spiritual significance" to the members of its Nation. This is premised on the unchallenged views of elders and members that this area has been the subject of prophecies and that in the performance of their stewardship of this area, the KLCN exercise a right of religious freedom.

188 In the ethno-historical overview referred to by German, there is no reference to Kelly Lake inhabitants having any particular interest in the Twin Sisters as distinct from other First Nations. Each had its own prophecies and dreamers as to the significance of the Twin Sisters area. There is evidence as well that the KLCN includes among its members descendants of the Saulteau, Dunne-za and Cree peoples.

189 In *Sioui v. Quebec (Attorney General)*, [1990] 1 S.C.R. 1025, the Court was concerned with whether or not a document signed in 1760, in what can be described as a safe conduct document, constituted a treaty as that term was used under the Indian Act, R.S.C. 1970, C.I.-6. Upon the determination of it being a treaty, the question then was whether the exercise of rights and customs were religious in nature and whether they were incompatible with the Crown's occupancy of lands

in question as a public park. There was little question that the exercise of the rights and customs were religious and that there was a territorial aspect to them. Thus in the context of this case, the area of the Twin Sisters is a territorial aspect of the exercise of religious rights and customs even though there is a dearth of evidence of actual physical exercise of the religious customs. The religious rights and customs lie in the prophesy and the intellectual stewardship with which First Nations people view the area of the Twin Sisters.

190 I accept that there is a territorial aspect to the KLCN members' religious practices that involves the Twin Sisters mountains even though there is no actual use in current or recent history of this area for such purposes.

191 What then is the breach that is alleged? For there to be a breach under s. 2(a), it must be the result of a coercion or constraint of an individual's right to exercise his or her religious beliefs or a denial of the ability to worship and practice those beliefs.

192 In *The Queen v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at 336, Dickson J. as he then was defined freedom as follows:

Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. ... Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others.

What the KLCN argues, as does the SFN, is that this gas well and access trail by its mere presence will defile an image of sanctuary that they are by their prophesies entrusted to preserve. It is not that in fact anyone can be said to have actually gone there on any consistent basis, as might one visit a temple, shrine or church. While there is a vague reference to sun dances having been performed some 50 years ago, there is simply a dearth of evidence as to any practices being carried out in any of the areas defined by the TSSMC.

193 In *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, Chief Justice Dickson at p. 757 reiterated his comments on the definition of freedom set forth in *Big M Drug Mart*, supra, of which I have quoted but a portion. Then at p. 759, he considered the question of a threshold test for assertion of impact upon the freedom of religion and observed:

For a state imposed cost or burden to be proscribed by s. 2(a) it must be capable of interfering with religious belief or practice.

194 Nothing permitted by these decisions will prevent any such attendances including hunting and the gathering of food. Environmental reports suggest that large mammals may remain up to 500

metres from the access trail and/or drill site but beyond that, the assessment reports demonstrate no impact. The decisions and the conditions attached to the decisions will minimize the aesthetic impact that will occur, again based on the TSSMC proposals. The Province recognizes the TSSMC proposals even though it has yet to be legislated into the Dawson Creek land use enactments.

195 I conclude that s. 2(a) does not protect a concept of stewardship of a place of worship under the protection of religious freedom. I also find that even if I were incorrect in that conclusion, the adherence of the decision-makers to the TSSMC recommendations within the protected area in fact protects an area for both alpine and sub-alpine activities upon which there can be an absolute stewardship and within areas I and II a lesser form of stewardship.

196 Additionally, I conclude that the provisions taken, in terms of the protected area and the conditions attached to the permits which minimize impact, amount to a minimal interference with the exercise of religious freedom in terms of the sanctity with which the general area is viewed.

197 While not satisfied with the intrusion into the area generally, the KLCN do not point to any actual deprivation or incursion of the right to religious freedom as a consequence but rather it is the defilement of a concept that is paramount. Thus, I conclude that there is no contemplated activity that inhibits or coerces the right to exercise religious beliefs or practices either on an actual usage basis or in an intellectual sense in this area as viewed by those who regard themselves as stewards of it.

198 The assertion by counsel for the KLCN as to the failure of decision-makers to understand the religious significance of the area is not borne out by the evidence. In fact, a protected area was designated after involvement of other First Nations who also based their religious beliefs upon the same prophecies involving the Twin Sisters as the KLCN. Limitations were also designed to minimize the impact of activity surrounding the protected area. These efforts were recognized by the decision-maker.

199 The Petition of the KLCN is dismissed.

COMPLAINTS OF THE SAULTEAU FIRST NATION

A) Administration Law.

1. reasonable apprehension of bias.

200 In this argument, counsel for the SFN lists a number of areas they argue give rise to a reasonable apprehension of bias. It is not disputed by the respondents that the "apprehension of bias" must be reasonable, held by reasonable and right-minded persons applying themselves to the question of obtaining thereon the required information (see *Committee for Justice and Liberty v. National Energy Board* (1976), 68 D.L.R. (3d) 716, at 735 (S.C.C.)).

201 That standard requires a reasonably right-minded person to not only be informed of the decision and its immediate antecedents but also the history of events leading to the decision and the statutory basis upon which it was founded. The SFN complains of bias in this respect as set out below.

i. Change of persona of the decision-maker without notice.

202 This refers to the movement of the decision up the bureaucratic ladder and reliance is placed upon Mr. Sumbot's comments as to why it was not him but rather Mr. Miltenberger who was to make the decision. In July while Mr. Miltenberger was away, the decision was made by Mr. German. It is clear from the affidavit of Mr. German that the decision was an important one and that is why it was removed from Mr. Miltenberger to himself in much the same manner that it had earlier been removed from Mr. Sumbot to Mr. Miltenberger. The expressions of Mr. Sumbot and Mr. Miltenberger in respect of their view of the process prior to the decision must be taken in the context in which they occurred; given Miltenberger's earlier observations that in November of 1997, he had viewed himself as being in a position to decide shortly thereafter. The decision was postponed. By July, 1998, while Mr. Miltenberger might have sought more time to persuade the SFN, the position of SFN had remained for some months as one of implacable opposition to any drilling in the area of the Twin Sisters as defined by the CMAC Report. Mr. German was aware of that and the reasons for it for he specifically refers to the SFN position in his decision.

203 There is no requirement under the Act or the duty imposed on the Crown to inform those interested who will make the decision. A clear reading of s. 93 of the Petroleum and Natural Gas Act, supra, gives that authority to the director or person appointed by him. There comes a point in any consultative process in which the positions of the interested persons is clearly evident, immovable and no amount of talk will change them. Likewise there is no requirement that the decision-maker be the one who consults personally. Such a requirement, given the complexity of issues and interested parties such as here, would be a practical impossibility.

204 A right minded person apprised of the statutory scheme under the Petroleum and Natural Gas Act and the Forestry Act with its accompanying Forest Practices Code, supra, the history of consultations, and the position taken by the SFN both before and after November of 1997 relative to the West Moberly and Halfway First Nations would come to but one conclusion: that there was nothing to gain from further study of issues already studied and the time for decision had arrived.

205 Given the importance of the decision, because of the seemingly irreconcilable interests of the SFN with those of the respondent as supported by the other two First Nations, it would make sense for the decision to be made by a more senior bureaucrat charged with the responsibility of making such decisions under the Act. I therefore find that there has not been a breach of administrative law principles in this respect.

ii) Unfairness of the Process

206 As I have observed earlier in reference to Chief Justice Williams' reasons in *Cheslatta*, supra, consultation is a two way process. By July of 1998 it was clear to an observer of these proceedings that the SFN position was one of implacable opposition to any economic activity in the original CMAC-defined area of the Twin Sisters. No lesser area was acceptable.

207 While those in the trenches might wish to continue dialogue, those who have the statutory responsibilities would see a broader horizon. The process of consultation had involved persons others than Mr. Miltenberger. Indeed, because of the concerns about what was happening in terms of the SFN's non-participation, Ms. Brooks herself, also an assistant deputy minister, involved herself to encourage SFN participation in the process of consultation. There is no requirement at law for a decision-maker to personally involve him or herself in the process of consultation for it is a duty of the state to consult with those who may be affected. This as a matter of practical and common sense is done through its civil service.

208 As well, there is no evidence that the decision was somehow pulled from Miltenberger because of an awareness that he was not prepared to issue the permit. While such an inference might be drawn upon a different set of facts, the fact here is that having delayed the decision since November of 1997, and having concluded that consultation would not add to the process in the sense of altering SFN's known position of absolute opposition, the decision was made by the most senior bureaucrat empowered to make it. Again, I find no breach of administrative law principles.

iii. Subordinate Rights

209 The SFN argue that Mr. German's reference to the anecdotal evidence of the interests of SFN being subordinated to that of West Moberly is indicative of a bias against the SFN. It must not be forgotten that a large portion of the decision is devoted to the consideration of the interests of First Nations as a whole. It did not seek to establish a priority of rights for it was concerned with a singular issue - whether or not an area of revered spirituality should be intruded upon by economic activity. The decision did not decide any priority of interests. Indeed the comment was expressed in terms of "might".

210 Mr. German's affidavit makes it clear his anecdotal evidence was of little consequence. But even if it were more than that, the observation did not in any way lessen the significance that was attached to the area generally referred to as the Twin Sisters area. Additionally Mr. German acknowledged specific trapping rights enjoyed by the SFN members who were Chief Cameron's brothers, and how those rights might be affected by the access road.

211 Further, there was a lack of response to inquiries made of the SFN as to how traditional use would be potentially affected.

212 In my view, any right-minded person would have properly placed those comments in a minimalistic position once aware of the totality of the context in which they were made.

iv. Loss of Industry Confidence

213 The SFN submit that Mr. German's statement that "[the] Province may also be impacted by a loss of confidence by industry in the ability of the Province to resolve First Nations issues" and the failure to mention the sacredness of the area to the SFN are factors contributing to a reasonable apprehension of bias. This submission in my opinion is factually incorrect. In the introductory paragraph of the decision, reference is made to the SFN's view of the area of the Twin Sisters as having a "special spiritual significance". There is then the reference on p. 5 to the TSSMC report on First Nations interests and values regarding the area, and the reference at p. 6 of the nine identifiable values of the area of which spiritual/cultural was the first one mentioned.

214 The SFN submits that the decision makers had not made "even the most minimal attempt to communicate with the Sauteau". Such a submission ignores the history of attempts not only by the Province but Amoco to draw the SFN into discussions and the failure of the SFN to participate after Chief Cameron took over from Chief Napoleon. With a complete reading of the decision and an understanding of the history of repeated attempts by the Province and Amoco to consult with the SFN, particularly after Chief Cameron's election, any right-minded person would not conclude a reasonable basis for an apprehension of bias regardless of whether they agreed with the decision.

v. Allegation of Refusal to Provide Specific Information

215 The SFN allege that the Province refused to provide specific information to the SFN. This submission again is not well founded upon a consideration of the history of the relationship between the SFN and the Province. The evidence establishes a continuum of attempts after Chief Cameron came to power that were ignored or rebuffed. The complaint that the Province would not fund a SFN traditional use study by reason of its "refusal to enter into an information sharing agreement" simply ignores the question of the reasons for that information sharing agreement not coming to fruition and the uncertainty of the need for such a study.

216 With respect to the information sharing agreement, it is clear that the SFN had a fundamental difference with the Province over the nature of such an agreement. The SFN perceived that it granted ownership rights over information whereas the Province regard the agreement similar to a form of protocol between two levels of government. Given this discrepancy, I do not determine that the failure by the parties to enter into an information sharing agreement constitutes a refusal by the government to provide information.

217 With respect to the question of the SFN traditional use study, given the singular focus of opposition to this well project, quite apart from the fact that a traditional use study had been funded through the auspices of the T8TA, no complaint can be raised with respect to the Province's refusal to fund yet another study on the same area. Further research would not alter SFN's position despite the WM and Halfway's satisfaction with consultation, and the Province was well aware of the high spiritual significance asserted by the SFN.

218 Chief Cameron complains that, at a meeting of April 29th, 1998, Ms. Brooks acknowledged the spiritual significance of the area and said that the only question was the boundary of the area. He then asserts that he was not aware of "any further steps that the government of British Columbia has taken to determine the boundary lines of the sacred area between the date of that meeting and the date - approximately three months later - of the authorization of the permit".

219 Such an assertion ignores the establishment of the TSSMC recommendations, a report whose preparation was denied SFN participation by Chief Cameron, who declined further participation in the committee and later failed to respond to the Province's inquiries as to how the project might infringe upon their traditional lands. The comment of Ms. Brooks in my view simply acknowledges the differences of opinion that existed with respect to the area.

vi. Pre-determination

220 The SFN argue that by having the decision made when it was, and considering that the view of provincial officials was that the SFN "were not prepared to consult", the decision was the result of a pre-determination of the issue.

221 There is simply no evidence of such a pre-determination and certainly no basis to infer that. Upon a review of all of the evidence, it is clear that by July 23rd, 1998, the date of the decision by Mr. German, the position of the SFN was one of adamant opposition to any activity within the area that had been earlier defined by the CMAC report. What studies were then sought would not add to the store of knowledge or a further understanding of the spiritual significance placed upon this area by the SFN. That was completely understood by the decision-maker and is referred to within the decision itself. Rather, the purpose of any further studies was simply to cause a delay sufficiently to close the winter window of opportunity for exploration such that Amoco could not drill for yet another year.

222 The process of consultation had run its course to the satisfaction of the Halfway and West Moberly First Nations. By then, a plethora of reports had crystallized the spiritual significance of the Twin Sisters in the minds of all concerned. As a consequence of those consultations, compromises had been reached in the establishment of the TSSMC protected area, and alterations had been made in terms of access within the special management areas. The SFN had dropped out of that process and at the 11th hour sought yet another study on a subject that had been well and long discussed during their self-imposed exile from the process. The time for a decision had come and its timing does not suggest a pre-disposition. Indeed, the passage of time from November of 1997 to July of 1998 suggests of just the opposite.

223 I am satisfied that no principle of administrative law was breached in this process of the decisions being made and as such there is no basis for any reasonable apprehension of bias.

224 There is a final aspect to this question of apprehension of bias in the process of the decision making that I wish to address. Following the making of the decision, Mr. German informed the

applicant Amoco of the decision. No apparent effort was made to inform any of the three First Nations and it was left to Amoco to do that. Given the duty placed upon the Crown to fulfil its honour through the consultative process, a specific duty imposed upon the Crown with respect to First Nations as opposed to any other interested parties, such an omission was an unnecessary act of insensitivity in the circumstances of this application. Regretfully, Mr. Gevatkoff similarly felt it necessary to inform only Amoco of the results of its application. While he may have viewed his decision as ancillary to that of Mr. German's and felt that the respective First Nations were already aware by that time of German's decision, common courtesy if nothing else should have suggested direct communication with each of the First Nations as to the decision regarding Amoco's application given the mandate of the Forest Practices Code, supra, respecting First Nations people.

2. ERROR OF FACTS

225 The SFN also argues error fact. Here it is argued that because of certain enumerated errors of fact, the decisions were patently unreasonable. See *Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941, at 963.

i. Sacred Lands Issue

226 The first alleged error of fact is said to be the reference to the well site being in "an area adjacent to the Twin Sisters area" at page 1 in the German decision. This quote is found just after a reference to the undisputed fact that the First Nations, being the Halfway, West Moberly and SFN, "accorded special spiritual significance to the Twin Sisters mountain and immediately surrounding area". This submission, in my view, clearly ignores the effect of the TSSMC recommendations later referred to in the decision and the compromises reached, albeit without the SFN participation, that there was to be a protected area and two outer areas of special management.

227 The SFN argue that Mr. German misconstrued not only the sacred nature of the area but the size of the area by his reference to the sacred area being limited to the Twin Sisters alpine area. Such a submission can only be predicated upon a belief that German was not aware of the TSSMC report. Yet German specifically refers to that report and its identification of nine values including the first mentioned, being spiritual/cultural. More significantly the report identifies three distinct areas extending outward from the inner protected area.

228 While the introductory paragraph of the decision refers to the "alpine area of the Twin Sisters", that was in reference to the original application by Amoco. A complete reading of the decision makes it abundantly clear to any right-minded person that German was alive to the sacredness of a much broader area. In fact, he makes reference at p. 5 to the CMAC process that was "critical in identifying First Nations interests in the Twin Sisters areas and concerns regarding the well drilling proposal". The decision then in the bottom half of p. 5 refers to the TSSMC "development of a plan that recommended protected special management zones where restricted resource development could occur in the Twin Sisters area".

229 When read as a whole, the introductory reference to "adjacent" can only be read in reference to that protected area. Accordingly, in my view, that does not constitute an error of fact.

ii. Subordinate Rights

230 The SFN allege that a reference made by German in his decision indicates that he treated some rights as being subordinate to others. The evidence is not that the reference was to rights, but as to interests. The insignificance and relative weight of this comment is illustrated by the reference by German as to the "evidence being anecdotal" and the term that there "might be" a subordination of interests. While Ms. Brooks had reported that to him, it is clear that Mr. Bazant disputes her recollection. What is clear is that the Deneza and Cree people, according to the affidavit evidence of various elders filed in these proceedings as to the prophecies, long preceded the Saulteau in the occupation of these lands.

231 In my view, the issue with respect to any subordination of interests is of no consequence as there is not a lack of recognition by the government of the interests of any of the First Nations in the area surrounding the Twin Sisters. Couched as it was, I do not determine it to be an error of fact, notwithstanding the conflicts between Ms. Brooks and Mr. Bazant with respect to whether or not the conversation occurred. Rather, it is in light of Mr. German's subsequent affidavit, an inconsequential statement that had little or no bearing upon the decision and would not have in the mind of a right-minded person aware of all of the circumstances having read the decision as a whole.

iii. Additional Errors

232 Certain additional errors are alleged. These can be summarized as a complaint that, in addition to what the decision refers to, it should have referred to more information which would have augmented or altered what is contained in the decision. For such an argument to be sound, the decision-maker would be required literally review every note, document and nuance of information gathered during the process leading up to the decision being made. I know of no authority for that proposition and none were referred to me by counsel. If there is, it must be recalled that there is a presumption of regularity for decision-maker that the information and consultation obtained and entered into by the state is within their cognizance unless there is evidence to the contrary. I am satisfied there is no evidence to the contrary in this matter.

3. FAILURE TO TAKE RELEVANT CONSIDERATIONS INTO ACCOUNT

233 The third general area of complaint involves the alleged failure of the decision-makers to take relevant considerations into account. The proposition that the failure to consider relevant factors can result in an exercise of discretion being struck down can be found in the judgment Dorgan J. in *Halfway* at p. 48:

While failure to consider relevant factors may provide a basis for impugning the exercise of discretion, an exercise of discretion will only be ultra vires if the decision-maker overlooked a relevant factor that its enabling statute expressly or, more usually, impliedly obliged it to consider.

234 The Petroleum and Natural Gas Act, supra, does not direct the decision-maker to relevant factors as does the Forest Practices Code of British Columbia, supra, an adjunct to the Forest Act, supra. There is, however, a handbook of guidance for MEM decision-makers that has similar considerations set out as a matter of policy. The latter requires a balancing of interests, not the least of which is the consideration of the First Nations. However, the SFN says that at law under the duty to consult, the decision-maker under the Petroleum and Natural Gas Act is required to consider the impact the decision would have upon treaty rights and aboriginal rights, and on rights and freedoms guaranteed by the Charter. While the decision does not use the word "Charter" or "Charter of Rights and Freedoms", the plain reading of the decision can lead one to no other conclusion than the decision of Mr. German involved a consideration of aboriginal and treaty rights. Reference is repeatedly made to T8TA and the question of infringement of the treaty rights of not only the West Moberly and Halfway but also of the SFN as referred to in p. 7 of the decision. There is no question that the SFN are unhappy with the results of the consideration. However, that does not go to the question of jurisdiction.

4. FETTERED DISCRETION

235 A decision-maker not must fetter his discretion to make a decision by adopting an inflexible policy or guideline. Such decisions must be made upon their merits: see *Maple Lodge Farms v. Canada* (1982), 137 D.L.R. (3d) 558, (S.C.C.), at 561. In *Halfway*, Dorgan J. concluded that the Ministry of Forest's decision-maker, by simply applying a government policy of not halting development when an aboriginal claim was advanced, demonstrated a slavish adoption of ministerial policy and as such was a fettering of the statutory discretion. She did not however conclude that an application of such a policy in the context of a consideration of all of the other factors constituted a fettering.

236 Here, the SFN had filed in March of 1997 a Treaty Land Entitlement Claim pursuant to the provisions of Treaty No. 8. That claim encompassed the original CMAC area. On June 13, 1998 Chief Cameron wrote to the Premier of the Province of British Columbia. Copies were sent to various persons including Ms. Brooks and Mr. Miltenberger, informing the Premier of the claim and reminding the Province of its "joint obligation to reserve this land from any future disposition pending the conclusion of settlement negotiation of the Sauteau First Nation Treaty Land Entitlement Claim".

237 The argument made by the SFN is that because the decision was made notwithstanding that letter the decision-maker must have followed a provincial policy to ignore Treaty Land Entitlement Claims. Because this was done in *Halfway*, the submission is that the decision-maker likewise

blithely adhered to such a policy (if such existed) here. If the permits had not been granted on that basis, the demand contained in the June 13, 1998 letter might well have been criticized as slavish following of such a policy (again, if such existed). That submission ignores the fact that the Treaty Land Entitlement Claim arises under Treaty 8 which contains treaty rights which the Province acknowledges exists. Repeatedly, Mr. German refers to treaty rights and whether the granting of the permits would unjustifiably infringe upon them.

238 Therefore, while not mentioning the Treaty Land Entitlement Claims specifically, I am satisfied that Mr. German was alive to the rights under Treaty 8 of the various First Nations including the SFN. All the decision-maker was required to do was to be cognizant of the existence of treaty rights, a matter of which I find he was. Given that a copy of the June 13, 1998 letter had been sent to Ms. Brooks and therefore he would unquestionably have been aware of it, the refusal to comply with the demands of the letter does not in my view go to support an attack upon the jurisdiction to make the decision. It is the process of consultation and consideration of such issues and not a power of veto that is required.

5. DUTY OF FAIRNESS AND RIGHT TO BE HEARD

239 As I observed earlier in reference to the KLCN, the decisions to be made under the Petroleum and Natural Gas Act, the Forest Act and its accompanying Forest Practices Code, *supra*, do not require a hearing. They are administrative decisions made pursuant to statutory authority created within those Acts themselves. In the case of the Petroleum and Natural Gas Act, s. 93, and that of the Forest Act, s. 51, neither these Acts nor in any of the authorities submitted by counsel for the SFN is there any suggestion of any requirement for a hearing. I therefore find the submissions of the SFN as it being entitled to a hearing before the decisions were made to be without merit.

240 There was however a duty to consult in a meaningful manner, and I agree with Dorgan J. when, at p. 60 in *Halfway*, she observes the decision-maker "must take into serious consideration the information provided . . . and . . . rights in general." That obligation of the Province is no more or less than the duty enunciated in the cases that follow *Guerin v. The Queen*, [1984] 2 S.C.R. 335, culminating in *Delgamuukw*, *supra*, in which Chief Justice Lamer observed at p. 113:

First, aboriginal title encompasses within it a right to choose to what ends a piece of land can be put. The aboriginal right to fish for food, by contrast, does not contain within it the same discretionary component. This aspect of aboriginal title suggests that the fiduciary relationship between the Crown and aboriginal peoples may be satisfied by the involvement of aboriginal peoples in decisions taken with respect to their lands. There is always a duty of consultation. Whether the aboriginal group has been consulted is relevant to determining whether the infringement of aboriginal title is justified, in the same way that the Crown's failure to consult an aboriginal group with respect to the terms by which reserve land is leased may breach its fiduciary duty at common law: *Guerin*. The nature

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

241 The duty to consult in the matter described is not that of any individual but rather the state in its dealing with First Nations people. I know of no authority that requires the decision-maker to personally inquire and receive the information upon which the decision is made or to personally engage in consultation. That is not a requirement of law and would, as I have observed earlier, be a physical impossibility. Rather, the decision-maker must be the repository of this process. Here, Mr. German upon a reading of his decision canvassed a multitude of issues and most importantly the process of discussion, acquisition of information, and consultation. Mr. Gevatkoff, in addition to his MOF inquiries referred to in his decision, had the benefit of that reviewed by Mr. German. Given the identical scope of the First Nations' concern with respect to the Twin Sisters, whether with regard to the gas well or with respect to the removal of trees to permit the winter trail access, what purpose could be served by duplication of process?

242 Mr. Gevatkoff clearly reviewed the procedures and processes in respect of the Amoco application for the siting of the gas well. In particular, the consultative processes that had been observed by the MEM and MEI augmented by the dialogues between Amoco and the various first nations fulfilled not only the requirement of consultation but the mandated balancing of interests required under the Forest Practices Code, *supra*.

243 In the fulfilment of his duty I find that those upon whom Mr. German relied, and in turn Mr. Gevatkoff, took steps to fully inform those who would decide of the aboriginal and treaty rights of the SFN and that any gap in the information was not through any want of trying to obtain it. There were repeated attempts to involve the SFN in consultation but this was met by the failure of Chief Cameron on behalf of the SFN to participate in this two-way process.

244 It was submitted that the SFN were without the resources to provide information unless requested. The evidence, while establishing that this community of First Nations is of limited means does not establish a community incapable of providing the information sought. The affidavit of Peter Havlik contains volume 1 of the Treaty Land Entitlement Claim with the SFN. Other volumes not filed in these proceedings are referred to in Mr. Havlik's affidavit at para. 3 and include archival documents and genealogical information.

245 That claim was dated March of 1997 and various volumes of supporting documents accompanying the claim. The claim and the supporting documents as filed in these proceedings (volume 1) is a document of some sophistication and complexity in the information it provides. Unquestionably, it was prepared for the SFN with the substantial assistance of the T8TA but is a document that illustrates the ability of the SFN to respond to the kind of request for information made of it by both the Province and Amoco, and more importantly to participate in the process of consultation. Mr. Havlik refers to the refusal of the Province to fund what he described as an impact study involving traditional and contemporary use of the "Twin Sisters Area" and its cultural and spiritual values. What the affidavit does not refer to, nor did counsel, is the substantial body of information developed through a plethora of studies, all of which were directed at the values ascribed to this area in terms of archeological, environmental, cultural and spiritual values. There is no suggestion that the utmost spiritual significance attached to the Twin Sisters Area was any greater or less to the SFN than to any of the other First Nations people whose history also includes the prophecies. What then could the decision-maker have additionally derived from any further studies other than the sense that the project and its impact were being studied ad nauseam?

6. ERROR OF LAW

246 The final general submission in this respect is one of error of law. Again, I accept Dorgan J.'s statement at p. 56 of Halfway when she commented upon the standard of review for an error of law:

The standard of a review for an error of law depends in part on whether the alleged error is jurisdictional in nature. In *U.E.S. Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048 at 1086, Beetz J. wrote:

It is, I think, possible to summarize in two propositions the circumstances in which an administrative tribunal will exceed its jurisdiction because of error:

1. if the question of law at issue is within the tribunal's jurisdiction, it will only exceed its jurisdiction if it errs in a patently unreasonable manner; a tribunal which is competent to answer a question may make errors in so doing without being subject to judicial review;
2. if however the question at issue concerns a legislative provision limiting the tribunal's powers, a mere error will cause it to lose jurisdiction and subject the tribunal to judicial review.

Here again, without repeating a multitude of the aspects of the decisions themselves, the argument is that the decision-maker "appeared to have made their decision without giving any consideration to either the treaty and aboriginal rights of the SFN or the constitutionally protected religious of the SFN."

247 The decision-makers repeatedly refer to treaty rights of the SFN and the significant spirituality that all three First Nations placed upon this area along with the need to locate the well away from the area of the Twin Sisters. While the term "area" may mean different things to different people, it is clear that the decision-makers were aware of the TSSMC process by which a protected area had been established and it was in reference to that protected area that the permit was granted. This argument is really a re-statement of the argument about the failure to consult, a submission that I have concluded cannot succeed in light of the evidence: the existence of the process of consultation, an invitation to partake, and the breaking off by the SFN from that consultative process.

B. INFRINGEMENT OF TREATY RIGHTS UNDER TREATY #8

248 The SFN also argued infringement of their rights under Treaty No. 8. As I have observed earlier in the reasons, it is not within the scope of this judicial review to determine rights save to the extent they are affirmed by the Crown or have been adjudged to exist. Here in fact, the Crown did so in respect of hunting, fishing and trapping rights in respect of all the first nations. It also agreed that where any such activity for which government approval is sought would likely interfere with those rights, the duty to consult is triggered. As well, while not admitting to rights under Treaty No. 8 beyond those three to which I have referred, the Crown says that it conducted itself in a manner consistent with the existence of the asserted spiritual or religious rights. I am in agreement with this submission. A substantial portion of the plethora of discussions, inquiries and consultations of all three First Nations was directed towards the treaty rights as they would be affected by the drilling project, in particular the sanctity of the area surrounding the Twin Sisters. That is particularly so in respect of the consultations that evolved through the TSSMC, resulting in the development of a protected area and areas of special management that were formulated and agreed upon. The SFN began as a part of that TSSMC process but because of an apparent internal disputes, withdrew under the leadership of Chief Cameron. Despite that, the process continued at which a minimization of infringement was addressed of not only the recognized treaty rights but also the spiritual significance or religious rights.

249 I find that in conducting itself as the Crown did, it fulfilled the duty cast upon it to "consult in good faith and with the intention of substantially addressing the concerns of the aboriginal people whose lands are at issue": see Delgamuukw, supra, p. 1113.

C. FREEDOM OF RELIGION

250 I have considered this submission earlier, made in a similar form by the KLCN and do not intend to repeat what I have said there. It applies equally to this submission by the SFN. Nothing done under the authority of those permits prevents the exercise of religious rights as it is enunciated within the prophecies. The area is still open for religious exercise that involves the use of the area for food and medicinal hunting and foraging; likewise it does not restrict trapping and fishing other than in marginal and minimalistic way. The consent of at least two First Nations has been obtained,

and a specific area is closed and protected from any activity.

251 The intellectual aspect of a concept of stewardship for times of need in refuge is not impugned and while in a perfect world as viewed by the SFN, such drilling would never occur, the activity does not deny that concept. The provisions of a protected area provides a basis for that continued intellectual stewardship that is an aspect of the area's spirituality. While geographically constricted, it is not eliminated to the extent that there is limitation or coercion of the existence of the religious rights. The threshold discussed in *R. v. Edwards Books and Art Ltd.*, supra, at 759, has not been crossed.

252 In conclusion, while the SFN as represented by Chief Cameron are adamant in their opposition to this project, they have been afforded the fulfilment of the duty upon the Crown to be consulted. Any responsibility for the absence of consultation lies with their own representatives. Their concerns and rights were considered in the matter as required by the statutory decision-makers.

253 It follows that the petition of the SFN is dismissed.

254 Counsel for Amoco specifically informed this court that his clients would not seek costs in the event that the petitions were dismissed. That subject was not addressed by counsel for the respondent Ministries and should it become an issue, counsel are at liberty to make submissions in that respect.

TAYLOR J.

cp/d/sfr/DRS/DRS

---- End of Request ----

Print Request: Current Document: 1

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Heiltsuk Tribal Council v.
British Columbia (Minister of
Sustainable Resource
Management),*
2003 BCSC 1422

Date: 20030918
Docket: 03 0746
Registry: Victoria

Between:

**Heiltsuk Tribal Council and Heiltsuk Hemas Society,
on their own behalf and on behalf of all other members
of the Heiltsuk Nation**

Petitioners

And

**Her Majesty the Queen in Right of British Columbia
as represented by the Minister of Sustainable Resource
Management, Land and Water British Columbia Inc.,
The Deputy Comptroller of Water Rights, The Regional
Water Manager (Cariboo Region) and Omega Salmon Group Ltd.**

Respondents

Before: The Honourable Madam Justice Gerow

Reasons for Judgment

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Date and Place of Hearing:

June 16-20, 2003
and June 23-26, 2003
Victoria, B.C.

[1] The petitioners apply pursuant to **Judicial Review Procedure Act**, R.S.B.C. 1996, c. 241, to set aside the decisions of the Minister of Sustainable Resource Management (the Minister), the Deputy Comptroller of Water Rights, the Regional Water Manager (Cariboo Region) and Land and Water British Columbia (LWBC)(collectively, the decision makers) with respect to:

- Conditional water licence 116890 for Martin Lake dated December 19, 2001 (the Martin Lake water licence 2001) and the replacement licence no. 117538 dated August 29, 2002 (the Martin Lake water licence 2002);
 - A licence of occupation to operate a commercial fish hatchery, dated January 15, 2002 (the hatchery licence of occupation);
 - A licence of occupation for a salt water intake pipe, effluent pipe and general dock, dated October 1, 2002 (the dock and pipe licence of occupation); and
 - Conditional water licence 116629 for Link River, dated November 18, 2002 (the Link River water licence).
- (collectively, the licences)

[2] The licences were issued to Omega Salmon Group Ltd. (Omega) and, together with other licences issued to it, allow Omega to operate a land based fish hatchery in Ocean Falls, B.C.

[3] The Heiltsuk claim aboriginal rights and title to a large area of land encompassing approximately 33,735 square kilometres. The land being claimed includes the 8.83 hectares or .08 square kilometres granted to Omega under the hatchery licence of occupation and the dock and pipe licence of occupation.

[4] The land is described in the two licences as:

That part or those parts of the following described land shown outlined by bold line on the schedule attached to the Industrial Licence:

Those unalienated and unencumbered portions of District Lots 31 and 104; together with unsurveyed foreshore or land covered by water being part of the bed of Link River, all within Range 3 Coast District, containing 5.88 hectares more or less, Except for those parts of the land that, on the January 15, 2002 Date, consisted of highways (as defined in the *Highway Act*) and land covered by water;

And

That part or those parts of the following described land shown outlined by bold line on the schedule attached to the Utility Licence:

That part of District Lot 847, together with unsurveyed foreshore or land covered by water being part of the bed of Cousins Inlet, Range 3, Cost District, containing 2.95 hectares, more or less,

Except for those parts of the land that, on October 1, 2002, consisted of highways (as defined by the *Highway Act*).

(hereinafter the "land")

[5] Much of the land impacted by the hatchery licence of occupation and the dock and pipe licence of occupation is filled land created prior to the construction of a pulp mill which was operated in Ocean Falls in the 1900s.

[6] The Heiltsuk also claim aboriginal title and rights to the water in their claimed territory and as a result take the position that they were owed a duty of consultation prior to the issuance of both the Martin Lake water licences and the Link Lake water licence.

[7] The Martin Lake water licence 2002 allows Omega to divert up to 100 cubic feet per second of water from Martin Lake to Link Lake. The Link Lake water licence authorizes the diversion of up to 200 cubic feet per second of water from the Link River to the hatchery. The water which is diverted will pass through the hatchery and then be discharged to Cousins Inlet. If not diverted the water will spill over the existing dam into Cousins Inlet.

[8] The Heiltsuk are seeking the following orders and declarations:

- A declaration that the decision makers had a duty to consult with and accommodate the Heiltsuk's interests and concerns before issuing the licences and that the decision makers breached their duties.
- A declaration that Omega had a duty to consult with and accommodate the interests and concerns of the Heiltsuk and that Omega breached that duty.
- A declaration that the licences issued by the decision makers are of no force and effect and an order quashing and setting aside the licences.
- An order in the nature of a prohibition barring the issuance of any approvals, permits or other authorizations relating to the proposed Atlantic salmon hatchery development;
- An interim or interlocutory injunction prohibiting Omega from operating the hatchery until either a final disposition of the proceedings or order of the court.

[9] Both the petitioners and Omega object to portions of the affidavit material which has been filed. I agree with both the petitioners and Omega that many statements in the affidavits are irrelevant or inadmissible hearsay, opinion or

argument. I am not going to deal with each objection raised, however I have disregarded the statements which are objectionable. In reaching my conclusions, I have relied on direct evidence and the oral histories contained in the affidavit material.

[10] The issues to be determined are:

- Have the Heiltsuk established a *prima facie* claim of aboriginal title or rights in respect of the lands and waters covered by the licences?
- Have the Heiltsuk established a *prima facie* infringement of the aboriginal title or rights which they claim?
- Was a duty of consultation and accommodation owed to the Heiltsuk by the decisions makers before they made their decisions to issue the licences and, if so, did they fulfill those duties?
- Was a duty of consultation and accommodation owed by Omega to the Heiltsuk and, if so, did Omega fulfill its duty?
- Is this an appropriate case for the court to exercise judicial review?

- If there were breaches of duty by the decisions makers or Omega what are the appropriate remedies?

CHRONOLOGY REGARDING ISSUANCE OF LICENCES

[11] Omega began the application process in September 2001.

[12] The Heiltsuk became aware of a proposed salmon hatchery to be located at Ocean Falls in November 2001. Following the meeting at which they were advised by LWBC of the proposed salmon hatchery the Heiltsuk met with Omega in November 2001.

[13] On December 17, 2001 Mr. Williams, the Aquaculture Manager at LWBC, sent an email to the Heiltsuk in response to an inquiry from the Heiltsuk as to why there had been no referral regarding the proposed Omega hatchery. He advised the Heiltsuk that Omega had applied for a licence of occupation to construct a fish hatchery on the old industrial lands in Ocean Falls. He further advised that the Province was not sending out any referrals as the land was Crown granted in the past and had been developed. As well, the land was mainly filled foreshore and that, following the Aboriginal Consultation Guidelines, referrals were not required. However, Mr. Williams was aware that the Heiltsuk had at that

point had one meeting and another planned with Omega. Omega had been told to document any feedback from the Heiltsuk in the meetings and provide it to LWBC. Mr. Williams further advised that the Martin Lake water licence 2001 was being assigned to Omega.

[14] An Aboriginal Interest Assessment Report was prepared December 19, 2001 by LWBC and a copy was provided to the Heiltsuk.

[15] The Martin Lake water licence 2001 was issued to Omega on December 19, 2001. The licence had originally been granted to Pacific Mills Ltd., who ran a pulp and paper mill on the site, in 1929. The Martin Lake water licence 2002 was issued to Omega on August 29, 2002 relocating the diversion. At the time the Martin Lake water licence 2002 was issued a report was prepared which stated that no referral was required as this was a minor modification to an existing licence.

[16] A letter was sent to Heiltsuk by LWBC regarding the decision not to consult on December 24, 2001 with an invitation to discuss the Aboriginal Interest Assessment report. The letter explained why a referral had not been made and advised the Heiltsuk that they would be kept apprised as the review process continued.

[17] The explanations given as to why the Province did not feel it was necessary to refer the issue to the Heiltsuk were:

- The site had been privately owned for nearly 80 years;
- The core areas of the town and millsite had been extensively disturbed and developed;
- The nature of the land use over that time effectively precluded the exercise of any aboriginal traditional uses;
- A significant portion of the application area was filled foreshore, i.e. land which did not exist prior to the development of the mill and town;
- There were extensive areas of relatively undisturbed vacant Crown land in the area surrounding Ocean Falls;
- Impacts which occurred were at the time of the original development of the site and any aboriginal issues associated with past activity on the land could not be resolved through consultation about the current land use proposal.

[18] Heiltsuk representatives visited another hatchery with Omega in December 2001. Following the meeting Omega advised the Heiltsuk that it wanted to continue an ongoing dialog with the Heiltsuk people.

[19] On January 7, 2001 a letter was sent by the Heiltsuk to LWBC expressing disappointment that there would be no referral and requesting that the Province reconsider its position.

[20] The Heiltsuk attended an open house at Bella Bella with Omega on January 9, 2002 where the Heiltsuk expressed their concerns. The Heiltsuk advised that they did not consider the meeting to be consultation.

[21] On January 11, 2002 Omega sent a letter to Heiltsuk expressing a willingness to work with the Heiltsuk and enter into a partnership with the Heiltsuk.

[22] On January 16, 2002 LWBC sent a letter to the Heiltsuk expressing that although there had been no referral, staff had communicated with members of the Heiltsuk regarding the proposed project and an information package was sent. LWBC advised the Heiltsuk it had requested Omega meet with the Heiltsuk, and understood that Omega had expressed a willingness to enter into a commercial arrangement with the

Heiltsuk. LWBC made an offer to assist the Heiltsuk in preparing an application for other lands in the vicinity which could be utilized for the Heiltsuk proposed salmon enhancement facility and in exploring potential opportunities to maximize the benefits from the Omega hatchery. As well, the Heiltsuk were advised that the provincial agencies responsible would ensure that the hatchery was in compliance with all regulatory requirements relating to the Heiltsuk's concerns about the potential for the introduction of diseases or chemical effluent into the marine environment and the escape of Atlantic salmon.

[23] Memos were sent by Omega to the Heiltsuk providing information on January 15 and 16, 2002 which responded to concerns expressed by the Heiltsuk.

[24] The hatchery licence of occupation was issued to Omega on January 15, 2002.

[25] LWBC sent a referral package to the Heiltsuk on April 10, 2002 with respect to the dock and pipe licence of occupation.

[26] On May 7, 2002 the Heiltsuk sent a letter expressing concerns regarding effluent, clean up of the contaminated site and Atlantic salmon escapes. As well, the Heiltsuk expressed

concern that the dock and pipe licence of occupation and project as a whole would impact the Heiltsuk's ability to site a village and a wild salmon enhancement facility in Ocean Falls.

[27] A meeting was held on May 30, 2002 between representatives of the Heiltsuk, Omega and the Province where details of the project were discussed and the time line for approvals and construction of the project was provided to the Heiltsuk.

[28] Omega sent a follow up letter and information package to the Heiltsuk on June 11, 2002 addressing concerns raised by the Heiltsuk.

[29] Omega sent a letter and video to the Heiltsuk showing various underwater and foreshore video clips from Omega's habitat survey on June 21, 2002 in response to some of the questions raised by the Heiltsuk.

[30] The Dock and Pipe licence of occupation was issued to Omega on October 1, 2002.

[31] A referral package was sent by LWBC to the Heiltsuk on August 28, 2002 regarding the Link River water licence.

[32] The Heiltsuk responded to the referral on October 15, 2002 outlining their aboriginal claims to Ocean Falls.

[33] A Report for **Water Act** decision was prepared November 15, 2002.

[34] On November 18, 2002 a letter was sent to the Heiltsuk attaching a copy of the Link River water licence issued to Omega on November 18, 2002.

DUTY OF CONSULTATION

[35] In the cases dealing with the issue of consultation the courts have considered the factual context, including:

- whether there is a general right to occupy lands or whether there is a right to engage in an activity;
- whether there is or has been an infringement; and
- if there is or has been an infringement, whether there is any justification for the infringement.

[36] It is in the final stage of the analysis, i.e., whether there is any justification for the infringement, that the courts have considered whether the Crown has met its fiduciary and constitutional duty of consultation and whether

there has been an attempt to accommodate the First Nations.

R. v. Sparrow, [1990] 1 S.C.R. 1075, ¶ 64 - 72 and ¶ 81 - 82,

R. v. Adams, [1996] 3 S.C.R. 101, ¶ 46 and 51 - 52.

[37] In *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, Lamer C.J. discussed the issue of consultation in the context of the justification of an infringement of aboriginal title and stated at ¶ 168:

There is always a duty of consultation. Whether the aboriginal group has been consulted is relevant to determining whether the infringement of aboriginal title is justified, in the same way that the Crown's failure to consult an aboriginal group with respect to the terms by which reserve land is leased may breach its fiduciary duty at common law: *Guerin*. The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal rights.

[38] In *Haida Nation v. British Columbia (Minister of Forests)* 2002 BCCA 147 (*Haida No. 1*), Lambert J.A. recognized

a three stage analysis in determining whether the Crown has breached its duty to consult consisting of:

1. consideration of whether aboriginal title or rights have been established on a balance of probabilities and a decision regarding the nature and scope of the title and rights;
2. determination of whether the particular title or rights have been infringed by a specific action; and
3. a consideration of whether the Crown has discharged its onus to show justification, including whether it has fulfilled its obligation to consult.

(¶ 46)

[39] Lambert J.A. acknowledged that although both the consultation and the infringement are likely to precede the determination of the aboriginal rights and title, that when determining if there has been a breach of duty the Court must first look at whether the First Nation has proved the title and then whether there has been an infringement of the right. Once those elements are established the onus shifts to the Crown to establish that there was justification for the

infringement both before and at the time the infringement occurred. (¶ 46)

[40] In **Haida No. 1** the Court of Appeal held that due to the circumstances surrounding the Minister's consent to the transfer of tenure from MacMillan Bloedel to Weyerhaeuser, the Minister had a legally enforceable duty to consult with respect to the transfer. The main issue in **Haida No. 1** was whether any consultation had taken place in the face of a good *prima facie* case of infringement of aboriginal rights to red cedar.

[41] In **TransCanada Pipelines Ltd. v. Beardmore (Township)** (2000), 186 D.L.R. (4th) 403 (Ont. C.A.), the Court held that it was only after a First Nation has established an infringement of an existing aboriginal or treaty right that the duty of the Crown to consult with the First Nation was a factor for the Court to consider in the justificatory phase of the proceeding. Borins J.A. stated at ¶ 120:

As the decisions of the Supreme Court illustrate, what triggers a consideration of the Crown's duty to consult is a showing by the First Nation of a violation of an existing Aboriginal or treaty right recognized and affirmed by s. 35(1) of the **Constitution Act, 1982**. It is at this stage of the proceeding that the Crown is required to address whether it has fulfilled its duty to consult with a First Nation if it intends to justify the constitutionality of its action.

[42] In *Taku River Tlingit First Nation v. Tulsequah Chief Mine Project* 2002 BCCA 59, it was argued that aboriginal right or title had to be established before there was duty to consult with the aboriginal peoples. In rejecting the argument, Rowles J.A. held that while the onus of proving a *prima facie* infringement of an aboriginal right or title is on the group challenging the legislation (or in this case the decisions of the statutory decision makers), it did not follow that until there was court ruling the right did not exist. (¶ 183)

[43] In *Taku*, the court accepted as findings of fact that the proposed road would impose serious impacts on the resources used by the Tlingit, that the Tlingits were not adequately prepared to handle the predicted impacts and that there was no plausible mitigation or compensation possible. The project had not been commenced and it was found that the proposed road would have a profound impact on the Tlingit's aboriginal way of life and their ability to sustain it. The Tlingit's were willing to participate in the environmental review process to have their needs accommodated but the project approval certificate had been issued without their concerns being met. (¶ 132 and 202)

[44] In the circumstances, the court felt it was appropriate to dismiss the appeal of the order quashing the certificate and remit the matter to the Ministers to consider afresh the issuance of the project approval certificate. In her dissent, Southin J.A. referred to the fact that the right to be consulted is not a right of veto and was of the view that to remit the matter back to the Ministers would prolong the agony for both the proponent of the project and the TINGLIT. (¶ 100 and 101)

[45] Although the Court in *Haida No. 1* agreed that the requirement to consult could arise prior to the aboriginal right or title having been established in court proceedings, and that the Crown and Weyerhaeuser were in breach of an enforceable duty to consult and to seek accommodation with the Haida, it did not necessarily follow that the replacement of the licence was invalid. The Court was not prepared to make a finding regarding the validity, invalidity or partial validity of the transfer of the licence but was of the view that it was a matter that could be more readily determined after the extent of the infringement of title and rights had been determined. (¶ 58 and 59)

[46] Lambert J.A. stated that the courts have considerable discretion in shaping the appropriate remedy in a

judicial review proceeding before the final determination of the title and rights of the aboriginal people and that the aim of the remedy should be to protect the parties pending the final determination of the nature and scope of title and rights. At the time of the final determination of rights and title the issues of the nature and extent of the infringement and the issue of justification could be dealt with. (¶ 53 and 54)

HAVE THE HEILTSUK ESTABLISHED A *PRIMA FACIE* CLAIM OF ABORIGINAL TITLE OR RIGHTS IN RESPECT OF THE LANDS AND WATERS COVERED BY THE LICENCE?

[47] The Heiltsuk advance claims based on aboriginal rights and title that have not yet been judicially determined. I am of the view that in interim proceedings of this type, I am not in a position to do more than make preliminary general assessments of the strength of the *prima facie* claims and potential infringement.

[48] I agree with Tysoe J.'s comment in ***Gitksan and other First Nations v. British Columbia (Minister of Forests)***, 2002 BCSC 1701 that the Court should avoid making detailed evidentiary findings on affidavit material unless it is essential to do so. Critical findings of admissibility or assessing the weight to be given to oral histories should be

left to the trial judge responsible for making the final determinations of the claims of rights or title. (¶ 70)

[49] The Heiltsuk's evidence is that they have been engaged in treaty negotiations with the Province regarding their land claim since 1981 when they filed a Statement of Comprehensive Aboriginal Rights Claim. In 1993, the Heiltsuk filed a Statement of Intent with the B.C. Treaty Commission and were accepted into treaty negotiations with the Provincial and Federal government. Throughout that time, the Heiltsuk have continuously asserted title over the land, including the area described in the licences.

[50] As well, the Heiltsuk have established an aboriginal right to harvest herring spawn on kelp. **R. v. Gladstone**, [1996] 2 S.C.R. 723.

[51] The Heiltsuk argue that based on the affidavit material they have a strong or good *prima facie* claim of aboriginal rights or title with respect to their territory including Ocean Falls.

[52] Given that I am of the view it is not appropriate for me to assess the weight to be given to the oral history or make findings of admissibility on the basis of the affidavit material, I have accepted the evidence contained in the oral

histories at face value for the purpose of determining if the Heiltsuk have a *prima facie* claim of aboriginal rights and title to Ocean Falls.

[53] The evidence contained in the affidavit material regarding the oral history is that one of the main winter villages of the Heiltsuk was located at Ocean Falls. The Heiltsuk moved away around the time the pulp mill was constructed in 1909. Approximately 300 - 400 Heiltsuk lived in Ocean Falls prior to industrialization in the early 1900s. The area was a good village site in the winter because it was sheltered from the winds and open waters of the outer coast. Link Lake provided fresh water and Cousins Inlet provided seafood including halibut, ling cod, rock cod, spring salmon, crabs, prawns and herring. The evidence is that the Heiltsuk were forced to relocate from the area when the pulp mill was built.

[54] Although the Heiltsuk assert that the village of Tuxvnaq or Duxwana'ka was located in Ocean Falls prior to the establishment of the pulp mill, there is also evidence that in the early 1900s there may have only been one First Nations individual living at Ocean Falls. The survey map prepared at the time of the original Crown grant in 1901 shows one Indian house near the tide flats with an Indian trail leading to it.

[55] There is little direct evidence and no documentary evidence of a forced relocation of the Heiltsuk at the time the pulp mill was constructed. There is no evidence in support of a forced relocation in the Bella Bella story, a book which was referred to by both the Heiltsuk and the Crown. As well, there has been no mention of a forced relocation in the materials filed by the Heiltsuk in the treaty negotiations.

[56] "... [C]laims must be proven on the basis of cogent evidence establishing their validity on the balance of probabilities. Sparse, doubtful and equivocal evidence cannot serve as the foundation for a successful claim." **Mitchell v. M.R.N.**, [2001] S.C.R. 911 at ¶ 51.

[57] Chief Justice McLachlin was clear that **Mitchell** did not impose upon aboriginal claimants the requirement of producing indisputable or conclusive evidence from pre-contact times. However, she observed that there was a "distinction between sensitively applying evidentiary principles and straining those principles beyond reason". In **Gladstone**, for example, the recognition of an aboriginal right to engage in trading herring roe on kelp was based on an indisputable historical and anthropological record corroborated by written documentation. The Court in **Gladstone** concluded that there

was clear evidence from which it could be inferred that the Heiltsuk were involved in trading herring roe on kelp prior to contact. (¶ 52)

[58] I am of the view that there is insufficient evidence before me to make a finding that the Heiltsuk were forcibly removed from Ocean Falls and I decline to make any finding in that regard.

[59] There is evidence that another First Nation, the Nuxalk Nation, asserts that Ocean Falls, including the land impacted by the licences, is within its territorial boundaries. The Nuxalk have put the Heiltsuk, Omega and the Crown on notice of their claim. The Nuxalk oppose the construction of the hatchery and have advised both Omega and the Crown that they will not permit salmon aquaculture in their territory.

[60] Although the petitioners argue that I should ignore the claims of the Nuxalk, I am of the view that making any findings regarding the Heiltsuk claim of rights and title which could potentially impact the overlapping claim of the Nuxalk in this proceeding is inappropriate.

[61] As set out in *Delmaguukw*, there are a number of criteria that must be satisfied by the group asserting

aboriginal title including exclusive occupancy at the time of sovereignty:

Were it possible to prove title without demonstrating exclusive occupation, the result would be absurd, because it would be possible for more than one aboriginal nation to have aboriginal title over the same piece of land, and then for all of them to attempt to assert the right to exclusive use and occupation over it.

(¶ 155)

[62] Although Lamer C.J. recognizes the possibility of a finding of joint title shared between two or more aboriginal nations, which would involve the right to exclude others except with whom possession is shared, no claim to joint title has been asserted by the Heiltsuk and the Nuxalk are not represented on this application. It is not possible therefore to assess the relative strengths of the two competing claims to the land or what impact the two claims have on each other.

[63] Based on the evidence before me of the overlapping claims, the only conclusion I have been able to reach is that both Heiltsuk and Nuxalk assert aboriginal title over the land, but I am unable to determine whether either has a good *prima facie* case of aboriginal title.

[64] However, the oral history of the Heiltsuk, which I accept at face value for the purpose of this application, is

that the area of Ocean Falls was used as a winter village and the Heiltsuk have fished in the area. I find, therefore, that the Heiltsuk have a strong *prima facie* case of aboriginal rights to fish in the area and to non-exclusive use of the land. The Heiltsuk's *prima facie* claim for aboriginal rights does not require exclusivity.

HAVE THE HEILTSUK SHOWN AN INFRINGEMENT OF AN ABORIGINAL RIGHT?

[65] The Heiltsuk take the position that the licences infringe their claims for aboriginal rights to the land impacted by the licences.

[66] In *Gladstone*, the Court refers to the *Sparrow* test for determining whether the government has infringed aboriginal rights which involves:

- asking whether the legislation, or in this case the decisions to grant the licences, has the effect of interfering with an existing aboriginal right; and
- determining whether the interference was unreasonable, imposed undue hardship, or denied the right to the holders of their preferred means of exercising the right.

[67] Even if the answer to one of the questions is no, that does not prevent the court from finding that a right has been infringed, rather it will be a factor for the court to consider in determining whether there has been a *prima facie* infringement. The onus of proving a *prima facie* infringement of rights lies on the Heiltsuk, i.e., the challengers of the decisions. **Gladstone**, ¶ 39 and 43.

[68] Because aboriginal rights are not absolute and do not exist in a vacuum, claimants must assert both a right and the infringement of the right. **Cheslatta Carrier Nation v. British Columbia**, 2000 BCCA 539, ¶ 18 and 19, **Delgamuukw**, ¶ 160, 162 and 165.

[69] In **Cheslatta**, the Court of Appeal referred to **R. v. Nikal** [1996], 1 S.C.R. 1013 for the proposition that aboriginal rights are like all other rights recognized by our legal system. The rights which are exercised by either a group or individual involve the balancing of those rights with the recognized interests of others. Any declaration regarding an aboriginal right would not be absolute in that it may be subject to infringement or restriction by government where such infringement is not unreasonable and can be justified. (¶ 18 and 19)

[70] The Heiltsuk have raised concerns that the issuances of the licences adversely affect their fishing rights and their non exclusive use of the land.

[71] They say the *prima facie* infringements regarding their right to the use of the land are:

- the hatchery licence of occupation allowing Omega to operate a hatchery is not their chosen use of the land;
- that it will prevent them from utilizing the area as a village site in the future;
- that the diversion of water will result in an inadequate amount of water for the future village;
- the hatchery will impact the availability of electricity to service a village; and
- the Heiltsuk do not support Atlantic salmon aquaculture, and take the position that their right to self government is irreparably harmed by the imposition of the hatchery in a territory over which they have asserted a claim.

[72] The Heiltsuk say the *prima facie* infringements regarding their fishing rights are:

- That the discharge from the factory into Cousins Inlet will cause pollution and disease thereby impacting the Heiltsuk fishing rights in the area;
- The construction of the facility has potentially caused pollution as a result of hazardous wastes, in particular asbestos, which was disturbed during construction; and
- The fish reared in the hatchery may escape from the hatchery, or alternatively, from fish farms outside Heiltsuk claimed waters and enter Heiltsuk claimed waters thereby impacting their fishing rights.

(i) Have the Heiltsuk established a *prima facie* infringement of their right to non exclusive use of the land?

[73] The Heiltsuk argue that this case falls within the cases referred to in *Delgamuukw* which may require the full consent of the aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands. (¶ 168) They argue that the Province's actions authorize aquaculture over Heiltsuk title through the regulation of farmed fish and therefore the Province should have obtained the consent of the Heiltsuk.

[74] I do not agree that the issuance of the licences in question is analogous to the type of situation contemplated in

Delgamuukw which would require the full consent of the aboriginal nation. There is no evidence that the Province by issuing the four licences is impacting the right of the Heiltsuk to hunt or fish in the area.

[75] There is no evidence that the Heiltsuk will not be able to locate a village there because of the licences of occupation. The hatchery in issue is a land based facility. The licences of occupation over the .08 square kilometres are for 10 years. Most of the land on which the hatchery is located is filled land created prior to the construction of the pulp mill. The site was a contaminated industrial site which has required significant expenditure by Omega to clean up. There is evidence that Omega has removed 700 tons of industrial debris from the site and plans to continue a process of remediation of the site in co-operation with LWBC.

[76] The Heiltsuk have not established that the issuances of the licences have resulted in a *prima facie* infringement to their right to non exclusive use of the land.

[77] There is a large area adjacent to the pulp mill site where the town of Ocean Falls was located which had a population of 4,000 people that could be used as a village

site. The total population has declined to less than 100 since the closure of the pulp mill 20 years ago.

[78] The diversion of water is not new. The original licence to divert water from Martin Lake was issued 70 years ago and there was sufficient water and electricity to service the town of Ocean Falls.

[79] There is no evidence that the issuance of the licences allowing construction and operation of the hatchery will impact the Heiltsuk's ability to pursue their negotiations with the Province regarding their claim of aboriginal title or locate a village there in the event they decide to do so.

[80] As well, there is no evidence that the licences will prevent the Heiltsuk from establishing a wild salmon enhancement facility in the future.

[81] With respect to the Heiltsuk's assertion about self government, there is no evidence to support their position that the hatchery will cause irreparable harm. On the contrary, the evidence is that Omega has cleaned up industrial waste from the site and is committed to continuing rehabilitation of a contaminated site. The licences are of fixed duration.

[82] The right to self govern is, in my view, inextricably bound up in the Heiltsuk's aboriginal claim to title and their right to use the land for their preferred use, i.e., the Heiltsuk want to decide what the land will be used for and the ability to veto uses of the land which do not accord with their philosophy. The Heiltsuk's complaint in this regard is that they are opposed to Atlantic salmon aquaculture and do not want any Atlantic salmon aquaculture in their territory.

[83] The necessary factual basis on which to determine whether the claim for self government has been made out is lacking. As set out above, the Nuxalk Nation is also claiming title to the same area and is not before me on this application. A determination regarding the Heiltsuk's right to self govern in the area would by necessity impact the Nuxalk.

[84] There is no evidence that the construction and operation of the hatchery pursuant to the licences will impact the Heiltsuk's ability to negotiate or establish the right to self govern in the area in the future. There is no evidence that the construction and operation of the hatchery either has or will cause irreparable harm whereby the Heiltsuk will not be able to utilize the land as they choose in the future.

[85] It is not within the ambit of this application to deal with the many difficult issues which would have to be addressed in order to make a determination of the Heiltsuk's right to self government beyond the finding that, in my view, there is no evidence to support the Heiltsuk argument that their asserted right to self govern, i.e., the right of the Heiltsuk to make decisions as to the use of the land in the event that they establish their aboriginal title in the future, has been infringed by the issuance of the licences.

[86] Accordingly, I find that the Heiltsuk have not discharged their burden of establishing a *prima facie* infringement of their aboriginal rights to non-exclusive use of the land.

(ii) Have the Heiltsuk established a *prima facie* infringement or their aboriginal right to fish?

[87] In *Nikal* the Supreme Court of Canada, in the course of finding that the bare requirement for a licence did not constitute an infringement of aboriginal fishing rights, rejected the proposition that any government action which affects or interferes with the exercise of aboriginal rights constitutes a *prima facie* infringement of the right. The Court held that the government must ultimately be able to balance competing interests. (¶ 91-94)

[88] In *Gladstone*, Lamer C.J. sets out that the threshold requirement for infringement and states that legislation infringes an aboriginal right when it "clearly impinges" upon the rights. (¶ 53 and 151) An infringement has been defined "as any real interference with or diminution of the right." *Mikisew Cree First Nation v. Canada*, 2001 FCT 1426 at ¶ 104.

[89] The Heiltsuk argue that their right to fish could be infringed by discharge of deleterious substances or disease into the marine environment during the construction or operation of the hatchery, the diversion of water and the potential impact of escaped Atlantic salmon on the wild native stock.

[90] There is evidence from Omega's expert that the construction of the facility will not impact the marine habitat in the area and that the discharge from the hatchery during operation will not pose a threat to marine life.

[91] The Minister of Fisheries and Oceans confirmed on August 16, 2002 that "a harmful alteration, disruption, or destruction (HADD) of fish habitat will not occur as a result of the construction and operation of this facility as proposed." The Regional Waste Manager, pursuant to the *Waste Management Act*, R.S.B.C. 1996, c. 482 and regulations

confirmed on April 29, 2002 that the hatchery was a regulated site under the *Land-Based Fin Fish Waste Control Regulation*, B.C. Regulation. 68/94. Neither the Federal Minister of Fisheries nor the Provincial Minister of Water, Land and Air Protection are parties to this petition.

[92] Omega's expert report was provided to the Heiltsuk and he was in attendance at a meeting with the Heiltsuk in May 2002 in Bella Bella to provide information.

[93] The Heiltsuk presented no evidence that the effluent or construction will impact the marine environment in an adverse way thereby impacting the Heiltsuk's fishing rights in the area. Although they have presented evidence that asbestos may have been present on the site, the Heiltsuk have presented no evidence that any asbestos or other deleterious substances leached into the marine environment during construction of the hatchery.

[94] The Heiltsuk have expressed concern regarding the possibility of escape of smolts from the hatchery which could adversely impact the wild Pacific salmon in the area. Omega explained that the discharge pipe will have a triple screening system, as required by Provincial and Federal regulations, in order to prevent the escape of fish from its tanks. The

likelihood of escapes from a land based facility is remote. The screening criteria and requirements to prevent smolts being introduced into the ocean are governed by the terms of the aquaculture licensing tenure, not by the licences in issue in this application. A federal permit is required for the transporting of smolts. The evidence is that the smolts will be removed by boat from the area.

[95] In my view, the Heiltsuk's concern about potential escape of salmon from fish farms outside Heiltsuk claimed territory is not an issue before the Court. The issues before me are whether the decision makers erred in granting the four licences to Omega, not whether fish farms, aquatic or land based, should exist in B.C.

[96] The Heiltsuk also argue that the diversion of water could possibly infringe their fishing rights in the area. The original Martin Lake water licence was granted over 70 years and there is no evidence that the diversion of water allowed by it has infringed the Heiltsuk's asserted right to fish in the area. There is no evidence that the water diverted pursuant to the Link River water licence infringes the fishing rights in the area. The water, although diverted through the hatchery, eventually flows into Cousins Inlet and as a result there is no impact on the volume of water in the Inlet.

[97] On the evidence before me, I find that the Heiltsuk have not discharged their burden of establishing a *prima facie* infringement of the aboriginal right to fish in the area of Ocean Falls.

IS THERE A DUTY TO CONSULT AND, IF SO, HAS THERE BEEN CONSULTATION?

[98] The Crown has acknowledged that it has a duty to consult with the Heiltsuk regarding any licences it issues to Omega. This is a change of position from when the initial licence, the Martin Lake water licence 2001, was granted to Omega at which time the Crown took the position that it did not need to consult with the Heiltsuk.

[99] In light of the Crown's concession that it has the duty to consult with the Heiltsuk regarding issuance of the licences, I am granting the order sought by the Heiltsuk that the Crown has a duty to consult with the Heiltsuk regarding the licences.

[100] The Heiltsuk also take the position that Omega owes them a duty of consultation. While not making a formal concession that it owes a duty to consult to the Heiltsuk, Omega has been clear from the commencement of the project that

it is willing to consult with the Heiltsuk and says that it has made attempts to do so.

[101] As set out by Lamer C.J. in *Delgamuukw*, the duty to consult can range from a duty to discuss important decisions that will be taken in respect of lands held pursuant to aboriginal title to a requirement for the full consent of the aboriginal nation depending on the circumstances. Consultation must be in good faith and with the intention to substantially address the concerns of the aboriginal people whose lands are in issue. (¶ 168)

[102] The Crown may rely on consultation which it knows is taking place between aboriginal groups and third parties. In *Kelly Lake Cree Nation v. Ministry of Energy and Mines et al.*, also known as *Calliou*, [1999] 3 C.N.L.R. 126, (B.C.S.C.), Mr. Justice Taylor dealt with the issue:

[154] There is no question that there is a duty on government to consult with First Nation people before making decisions that will affect rights either established through litigation or recognized by government as existing....It is my view that a consideration of the question of consultation must be taken into account not only the aspects of direct consultation between First Nations people and the provincial government whose officials were charged with responsibility to decide upon these applications, but also the consultations between First Nations people and Amoco that were known to the government to have occurred. The process of consultation cannot be viewed in a vacuum and must

take into account the general process by which government deals with First Nations people, including any discussions between resource developers such as Amoco and First Nations people.

[103] The Heiltsuk take the position they have not been consulted at all with respect to the issuance of the licences and that any meetings held between the Heiltsuk and the Province or between Heiltsuk and Omega do not constitute consultation.

[104] In *Ryan et al. v. Fort St. James Forest District (District Manager)*, Smithers Registry, No. 7855 (BCSC) aff'd (1994), 40 B.C.A.C. 91, Macdonald J. dealt with the issue of whether the Gitksan could argue that there had not been adequate consultation when they had refused to participate in the process:

¶ 23 I accept that the Gitksan are entitled to be consulted in respect of such activities. They do not need the doctrine of legitimate expectations to support that right, because the *Forest Act* itself and the fiduciary obligations toward Native Indians discussed in *Delgamuukw*, establish that right beyond question. However, consultation did not work here because the Gitksan did not want it to work. The process was impeded by their persistent refusal to take part in the process unless their fundamental demands were met.

. . .

¶ 26 I accept the submission that the M.O.F. more than satisfied any duty to consult which is upon it. It was the failure of the Petitioners to avail

themselves of the consultation process, except on their own terms, which lies at the heart of this dispute.

[105] A similar finding was made in **Halfway River First Nation v. BC (Ministry of Forests)**, 1999 BCCA 470. On a review of the consultation which took place in that case, Mr. Justice Finch held:

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.

(¶ 161)

[106] Here the evidence is that Omega attempted to meet with and consult with the Heiltsuk:

- Omega met with the Heiltsuk in Bella Bella concerning the proposed hatchery in October 2001 just after it had commenced the application process for the licences.
- Omega met with the Heiltsuk in Campbell River in December 2001.

- Omega requested a meeting with the Heiltsuk in January 2002 and met with them in Bella Bella on January 9, 2002.
- Omega provided information to the Heiltsuk in January 2002 following the meeting in response to questions and concerns raised by the Heiltsuk.
- Omega met with the Heiltsuk in Bella Bella on May 30, 2002 and provided additional information following the meeting.

[107] During the various meetings and correspondence with Omega and the Crown the Heiltsuk have taken the position that they have zero tolerance to Atlantic salmon aquaculture and do not want the hatchery in their claimed territory, i.e., they have asserted a right to veto all Atlantic salmon aquaculture operations in their claimed territory.

[108] The Heiltsuk have remained firm in their position that they are opposed to any type of Atlantic salmon aquaculture in the territory over which they are asserting a claim. I find on the evidence that prior to the petition the Heiltsuk have been unwilling to enter into consultation regarding any type of accommodation concerning the hatchery. This is apparent both from the position they have taken

throughout the meetings where they have clearly indicated that they do not consider the meetings to be consultation and from correspondence between counsel in which the Heiltsuk have continued to express the view that no consultation has taken place.

[109] The Heiltsuk have never advised the Crown or Omega of any terms upon which they would be willing to withdraw their opposition to the hatchery. Rather, they have maintained their position of zero tolerance for Atlantic fish farming in their claimed territory, including this hatchery site. It is apparent on the evidence that the Heiltsuk do not want a hatchery on the site; i.e., they want a veto with respect to what use the land can be put.

[110] In oral submissions, counsel for the Heiltsuk attempted to characterize the "zero tolerance" of the Heiltsuk as "zero tolerance to law breaking" in that Heiltsuk law prohibits any activities that damage the environment and the Heiltsuk are of the view that the hatchery has the potential to damage the environment.

[111] However, the Heiltsuk clearly advised the Crown and Omega at the various meetings and in correspondence that the Heiltsuk had zero tolerance for fish farms and this hatchery.

They told Omega in January 2002 that they did not want the hatchery in Ocean Falls. As of January 2003, their stated position that the proposed hatchery was not welcome in Heiltsuk territory had not changed and they advised Omega and the Crown that they were opposed to the hatchery and wanted it removed.

[112] The conduct of the Heiltsuk both in stating their position as one of zero tolerance to Atlantic salmon aquaculture and in attending meetings at which they stated they did not consider the meeting to be consultation indicates, in my view, an unwillingness to avail themselves of the consultation process.

[113] On all of the evidence, it is clear that the Heiltsuk seek a veto over Omega's operations. They "want it removed". While saying they want to consult, their position has reflected an unwillingness to consult.

[114] No authority has been provided to me to support the proposition that the right to consultation carries with it a right to veto a use of the land. On the contrary, the Supreme Court of Canada has recognized that the general economic development of the Province, the protection of the environment or endangered species, as well as building infrastructure and

settlement of foreign populations may justify the infringement of aboriginal title. The government is expected to consider the interests of all Canadians including the aboriginal people when considering claims that are unique to the aboriginal people. It is in the end a balancing of competing rights by the government. Any accommodation must be done in good faith and honour. When dealing with generalized claims over vast areas, the court held that accommodation was much broader than a simple matter of determining whether licences had been fairly allocated. (*Delgamuukw*, ¶ 165, 202, 203)

[115] Although the Crown took the position that consultation was not required regarding the initial two licences, the evidence is that the Crown changed its position and attempted to consult with the Heiltsuk prior to the issuance of the dock and pipe licence of occupation and the Link Lake water licence. There is evidence that there are ongoing opportunities for consultation and accommodation with respect to the hatchery.

[116] Additionally, the evidence is that Omega has made and is making ongoing efforts to provide information to the Heiltsuk about the impact of discharge from the hatchery on the marine environment and to consult in relation to the procedures that are in place to prevent escapes from the

hatchery. Omega has expressed a willingness to work with the Heiltsuk to create jobs and establish a wild salmon enhancement facility in the area.

[117] The Heiltsuk have not disclosed their position about the terms they would find acceptable to withdraw their objection to the issuance of the licences to Omega. They have not suggested any terms that should be added to the licences or identified any specific impacts the licences have had on their rights.

[118] In the circumstances, I find that the duty of the Crown to consult was adequately discharged by the Crown and Omega. The process has been frustrated by the Heiltsuk's failure "to avail themselves of the consultation process, except on their own terms, which lies at the heart of this dispute". *Ryan*, at ¶ 6, 24 and 26.

WHETHER THIS IS AN APPROPRIATE CASE TO EXERCISE JUDICIAL REVIEW AND, IS SO, WHAT ARE THE APPROPRIATE REMEDIES?

[119] The Heiltsuk are seeking to have the licences quashed.

[120] Relief under s. 8(1) of the *Judicial Review Act* is discretionary.

[121] In *Klahoose First Nation v. British Columbia (Minister of Forests)* (1995), 13 B.C.L.R. (3d) 59 (S.C.), Mackenzie J., as he then was, dismissed an application by a First Nation to quash the Minister's consent to the transfer of a tree licence. The Court assumed, without deciding, that the Minister had acted in breach of a duty to consult, but exercised its discretion to deny the petitioners their remedy under the *Judicial Review Procedure Act*. Mackenzie J. held that although the Band had lost the opportunity to consult before the Minister gave his consent, the consent was for the transfer of an existing tenure and no additional interests were alienated which could prejudice the Band's aboriginal claims. (p. 65)

[122] In this case, not only is there no evidence that the Heiltsuk's aboriginal claims are prejudiced by the issuance of the licences, but the fact that the Heiltsuk have zero tolerance for Atlantic salmon aquaculture within their claimed territory must also be considered.

[123] Although the Heiltsuk speak to their willingness to consult in regard to the licences which provide the tenures necessary for Omega to operate the hatchery this must be questioned in light of their consistently stated position to the Crown and Omega.

[124] Section 11 of the *Judicial Review Procedure Act* provides that an application for judicial review is not barred by the passage of time unless: "(b) the court considers that substantial prejudice and hardship will result to any other person affected by reason of delay."

[125] The Heiltsuk were advised that Omega's plans for construction and operation of the facility were progressing. In addition, information was provided to them about the amount of the planned investment and the timelines for completion of the project. It is clear from the Heiltsuk's evidence that they were aware of the issuance of the hatchery licence of occupation and the lack of consultation as early as mid December 2001. At that time, no significant investment had been made by Omega.

[126] The Heiltsuk chose neither to bring the petition at the time nor to apply for an injunction prior to construction of the facility commencing in late 2002. Rather, they waited 13 months after they were aware that the Crown had determined that no consultation about the initial licences was required. The evidence is that as of March 2003 Omega had invested \$9.5 million in cleaning up the site and building the facility. Further losses will be incurred if the facility cannot be operated.

[127] Given my findings that the Heiltsuk have not established that there has been a *prima facie* infringement of their aboriginal rights and that the Crown and Omega have attempted to consult with the Heiltsuk, it is my view this is not an appropriate case to exercise my discretion to either quash the licences or make a prohibition order barring issuance of approvals or licences relating to the hatchery.

[128] I suggest that the parties continue to consult to determine whether the hatchery may adversely affect the Heiltsuk's rights and, if so, seek a workable accommodation with the Heiltsuk through negotiation. Given the expressed desire of Omega to continue to seek agreements with the Heiltsuk, I find that it is not necessary at this time to make an order in that regard.

CONCLUSION

[129] The following orders and declarations are made:

- The decision makers had in December 2001 and continue to have a duty to consult with the Heiltsuk in good faith and to endeavour to seek workable accommodations between the aboriginal interests of the Heiltsuk and the short and long term objectives of the Crown and Omega with respect to the licences;

- The decision makers are to provide the Heiltsuk with all relevant information reasonably requested by them;
- The parties are at liberty to apply to this Court with respect to any question relating to the duty of consultation and accommodation;
- The relief in the petition to quash the licences and for a prohibition order is adjourned generally;
- The balance of the relief sought in the petition regarding the decision makers, including the application for a declaration that the decision makers breached their duty to consult and accommodate the Heiltsuk interests and concerns is dismissed.
- The application regarding a declaration that Omega had a duty to consult and seek accommodation with the Heiltsuk is adjourned generally.
- The balance of the relief sought in the petition with respect to Omega, including,, that it was in breach of its duty to consult, is dismissed.
- As well the application for an interim or interlocutory injunction is dismissed.

[130] Given the divided success on the petition, I order that each party bear its own costs.

"L.B. Gerow, J."
The Honourable Madam Justice L.B. Gerow

Date: 20070720

Docket: T-1379-05

Citation: 2007 FC 763

2007 FC 763 (CanLII)

Ottawa, Ontario, July 20, 2007

PRESENT: The Honourable Mr. Justice Blanchard

PRESENT:

**CHIEF LLOYD CHICOT suing on his own behalf
and on behalf of all Members of the KA'A'GEE Tu First
Nation and the KA'A'GEE TU FIRST NATION**

Applicants

and

**THE ATTORNEY GENERAL OF CANADA
and PARAMOUNT RESOURCES LTD.**

Respondents

REASONS FOR ORDER AND ORDER

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1. Introduction

[1] This application for judicial review challenges the decision to approve a recommendation of a project involving oil and gas development in the Northwest Territories. The project, known as the Extension Project, proposed by Paramount Resources Ltd. (Paramount) is located in the Cameron Hills, over which the Ka'a'Gee Tu First Nation (KTFN) claims Aboriginal rights and treaty rights. The KTFN states that the project negatively impacts their established treaty rights and their asserted Aboriginal rights and consequently argues that the Crown had a duty to consult and accommodate before approving the project. In this application the KTFN claims that the Crown failed to meet its duty to consult and accommodate.

2. Background Facts

- *The Parties*

[2] The KTFN, a community of the Deh Cho First Nations (DCFN) who descend from the South Slavey people of the Dene Nation, and its Chief Lloyd Chicot are Applicants in this proceeding. On November 1, 1990, a sub-Band of the Fort Providence Band consisting of 36 members residing at Kakisa Lake formed the Kakisa Lake Band. In 1996, the Kakisa Lake Band Council resolved to be known as the Ka'a'Gee Tu First Nation. Currently there are approximately 55 people living at the Kakisa settlement on the east side of Kakisa Lake. There are now about 62 people on the KTFN Band list.

[3] Paramount, a Respondent in this application, is a Calgary based energy company that explores, develops, processes, transports and markets oil and gas. Paramount has explored and

developed oil and gas reserves in the Cameron Hills area since about 1979, after it acquired exploration licenses for approximately 80,800 acres in that area.

[4] The “Responsible Ministers” pursuant to section 111 of the *Mackenzie Valley Resource Management Act*, 1998 c. 25 (the Act) are the Minister of Indian and Northern Affairs Canada (INAC), the Minister of Fisheries and Oceans, the Minister of the Environment Canada and Natural Resources Government of the Northwest Territories.

- *The Geography*

[5] Cameron Hills is a remote area in the Northwest Territories just north of the Alberta border, consisting of a high plateau, which is south of Tathlina Lake and a collection of surrounding lower laying hills to the southwest and west of Tathlina Lake. Paramount’s development project is located on the high plateau. The plateau is inaccessible from the north, northwest and southeast sides, and is accessible only by a winter road when the ground is frozen, via the southwest side where the terrain is not as steep. The Cameron River flows in a northwesterly direction off the plateau and eventually into Tathlina Lake which is located about 10 kilometers north of the plateau. Kakisa Lake lies approximately 70 kilometers north of the Cameron Hills plateau, and Kakisa settlement is situated on the east side of that lake.

[6] The Applicants claim a deep spiritual and cultural connection, as well as an economic reliance on the Cameron Hills. In the words of Chief Chicot: “our culture, economy, spirituality and our way of life are intimately connected to our land, which supports and sustains us. Our land is the home of the Ka’a’Gee Tu people who are alive today as well as the home of our

ancestors and the home for all future generations of Ka'a'Gee Tu". Prior to the arrival of settlers to the area, the KTFN have harvested animals, fish, trees and water from the area, and many families continue to hunt and trap in the Cameron Hills area.

[7] The Applicants claim stewardship over the Cameron Hills area. However, other Aboriginal groups, including the Deh Cho members of the Deh Gah Got'ie, the Katlodeeche, the West Point and the Trout Lake First Nations; the Alberta First Nation Dene Tha'; the Fort Providence First Nation and the NWT Métis also claim Cameron Hills as part of their traditional territory. There is no consensus amongst these Aboriginal groups regarding this stewardship.

[8] There is no dispute amongst the parties in this application that the lands subject to Paramount's proposed development are also the lands over which the Applicants claim treaty rights and assert Aboriginal rights. There is no agreement, however, concerning the seriousness of the impact of Paramount's proposed project on these rights. While the Respondents agree that the Crown owed a duty to consult to the Applicants, there is no agreement on the scope or content of that duty. The Respondents take the position that the Crown discharged its duty to consult in the circumstances.

- *The Project*

[9] Oil and gas development in the Cameron Hills proceeded in phases. Exploration for oil and gas began in the early 1960s. Paramount obtained long term mineral rights in the early 1980s and by 2004 had been granted several exploration, discovery and production licenses.

Paramount's development in the Cameron Hills proceeded in three phases: the Drilling Project

(August 2000), the Gathering and Pipeline System Project (April 2001), and the Extension Project (August 2003). These three projects are collectively referred to as the Cameron Hills Development. The development proposed at the outset consisted of setting up a trans-border pipeline, central battery and gathering facilities. Once the construction of the Gathering and Pipeline System had been completed in August 2002, Paramount sought land use permits and water licenses to access new well sites and tie-in the new wells to the newly constructed gathering system. This aspect of the development came to be known as the Extension Project. It signalled the beginning of Paramount's production work in the Cameron Hills. The approval of the Extension Project is the decision being reviewed in this application.

[10] The Extension Project is significant in scope. Over time, the Project will include: drilling, testing and tie-in of up to 50 additional wells over a period of 10 years; oil and gas production over a 15 to 20 year period; excavation of 733 km of seismic lines; construction of temporary camps servicing up to 200 workers; the withdrawal of water from lakes; and the disposal of drill waste.

[11] Before turning to the issues in this application, which essentially concern the Crown's duty to consult, it is necessary to understand the context in which the impugned decision was made. To that end, I propose to review background information in respect to the applicable treaties, the Deh Cho comprehensive land claims process, the regulatory approval process under the Act and how this process was applied in the circumstances of this case.

- *Treaties 8 and 11*

[12] The Deh Cho First Nations fall within Treaty 8 and 11. Treaty 8 was signed on June 21, 1899, and Treaty 11 was signed on June 27, 1921 with an adherence agreement signed on July 17, 1922. At the time of the signing of Treaty 11, the KTFN was part of the community of Deh Cho First Nations and are consequently bound by that Treaty. Both Treaties contain cession of land and surrender of rights provisions. The Treaties also guarantee to its Aboriginal signatories the right to pursue “their usual vocations of hunting, trapping and fishing throughout the tract surrendered”. Both Treaties also provided for the creation of reserve lands. However, in the Northwest Territories (the NWT), no reserves have been set aside pursuant to Treaty 11, the treaty at issue in this application.

[13] The Crown in right of Canada and the Deh Cho First Nations disagree on whether Treaty 11 extinguished Aboriginal title. The Crown construes Treaty 11 as an extinguishment treaty while the Deh Cho and the Applicants understand Treaty 11 to be a peace and friendship treaty, whereby Aboriginal title was not surrendered. The Applicants contend that the Deh Cho did not allow reserve lands to be set aside pursuant to the Treaties because they did not want to submit to the Crown’s interpretation of the Treaties.

[14] While Aboriginal title in respect to the land under the treaties is disputed there is no dispute as to the existence of the Applicants’ treaty rights to hunt, fish and trap in the Cameron Hills area.

- *Deh Cho Process*

[15] In 1976 and 1977, on the basis that the land provisions of the Treaties had not been implemented, Canada accepted comprehensive land claims from the Dene and Métis of the Mackenzie Valley in the NWT. Ultimately, agreements were reached and implemented in respect of the Gwich'in, the Sahtu Dene and the Métis, all under Treaty 11, following which Canada passed the Act essentially to give effect to these agreements. The Act was amended in August 2005 to reflect the requirements of the land claims and self-government agreement between Canada and the Tlicho.

[16] The relevant outstanding comprehensive land claim relating to Treaty 11 is with respect to what is known as the Deh Cho region, which includes the Cameron Hills area. This claim was accepted for negotiation by the Crown in right of Canada in 1998. The negotiation process became known as the “Deh Cho Process”. The parties to the negotiations are the Deh Cho First Nations, including the Applicants, the Government of Canada and the Government of the Northwest Territories. The process was to provide a forum for respectful interaction of Aboriginal and Crown titles and jurisdictions with the view of negotiating a final agreement.

[17] Although negotiations are ongoing in the Deh Cho Process, various agreements have been reached along the way, including the Interim Measures Agreement of 2003, which contemplates collaborative land use planning for the Deh Cho territory in accordance with Deh Cho principles of respect for land. This agreement establishes the Deh Cho Land Use Planning Committee which provides for the conservation, development and utilization of the land, waters and other resources. Under this agreement, Canada and the Deh Cho First Nations have

identified and negotiated the withdrawal of certain lands from disposal and mineral staking. Criteria agreed upon in identifying such lands include: lands used for the harvest of food and medicines; lands that are culturally and spiritually significant; lands which are ecologically sensitive as well as watersheds. Withdrawn lands remain subject to the continuing exercise of existing rights and interests.

- *Regulatory Approval Process*

[18] Oil and gas development in the Mackenzie Valley is complex involving several pieces of legislation and engaging several administrative bodies. The text of pertinent statutory provisions is attached to these reasons as Appendix A.

[19] Construction and operation of a pipeline and gathering system occurs under the authority of the National Energy Board (the NEB), pursuant to the *Canada Oil and Gas Operations Act*, R.S., 1985, c. O-7, and the *Canadian Petroleum Resources Act*, R.S., 1985, c. 36 (2nd Supp.). Following the Gwich'in and Métis Comprehensive Land Claim Agreements, the *Mackenzie Valley Resource Management Act* was enacted in 1998. It provides for two regulatory boards: the Mackenzie Valley Land and Water Board (the Land and Water Board) and the Mackenzie Valley Environmental Impact Review Board (the Review Board). These Boards are established pursuant to the Act as institutions of public government within an integrated and coordinated system of land and water management in the Mackenzie Valley.

[20] The Land and Water Board and the Review Board are established for the purpose of regulating all land and water uses, including deposits of waste, in the Mackenzie Valley. Bill

C-6, which preceded the legislation, took five years to complete, during which time there was considerable consultation with all affected groups, including affected First Nations who were funded to review the proposed Bill.

[21] Under the Act, the Land and Water Board is responsible for issuing land use permits and water licences in the unsettled land claim areas within the Mackenzie Valley. A developer must apply to the Land and Water Board for a land use permit and water licence where the proposed activity is to be carried out in the Mackenzie Valley. Section 60.1 of the Act specifically requires that the Land and Water Board gives consideration to “the well-being and way of life of the Aboriginal peoples of Canada” in making its decisions. The section provides as follows:

60.1 In exercising its powers, a board shall consider

(a) the importance of conservation to the well-being and way of life of the aboriginal peoples of Canada to whom section 35 of the *Constitution Act, 1982* applies and who use an area of the Mackenzie Valley; and

(b) any traditional knowledge and scientific information that is made available to it.

60.1 Dans l'exercice de ses pouvoirs, l'office tient compte, d'une part, de l'importance de préserver les ressources pour le bien-être et le mode de vie des peuples autochtones du Canada visés par l'article 35 de la *Loi constitutionnelle de 1982* et qui utilisent les ressources d'une région de la vallée du Mackenzie et, d'autre part, des connaissances traditionnelles et des renseignements scientifiques mis à sa disposition.

[22] Pursuant to subsection 63(2) of the Act, the Land and Water Board is required to notify affected communities and First Nations upon receipt of an application for a permit or license.

[23] Section 114 of the Act sets out the purpose of Part 5 of the Act, which is to establish a process comprising a preliminary screening, an environmental assessment and an environmental impact review. The Review Board is established as the main instrument in the Mackenzie Valley for the environmental assessment and the environmental impact review and is mandated with ensuring that the concerns of Aboriginal people and the general public are taken into account in the process.

[24] The guiding principles of Part 5, set out in section 115 of the Act, provide that the process shall have regard to the following: the protection of the environment from significant adverse effects of proposed developments; the protection of the social, cultural and economic well-being of the residents and communities in the Mackenzie Valley; and, the importance of conservation to the well-being and way of life of the Aboriginal peoples. Section 115.1 states specifically that the Review Board shall consider any traditional knowledge that is made available to it in exercising its powers.

[25] Community consultation is integral to the processes undertaken by both the Land and Water Board and the Review Board. Section 3 of the Act governs how this consultation is to be carried out:

3. Wherever in this Act reference is made, in relation to any matter, to a power or duty to consult, that power or duty shall be exercised

(a) by providing, to the party to be consulted,

3. Toute consultation effectuée sous le régime de la présente loi comprend l'envoi, à la partie à consulter, d'un avis suffisamment détaillé pour lui permettre de préparer ses arguments, l'octroi d'un délai suffisant pour ce faire et la possibilité de présenter à qui de

- (i) notice of the matter in sufficient form and detail to allow the party to prepare its views on the matter, droit ses vues sur la question; elle comprend enfin une étude approfondie et impartiale de ces vues.
- (ii) a reasonable period for the party to prepare those views, and
- (iii) an opportunity to present those views to the party having the power or duty to consult; and
- (b) by considering, fully and impartially, any views so presented.

[26] Both the Land and Water Board and the Review Board provide guidelines on how consultation is to be undertaken by developers when applications are made to the respective boards.

[27] The Act provides for a three stage review process: a preliminary screening, an environmental assessment and an environmental impact review. Developers must consult with affected parties before submitting an application, and the consultation should involve notice of the matter in sufficient detail, a reasonable period for the party consulted to prepare their views, and the opportunity to present those views to the developer. Once the Land and Water Board is satisfied pre-application community consultation has taken place, it performs the preliminary screening which involves determining whether the development might have a significant adverse impact on the environment. If development might have a significant adverse impact, then the Land and Water Board will refer the proposal to the Review Board for an environmental

assessment under section 125 of the Act. Otherwise the application will proceed to the permitting phase.

[28] Once an environmental assessment has been triggered by a referral from the Land and Water Board, the Review Board determine the scope of the environmental assessment and request a more detailed description of the development. Next, issues are identified by the Review Board and Terms of Reference (TOR) for the environmental assessment are determined. A draft version of the TOR is circulated to all parties for comments. After the TOR is finalized, the developer proceeds to prepare the Developer's Assessment Report (DAR). The DAR is circulated to all parties and undergoes a conformity check in which it is compared to the TOR. It then undergoes a Technical Review in which participants may present their views supported by facts and evidence in a forum that is open to the public. Questions arising from the Technical Review which require formal responses are issued by way of Information Requests (IRs), which may originate from any party, and are made accessible to everyone. The Review Board may order a hearing. Following the hearing, the Review Board will consider the DAR and the evidence and determine whether the development is likely to have significant adverse environmental impacts or be a cause of significant public concern. Under section 128, the Review Board may determine that no assessment need be performed, recommend that the approval of the proposal be made subject to the imposition of measures that the Review Board considers necessary to prevent an adverse impact, recommend the proposal be rejected without an environmental assessment, or, if the Review Board decides that the development is likely to cause significant public concern, order an environmental impact review. The decision of the

Review Board is subject to section 130 of the Act which essentially places the ultimate decision in the hands of the Ministers.

[29] Pursuant to section 130 of the Act, after having considered the environmental assessment report, the Ministers may order an environmental impact review even if the Review Board determined such a review need not be conducted (paragraph 130(1)(a)). Where the Review Board recommends the approval of a proposal subject to the imposition of certain measures or the rejection of a proposal because of its adverse impact on the environment, the Ministers may:

- (1) adopt the recommendation or refer it back to the Review Board for further consideration (subparagraph 130(1)(b)(ii)) or
- (2) after consulting the Review Board, reject the recommendation and order an environmental impact review of the proposal or adopt the recommendation with modifications

This latter option is known as the “consult to modify” process. The parties that participate in the consult to modify process are the representatives of the Responsible Ministers and representatives of the Review Board. The Act imposes no obligation on the Ministers to involve others in the process including the parties to the Environmental Assessment or Environmental Impact Review.

[30] The third stage, the environmental impact review, consists of a review of the environmental assessment by a panel of three or more members appointed by the Review Board. The Panel is vested with the powers of a review board and the Act sets out a comprehensive

process as to how the review is to be conducted. Pursuant to subsection 135(1) of the Act, after considering the report from the Review Panel, the Ministers may adopt the recommendations contained in the report with or without modifications, reject them or refer the proposal back to the Review Board.

- *Funding*

[31] The Applicants contend that throughout the Review Board process concerning the Cameron Hills development they participated in each environmental assessment process to the extent permitted by their limited resources.

[32] While the Applicants complain that their full and meaningful participation in the consultation process under the Act was compromised by lack of resources, the evidence indicates that funding was made available by the Crown to assist the Applicants.

[33] In fiscal year 2001-2002, the KTFN requested and received from INAC \$40,000 to assist with costs associated with an Oral Traditional Knowledge Research Project. This resulted in the production of a documentary film, which is in evidence, entitled “Straight from the Heart”. The film documents Elders speaking to KTFN regarding traditional knowledge, which included gathering stories, legends and knowledge of the land. The cost of the project was \$30,844 resulting in a \$9,166 surplus.

[34] In fiscal year 2002-2003, the KTFN requested and received from INAC the sum of \$40,000 to allow participation in land and resource management activities in the area. To this

end an Oil and Gas Coordinator was hired to address environmental concerns and act as spokesperson for the KTFN. The Government of the Northwest Territories (GNWT) also provided \$40,000 in funding for this purpose. A \$6,476 surplus resulted from the \$80,000 in grants for resource management activities provided in 2002-2003.

[35] In 2003-2004, the KTFN requested \$40,000 and received \$10,000 from INAC to continue funding the Oil and Gas Coordinator. The same funding was obtained in 2004-2005 for this purpose. Also, in 2004-2005, INAC provided \$10,000 for the completion of a community protocol for the Cameron Hills Oil and Gas Project.

[36] In summary, from 2001 to 2005, INAC and the GNWT provided a total of \$140,000 to the KTFN for their traditional knowledge project and for the services of the Oil and Gas Councillor. This represents \$30,000 less than the amount the KTFN requested. Of the total amount received, the record indicates that the KTFN had a \$15,642 surplus.

- *The First Two Phases of the Cameron Hills Development*

[37] Since 1992, Paramount obtained 14 production licenses (two issued in 1992, four in 2002, two in 2003 and six in 2004), and it holds 7 land use permits (LUP), 4 water licenses and 22 federal surface leases, all in the Cameron Hills. As mentioned, development proceeded in three phases: the Drilling Project, the Gathering and Pipeline Project, and the Extension Project.

[38] The Drilling Project involved 9 new wells and 7 existing wells in order to evaluate oil and gas reserves. The Gathering and Pipeline Project involved the construction of an extensive

trans-boundary pipeline and gathering system to connect Paramount's wells in the Cameron Hills to Alberta's pipeline system. This also included more than 60 km of pipelines, well-site facilities for 11 existing and 9 new wells, temporary construction camps to house up to 200 workers, a permanent camp for 20 workers, an airstrip and vehicle access routes to well-sites.

[39] Applications for land use permit and water licences for the Drilling Project were made to the Land and Water Board on August 29, 2000. The project was referred to the Review Board for an environmental assessment on November 20, 2000, and the Review Board issued its environmental assessment report on October 16, 2001. The Review Board recommended that land use permits and water licenses be issued on condition that the mitigating measures contained in Paramount's environmental report be respected. The Drilling Project was eventually allowed to proceed on this basis.

[40] The Applicants state that they were surprised to learn in 2001, when the Drilling Project was first before the Review Board, the full magnitude of Paramount's plans for the Cameron Hills area. They claim that they were not aware that the Federal Crown had previously issued Paramount extensive licenses in the Cameron Hills. The Applicants argue that the KTFN were facing a major industrial development without any meaningful input into the issuance of the original discovery and exploration licenses granted to Paramount.

[41] Paramount initiated the Gathering and Pipeline System Project in April 2001 by applying to the Land and Water Board for land use permits and water licenses. The KTFN were involved in the preliminary screening and environmental review processes for the Gathering and Pipeline

Project. Between June 22, 2000, and November 19, 2001, more than a dozen meetings were held and numerous phone calls were made with Paramount, discussing traditional knowledge, benefits of the project for the Kakisa community, concerns in respect to other Bands claiming stewardship over the Cameron Hills area as traditional territory, and mitigating measures for the environment. The KTFN's participation included a helicopter flyover of the proposed project and a three day excursion to the territory around Tathlina Lake for the purpose of discussing traditional knowledge.

[42] The project was referred to the Review Board for environmental assessment and on December 3, 2001, the Review Board issued its report on the Environment Assessment.

[43] Paramount's DAR prepared for the Gathering and Pipeline System Environmental Assessment concluded that the project would have no significant cumulative environmental impacts and was not expected to have an adverse effect on the pursuit of traditional activities. Both the KTFN and the GNWT disagreed. The Applicants questioned Paramount's ability to draw conclusions regarding impacts of its project on the Applicants in the absence of a proper Traditional Land Use Study. In its submissions to the Review Board, the GNWT argued that Paramount had underestimated the impact of the project on the boreal caribou population. In its Environmental Assessment Report for the Gathering and Pipeline Project, the Review Board found that the Applicants were "very actively involved in traditional land use ... most if not all residents participate in traditional land use in one manner or another". The Review Board accepted the GNWT data that "...Kakisa families derive 50-60%, and possibly more, of their annual food basket requirements from the land." Ultimately, the Review Board recommended

that with the implementation of 21 mitigating measures, the project "... is not likely in its opinion to have any significant adverse impact on the environment or to be a cause of significant public concern".

[44] Paramount expressed serious concern in respect to measures 13, 15, 16 and 17. I reproduce these recommendations in Appendix B to these reasons. These recommendations essentially provided that the project not proceed until Paramount: (1) has revised its Heritage Resource Plan to incorporate First Nation concerns; (2) has developed a compensation plan cooperatively with affected First Nations which address the effects on land and resources used beyond trapping; and (3) has provided INAC with proof that affected First Nations have approved of the Traditional Use Study and incorporated any mitigating measures arising from the Study into their development plan.

[45] The KTFN wrote to the Review Board and INAC urging support for the measures and asking that the necessary steps be taken to ensure that these conditions are fulfilled by Paramount before any construction begins on the ground. The KTFN noted that the report supported their position that Paramount's Traditional Use Study had not been completed and the Benefits Plan failed to meet some of its legislated requirements regarding compensation.

[46] From the beginning of the Cameron Hills development, the Applicants have expressed concerns regarding the project's actual impact on land, water and wildlife in the Cameron Hills area, affecting their rights to hunt fish and trap. From the outset, the KTFN consistently expressed two concerns: first, that a Traditional Land Use Study was required to provide baseline

data against which mitigating measures could be designed and damages caused by Paramount's development could be measured, and second, that an Impacts and Benefits Agreement which would include investments in the community and employment opportunities, be negotiated with the KTFN to address Paramount's infringement of their aboriginal title and treaty rights. In the Applicant's submission, neither of these objectives has been met.

[47] With respect to the Traditional Land Use Study, Paramount prepared a statutory Benefits Plan pursuant to subsection 5(2) of the *Canada Oil and Gas Operations Act*. Paramount concedes that the Benefits Plan was never intended to address specific benefits or impact on a particular community, but was a plan to address benefits to Canadians in general and people in the north in particular.

[48] The Applicants' contend that Paramount's Traditional Knowledge (TK) Study did not meet the requirements of a proper Traditional Land Use Study. They argue that the study was prepared without meaningful consultation and completed without their full or proper involvement or participation. They claim the study was deficient in that it did not consider or address how the KTFN occupied their territory, how their laws protected the land, water and wildlife, or how Paramount's operations truly impact their economy, culture, traditional way of life and well-being.

[49] Paramount argues that the availability of traditional knowledge of the KTFN to further assist in fashioning mitigating measures was limited by the KTFN itself. Paramount's TK study was prepared from information gathered from KTFN Elders and Chief Chicot himself, who

participated in the process. Paramount contends that after it prepared the study it made several attempts to request further input from the Applicants. None was forthcoming. Paramount's study was therefore submitted to the Review Board without the Applicants' further input.

[50] The Applicants agree that only a limited amount of traditional land use information was provided to Paramount and the Review Board. They explain that they did not want some of their sensitive traditional knowledge to become public, such as the location of trap lines. They further believed that Paramount "needs to recognize the aboriginal and treaty rights of the KTFN before the remaining information is shared as part of the ABA negotiations about infringing KTFN rights".

[51] The Applicants also contend that they were not involved in the process that led to the preparation of the benefits agreement by Paramount and there was no meaningful consultation about accommodating matters of real concern to their community. The Plan provided for compensating trappers "who can conclusively establish that they have sustained lower harvests directly attributable to Paramount's operations in the area." In the Applicants' view, Paramount's plan was unworkable for a number of reasons. First, precise records of their harvesting were not kept. Second, direct loss of trapping income is not the only impact warranting compensation or benefits. Third, the plan does not consider the fact that the Applicants' treaty rights and asserted Aboriginal rights are at stake.

[52] The consult to modify process was initiated by the Minister of INAC with respect to the Gathering and Pipeline Project Environmental Assessment Report on December 20, 2001. The

Ministers expressed concern with recommendations 13, 15, 16 and 17 in the Review Board's Environmental Assessment Report and proposed certain modifications and a deletion. The Review Board felt that other participants to the environmental assessment process should have the opportunity to make their concerns known in respect of the impugned measures to be discussed at the upcoming meeting between INAC, the NEB and the Review Board. As a result, all participants, including the KTFN, were sent a copy of the Review Board's December 24, 2001 letter to INAC wherein it expressed the view it would not object to these participants making their views known in respect to the proposed changes sought by the Ministers.

[53] In a letter to the Review Board dated January 3, 2002, INAC expressed the view that the provisions of the Act provide that only the federal Minister and the Responsible Ministers are to consult with the Review Board regarding its Report.

[54] The Review Board and the Ministers met in a closed meeting on January 4, 2002, despite the Applicants' protestation. After considering the evidence presented in the consult to modify process, the Review Board approved modifications to all of the impugned measures, and also deleted measure 17. On January 11, 2002, the Ministers issued a final decision that substantially modified recommendations 13, 15, 16 and deleted recommendation 17. I reproduce these modified recommendations in Appendix C to these reasons. In his decision letter, the Minister of INAC, writing on behalf of the Responsible Ministers under the Act, indicated that certain letters expressing the views of the Applicants were considered. I note, however, that certain other letters on behalf of the Applicants were not identified by the Minister.

[55] The Applicants perceived the Ministers' decision to be detrimental to their interests and, in particular, protested the deletion of recommendation 17 and modifications to the other recommended measures. The Applicants reiterated their position that they had not been consulted on this issue.

- *The Extension Project*

[56] In April 2003, Paramount brought an application to the Land and Water Board to amend some of the land use permits and water licenses issued with respect to its initial project. This aspect of the development came to be known as the Extension Project. It signalled the beginning of Paramount's production work in the Cameron Hills. The project initially involved approval for 5 additional wells but would eventually also include the drilling, testing and tie-in of up to 50 additional wells over a period of 10 years; the production of oil and gas for over 15-20 years; the excavation of 733 km of seismic lines; the construction of temporary camps servicing up to 200 workers; the withdrawal of water from lakes; and the disposal of drill waste.

[57] After receiving the application, the Land and Water Board conducted the requisite preliminary screening of the project. During this stage it consulted with 21 organizations, including the KTFN and the DCFN. The Land and Water Board found, as a result of its preliminary screening, that it was satisfied of the project's significant adverse impacts on the environment and that there was a clear indication of public concern. As a result the Land and Water Board referred Paramount's application to the Review Board for an environmental assessment pursuant to section 125 of the Act, and recommended that the Review Board consider joint public hearings with the Land and Water Board.

[58] The environmental assessment followed the process outlined earlier in these reasons. In June 2003, the draft TOR and a draft work plan were sent to the interested parties, including the Applicants. On July 21, 2003, the Applicants responded to the draft TOR and as a result of comments made by the KTFN the work plan was adjusted.

[59] On August 8, 2003, the Review Board issued the final TOR, setting out the scope of the environmental review. The Review Board determined the environmental assessment should be focused on the cumulative effects of drilling, testing and tie-in of up to 50 additional wells over the next 10 years indicated in Paramount's planned development and not just the 5 well sites actually applied for.

[60] On September 17, 2003, Paramount prepared and submitted its DAR to the Review Board which included an assessment of the impact of the 5 well sites applied for, plus the additional 48 under the planned development. The DAR also included a detailed summary of the public consultation process and the results of various studies that were undertaken for the purposes of the environmental assessment. The DAR also set out in an appendix a summary of the consultation and communication which had occurred between Paramount and the KTFN since May of 2000. The summary indicates extensive correspondence and a great number of meetings and exchanges between the parties.

[61] The second phase of the environmental assessment included two rounds of IRs. Many of these requests originated from the KTFN and were directed to both INAC and Paramount. Responses were provided, but not always to the satisfaction of the KTFN.

[62] A pre-hearing conference was held to address the hearing process and to set a draft agenda for the public hearing. A community meeting was held at Kakisa on February 17, 2004, between members of the KTFN, the Land and Water Board, the Review Board and Paramount to discuss related issues.

[63] A public hearing was held jointly by the Review Board and the Land and Water Board at Hay River on February 18 and 19, 2004. The Applicants participated in the hearing and had the opportunity to question Paramount and other parties involved in the environmental assessment.

[64] Following the public hearing, the parties were invited to submit technical reports to the Review Board. The KTFN did so on March 2, 2004 and on March 10, 2004 Paramount responded to the concerns raised in the technical report submitted by the KTFN. INAC, in a letter dated March 11, 2004, to the Review Board, also responded to concerns raised by the KTFN in its technical report and answered questions asked by the KTFN at the public hearing.

[65] During the Environmental Assessment Process the Applicants issued two Information Requests (IR 1.2.136 and IR 1.2.137) asking INAC to clarify how it intended to discharge its duty to consult and accommodate. INAC responded that the Land and Water Board and the Review Board are the primary vehicles for environmental assessment consultations with

Aboriginal groups and the general public, producing an opportunity for participation. INAC indicated that it would wait until the environmental assessment process was complete before making any decision regarding potential infringement and Aboriginal consultation regarding the project.

[66] INAC's understanding of the Crown's duty to consult in respect to an asserted Aboriginal right is expressed in its response to KTFN Information Request 1.2.31, which I reproduce below:

With respect to Aboriginal rights: the Crown may not unjustifiably infringe on rights protected by Section 35 of the *Constitution Act, 1982*, and **the onus is on the First National to prove that a right exists and that it would be unjustifiably infringed upon.** The Crown is unable to unilaterally determine what assertions a First Nation might make or what the ultimate outcome of that assertion may be. When responding to an assertion, and without limiting in any way the breadth or scope of the matters that Canada may consider, including the ethnographic, historical, traditional, and other evidence, Canada also takes into consideration expressions by the First Nations of consent or support for the proposed activity.

[Emphasis in original.]

[67] The Review Board issued its Report and its reasons on the environmental assessment on June 1, 2004. In its report the Review Board recognized the KTFN dependence on the Cameron Hills Area and made certain findings in respect to the projects potential impact on the Applicants' rights. I reproduce below certain applicable excerpts from the report.

The Cameron Hills is an important traditional use area for local First Nations. (p. vi)

There is no doubt, in the Review Board's opinion, that the evidence in this proceeding provides a firm foundation for the concerns expressed about this area, particularly in relation to the

possible effects of the proposed development on the traditional activities important to the [Ka'a'Gee Tu and other aboriginal communities]. (p. 14)

[The] Board concludes that the environmental consequence of the combined direct and indirect footprint of the Planned Development Case is *High* (potentially significant) for boreal caribou and marten. (p. 42)

The Review Board supports the communities' requests for a socio-economic agreement with Paramount. The Review Board also concurs with the GNWT on the effectiveness of socio-economic agreements to aid in assessing the impact on the social and the cultural aspects of northern development. (p. 51)

[68] Notwithstanding the above observations the Review Board concluded that "...with the implementation of the measures recommended in this Report of EA and the commitments made by Paramount Resources Ltd, ... the proposed development will not likely have a significant environmental impact or be cause for significant public concern and should proceed to the regulatory phase of approvals." The Review Board in its report issued 17 mitigating measures and suggestions. These measures and suggestions are attached as Appendix D to these reasons.

[69] The Report considered impacts on both the "Biophysical Environment" and "Socio-Economic and cultural environment".

[70] In respect to the Biophysical Environment, issues concerning air quality, water quality, wildlife and in particular the Boral Caribou and the cumulative impact of the project were considered.

[71] The Applicants raised concerns about water quality and its impact on fishing. The Review Board found that there was potential for significant adverse environmental impacts to water due to potential spills and sedimentation of waterways from erosion as a result of Paramount's operations in the Cameron Hills. The Review Board found that application of measures R-8 to R-11 and suggestion S-1 would mitigate these potential impacts.

[72] In relation to hunting and trapping, the Review Board concluded that the balance of the evidence did not suggest wildlife concerns, except in the case of the Boreal Caribou. It found that the measures concerning the Boreal Caribou proposed by the GNWT, supported by the Applicants, would mitigate the likelihood for significant adverse environmental impacts on the Boreal Caribou population. Additional concerns were raised regarding wolves and wolverines. The Review Board considered the evidence and concluded that the approach taken by Paramount was reasonable, and decided that wolves and wolverines should be explicitly considered in future environmental assessments in the area. Ultimately, the Review Board provided mitigation measures R-12 to R-14 and suggestions S-3 and S-4 in relation to wildlife.

[73] In respect to impacts on the socio-economic and cultural environment, the Review Board considered the difficulties surrounding an agreement on the Wildlife and Resources Harvesting Compensation Plan. It noted that the Aboriginal communities emphasized that compensation plans must address economic as well as cultural components and not merely the lost revenue from harvesting. The Review Board found that to prevent significant potential adverse socio-economic impacts on the environment relating to the viability of the Cameron Hills as a source

of harvesting and preserving harvesting opportunities over the long term, further mitigation was needed. It recommended measures R-15 and R-16 and suggestions S-5 and S-6.

[74] In a letter dated June 24, 2004, addressed to the Responsible Ministers, the KTFN provided its response to the Review Board's environmental report. In a subsequent letter dated July 7, 2004 to the Responsible Ministers and the Review Board, the KTFN sought to be included in the post-Report process under sections 130 and 131 of the Act. In their July 29, 2004 letter to INAC, the KTFN firmly stated their position that the "...closed door, post-Report process that shuts them out" clearly violates the principles of natural justice and fairness and by engaging in such a process the Crown is failing to discharge its duty to consult.

[75] In a letter to the KTFN dated August 26, 2004, the Minister of Fisheries and Oceans stated that he and the other Responsible Ministers would be making a decision pursuant to section 130 of the Act. This also represents the position adopted by INAC, which is repeatedly expressed in the record, namely that pursuant to the Act, only the Responsible Ministers and the Review Board may participate in the consult to modify process.

- *Consult to Modify Process for the Extension Project*

[76] Both the NEB and the Responsible Ministers had concerns about some of the mitigation measures set out by the Review Board. By letter dated August 19, 2004, addressed to the Review Board, the Minister of INAC on behalf of the Responsible Ministers initiated consultation with the Review Board, pursuant to subparagraph 130 (1)(b)(ii) of the Act. INAC informed the Review Board on November 17, 2004, that the Responsible Ministers wanted to address

recommended measures R7, R11, R12, R13, R15, and R16 in the Environmental Assessment Report. Proposed modifications with supporting rationale were submitted for the Review Board's consideration. In particular, the modifications proposed the deletion of recommendations R15 and R16.

[77] The Review Board decided to seek comments and input related to the Responsible Ministers' proposed modifications, from parties to the Environmental Assessment process, which included the Applicants.

[78] In response, the KTFN wrote to the Review Board on December 17, 2004, and provided comprehensive comments on the proposed modifications to the Review Board's recommended measures. In essence the KTFN reasserted views it had expressed in its June 14, 2004 letter to the Review Board. While the KTFN stated that certain proposed changes were generally acceptable, it strongly objected to the deletion of recommendations R15 and R16 and urged the Responsible Ministers to strengthen the recommended measures. Further, the KTFN submitted that the consult to modify process was not in keeping with the Crown's duty to consult as clarified by the Supreme Court of Canada in the recent decisions of *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511 and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550. The honour of the Crown was at stake in such matters and meaningful consultation must take place prior to the approval of projects that will infringe Aboriginal title and rights. In KTFN's submission to the Review Board, the consult to modify process and the substance of the proposed modifications represents an "an impoverished vision of the honour of the Crown".

[79] Following the release of the Supreme Court decisions in *Haida* and *Taku* and before the decision on the Extension Project was made, INAC conducted a “Crown Consultation Analysis” with the view of assessing whether consultation and accommodation performed to date had been adequate in addressing the potential infringements on an Aboriginal Treaty and/or upon asserted Aboriginal rights. The analysis concluded that adequate consultation had been conducted.

[80] Thereafter, the Applicants were excluded from the consult to modify process which continued for three months until March 15, 2005, when the Review Board adopted the revised recommendations.

[81] The Review Board, the Ministers and the NEB met on January 24, 2005, and decided that Canada would take the position that R-15 and R-16 would be substantially revised instead of deleted. On March 15, 2005, the Review Board forwarded final revised recommendations to the Ministers. The Applicants did not participate in this meeting and were not consulted in respect to the final recommendations.

[82] The KTFN wrote directly to the Minister of INAC on six different occasions between July 20, 2004 and April 27, 2005, asking INAC to respect its legal duty to consult before rendering a final decision. These letters went unanswered until May 17, 2005, at which time the Minister of INAC wrote to Chief Chicot and assured him that he would be contacted before a final decision was made. However, this commitment was not kept. INAC never met with the

KTFN to discuss the proposed modifications to the recommended measures or the final decision on the Extension Project.

[83] In her March 24, 2005 letter to the Minister of INAC, counsel for the KTFN addressed the modified recommendations that had been submitted to the Responsible Ministers for decision. In her submissions on behalf of the KTFN, counsel argued that the process that led to the modified recommendations failed to solicit the input of the KTFN and as a result its concerns were not heard. The KTFN submitted that the recommendations were substantially rewritten in secret and, as a consequence, fairness and justice were lost and the honour of the Crown impugned. The KTFN further submitted that the proposed modifications are in effect tantamount to a rejection of the original recommendations and as a result trigger the statutory requirement that an environmental impact review be ordered. Finally, it is argued that, in the circumstances, the Crown has not discharged its duty to consult and accommodate.

[84] The Minister of INAC, on behalf of the Responsible Ministers, by letter dated July 5, 2005, adopted the recommended mitigating measures of the Review Board with modifications. In the decision letter, the Minister stated that the decision was made after undertaking consultation with the Review Board and considering the Environmental Assessment Report and letters from various stakeholders, including the following letters; from the KTFN dated June 24 and August 10, 2004; and the letters from Counsel for the KTFN dated July 20, August 31, November 19, December 13, 2004, and March 24 and April 28, 2005.

[85] By letter dated July 20 and July 28, 2005, the Applicants wrote to the Land and Water Board informing it that the Ministers' decision was made in breach of the Federal Crown's duty to consult and accommodate and that there had yet to be proper consultation with the Applicants.

[86] Of the 17 recommended measures, 12 were modified during the consult to modify process. Six measures falling within the jurisdiction of the NEB were modified by the NEB. The NEB contends that these modifications were made after receipt of comments from Paramount, government departments and the Applicants.

[87] Six other measures falling within the jurisdictions of the Responsible Ministers were modified by the Responsible Ministers. R-15 and R-16 were not deleted as originally proposed but instead were modified. The modifications to R-15 removed the requirement for a compensation plan and enforcement to be determined through binding arbitration, and modifications to R-16 removed the requirement for a socio-economic agreement to be developed in consultation with affected communities. I reproduce below the two recommendations as modified:

R-15 The Review Board recommends that Paramount commit, in a letter to the Parties to the Environmental Assessment, to compensate the Ka'a'Gee Tu First Nation and other affected Aboriginal groups for any direct wildlife harvesting and resource harvesting losses suffered as a result of project activities, and to consider indirect losses on a case-by-case basis.

R-16 The Review Board recommends that Paramount report annually to the Government of the Northwest Territories and the other Parties to the Environmental Assessment documenting its performance in the provision of socio-economic benefits, such as employment and training opportunities for local residents, including a detailed ongoing community consultation plan

describing the steps it has taken and will take to improve its performance in those areas. The Government of the Northwest Territories will review this report with Paramount in collaboration with the other Parties to the Environmental Assessment.

[88] The Applicants challenge the Responsible Ministers' decision by filing the within application for judicial review on August 9, 2005, which was amended on February 23, 2006.

3. Issues

[89] The central issue in this application is whether the Crown failed to discharge its duty to consult in making the decision. The issue involves answering the following questions:

- (1) What is the content of the Crown's duty to consult and accommodate?
- (2) Did the Crown fulfil its duty in the circumstances of this case?
- (3) What is the appropriate remedy, in the event it is determined that the Crown failed to fulfill the duty to consult?

4. Standard of Review

[90] The applicable standard of review of government decisions which are challenged on the basis of allegations that the government failed to discharge its duty to consult and accommodate pending claims resolution was canvassed by the Supreme Court in *Haida*. In that case, Chief Justice McLachlin suggested that, absent a statutory process for such a review, general principles of administrative law were to be considered. Here, as in *Haida*, no specific review process has been established. At paragraphs 61 to 63 of the Court's reasons for decision, the Chief Justice wrote:

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

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

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

[91] The above general principles find application here. A question as to the existence and content of the duty to consult and accommodate is a question of law reviewable on the standard of correctness. A question as to whether the Crown failed to discharge its duty to consult in making the decision typically involves assessing the facts of the case against the content of the duty. On findings of fact, deference to the decision maker may be warranted. The degree of deference to be afforded by a reviewing court depends on the nature of the question and the relative expertise of the decision maker in respect to the facts. Here, it is difficult to isolate the pure questions of law from the issues of fact. In essence, the central question is whether, as implemented, the mandated environmental assessment and regulatory processes are sufficient to discharge the Crown's duty to consult and accommodate in the circumstances. This is a mixed question of fact and law. Applying the reasoning set out above in *Haida*, it would therefore follow that absent error on legal issues, because of the factual component of the decision, the Ministers may be in a better position to evaluate the issue than the reviewing court, and as a result some degree of deference may be required.

[92] Further, Ministerial decisions in these circumstances are polycentric in nature, in the sense that they often involve the making of choices between competing interests. These factors militate towards a certain degree of deference in favour of the decision maker.

[93] Based on the above principles articulated in *Haida*, I find that the question of whether the regulatory process at issue and its implementation discharge the Crown's duty to consult and accommodate in the circumstances is to be examined on the standard of reasonableness.

Questions concerning the existence and content of the duty, to the extent such questions arise in this application, are to be reviewed on the standard of correctness.

5. The Law

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

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

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

[96] For the duty to arise there must, first, be either an existing or potentially existing Aboriginal right or title that might be adversely affected by the Crown's contemplated conduct. Second, the Crown must have knowledge (either subjective or objective) of this potentially

existing right or title and that the contemplated conduct might adversely affect those rights.

While the facts in *Haida* did not concern treaties, there is nothing in that decision which would indicate that the same principles would not find application in Treaty cases. Indeed in *Mikisew*, the Supreme Court essentially decided that the *Haida* principles apply to Treaties.

[97] While knowledge of a credible but unproven claim suffices to trigger a duty to consult and, if appropriate, accommodate, the content of the duty varies with the circumstances.

Precisely what is required of the government may vary with the strength of the claim and the impact of the contemplated government conduct on the rights at issue. However, at a minimum, it must be consistent with the honour of the Crown. At paragraph 37 of *Haida*, the Chief Justice wrote:

...Precisely what duties arise in different situations will be defined as the case law in this emerging area develops. In general terms, however, it may be asserted that the scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed. Hence, unlike the question of whether there is or is not a duty to consult, which attracts a yes or no answer, the question of what this duty consists, is inherently variable. Both the strength of the right asserted and the seriousness of the potential impact on this right are the factors used to determine the content of the duty to consult.

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

Against this background, I turn to the kind of duties that may arise in different situations. In this respect, the concept of a spectrum may be helpful, not to suggest watertight legal compartments but rather to indicate what the honour of the Crown may require in

particular circumstances. At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice. "[C]onsultation' in its least technical definition is talking together for mutual understanding": T. Isaac and A. Knox, "The Crown's Duty to Consult Aboriginal People" (2003), 41 *Alta. L. Rev.* 49, at p. 61.

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

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

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

6. Analysis

[100] Here, the Respondent, the Attorney General of Canada does not dispute that the Crown had an obligation to consult with the Applicants in advance of making the impugned decision. It is the Attorney General of Canada's contention that the consultation process engaged in was sufficient to discharge the Crown's duty to consult and accommodate in the circumstances of this case. Since it is agreed that the duty is triggered I will now turn to consider the content and scope of the duty to consult owed by the Crown to the KTFN in the circumstances. As indicated in *Haida*, the scope of the duty to consult and accommodate is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title and to the seriousness of the potentially adverse effects upon the right or title claimed. I will now deal with each of the above factors in turn.

[101] The existence of the Applicants' broad harvesting rights to hunt, trap and fish under Treaty 11 is not in dispute. Since these rights are not asserted rights but established rights, the analysis would usually now turn to consideration of the degree to which the conduct contemplated by the Crown would adversely affect the harvesting rights of the Applicants in order to determine the content of the Crown's duty to consult. Here, however, there is also an asserted claim to Aboriginal title which may have a bearing on the Crown's duty. It is therefore necessary before turning to consider the seriousness of the potential adverse effect upon the right or title claimed to consider the strength of the Applicants' asserted claim.

[102] Here, the Applicants assert that their Aboriginal rights were never surrendered by Treaty 11. Contrary to INAC's expressed understanding of the Crown's duty to consult

articulated in response to IR 1.2.31, which I reproduced at paragraph 66, above, *Haida* teaches that the Aboriginal group need not prove that an asserted right exists before the obligation is triggered. While there is no dispute as to the existence of the Applicants' harvesting rights, the parties disagree about whether Treaty 11 extinguished Aboriginal title. The Applicants understand Treaty 11 to be a peace and friendship treaty and contend that the Aboriginal signatories to the Treaty did not, thereby, intend to surrender Aboriginal title. The Crown construes Treaty 11 as an extinguishment agreement which essentially provides for the cession and surrender of the described lands subject to "the right to pursue their usual vocations of hunting, trapping and fishing." The Crown acknowledges that it did not fulfill the reserve creation obligation of that Treaty. The Applicants contend that the Deh Cho did not allow reserve lands to be set aside for them pursuant to the Treaty because they did not want to submit to the Crown's interpretation of the Treaty.

[103] Since 1998, the issue of Aboriginal title, "the land question" has been subject to the "Deh Cho Process" whereby the Crown in right of Canada, the Deh Cho First Nations, and the Government of the NWT have agreed to seek a negotiated resolution to the land question. The Process has led to a negotiated Framework Agreement signed in 2001. Two subsequent agreements were negotiated: an Interim Resource Development Agreement and an Interim Measures Agreement. The latter agreement established the *Deh Cho Land Use Planning Committee*, which contemplates a collaborative approach in land use planning of the Deh Cho territory, which includes the Cameron Hills area.

[104] The Respondent contends that the land claims process was entered into on a without prejudice basis and should therefore have no bearing on the determination of the strength of the Applicants' asserted claim. I disagree. While not a determinative factor, the Crown's participation in the land claims process is a factor that may inform the Court in assessing the strength of the Applicants' asserted claim.

[105] The evidence establishes that a significant component of Treaty 11, the Crown's obligation to set aside reserve lands, was not fulfilled. This is not disputed by the parties to these proceedings. The eventual legal impact of the Crown's failure to fulfill its Treaty obligation on the Applicants' asserted Aboriginal title remains to be determined on a more fulsome record at trial. For the purposes of this application, I think it appropriate to consider these underlying circumstances to the land title issues which flow from Treaty 11 as material factors in assessing the strength of the Applicants' asserted claim.

[106] The Crown's obligation under Treaty 11, to set aside reserve lands, is arguably a fundamental aspect of the Treaty. Here, the Crown failed to set aside reserve lands for the exclusive use of the Aboriginal community as required under the terms of the Treaty. The question then is what effect, if any, does the Crown's breach of its Treaty obligation have on the Applicants' asserted claim of Aboriginal title? In my view, the question, at a minimum, raises a serious issue to be debated. Further, the Crown's acceptance of the comprehensive land claims process with the view of seeking a negotiated resolution to the land question, and resulting agreements, lend further support to the Applicants' argument that their asserted claim is meritorious. The above factors must be balanced against the language in the Treaty, which in the

Respondent's submission clearly supports an agreement to relinquish Aboriginal title in the lands at issue.

[107] It is not for the Court, in the conduct of a judicial review application, to decide the Applicants' asserted claim. Such questions are best left to be dealt with in the context of a trial where the ethnographic, historical, and traditional evidence is comprehensively reviewed and considered. In the circumstances of this case, while it is difficult to quantify the strength of the Applicants' asserted claim, I am nevertheless satisfied that the claim raises a reasonably arguable case. This determination is based on a review of the record before me, the nature of the asserted claim, the language of Treaty 11, the Crown's breach of its Treaty obligation and the Crown's commitment to the comprehensive land claims process. In the circumstances, these factors serve to elevate the content of the Crown's duty to consult from what would otherwise have been the case had the content of the duty been based exclusively on the interpretation of the Treaty rights in play.

[108] I now turn to the seriousness of the potentially adverse effect of the intended Crown conduct upon the rights or title claimed.

[109] The Extension Project involves, among other work that I addressed earlier in these reasons, the drilling and testing of up to 50 additional wells over a 10 year period, reclamation work, 733 km of seismic lines and temporary camps to be set up to service the needs of up to 200 workers. Even at the preliminary screening stage, the Review Board was satisfied of the project's significant adverse impacts on the environment and that there was a clear indication of public

concern. To appreciate the significance of the potential impact the Extension Project would have on the lands at issue and on the harvesting rights of the Applicants, one need only consider the report which resulted from the Environmental Assessment Process under the Act. At page 14 of its report, the Review Board found that the evidence provided a “firm foundation for the concerns expressed about this area, particularly in relation to the possible effects of the proposed development on the traditional activities important to the Ka’a’Gee Tu and other aboriginal communities”.

[110] Paramount contends that there is little indication that any of the Applicants’ traditional activities actually occur on the plateau of the Cameron Hills, the site of Paramount’s activities in this Application. While this may be so, it remains that the Plateau is within the area over which the Applicants’ claim Aboriginal title. Further, as stated earlier in these reasons, the Review Board was satisfied on the evidence, that the combined direct and indirect footprint of the Planned Development would have a significant impact on the environment. Also, the Review Board did not distinguish the Plateau from other areas in the Cameron Hills. Rather, the Review Board recognized the Cameron Hills as an important traditional use area for local First Nations.

[111] The Review Board issued comprehensive Environmental Reports for both the Gathering and Pipeline Project and the Extension Project. These reports, which I have reviewed in some detail earlier in these reasons, discuss the potential impacts of oil and gas development on the lands, fish and wildlife in the affected territory and recommend numerous mitigating measures viewed by the Review Board as necessary to address and minimize the impact of the projects on the environment and therefore by extension on the Applicants’ Treaty and asserted rights. A

review of the evidence which led the Review Board to prepare its report on the Extension Project and recommend mitigating measures, leaves little doubt as to the significance of the potential impact on the Cameron Hills area and on the Applicants' Treaty and asserted rights.

[112] I am therefore satisfied that the extension project will have a significant and lasting impact on the Cameron Hills area and, consequently, on the lands over which the Applicants assert Aboriginal title. I am also satisfied that the project has the potential of having a significant impact on the Applicants' "broad harvesting rights to hunt, trap and fish".

[113] The Respondent, the Attorney General of Canada, cites *Mikisew* for the proposition that the Crown's duty, in the circumstances, lies at the lower end of the Spectrum. In *Mikise*, where established Treaty rights were also at issue, Mr. Justice Binnie on behalf of the Supreme Court wrote: "...given that the Crown is proposing to build a fairly minor winter road on *surrendered* lands where the *Mikisew* hunting, fishing and trapping rights are expressly subject to the 'taking up' limitation, I believe the Crown's duty lies at the lower end of the spectrum." Mr. Justice Binnie went on to describe the content of the duty at the lower end of the spectrum.

[114] Here, the Applicants also assert a claim of Aboriginal title, which was not the case in *Mikisew*. Further, oil and gas development in the Cameron Hills area, from its inception, and the Extension Project in particular, involve far more than the building of a minor road. In my view the project's physical scope and potential impact on the environment and the Applicants' established rights to hunt, fish and trap, and asserted aboriginal title, as discussed above, militate

in favour of the content of the Crown's duty to consult being greater than that found to be the case in *Mikisew*.

[115] Even in *Mikisew*, where Mr. Justice Binnie found the Crown's duty to consult to lie at the lower end of the spectrum, he nevertheless held that the Crown was required to attempt to minimize adverse impacts on the Mikisew hunting, fishing and trapping rights. At paragraph 64 of the Court's reasons, he described the content of the duty as follows:

...The Crown was required to provide notice to the Mikisew and to engage directly with them (and not, as seems to have been the case here, as an afterthought to a general public consultation with Park users. This engagement ought to have included the provision of information about the project addressing what the Crown knew to be Mikisew interests and what the Crown anticipated might be the potential adverse impact on those interests. The Crown was required to solicit and to listen carefully to the Mikisew concerns, and to attempt to minimize adverse impacts on the Mikisew hunting, fishing and trapping rights).

[116] Mr. Justice Binnie agreed with the following articulation of the duty to consult by Mr. Justice Finch, J.A., (now C.J.B.C.), in *Halfway River First Nation v. British Columbia (Ministry of Forests)* (1999), 178 D.L.R. (4th) 666 at paras. 159-160:

The fact that adequate notice of an intended decision may have been given does not mean that the requirement for adequate consultation has also been met.

The Crown's duty to consult imposes on it a positive obligation to reasonably ensure that aboriginal peoples are provided with all necessary information in a timely way so that they have an opportunity to express their interests and concerns, and to ensure that their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action.

[Emphasis added.]

[117] In my view, the contextual factors in this case, particularly the seriousness of the impact on the Aboriginal people, by the Crown's proposed course of action and the strength of the Applicants' asserted aboriginal claim, militate in favour of a more important role of consultation. The duty must in these circumstances involve formal participation in the decision-making process.

[118] The consultation process provided for under the Act is comprehensive and provides the opportunity for significant consultation between the developer and the affected Aboriginal groups. As noted above, the record indicates that the Applicants have had many opportunities to express their concerns in writing or at public meetings through submissions made by counsel on their behalf or by the Applicants directly. The record also establishes the Applicants were heavily involved in the process and that their involvement influenced the work and recommendations of the Review Board. In essence, the product of the consultation process is reflected in the Review Board's Environmental Assessment Reports. These reports, while not necessarily producing the results sought by the Applicants, do reflect the collective input of all of the parties involved, including the Applicants. The Environmental Assessment Report concerning the Extension Project clearly shows that many of the concerns of the Applicants were taken into account. While the Review Board ultimately endorsed the project, it did so only with significant mitigating measures and suggestions which were supported by the Applicants and which went a long way in addressing their main concerns.

[119] Up until this point, the process, in my view, provided an opportunity for the Applicants to express their interests and concerns, and ensured that these concerns were seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action. Up until this point in the process, I am satisfied that the Applicants benefited from formal participation in the decision-making process.

[120] The difficulty in this case arises when the Crown elected to avail itself of the “consult to modify process” provided for in the Act. Under the Act, where a recommendation approving a project is made by the Review Board and is subject to the imposition of measures considered necessary to prevent the significant adverse impact of the project, this process provides that the Responsible Ministers may agree to adopt the recommendation with modifications after consulting the Review Board. As a result of the consult to modify process, many of the Review Board’s recommendations were modified. Recommendations R-15 and R-16 were of particular importance to the Applicants, affecting the wildlife compensation plan and the socio-economic agreement. This occurred notwithstanding the firmly expressed and long held position of the Applicants that these recommendations were critical to them. The Applicants, apart from objecting to any change or deletion of these recommendations, had no opportunity for any input in respect to proposed changes to these recommendations. There may well have been other options that could have gone a long way in satisfying the Applicants’ objections. In the absence of consultations we will never know. The consult to modify process, in the circumstances of this case, essentially allowed the Crown to unilaterally change the outcome of what was arguably, until that point, a meaningful process of consultation. Implementation of the mitigating measures recommended by the Review Board may not have been sufficient to address all of the concerns

of the Applicants, but may have been sufficient to discharge the Crown's duty to consult and accommodate in the circumstances. This is so because the recommendations were the product of a process that provided the Aboriginals an opportunity for meaningful input whereby the Crown, through the Review Board, demonstrated an intention of substantially addressing their concerns. Clearly, this cannot be said of the consult to modify process. The new proposals which resulted from the consult to modify process were never submitted to the Applicants for their input. There was simply no consultation, let alone any meaningful consultation at this stage.

[121] It is not enough to rely on the process provided for in the Act. From the outset, representatives of the Crown defended the process under the Act as sufficient to discharge its duty to consult, essentially because it was provided for in the Act. I agree with the Applicants that the Crown's duty to consult cannot be boxed in by legislation. That is not to say that engaging in a statutory process may never discharge the duty to consult. In *Taku*, at paragraph 22, the Supreme Court found that the process engaged in by the Province of British Columbia under the *Environmental Protection Act* of that jurisdiction fulfilled the requirements of the Crown's duty to consult. The circumstances here are different. The powers granted to the Ministers under the Act must be exercised in a manner that fulfills the honour of the Crown. The manner in which the consult to modify process was implemented in this case, for reasons expressed herein, failed to fulfill the Crown's duty to consult and was inconsistent with the honour of the Crown.

[122] The Respondent, the Attorney General of Canada, argues that the role of the tribunal at the consult to modify stage of the process is a polycentric one, made in the exercise of judgment

that takes into account appropriate economic, social, political and other considerations and as a consequence a reviewing court should show deference to the tribunal's decision. Further, the Respondent, the Attorney General of Canada, argues that the consult to modify process is but one small part of the overall process and that prior to making a decision under section 130 of the Act, a full exploration of the proposal and its actual and long-term effects had occurred.

[123] It is true that the Review Board via a long hearing process which involved the KTFN undertook the task of investigating the Applicants' concerns and eventually made recommendations to address some of those concerns. However, by engaging the "consult to modify process" which resulted in a substantial revision of certain key recommendations of the Review Board, in particular Recommendations 15 and 16, without consulting the Applicants, the Ministers essentially decided not to rely on the investigative and fact finding role of the Review Board. It is not good enough for the Ministers, at this stage, to argue that as a consequence of prior consultation they were made aware of the concerns of the Applicants. The difficulty is that the Applicants were not made aware of subsequent proposals by the Ministers that changed the recommended mitigating measures of the Review Board. They could not provide their views or build on the proposed modifications because they were not part of the process. They were simply not consulted. The Ministers, in effect, commenced their own process of determining how to respond to the Applicants' concerns and that process made no provision for any input by the Applicants. The matter is further aggravated here by the significance of the changes made to recommendations of the Review Board, which the Ministers knew were important to the

Applicants. In my view, the Crown's duty to consult in respect to the new proposals which resulted from the consult to modify process was not met in the circumstances.

[124] I find the Crown failed to discharge its duty to consult in the circumstances of this case. In sum, the consult to modify process allowed for fundamental changes to be made to important recommendations which were the result of an earlier consultative process involving the Applicants and other stakeholders. These changes were made without input from the Applicants. It cannot be said, therefore, that the consult to modify process was conducted with the genuine intention of allowing the KTFN's concerns to be integrated into the final decision. At this stage the Applicants were essentially shut out of the process.

7. Other Issues

[125] The Applicants contend that the Ministers' meeting with Paramount on May 17, 2005, breached the rules of procedural fairness and gives rise to a reasonable apprehension of bias. It is argued that the Ministers, at that time, were aware that the parties had taken adversarial positions on whether recommendations in the Environmental Assessment Report on the Extension Project should be modified. It was therefore incumbent on the Ministers to ensure procedural fairness was met and to provide equal access to the Applicants.

[126] Paramount argues that the meetings in Ottawa were never about the consult to modify process, but were generally about Paramount's development and the delay in the regulatory process. Mr. Livingstone, on behalf of the Respondents, attests that while Paramount tabled a

“generic presentation about its development to Mimi Fortier” the meeting had nothing to do with the consult to modify process and that it was open to the Applicants to request a similar meeting.

[127] In my view, it is strongly advisable that representatives of Ministers should not hold meetings with any party to a proceeding, absent the adverse party or parties, in cases where a decision by the said Ministers is pending. I am nevertheless satisfied that the evidence here does not allow me to conclude that the impugned meeting resulted in a breach of procedural fairness or that the particular circumstances give rise to a reasonable apprehension of bias.

[128] The Applicants also argue that their full and meaningful participation in the consultation process under the Act was compromised by a lack of resources. The evidence indicates that the Crown did provide funding to allow the KTFN to participate in the consultation process. The financial resources advanced over the five year period were not every thing the Applicants had requested, but they were not insignificant. While the Applicants allege that the lack of resources impaired their ability to fully participate in the process, they fail to identify what additional resources would have been required to adequately address their needs, or to what end such additional resources would be used. Further, as mentioned, the evidence established that a surplus remained from the funds that were provided. Based on the evidence on the record, I am unable to determine whether the resources provided were sufficient to allow a meaningful participation in the process. In any event, given my above determination that the Crown in right of Canada has not discharged its duty to consult in the circumstances, resolution of the funding issue is not necessary in order to dispose of this application.

[129] Finally, the Applicants argue that Paramount's Traditional Knowledge study was prepared by Paramount without meaningful consultation and consequently fails to meet the requirements of a proper Traditional Land Use Study. On the evidence, I find that the Applicants have not justified their failure to participate in the consultative process for the purpose of developing a TK study. I am not persuaded that the concerns or excuses offered by the Applicants for not sharing TK information with Paramount or the Review Board have merit.

[130] I understand the main concern to be the protection of sensitive information concerning Traditional Knowledge of the Applicants becoming public. No evidence was adduced to suggest that other options were unavailable to protect against public dissemination of such sensitive information, while still participating in the process. In my view, since the Applicants have not justified their failure to participate, the Applicants cannot now complain that their concerns were not considered in the preparation of the TK study. While it may not be necessary to decide the issue, given my earlier determinative finding that the Crown breached its duty to consult, any future consultative process will require the Applicants' sharing their traditional knowledge and full meaningful participation in the consultation process.

8. Conclusion

[131] The Crown in right of Canada has failed to discharge its duty to consult and, if necessary, accommodate before making a final decision on the approval of the Extension Project. The Crown in right of Canada has a duty to consult with the KTFN in respect to modifications it proposes to bring to the recommendations of the Review Board pursuant to the Environmental Assessment Process concerning the Extension Project. Good faith consultation in the consult to

modify stage of the process is required and while there is no duty to reach an agreement, such consultation may well lead to an obligation to accommodate the concerns of the KTFN. The extent and nature of accommodation, if any, can only be ascertained after meaningful consultation at this final stage of the process.

9. Remedy

[132] The Applicants seek a remedy which provides for the following relief:

- (a) An order declaring that the decision is invalid and unlawful, quashing and setting aside the decision. Also a declaration that the Ministers breached their constitutional and legal duty to consult with and accommodate the Ka'a'Gee Tu before issuing the Ministers' decision.
- (b) An order directing the Ministers to consult through good faith negotiations with the Ka'a'Gee Tu and accommodate the Ka'a'Gee Tu's Treaty with respect to their concerns before allowing the Extension Project to proceed, with a direction that Paramount participate in the negotiations. These negotiations would be conducted with Court oversight.
- (c) An order restraining the Ministers and Paramount from taking any further steps in relation to the approval of the Extension Project, pending further order of the Court.
- (d) An order that the parties are at liberty to re-apply to this Court for further relief.
- (e) Costs.

[133] I am satisfied that the proper relief in the circumstances consists in a declaration that the Crown in right of Canada has breached its duty to consult and accommodate. As a consequence, I will order that in accord with the above reasons, the parties are to engage in a process of meaningful consultation with the view of taking into account the concerns of the KTFN and if necessary accommodate those concerns. The process is to be conducted with the aim of reconciling outstanding differences between the parties, in a manner that is consistent with the honour of the Crown and the principles articulated by the Supreme Court of Canada in *Haida* and *Taku*.

[134] The Applicants will have their costs on the application.

ORDER

THIS COURT DECLARES that:

The Crown in right of Canada has breached its duty to consult with the Ka'a'Gee Tu First Nation before deciding to approve the Extension Project.

THIS COURT ORDERS that:

1. In accordance with the above reasons, the parties are to engage in a process of meaningful consultation with the view of taking into account the concerns of the KTFN and if necessary accommodate those concerns. The process is to be conducted with the aim of reconciliation in a manner that is consistent with the honour of the Crown and the principles articulated by the Supreme Court of Canada in *Haida* and *Taku*.
2. The Applicants will have their costs on the application, to be borne and shared by the Respondents in proportions to be agreed upon by them.
3. Failing such agreement, each Respondent may serve and file written submissions on the issue of the apportioning of the costs between Respondents, not to exceed 10 pages each

no later than August 20, 2007, with replies not to exceed 5 pages each to be served and filed no later than August 31, 2007. The Court will then determine, after consideration of the written submissions, the proportion of the costs to be borne by each Respondent.

“Edmond P. Blanchard”

Judge

APPENDIX A

Mackenzie Valley Resource Management Act, 1998 C-26
Loi sur la gestion des ressources de la vallée du Mackenzie 1998, ch. 26

3. Wherever in this Act reference is made, in relation to any matter, to a power or duty to consult, that power or duty shall be exercised

(a) by providing, to the party to be consulted,

(i) notice of the matter in sufficient form and detail to allow the party to prepare its views on the matter,

(ii) a reasonable period for the party to prepare those views, and

(iii) an opportunity to present those views to the party having the power or duty to consult; and

(b) by considering, fully and impartially, any views so presented.

60.1 In exercising its powers, a board shall consider

(a) the importance of conservation to the well-being and way of life of the aboriginal peoples of Canada to whom section 35 of the *Constitution Act, 1982* applies and who use an area of the Mackenzie Valley; and

(b) any traditional knowledge and scientific information that is made available to it.

63. (1) A board shall provide a copy of each application made to the board for a licence or permit to the owner of any land

3. Toute consultation effectuée sous le régime de la présente loi comprend l'envoi, à la partie à consulter, d'un avis suffisamment détaillé pour lui permettre de préparer ses arguments, l'octroi d'un délai suffisant pour ce faire et la possibilité de présenter à qui de droit ses vues sur la question; elle comprend enfin une étude approfondie et impartiale de ces vues.

60.1 Dans l'exercice de ses pouvoirs, l'office tient compte, d'une part, de l'importance de préserver les ressources pour le bien-être et le mode de vie des peuples autochtones du Canada visés par l'article 35 de la *Loi constitutionnelle de 1982* et qui utilisent les ressources d'une région de la vallée du Mackenzie et, d'autre part, des connaissances traditionnelles et des renseignements scientifiques mis à sa disposition.

63. (1) L'office adresse une copie de toute demande de permis dont il est saisi aux ministères et organismes compétents

to which the application relates and to appropriate departments and agencies of the federal and territorial governments.

Notice of applications

(2) A board shall notify affected communities and first nations of an application made to the board for a licence, permit or authorization and allow a reasonable period of time for them to make representations to the board with respect to the application.

Notice to Tlicho Government

(3) The Wekeezhii Land and Water Board shall notify the Tlicho Government of an application made to the Board for a licence, permit or authorization and allow a reasonable period of time for it to make representations to the Board with respect to the application.

Consultation with Tlicho Government

(4) The Wekeezhii Land and Water Board shall consult the Tlicho Government before issuing, amending or renewing any licence, permit or authorization for a use of Tlicho lands or waters on those lands or a deposit of waste on those lands or in those waters.

111. (1) The following definitions apply in this Part.

"designated regulatory agency"
« *organisme administratif désigné* »

"designated regulatory agency" means an agency named in the schedule, referred to in a land claim agreement as an

des gouvernements fédéral et territorial, ainsi qu'au propriétaire des terres visées.

Avis à la collectivité et à la première nation

(2) Il avise la collectivité et la première nation concernées de toute demande de permis ou d'autorisation dont il est saisi et leur accorde un délai suffisant pour lui présenter des observations à cet égard.

Avis au gouvernement tlicho

(3) L'Office des terres et des eaux du Wekeezhii avise de plus le gouvernement tlicho de toute demande de permis ou d'autorisation dont il est saisi et lui accorde un délai suffisant pour lui présenter des observations à cet égard.

Consultation du gouvernement tlicho

(4) L'Office des terres et des eaux du Wekeezhii consulte le gouvernement tlicho avant de délivrer, modifier ou renouveler un permis ou une autorisation relativement à l'utilisation des terres tlichos ou des eaux qui s'y trouvent ou au dépôt de déchets dans ces lieux.

111. (1) Les définitions qui suivent s'appliquent à la présente partie.

« autorité administrative »
"regulatory authority"

« autorité administrative » Personne ou organisme chargé, au titre de toute règle de droit fédérale ou territoriale, de délivrer les permis ou autres autorisations

independent regulatory agency.	relativement à un projet de développement. Sont exclus les administrations locales et les organismes administratifs désignés.
"development" « <i>projet de développement</i> »	
"development" means any undertaking, or any part or extension of an undertaking, that is carried out on land or water and includes an acquisition of lands pursuant to the <i>Historic Sites and Monuments Act</i> and measures carried out by a department or agency of government leading to the establishment of a park subject to the <i>Canada National Parks Act</i> or the establishment of a park under a territorial law.	« étude d'impact » "environmental impact review" «étude d'impact » Examen d'un projet de développement effectué par une formation de l'Office en vertu de l'article 132.
"environmental assessment" « <i>évaluation environnementale</i> »	« évaluation environnementale » "environmental assessment" « évaluation environnementale » Examen d'un projet de développement effectué par l'Office en vertu de l'article 126.
"environmental assessment" means an examination of a proposal for a development undertaken by the Review Board pursuant to section 126.	« examen préalable » "preliminary screening" «examen préalable » Examen d'un projet de développement effectué en vertu de l'article 124.
"environmental impact review" « <i>étude d'impact</i> »	« mesures correctives ou d'atténuation » "mitigative or remedial measure"
"environmental impact review" means an examination of a proposal for a development undertaken by a review panel established under section 132.	« mesures correctives ou d'atténuation » Mesures visant la limitation, la réduction ou l'élimination des répercussions négatives sur l'environnement. Sont notamment visées les mesures de rétablissement.
"follow-up program" « <i>programme de suivi</i> »	
"follow-up program" means a program for evaluating	« ministre compétent » "responsible minister"
(a) the soundness of an environmental assessment or environmental impact review of a proposal for a development; and	« ministre compétent » Le ministre du gouvernement fédéral ou du gouvernement territorial ayant compétence, sous le régime des règles de droit fédérales ou territoriales, selon le cas, en ce qui touche le projet de
(b) the effectiveness of the mitigative or remedial measures imposed as	

conditions of approval of the proposal.	développement en cause.
"impact on the environment" « <i>répercussions environnementales</i> » ou « <i>répercussions sur l'environnement</i> »	« Office » "Review Board"
"impact on the environment" means any effect on land, water, air or any other component of the environment, as well as on wildlife harvesting, and includes any effect on the social and cultural environment or on heritage resources.	« Office » L'Office d'examen des répercussions environnementales de la vallée du Mackenzie constitué en vertu du paragraphe 112(1).
"mitigative or remedial measure" « <i>mesures correctives ou d'atténuation</i> »	« organisme administratif désigné » "designated regulatory agency"
"mitigative or remedial measure" means a measure for the control, reduction or elimination of an adverse impact of a development on the environment, including a restorative measure.	« organisme administratif désigné » Organisme mentionné à l'annexe. « Organisme administratif autonome » dans l'accord de revendication.
"preliminary screening" « <i>examen préalable</i> »	« programme de suivi » "follow-up program"
"preliminary screening" means an examination of a proposal for a development undertaken pursuant to section 124.	« programme de suivi » Programme visant à vérifier, d'une part, le bien-fondé des conclusions de l'évaluation environnementale ou de l'étude d'impact, selon le cas, et, d'autre part, l'efficacité des mesures correctives ou d'atténuation auxquelles est assujéti le projet de développement.
"regulatory authority" « <i>autorité administrative</i> »	« projet de développement » "development"
"regulatory authority" , in relation to a development, means a body or person responsible for issuing a licence, permit or other authorization required for the development under any federal or territorial law, but does not include a designated regulatory agency or a local government.	« projet de développement » Ouvrage ou activité — ou toute partie ou extension de ceux-ci — devant être réalisé sur la terre ou sur l'eau. Y sont assimilées la prise de mesures, par un ministère ou un organisme gouvernemental, en vue de la constitution de parcs régis par la <i>Loi sur les parcs nationaux du Canada</i> ou de la constitution de parcs en vertu d'une règle de droit territoriale ainsi que l'acquisition de terres sous le régime de la <i>Loi sur les lieux et monuments historiques</i> .
"responsible minister" « <i>ministre compétent</i> »	
"responsible minister" , in relation to a proposal for a development, means any	

minister of the Crown in right of Canada or of the territorial government having jurisdiction in relation to the development under federal or territorial law.

"Review Board"
« Office »

"Review Board" means the Mackenzie Valley Environmental Impact Review Board established by subsection 112(1)

« répercussions environnementales » ou « répercussions sur l'environnement » "impact on the environment"

« répercussions environnementales » ou « répercussions sur l'environnement » Les répercussions sur le sol, l'eau et l'air et toute autre composante de l'environnement, ainsi que sur l'exploitation des ressources fauniques. Y sont assimilées les répercussions sur l'environnement social et culturel et sur les ressources patrimoniales.

Application

(2) This Part applies in respect of developments to be carried out wholly or partly within the Mackenzie Valley and, except for section 142, does not apply in respect of developments wholly outside the Mackenzie Valley.
1998, c. 25, s. 111; 2000, c. 32, s. 55; 2005, c. 1, s. 65.

114. The purpose of this Part is to establish a process comprising a preliminary screening, an environmental assessment and an environmental impact review in relation to proposals for developments, and

(a) to establish the Review Board as the main instrument in the Mackenzie Valley for the environmental assessment and environmental impact review of developments;

(b) to ensure that the impact on the environment of proposed developments receives careful consideration before actions are taken in connection with them; and

Champ d'application

(2) La présente partie s'applique aux projets de développement devant être réalisés en tout ou en partie dans la vallée du Mackenzie et ne s'applique pas, à l'exception de l'article 142, aux projets devant être réalisés entièrement à l'extérieur de celle-ci.
1998, ch. 25, art. 111; 2000, ch. 32, art. 55; 2005, ch. 1, art. 65.

114. La présente partie a pour objet d'instaurer un processus comprenant un examen préalable, une évaluation environnementale et une étude d'impact relativement aux projets de développement et, ce faisant :

a) de faire de l'Office l'outil primordial, dans la vallée du Mackenzie, en ce qui concerne l'évaluation environnementale et l'étude d'impact de ces projets;

b) de veiller à ce que la prise de mesures à l'égard de tout projet de développement découle d'un jugement éclairé quant à ses répercussions environnementales;

c) de veiller à ce qu'il soit tenu compte,

(c) to ensure that the concerns of aboriginal people and the general public are taken into account in that process.

dans le cadre du processus, des préoccupations des autochtones et du public en général.

115. The process established by this Part shall be carried out in a timely and expeditious manner and shall have regard to

115. Le processus mis en place par la présente partie est suivi avec célérité, compte tenu des points suivants :

(a) the protection of the environment from the significant adverse impacts of proposed developments;

a) la protection de l'environnement contre les répercussions négatives importantes du projet de développement;

(b) the protection of the social, cultural and economic well-being of residents and communities in the Mackenzie Valley; and

b) le maintien du bien-être social, culturel et économique des habitants et des collectivités de la vallée du Mackenzie;

(c) the importance of conservation to the well-being and way of life of the aboriginal peoples of Canada to whom section 35 of the *Constitution Act, 1982* applies and who use an area of the Mackenzie Valley.

c) l'importance de préserver les ressources pour le bien-être et le mode de vie des peuples autochtones du Canada visés par l'article 35 de la *Loi constitutionnelle de 1982* et qui utilisent les ressources d'une région de la vallée du Mackenzie.

1998, c. 25, s. 115; 2005, c. 1, s. 67.

1998, ch. 25, art. 115; 2005, ch. 1, art. 67.

Considerations

Éléments à considérer

115.1 In exercising its powers, the Review Board shall consider any traditional knowledge and scientific information that is made available to it.

115.1 Dans l'exercice de ses pouvoirs, l'Office tient compte des connaissances traditionnelles et des renseignements scientifiques mis à sa disposition.

2005, c. 1, s. 68.

2005, ch. 1, art. 68.

125. (1) Except as provided by subsection (2), a body that conducts a preliminary screening of a proposal shall

125. (1) Sauf dans les cas visés au paragraphe (2), l'organe chargé de l'examen préalable indique, dans un rapport d'examen adressé à l'Office, si, à son avis, le projet est susceptible soit d'avoir des répercussions négatives importantes sur l'environnement, soit

(a) determine and report to the Review Board whether, in its opinion, the development might have a significant

adverse impact on the environment or might be a cause of public concern; and

(b) where it so determines in the affirmative, refer the proposal to the Review Board for an environmental assessment.

Within local government territory

(2) Where a proposed development is wholly within the boundaries of a local government, a body that conducts a preliminary screening of the proposal shall

(a) determine and report to the Review Board whether, in its opinion, the development is likely to have a significant adverse impact on air, water or renewable resources or might be a cause of public concern; and

(b) where it so determines in the affirmative, refer the proposal to the Review Board for an environmental assessment.

Assessment by Review Board

128. (1) On completing an environmental assessment of a proposal for a development, the Review Board shall,

(a) where the development is not likely in its opinion to have any significant adverse impact on the environment or to be a cause of significant public concern, determine that an environmental impact review of the proposal need not be conducted;

(b) where the development is likely in its opinion to have a significant adverse impact on the environment,

d'être la cause de préoccupations pour le public. Dans l'affirmative, il renvoie l'affaire à l'Office pour qu'il procède à une évaluation environnementale.

Territoire d'une administration locale

(2) Dans le cas d'un projet devant être entièrement réalisé dans le territoire d'une administration locale, le rapport indique si, de l'avis de l'organe chargé de l'examen préalable, le projet soit aura vraisemblablement des répercussions négatives importantes sur l'air, l'eau ou les ressources renouvelables, soit est susceptible d'être la cause de préoccupations pour le public. Dans l'affirmative, l'affaire fait l'objet du même renvoi.

Résultat de l'évaluation environnementale

128. (1) Au terme de l'évaluation environnementale, l'Office :

a) s'il conclut que le projet n'aura vraisemblablement pas de répercussions négatives importantes sur l'environnement ou ne sera vraisemblablement pas la cause de préoccupations importantes pour le public, déclare que l'étude d'impact n'est pas nécessaire;

b) s'il conclut que le projet aura vraisemblablement des répercussions négatives importantes sur

(i) order that an environmental impact review of the proposal be conducted, subject to paragraph 130(1)(c), or

(ii) recommend that the approval of the proposal be made subject to the imposition of such measures as it considers necessary to prevent the significant adverse impact;

(c) where the development is likely in its opinion to be a cause of significant public concern, order that an environmental impact review of the proposal be conducted, subject to paragraph 130(1)(c); and

(d) where the development is likely in its opinion to cause an adverse impact on the environment so significant that it cannot be justified, recommend that the proposal be rejected without an environmental impact review.

Report to ministers, agencies and Tlicho Government

(2) The Review Board shall make a report of an environmental assessment to

(a) the federal Minister, who shall distribute it to every responsible minister;

(b) any designated regulatory agency from which a licence, permit or other authorization is required for the carrying out of the development; and

(c) if the development is to be carried out wholly or partly on Tlicho lands, the Tlicho Government.

Copies of report

l'environnement :

(i) soit ordonne, sous réserve de la décision ministérielle prise au titre de l'alinéa 130(1)c), la réalisation d'une étude d'impact,

(ii) soit recommande que le projet ne soit approuvé que si la prise de mesures de nature, à son avis, à éviter ces répercussions est ordonnée;

c) s'il conclut que le projet sera vraisemblablement la cause de préoccupations importantes pour le public, ordonne, sous réserve de la décision ministérielle prise au titre de l'alinéa 130(1)c), la réalisation d'une étude d'impact;

d) s'il conclut que le projet aura vraisemblablement des répercussions négatives si importantes sur l'environnement qu'il est injustifiable, en recommande le rejet, sans étude d'impact.

Rapport de l'Office

(2) L'Office adresse son rapport d'évaluation, d'une part, au ministre fédéral, qui est tenu de le transmettre à tout ministre compétent, et, d'autre part, à l'organisme administratif désigné chargé de délivrer les permis ou autres autorisations nécessaires à la réalisation du projet. Il adresse également le rapport au gouvernement tlicho s'il s'agit d'un projet devant être réalisé — même en partie — sur les terres tlichos.

Copie

(3) L'Office adresse une copie du rapport au promoteur du projet de développement,

(3) The Review Board shall provide a copy of its report to any body that conducted a preliminary screening of the proposal, to any body that referred the proposal to the Review Board under subsection 126(2) and to the person or body that proposes to carry out the development.

Areas identified

(4) The Review Board shall identify in its report any area within or outside the Mackenzie Valley in which the development is likely, in its opinion, to have a significant adverse impact or to be a cause of significant public concern and specify the extent to which that area is affected.

1998, c. 25, s. 128; 2005, c. 1, s. 78.

130. (1) After considering the report of an environmental assessment, the federal Minister and the responsible ministers to whom the report was distributed may agree

(a) to order an environmental impact review of a proposal, notwithstanding a determination under paragraph 128(1)(a);

(b) where a recommendation is made under subparagraph 128(1)(b)(ii) or paragraph 128(1)(d),

(i) to adopt the recommendation or refer it back to the Review Board for further consideration, or

(ii) after consulting the Review Board, to adopt the recommendation with modifications or reject it and order an environmental impact review of the proposal; or

(c) irrespective of the determination in

à l'organe en ayant effectué l'examen préalable et, en cas de renvoi effectué en vertu du paragraphe 126(2), au ministère, à l'organisme, à la première nation, au gouvernement tlicho ou à l'administration locale concernée.

Régions touchées

(4) Dans son rapport, l'Office précise la région — même située à l'extérieur de la vallée du Mackenzie — dans laquelle, à son avis, le projet aura vraisemblablement les répercussions visées à l'alinéa (1)b) ou sera vraisemblablement la cause des préoccupations visées à l'alinéa (1)c), ainsi que la mesure dans laquelle la région sera ainsi touchée.

1998, ch. 25, art. 128; 2005, ch. 1, art. 78.

130. (1) Au terme de leur étude du rapport d'évaluation environnementale, le ministre fédéral et les ministres compétents auxquels le rapport a été transmis peuvent, d'un commun accord :

a) ordonner la réalisation d'une étude d'impact malgré la déclaration contraire faite en vertu de l'alinéa 128(1)a);

b) accepter la recommandation faite par l'Office en vertu du sous-alinéa 128(1)b)(ii) ou de l'alinéa 128(1)d), la lui renvoyer pour réexamen ou après avoir consulté ce dernier soit l'accepter avec certaines modifications, soit la rejeter et ordonner la réalisation d'une étude d'impact;

c) dans les cas où, à leur avis, l'intérêt national l'exige et après avoir consulté le ministre de l'Environnement, saisir celui-ci de l'affaire, quelles que soient les conclusions du rapport, pour qu'un

the report, to refer the proposal to the Minister of the Environment, following consultation with that Minister, for the purpose of a joint review under the *Canadian Environmental Assessment Act*, where the federal Minister and the responsible ministers determine that it is in the national interest to do so.

examen conjoint soit effectué sous le régime de la *Loi canadienne sur l'évaluation environnementale*.

Consultation

(1.1) Before making an order under paragraph (1)(a) or a referral under paragraph (1)(c), the federal Minister and the responsible ministers shall consult the Tlicho Government if the development is to be carried out wholly or partly on Tlicho lands.

Consultation du gouvernement tlicho

(1.1) Avant de prendre la mesure visée aux alinéas (1)a) ou c), le ministre fédéral et les ministres compétents consultent le gouvernement tlicho si le projet de développement doit être réalisé — même en partie — sur les terres tlichos.

Areas identified

(2) Where an environmental impact review of a proposal is ordered under subsection (1), the federal Minister and responsible ministers shall identify any area within or outside the Mackenzie Valley in which the development is likely, in their opinion, to have a significant adverse impact or to be a cause of significant public concern and specify the extent to which that area is affected.

Régions touchées

(2) Dans les cas où ils ordonnent la réalisation d'une étude d'impact, le ministre fédéral et les ministres compétents précisent la région — même située à l'extérieur de la vallée du Mackenzie — dans laquelle, à leur avis, le projet aura vraisemblablement des répercussions négatives importantes ou sera vraisemblablement la cause de préoccupations importantes pour le public, ainsi que la mesure dans laquelle la région sera ainsi touchée.

Additional information

(3) If the federal Minister and responsible ministers consider any new information that was not before the Review Board, or any matter of public concern not referred to in the Review Board's reasons, the new information or matter shall be identified in the decision made under this section and in any consultation under paragraph (1)(b).

Renseignements supplémentaires

(3) Le ministre fédéral et les ministres compétents sont tenus d'indiquer, au soutien de la décision ou dans le cadre des consultations visées à l'alinéa (1)b), les renseignements dont il a été tenu compte et qui étaient inconnus de l'Office, ainsi que les questions d'intérêt public qui ont été étudiées et qui n'ont pas été soulevées par ce dernier.

Distribution of decision

(4) The federal Minister shall distribute a decision made under this section to the Review Board and to every first nation, local government, regulatory authority and department and agency of the federal or territorial government affected by the decision.

Effect of decision

(5) The federal Minister and responsible ministers shall carry out a decision made under this section to the extent of their respective authorities. A first nation, local government, regulatory authority or department or agency of the federal or territorial government affected by a decision made under this section shall act in conformity with the decision to the extent of their respective authorities. 1998, c. 25, s. 130; 2005, c. 1, s. 80.

Decision by designated Agency

131. (1) A designated regulatory agency shall, after considering a report of the Review Board containing a recommendation made under subparagraph 128(1)(b)(ii) or paragraph 128(1)(d),

(a) adopt the recommendation or refer it back to the Review Board for further consideration; or

(b) after consulting the Review Board, adopt the recommendation with modifications or reject it and order an environmental impact review of the proposal.

Communication de la décision

(4) Le ministre fédéral est chargé de communiquer la décision ainsi rendue à l'Office, aux premières nations, administrations locales et autorités administratives touchées par celle-ci et aux ministères et organismes des gouvernements fédéral et territorial concernés.

Mise en œuvre

(5) Ces premières nations, administrations locales, autorités administratives, ministères et organismes sont tenus de se conformer à la décision ministérielle dans la mesure de leur compétence. La mise en œuvre de celle-ci incombe au ministre fédéral et aux ministres compétents. 1998, ch. 25, art. 130; 2005, ch. 1, art. 80.

Organisme administrative désigné

131. (1) Au terme de son étude du rapport d'évaluation environnementale, l'organisme administratif désigné accepte la recommandation faite par l'Office en vertu du sous-alinéa 128(1)(b)(ii) ou de l'alinéa 128(1)(d), la lui renvoie pour réexamen ou après avoir consulté ce dernier soit l'accepte avec certaines modifications, soit la rejette et ordonne la réalisation d'une étude d'impact.

Effect of decision

(2) A designated regulatory agency shall carry out, to the extent of its authority, any recommendation that it adopts.

Areas identified

(3) Where an environmental impact review of a proposal is ordered under subsection (1), the designated regulatory agency shall identify any area within or outside the Mackenzie Valley in which the development is likely, in its opinion, to have a significant adverse impact or to be a cause of significant public concern and specify the extent to which that area is affected.

Additional information

(4) If a designated regulatory agency considers any new information that was not before the Review Board, or any matter of public concern that was not referred to in the Review Board's reasons, the new information or matter shall be identified in the decision made under this section and in any consultation under paragraph (1)(b).

Decision by Tlicho Government

131.1 (1) If a development is to be carried out wholly or partly on Tlicho lands, the Tlicho Government shall, after considering a report of the Review Board containing a recommendation made under subparagraph 128(1)(b)(ii),

(a) adopt the recommendation or refer it back to the Review Board for further consideration; or

(b) after consulting the Review Board, adopt the recommendation with

Mise en oeuvre

(2) L'organisme administratif désigné est tenu, dans la mesure de sa compétence, de mettre en oeuvre toute recommandation qu'il accepte.

Régions touchées

(3) Dans les cas où il ordonne la réalisation d'une étude d'impact, l'organisme administratif désigné précise la région — même située à l'extérieur de la vallée du Mackenzie — dans laquelle, à son avis, le projet aura vraisemblablement des répercussions négatives importantes ou sera vraisemblablement la cause de préoccupations importantes pour le public, ainsi que la mesure dans laquelle la région sera ainsi touchée.

Renseignements supplémentaires

(4) L'organisme administratif désigné est tenu d'indiquer, au soutien de sa décision ou dans le cadre des consultations visées au paragraphe (1), les renseignements dont il tient compte et qui étaient inconnus de l'Office, ainsi que les questions d'intérêt public qu'il a étudiées et qui n'ont pas été soulevées par ce dernier.

Décision du gouvernement tlicho

131.1 (1) Lorsque le projet de développement doit être réalisé — même en partie — sur les terres tlichos, le gouvernement tlicho, au terme de son étude du rapport d'évaluation environnementale, accepte la recommandation faite par l'Office en vertu du sous-alinéa 128(1)(b)(ii), la lui renvoie pour réexamen ou, après l'avoir consulté, soit l'accepte avec modifications, soit la rejette.

modifications or reject it.

Effect of decision

(2) The Tlicho Government shall carry out, to the extent of its authority, any recommendation that it adopts.

Additional information

(3) If the Tlicho Government considers any new information that was not before the Review Board, or any matter of public concern that was not referred to in the Review Board's reasons, the new information or matter shall be identified in the decision made under this section and in any consultation under paragraph (1)(b).

2005, c. 1, s. 81.

Conservation

131.2 In making a decision under paragraph 130(1)(b) or subsection 131(1) or 131.1(1), the federal Minister and the responsible ministers, a designated regulatory agency or the Tlicho Government, as the case may be, shall consider the importance of the conservation of the lands, waters and wildlife of the Mackenzie Valley on which the development might have an impact.

2005, c. 1, s. 81.

Consideration of report by ministers

135. (1) After considering the report of a review panel, the federal Minister and responsible ministers to whom the report was distributed may agree to

(a) adopt the recommendation of the review panel or refer it back to the

Mise en œuvre

(2) Le gouvernement tlicho est tenu, dans la mesure de sa compétence, de mettre en œuvre toute recommandation qu'il accepte.

Renseignements supplémentaires

(3) Il est tenu d'indiquer, au soutien de sa décision ou dans le cadre des consultations visées au paragraphe (1), les renseignements dont il tient compte et qui étaient inconnus de l'Office, ainsi que les questions d'intérêt public qu'il a étudiées et qui n'ont pas été soulevées par ce dernier. 2005, ch. 1, art. 81.

Préservation des terres, des eaux et de la faune

131.2 Pour la prise de toute décision en vertu de l'alinéa 130(1)b) ou des paragraphes 131(1) ou 131.1(1), le ministre fédéral et les ministres compétents, l'organisme administratif désigné ou le gouvernement tlicho, selon le cas, tiennent compte de l'importance de préserver les terres, les eaux et la faune de la vallée du Mackenzie qui peuvent être touchées par le projet de développement.

2005, ch. 1, art. 81.

Décision ministérielle

135. (1) Au terme de son étude du rapport visé au paragraphe 134(2), le ministre fédéral et les ministres compétents auxquels ce document a été transmis peuvent, d'un commun accord, parvenir à l'une des décisions suivantes :

panel for further consideration; or

(b) after consulting the review panel, adopt the recommendation with modifications or reject it.

a) ils acceptent la recommandation de la formation de l'Office ou la lui renvoient pour réexamen;

b) après avoir consulté cette dernière, ils l'acceptent avec certaines modifications ou la rejettent.

Additional information

(2) If the federal Minister and responsible ministers consider any new information that was not before the review panel, or any matter of public concern not referred to in the panel's reasons, the new information or the matter shall be identified in the decision made under this section and in their consultations under paragraph (1)(b).

Renseignements supplémentaires

(2) Le ministre fédéral et les ministres compétents sont tenus d'indiquer, au soutien de la décision ou dans le cadre des consultations visées à l'alinéa (1)b), les renseignements dont il a été tenu compte et qui étaient inconnus de la formation, ainsi que les questions d'intérêt public qui ont été étudiées et qui n'ont pas été soulevées par celle-ci.

Canada Oil and Gas Operations Act/ Loi sur les opérations pétrolières au Canada

5(2) Before authorizing any work or activity under paragraph (1)(b), the National Energy Board shall require the submission of a plan satisfactory to the National Energy Board for the employment of Canadians and for providing Canadian manufacturers, consultants, contractors and service companies with a full and fair opportunity to participate on a competitive basis in the supply of goods and services used in that work or activity.

5(2) Avant d'autoriser les activités prévues à l'alinéa (1)b), l'Office national de l'énergie exige la soumission d'un programme qu'il juge acceptable, prévoyant dans l'exécution de celles-ci l'embauche de Canadiens et offrant aux fabricants, conseillers, entrepreneurs et compagnies de services canadiens la juste possibilité de participer, compte tenu de leur compétitivité, à la fourniture des biens et services utilisés lors de ces activités.

APPENDIX B

Recommended Mitigating Measures R-13, R-15, R-16 and R-17 From the Environmental Assessment Report concerning the Gathering and Pipeline Project

The MVEIRB produced the following Recommendations with respect to the Gathering and Pipeline Project in the original Environmental Assessment Report, dated October 16, 2001:

- R-13 INAC ensures that Paramount discusses its proposed compensation plan with the affected communities and the GNWT. Paramount should widen the scope of the compensation plan as required to ensure that reasonable and credible land and resource use impacts caused by the development and identified by the communities are eligible for compensation.
- R-14 The MVLWB and the NEB ensure that Paramount includes mitigative measures in the TK study to address impacts identified by the TK study. The MVLWB and the NEB should obtain copies of the completed TK study from Paramount along with evidence of community approval of the study. The MVLWB and the NEB should ensure that authorization terms and conditions are amended as appropriate to address any impacts identified by the study that have not already been addressed with existing terms and conditions.
- R-15 INAC and Paramount amend the Benefits Plan approved by INAC on September 25, 2001 to include the revised compensation plan developed as a result of Review Board Measure #13 or that a separate compensation plan be developed to address these concerns. Should Paramount and the communities be unable to come to an agreement on the contents of the revised compensation plan, then INAC should make the final decision and proceed with its approval of the amended Benefits Plan.
- R-16 INAC ensures that the amended Benefits Plan requires Paramount to provide copies of the Annual Reports required by the Benefits Plan to the GNWT, the Review Board, the MVLWB and the local communities in addition to INAC. The scope of the Annual Reports should be expanded beyond what is currently required. The Annual Reports should detail consultations undertaken with the local communities, discuss what concerns were raised by the communities, describe how Paramount has addressed or intends to address these concerns and discuss what actions Paramount will take to enhance positive socio-economic impacts and mitigate negative socio-economic impacts.

- R-17 The MVLWB, the NEB and INAC do not take any irreversible steps in relation to this development until INAC has accepted this recommendation for an amended Benefits Plan. When complete, a copy of the amended Plan should be provided to each of the potentially impacted communities and to the Review Board, the MVLWB, the NEB, INAC and the GNWT.

APPENDIX C

Modified Recommendations R-13, R-15, R-16 and R-17 Following the Consult to Modify Process in respect To the Gathering and Pipeline Project

INAC initiated a consult to modify process to change these recommendations. The final recommendations issued January 11, 2002, significantly modified recommendations R-13 to R-16 and deleted R-17. The modified recommendations follow:

- R-13 (as modified) Paramount is to discuss, develop and implement a wildlife and resource harvesting compensation plan with potentially affected First Nation communities – Deh Gah Go'tie First Nation, Fort Providence Métis, Ka'a'Gee Tu First Nation, K'atlodeeche First Nation and West Point First Nation. The scope of the plan is to include compensation for hunting, trapping, fishing and other resource harvesting activity losses resulting from the development as agreed to by Paramount and the communities. Paramount is to commence the consultations as soon as possible, with a draft plan submitted to the communities within 60 days of EA Report acceptance by the INAC Minister and a final plan submitted to the communities within 90 days of EA Report acceptance. The plan is to apply retroactively to impacts arising from the start of construction of the gathering facilities and pipeline. If requested by Paramount or any of the communities, the GNWT and INAC are to facilitate the discussions on the plan.
- R-14 (as modified) The MVLWB and/or the NEB should ensure that the affected aboriginal communities have been provided a copy of the TK study and an opportunity to comment on the study and Paramount's proposed mitigative measures. The MVLWB and/or the NEB should ensure that Paramount implements appropriate mitigative measures to address impacts throughout the life span of the development.
- R-15 (as modified) Paramount and the communities are to cooperate to the fullest extent possible in developing the wildlife and resource harvesting compensation plan. If the parties are unable to come to an agreement on the contents of the plan within the 90 day period, an independent arbitrator shall be jointly appointed within 30 days by the GNWT and INAC. The arbitration process shall conclude within 30 days of the appointment of the arbitrator.

R-16 (as modified) Following review and acceptance of Paramount's Cameron Hills Annual Report, INAC will provide copies of the Report to the GNWT, the Review Board, the MVLWB and the potentially affected First Nations communities. The scope of the Annual Report should detail consultations undertaken with the local communities, discuss concerns raised by the communities, describe how Paramount has addressed or intends to address these concerns and discuss what actions Paramount will take to enhance positive socio-economic impacts.

R-17 (as modified) This measure has been deleted.

APPENDIX D

SUMMARY OF RECOMMENDATIONS AND SUGGESTIONS Report of Environmental Assessment and Reasons for Decision EA03-005 Paramount Resources Limited Cameron Hills Extension

Recommendations

- R-1 The Review Board recommends that regulatory authorities include in their authorizations those items set out in the Developer's commitments, outlined in Appendix A, that are within their jurisdiction.
- R-2 The Review Board recommends that Paramount prepare a report within 12 months and thereafter, annually, until the developments on the SDL are abandoned and restored, for distribution in plain language to the parties in this EA. This report will outline the implementation status of each commitment made during the course of this EA, as set out in Appendix A.
- R-3 The Review Board recommends that prior to the issuance of any further licenses or permits Paramount install a meteorological station (at minimum must monitor wind speed, wind direction and temperature) in the Cameron Hills SDL to gather baseline data related to its development. Meteorological data will be provided annually to air quality staff of GNWT-RWED and Environment Canada along with a detailed re-modeling of Paramount's various development scenarios to ensure onsite meteorological conditions are reflected in the modeled outputs.
- R-4 The Review Board recommends that Paramount install a continuous gas analysis monitoring system to track ambient air quality (at minimum 1 hour SO₂ and NO₂) and provide the data to the general public via website, to be updated no less than monthly if a live connection is not available. Annual reports on the status of the air quality at Cameron Hills will be provided by Paramount to all potentially affected communities and government in a plain language document throughout the life of the Paramount operations at Cameron Hills.
- R-5 The Review Board recommends that Paramount install an amine fuel sweetening unit at the Central Battery (H-03) location prior to bringing any further wells online or pipe in sweet fuel from outside Cameron Hills, as per Paramount's original development plan.

- R-6 The Review Board recommends that any further combustion engines being installed for line heaters and pumpjacks at the Cameron Hills operation must use the sweetened fuel or an alternate source of no sulphur fuel.
- R-7 The Review Board recommends that the Government of Canada (INAC and Environment Canada) and the Government of the Northwest Territories implement recommendation 7 from the Ranger-Chevron EA by June 2005.
- R-8 The Review Board recommends that Paramount modify its spill reporting procedures for the Paramount Cameron Hills developments to include notice of spill occurrences to potentially affected communities. Spills must be reported according to the NWT Spill Reporting Procedures.
- R-9 The Review Board recommends that Paramount continue to monitor all work sites for erosion, and take appropriate measures in advance to avoid such problems. The Review Board recommends appropriate erosion mitigation measures be identified in advance and authorized by the NEB and INAC inspectors, and that any remediation of sites be documented and reported to regulators and the Ka'a'Gee Tu First Nation on a quarterly basis.
- R-10 The Review Board recommends that Paramount, in the case of an isolated water crossing, maintain downstream water flow at pre-in-stream work levels. All in-stream work must be completed as expediently as possible to mitigate disruption of fish movements.
- R-11 The Review Board recommends that the Department of Fisheries and Oceans conduct regular site visits to the Cameron Hills to inspect for determine if any impacts to fish or fish habitat. Reports of these inspections must be made publicly available via DFO and also be sent directly to the Ka'a'Gee Tu First Nation, in a plain language version.
- R-12 The Review Board recommends that RWED will, within the next six months, initiate the formation of a Deh Cho Boreal Caribou Working Group (DCBCWG). The Working Group will, among other things, consider: habitat identification, range plan development, thresholds, monitoring systems, adaptive mitigation, research programs and cumulative effects models. In addition, it will coordinate its activities with similar working groups in Alberta and British Columbia.
- R-13 The Review Board recommends that the MVLWB adopt an average linear disturbance target of 1.8 km per km squared as a boreal caribou disturbance threshold for the entire Cameron Hills, NT area, in order to prevent significant adverse environmental impacts on boreal caribou populations whose range includes the Paramount SDL and surrounding area. This shall be considered in all future land use applications for the area.

- R-14 The Review Board recommends that paramount locate at least 50% of all proposed and planned development In the Cameron Hills SDL, as described In Paramount's Developer's Assessment Report, on areas that are currently disturbed (as of the date of Ministerial approval of this Report of Environmental Assessment). This requirement should be included as a condition in land use permit MV2002A0046.
- R-15 The Review Board recommends that Paramount and the other parties to the unfinished Cameron Hills Wildlife and Resources Harvesting Compensation Plan developed in response to measures 13 and 15 of EA01-005 complete the compensation plan. If a compensation plan cannot be completed by these parties within 90 days of the federal Minister's acceptance of this report, this matter will proceed to binding arbitration, pursuant to the NWT Arbitration Act. A letter signed by the parties, indicating agreement to the compensation plan or in the case of arbitration, the arbitrator's decision must be filed with NEB and MVLWB prior to the commencement of Paramount's operations under land use permit MV2002A0046.
- R-16 The Review Board recommends that the GNWT develop a socio-economic agreement with Paramount in consultation with affected communities before operations proceed under the land use permit MV2002A0046. The socio-economic agreement is to address issues such as employment targets, educational and training opportunities for local residents and a detailed ongoing community consultation plan.
- R-17 The Review Board recommends the KTFN be notified directly if any heritage resources are suspected or encountered during Paramount's activities in the Cameron Hills.

Suggestions

- S-1 The Review Board suggests that a member of the K'a'Gee Tu First Nation be invited by DFO to accompany its inspectors while conducting inspections in the Cameron Hills operations area.
- S-2 The Review Board suggests the agencies responsible for water resource management and protection increase their monitoring and enforcement efforts commensurate with the increase in the scope of Paramount's development in the Cameron Hills area.
- S-3 The Review Board suggests that the MVLWB and NEB specify low-impact seismic lines (currently =4.5 m wide average, maximum =5 m wide, maximum line of sight =200 m) as the current standard for geophysical programs in boreal caribou habitat, as outlined in the MVEIRB 2003 draft document: Reference Bulletin - Preliminary Screening of Seismic Operations in the Mackenzie Valley.
- S-4 The Review Board suggests that RWED determine the need for cooperative research to document the impacts of the Cameron Hills development on marten, wolf, and wolverine populations.
- S-5 The Review Board suggests that the discussion and drafting of the community investment plan be resumed between the KTFN and Paramount, with a target date of completion and implementation of November 30, 2004.
- S-6 The Review Board suggests that Paramount continue discussions with the Hay River Health and Social Services with regards to services (emergency or other) that may be utilized by the company in certain instances.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-1379-05

STYLE OF CAUSE: CHIEF LLOYD CHICOT suing on his own behalf and on behalf of all Members of the Ka'a'Gee Tu First Nation and the KA'A'GEE TU FIRST NATION v. THE ATTORNEY GENERAL OF CANADA and PARAMOUNT RESOURCES LTD.

PLACE OF HEARING: Vancouver, B.C.

DATE OF HEARING: January 23, 2007

REASONS FOR ORDER AND ORDER: Blanchard J.

DATED: July 20, 2007

APPEARANCES:

Ms. Louise Mandell, Q.C. Mr. Timothy Howard/Ms. Cheryl Sharvit	FOR THE APPLICANT
Ms. Donna Tomljanovic	FOR THE RESPONDENT ATTORNEY GENERAL
Mr. Everett Bunnell Q.C. Ms. Jung Lee	FOR THE RESPONDENT PARAMOUNT
Ms. Vickie Giannacopoulos Mr. Ronald M. Kruhlak	FOR THE RESPONDENT MACKENZIE VALLEY

SOLICITORS OF RECORD:

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FOR THE RESPONDENT
PARAMOUNT

McLennon Ross LLP
Edmonton, Alberta

FOR THE RESPONDENT
MACKENZIE VALLEY

2007 FC 763 (CanLII)

Federal Court



Cour fédérale

Date: 20090512

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

Citation: 2009 FC 484

Ottawa, Ontario, May 12, 2009

PRESENT: The Honourable Mr. Justice Barnes

Docket: T-225-08

BETWEEN:

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

Applicants

and

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

Respondents

Docket: T-921-08

BETWEEN:

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

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

Applicants

and

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

Respondents

T-925-08

2009 FC 484 (CanLII)

BETWEEN:

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

Applicants

and

**THE ATTORNEY GENERAL OF CANADA,
THE NATIONAL ENERGY BOARD
and**

ENBRIDGE PIPELINES INC.

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

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

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

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

I. Regulatory Background

The Keystone Pipeline Project

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. Issues

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

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

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

III. Analysis

Standard of Review

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Duty to Consult – Legal Principles

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

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

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

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

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

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

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

...Precisely what duties arise in different situations will be defined as the case law in this emerging area develops. In general terms, however, it may be asserted that the scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed. Hence, unlike the question of whether there is or is not a duty to consult, which attracts a yes or no answer, the question of what this duty consists, is inherently variable. Both the strength of the right asserted and the seriousness of the potential impact on this right are the factors used to determine the content of the duty to consult.

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

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

At the other end of the spectrum lie cases where a strong *prima facie* case for the claim is established,

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

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

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

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

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

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

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

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

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

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

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

[29] It follows from this that the NEB process may not be a substitute for the Crown's duty to consult where a project under review directly affects an area of unallocated land which is the subject of a land claim or which is being used by Aboriginal peoples for traditional purposes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[37] The Treaty One First Nations maintain that there must always be an overarching consultation regardless of the validity of the mitigation measures that emerge from a relevant regulatory review. This duty is said to exist notwithstanding the fact that Aboriginal communities have been given an unfettered opportunity to be heard. This assertion seems to me to represent an impoverished view of the consultation obligation because it would involve a repetitive and essentially pointless exercise. Except to the extent that Aboriginal concerns cannot be dealt with, the appropriate place to deal with project-related matters is before the NEB and not in a collateral discussion with either the GIC or some arguably relevant Ministry.

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

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

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

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

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

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

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

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

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

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

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

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

IV. Conclusion

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

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

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

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

JUDGMENT

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

“ R. L. Barnes ”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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

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

DATED: May 12, 2009

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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

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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

1999 BCCA 470 (CanLII)

Written Reasons by: (with Index)

The Honourable Mr. Justice Finch

Concurred in by:

The Honourable Madam Justice Huddart (P. 80, para. 170)

Dissenting Reasons by:

The Honourable Madam Justice Southin (P. 93, para. 194)

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Reasons for Judgment of the Honourable Mr. Justice Finch:

I

Introduction

[1] The Ministry of Forests ("the Ministry"), its District Manager at Fort St. John, David Lawson, ("the District Manager") and Canadian Forest Products Limited ("Canfor") appeal the order of the Supreme Court of British Columbia pronounced 24 June, 1997, which quashed the decision of the District Manager on 13 September, 1996, approving Canfor's application for Cutting Permit 212. Canfor holds the timber harvesting licence for the wilderness area in which C.P.212 would permit logging. It is Crown land, adjacent to the reserve land granted to the Halfway River First Nation. The Halfway Nation are descendants of the Beaver People who were signatories to Treaty 8 in 1900.

[2] The part of Treaty 8 that preserved the signatories right to hunt says:

And Her Majesty the Queen HEREBY AGREES with the said Indians that they shall have the right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and **saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.**

(my emphasis)

[3] The petitioners claimed under the Treaty the traditional right to hunt on the Crown land adjacent to their reserve, which they refer to as the "Tusdzuh" area, including the areas covered by C.P.212. In addition, they have an outstanding Treaty Land Entitlement Claim (T.L.E.C.) against the federal Crown, and they say lands recoverable in that claim may be located in the Tusdzuh.

[4] Among many other arguments advanced the petitioners said that issuance of the permit, and the logging it will allow, infringes their hunting rights under the Treaty, and that such infringement cannot be justified by the Crown. The petitioners also claimed that C.P.212 was granted by the District Manager in breach of his administrative law duty of fairness, in that he fettered his discretion by applying government policy, prejudged Canfor's right to have the permit issued, failed to give adequate notice of his intention to decide the question, and failed to provide an adequate opportunity for them to be heard. The petitioners also said the District Manager reached a patently unreasonable decision in deciding factual issues on an incomplete evidentiary base.

[5] The learned chambers judge accepted all these submissions and held therefore that C.P.212 should be quashed. Other

submissions were rejected.

[6] On this appeal, the appellants say the learned chambers judge erred on all counts. They say that, properly construed, the plaintiffs' right under Treaty 8 to hunt is subject to the Crown's right to "require", or "take up" lands from time to time for, among other purposes, "lumbering"; and that the issuance of C.P.212 therefore did not breach or infringe the petitioners' treaty rights to hunt. Alternatively, the petitioners say that if the treaty right to hunt was breached, that breach was justified within the test laid down in **R. v. Sparrow**, [1990] 1 S.C.R. 1075, 3 C.N.L.R. 160, 4 W.W.R. 410.

[7] As to the administrative law issues, the appellants say the learned chambers judge erred in finding that the District Manager had fettered his discretion, that his decision gave rise to a reasonable apprehension of bias, and that he failed to give adequate notice or opportunity to be heard. They also say the learned chambers judge erred in holding the District Manager's decision to be patently unreasonable.

[8] For the reasons that follow, I have concluded that the only lack of procedural fairness in the decision-making process of the District Manager was the failure to provide to the petitioners an opportunity to be heard. In my respectful view,

the learned chambers judge erred in holding that there was a lack of procedural fairness on the other three grounds that were raised. I have also concluded that the issuance of the cutting permit infringed the petitioners' treaty right to hunt, that the Crown has failed to show that infringement was justified, and that the learned chambers judge did not err in quashing the District Manager's approval of Canfor's permit application.

II

Background

[9] Treaty 8 is one of 11 numbered treaties made between the federal government and various Indian bands between 1871 and 1923. B.C. joined confederation in 1871, but the provincial government was not represented in these treaty negotiations. Treaty 8 was negotiated in 1899, and was adhered to in that year by a number of bands who lived in what are now Alberta, Saskatchewan and the Northwest Territories. The first adherents, a band of Cree Indians, signed the treaty at Lesser Slave Lake in June, 1899. The Hudson Hope Beaver people, from whom the petitioners are descended, adhered to the treaty at Fort St. John in 1900. At that time there were 46 Beaver people living in the vicinity of Fort St. John. The Hudson Hope people are now spread between the Halfway River Nation and the West Moberley Band.

[10] On this appeal, counsel for the Ministry of Forests told the Court that the British Columbia government acknowledged that it was bound by the provisions of Treaty 8 concerning the petitioners' rights to hunt and fish, but made no similar concession in respect of the petitioners' right to lands under the treaty.

[11] The full provisions of the treaty are set out in the reasons of my colleague, Madam Justice Southin. The Indians could neither read nor write English, and the terms of the treaty were interpreted to them orally. There is a question in this case as to what extrinsic evidence, if any, is admissible in interpreting the treaty. The commissioners who acted on behalf of the federal government made a report concerning their discussions and negotiations with the original adherents to the treaty in 1899. There is no similar record of what was said to the Beaver people of Fort St. John in 1900. The appellant Minister says the extrinsic evidence of what occurred in 1899, and which was admitted and considered in *R. v. Badger*, [1996] 1 S.C.R. 771, is not admissible for the purposes of construing the treaty adhered to by the petitioners' ancestors in 1900.

[12] In 1900 title to Crown land was vested in the provincial Crown by virtue of the terms of union between British Columbia

and Canada in 1871. Treaty 8 provides for reserve lands to be set aside for the Indians, to the extent of one square mile for each family of five, or 160 acres per individual. The "selection" of such reserves was to be made in the manner provided for in the treaty.

[13] On 15 May, 1907 the provincial government transferred administration and control of lands in the Peace River block to the federal government by Executive Order-in-Council. The transfer covered about 3.5 million acres of land, selected as agreed in 1884. By virtue of s.91(24) of the ***Constitution Act, 1867***, the federal government already had all jurisdiction to deal with "Indians and land reserved for Indians".

[14] The reserve lands of the Halfway River Nation were not finally surveyed and located until 1914. The reserve is located on the north bank of the Halfway River, about 100 miles west of the city of Fort St. John. The reserve comprises about 9,880 acres.

[15] The lands to the south and west of the Halfway River reserve were, in 1900 and 1914, unsettled and undeveloped wilderness. The Halfway River Nation referred to this area as the Tuszuh. It is an area that the petitioners and their ancestors have used for hunting, fishing, trapping and the

gathering of food and medicinal plants. The area was plentiful with game, and conveniently located for the purposes of the Halfway Nation. The petitioners or their forebears built cabins, corrals and meat drying racks in the area for use in conjunction with their hunting activities. The time of building, and the precise location of these structures, is not disclosed in the evidence.

[16] In 1930 the federal government transferred administration and control of the lands in the Peace River block back to the provincial government by the ***Railway Belt Retransfer Agreement Act***, S.B.C. 1930, c.60. Also in 1930, the ***Constitution Act, 1930*** was enacted by the parliament of the United Kingdom giving effect to, *inter alia*, the agreement between the federal and B.C. provincial governments by which the retransfer of lands, including the Peace River block, took place. There was an exception from the retransfer of the Indian reserve lands located in the Peace River block.

[17] It is significant for the purposes of this case, and to understanding earlier jurisprudence interpreting Treaty 8 and other of the numbered treaties, that B.C. is not affected by the ***Natural Resources Transfer Act, 1930 (Constitution Act, 1930 Schedule II)***, which was an important consideration in such cases as ***R. v. Badger***, *supra* and ***R. v. Horse***, [1988] 1 S.C.R.

187.

[18] In 1982, the *Constitution Act, 1982* was enacted. Section 35 of the *Act* provides:

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

[19] About 15 years ago, at a date not disclosed in the evidence, the Halfway River Nation entered into negotiations with both the federal and provincial governments to allow the expansion of its reserve lands. They subsequently advanced a Treaty Land Entitlement Claim (TLEC) against the Crown in Right of Canada asserting a shortfall of over 2,000 acres in the reserve lands allocated to them in 1914. In fact, the Nation has made a demand for over 35,000 acres of additional land, the basis for which claim was not made clear in the submissions of counsel. Whatever the area entitlement of the petitioners to further reserve lands may be, there is an unresolved issue as to their location. The petitioners claim that the entitlement may be located, in whole or in part, in the Tusdzuh, the wilderness area to the south of their present reserve lands.

[20] There are now said to be 184 men, women and children in the Halfway River Nation. They are a poor people,

economically, and have in general not adapted themselves to the agricultural lifestyle contemplated in those parts of Treaty 8 granting each family of five one square mile of land, or each individual 160 acres of land, as well as livestock, farm implements and machinery, and such seed as was suited to the locality of the Band. They have instead pursued their traditional means of support and sustenance, of which moose hunting is an important element. 75% of the members of the Halfway River Nation live on social assistance.

[21] The lands referred to by the petitioners as the Tuzdzhuh 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 Meticheah wrote to the Minister of Forests on 20 January, 1992 requesting a meeting to discuss the development of lands

in the Tusdzuh. On 30 June, 1992, Canfor wrote to the Treaty 8 Tribal Association (of which the Halfway River Nation is a member) advising of the proposed harvesting. From that time up to the present litigation there have been both correspondence and telephone communications between the parties to these proceedings: these are more specifically detailed in the reasons for judgment of the learned chambers judge, and in Appendix A to her reasons, setting out a "chronology of notices and consultation". Particular reference to some of these communications will be made later in these reasons, as may appear necessary.

III

The Legislative Scheme

[23] The authority of the District Manager to issue a cutting a permit derives from the **Forest Act**, R.S.B.C. 1979, c. 140, as am. S.B.C. 1980, c. 14 (the **Act**), the **Forest Practices Code of British Columbia Act**, S.B.C. 1994, c. 41 (the **Code**, now R.S.B.C. 1996, c. 159) and subsequent regulations, and the **Ministry of Forests Act**, R.S.B.C. 1979, c. 272, as am. S.B.C. 1980, c. 14. That latter statute amended various aspects of the **Forest Act**, the **Ministry of Forests Act**, and the **Range Act**, R.S.B.C. 1979, c. 355. The 1980 amendment to s. 158(2) of the **Forest Act** provides:

158 (2) Without limiting ss. (1), the Lieutenant Governor in Council may make regulations respecting ...
(d.1) the establishment of an area of the Province as a forest district, the abolition and variation in boundaries and name of a forest district and the consolidation of 2 or more forest districts; ...

Section 2(1) of the **Ministry of Forests Act**, R.S.B.C. 1979, c. 272 (now R.S.B.C. 1996, c.300) was amended to state:

2 (1) The following persons may be appointed under the **Public Service Act**: ...
(d) a district manager for a forest district established under the **Forest Act** and the part of a range district established under the **Range Act** that covers the same area as the forest district; ...

[24] That section, in combination with the **Public Service Act**, R.S.B.C. 1979, c.343, authorized the Lieutenant Governor in Council to appoint district managers for forest districts established under the **Forest Act**. Section 9 of the 1979 **Forest Act** (now section 11) specified that no rights to harvest Crown timber could be granted on behalf of the government except in accordance with the **Act**. Section 10 (now section 12) specified that a District Manager, a regional manager or the minister may enter into agreements granting rights to harvest timber in the form of licenses and/or permits subject to the provisions of the **Act** and the **Regulations**. In 1994, section 247 of the **Code** amended section 10 of the **Forest Act**, subjecting the District Manager's authority to enter into agreements granting rights to harvest timber to the requirements of the **Code**. Section 238 of

the **Code** states that every cutting permit in existence at the time the **Code** came into force remains in existence, but ceases to have effect two years after the date the section came into force unless the District Manager determines that the operational planning requirements of the cutting permit are consistent with the requirements of the **Code**. With the exception of a few sections, the **Code** came into effect pursuant to Reg. 165/95 on June 15, 1995.

[25] The relationship between the **Forest Act** and the **Forest Practices Code** with respect to the District Manager's authority to issue a cutting permit pursuant to a forest licence agreement is important. The **Code** regulates the actual practice of forestry as it occurs on the ground, whereas the **Act** governs matters such as the formation of forest licence agreements and the determination of the annual allowable cut. The **Code** does not replace the **Act** but supplements it, as contemplated by s. 10 of the **Act** (now s. 12) where the authority of officials (including the District Manager) in the Ministry of Forests to issue licenses is circumscribed by the **Code** insofar as the **Code** requires that certain operational plans receive approval before the granting of licenses or permits. The process by which those plans receive approval is set out in the **Code** and in the **Regulations** enacted pursuant to the **Code**. Sections 10 and 12 of the 1979 **Act**, as amended in 1980, provide:

- 10. Subject to this **Act** and the **Regulations**, a district manager, a regional manager or the minister, on behalf of the Crown, may enter into an agreement granting rights to harvest Crown timber in the form of a
 - (a) forest licence;
 - (b) timber sale licence;
 - (c) timber licence;
 - (d) tree farm licence; ...

- 12. A forest licence ...
 - (f) shall provide for cutting permits to be issued by the Crown to authorize the allowable annual cut to be harvested, within the limits provided in the licence, from specific areas of land in the public sustained yield unit or timber supply area described in the licence;

. . . .

[26] The enactment of the **Forest Practices Code** further amended these provisions, so as to render the formation of agreements under section 10 of the **Act** subject to the provisions of the **Code** (s. 247 of the **Code**).

[27] In addition, the preamble to the **Code** provides a broad set of principles to guide the actions of forestry officials, and by which the statute is to be interpreted.

[28] The preamble to the **Forest Practices Code** is as follows:

WHEREAS British Columbians desire sustainable use of the forests they hold in trust for future generations;

AND WHEREAS sustainable use includes

- (a) managing forests to meet present needs without compromising the needs of future generations,

- (b) providing stewardship of forests based on an ethic of respect for the land,
- (c) balancing productive, spiritual, ecological and recreational values of forests to meet the economic and cultural needs of peoples and communities, including First Nations,
- (d) conserving biological diversity, soil, water, fish, wildlife, scenic diversity and other forest resources, and
- (e) restoring damaged ecologies;

THEREFORE HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:

[29] The **Code** is to be interpreted so as to achieve the principles set out in the preamble: see *Koopman v. Ostergaard* (1995), 12 B.C.L.R. (3d) 154 (S.C.); *Chetwynd Environmental Society v. British Columbia* (1995), 13 B.C.L.R. (3d) 338 (S.C.). The preamble of the **Code**, therefore, is to receive a broad and liberal construction so as to best ensure the attainment of the **Code's** goals: *International Forest Products v. British Columbia (Ministry of Forests)* (unreported, 19 March, 1997. Forest Appeals Commission (Vigod, Chair), App. No. 96/02(b)).

[30] In addition to receiving guidance from the preamble's principles, the District Manager's authority to grant cutting permits is subject to certain specific operational planning requirements under the **Code**. These generally take the form of

requiring the permit holder to demonstrate that the plans for harvesting conform to certain environmental standards. The operational planning requirements are set out in Part 3 of the **Code**, directing that the holder of an agreement under the **Forest Act** must carry out certain impact assessments of the proposed harvest area and integrate the findings of such an assessment into forest development plans (ss. 10, 17-19), logging plans (s. 11, 20-21), silviculture prescriptions and plans (s. 12, 14, 22-23, 25), and access management, stand management, and range use plans (ss. 13, 15-16, 24, 26-27). There are numerous provisions that allow for the holder of an agreement under the **Forest Act** to apply for exemptions from these requirements (Part 3, Division 3).

[31] Finally, the District Manager's authority to grant cutting permits pursuant to forest licence agreements entered into under the **Act** is limited by many of the regulations enacted pursuant to the **Code**. Specifically, the **Operational Planning Regulations** [B.C. Reg. 174/95] identify areas where the District Manager must satisfy himself of the nature of the various kinds of public consultations that have occurred and need to occur. According to sections 5-8 of the **Operational Planning Regulations** the proponent of an operational plan or forest development plan is required to ensure that the best information available is used and that the District Manager

approves of it.

[32] Under the **Regulations**, before a person submits, or a District Manager puts into effect, a forest development plan, they must publish notice of the plan to the public (s.2). The District Manager must provide an opportunity for review and comment to an interested or affected person (s.4(4)), and must consider all comments received (s.4(5)).

[33] Section 4(4) of the **Regulations** provides:

An opportunity for review and comment provided to an interested or affected person under s-s.(1) will only be adequate for the purposes of that subsection if, in the opinion of the district manager, the opportunity is commensurate with the nature and extent of that person's interest in the area under the plan and any right that person may have to use the area under the plan.

[34] Finally, under s.6(1)(a) of the **Regulations** the District Manager has a discretion to require that operational plans be referred to any other resource agency, person, or other agency he may specify. I observe in passing that the District Manager's discretion to determine the adequacy of the opportunity to "review and comment" does not extend to that consultation required by the jurisprudence concerning the Crown's obligation to justify infringement of aboriginal or treaty rights.

[35] The proponent of a plan is under an obligation to use the best information available (s.11(1)) and to use all information known to the person (s.11(2)(b)). These provisions confer a very broad discretion. It would appear, however, to be the sort of discretion calling for expertise beyond that of a professional forester. Whether a set plan of logging is acceptable to those members of the public who have a stake in it appears to be a question of judgment that any properly informed person would be as well able to answer as a forester.

[36] **In summary then**, the District Manager's powers to issue cutting permits are found in s.10 of the 1979 **Forest Act** as amended by s.247 of the **Code** in 1994, and those powers are subject to the requirements of the **Code**. The preamble to the **Code** states the guiding principles for forest management which include meeting "the economic and cultural needs of First Nations". Section 4(4) to the **Regulations** gives the District Manager a discretion to determine the adequacy of consultation with interested parties, as specified in s.4(1).

IV

The Decision of the District Manager

[37] After investigation, reviews and discussion, the District

Manager finally decided to issue C.P.212 on 13 September, 1996.

His reasons for doing so are set out in a letter he wrote to Chief Meticheah on 3 October, 1996. In summary, the District Manager held:

1. Canfor's application for C.P.212 was consistent with Canfor's approved five year forest development plan;
2. C.P.212 was in substantial compliance with the requirements of the **Forest Practices Code**;
3. Canfor's harvesting operations would have minimal impacts on wildlife habitat suitability and capability for ungulates (moose and deer) and black bear in the area;
4. There would be minimal to no impact on fish habitat or fishing activities;
5. It was not the policy of the Provincial government to halt resource development pending resolution of a Treaty Land Entitlement Claim (TLEC) advanced by the petitioners against the federal Crown;
6. Canfor would be required to perform an Archeological Impact Assessment (AIA) in block 4 of C.P.212 where an old First Nations pack trail was located;
7. The proposed harvesting plan included sufficient measures to mitigate any concerns as to the trapping of fur bearing animals in the area;
8. Canfor's plan would deactivate all roads seasonally, to make them impassable, and on completion of harvesting, would deactivate the roads permanently.
9. Canfor's proposed harvesting activities would not infringe the petitioners' Treaty 8 rights of hunting, fishing and trapping.

[38] There does not appear to be any statutory requirement for the giving of such reasons, either oral or written. The reasons are useful, however, because they record the factors the District Manager took into account in reaching his decision, and they lend an air of openness to the process he followed. On the other hand, the giving of reasons may suggest a more judicial or quasi-judicial process than is required by the legislative scheme.

V

The Decision of the Chambers Judge

[39] The Halfway River First Nation brought an application for judicial review, seeking to quash the decision of the District Manager to issue C.P.212. That application was brought pursuant to the *Judicial Review Procedure Act*, which provides remedies for administrative actions in excess of statutory powers. Whether this was the proper form of proceedings to bring is considered more fully below. On that application, Madam Justice Dorgan granted *certiorari* and quashed the decision of the District Manager, citing reasons related to the various issues involved, which are outlined below.

A. Fettering:

[40] The learned chambers judge held that the District Manager had fettered his discretion. She said at para.35:

[35] Notwithstanding these references which indicate a notion of weighing various interests, on the whole of the record I am satisfied that Lawson fettered his discretion by treating the government policy of not halting development as a given and by simply following the direction of the Minister of Forests not to halt development. This is particularly evident from p.4 of his Reasons for Decision which reads:

... in December 1995 the Minister of Forests advised both ourselves and the Halfway band that it is not the policy of the provincial government to halt resource development pending resolution of the Treaty Land Entitlement (TLE) claim and that we must honour legal obligations to both the Forest Industry as well as First Nations. This fact was again reiterated by Janna Kumi, Assistant Deputy Minister, Operations, upon her meeting with the Halfway Band in January 1996.

B. Bias

[41] The learned chambers judge held that there was no actual bias in the District Manager's decision, but that there was a reasonable apprehension of bias. She said at paras.48-9:

[48] However, a further statement by Lawson is of concern. In his letter to Chief Meticheah dated August 29, 1996 Lawson states:

"I must inform you that if the application is in order and abides by all ministry regulations and the **Forest Practices Code I**

have no compelling reasons not to approve their application."

This statement strongly suggests that Lawson had already concluded that there was no infringement of Treaty or Aboriginal Rights. His only remaining concerns about the application were with respect to compliance with MOF and **Code** requirements. He requests information on Aboriginal and Treaty Rights with respect to future Canfor activities but makes no reference to such rights vis-a-vis CP212. The only conclusion to be drawn from this letter is that Lawson had already decided that there was no infringement of Halfway's rights.

[49] As well, it should be noted that at paragraph 18 of the affidavit of David Menzies, he states:

Approval to proceed with harvesting in Blocks 1, 2, 4, 5, 17 and 19 was granted by the District Manager on September 13, 1996 (attached as Exhibit 8). The formal application letter was only sent after the Ministry of Forests confirmed that the application would be granted, consistent with the approval already granted for the Development Plan.

[emphasis added]

This evidence indicates that once the Development Plan was approved, all applications for cutting permits within it will likely be approved as well and is evidence which supports a finding of a reasonable apprehension of bias.

[42] She held that the petitioners had not waived their right to rely on the allegation of apprehended bias.

C. The District Manager's "Errors of Fact"

[43] The learned chambers judge held that it was patently

unreasonable for the District Manager to conclude that there was no infringement of the petitioner's hunting rights under Treaty 8. In reaching this conclusion, she said in part at paras. 63, 66 and 68:

[63] In the present case, it cannot be said that there was no evidence supporting Lawson's finding that Aboriginal and Treaty Rights would not be infringed. Lawson had the CHOA report and information provided by BCE staff regarding the impact of harvesting on the traditional activities of hunting, trapping and fishing.

. . .

[66] Given the limited evidence available to Lawson, the factual conclusions which he reached as to infringement of Treaty 8 or Aboriginal Rights is unreasonable. There was some evidence supporting his findings, however, Lawson had no information from Halfway. How can one reach any reasonable conclusion as to the impact on Halfway's rights without obtaining information from Halfway on their uses of the area in question? This problem was recognized in the CHOA report, which stated, at 33-34:

In summary, the Cultural Heritage (Ethnographic) Overview presented here provides a useful starting point for assessing the extent of the Halfway River First Nation's use of the Tuszah study area. It demonstrates the area was, and continues to be, utilized for hunting, fishing, trapping and plant collecting, and provides a ranking of the use potential for each of these activities. However, these data alone are not sufficient to understanding the issues surrounding infringement of Treaty and/or Aboriginal rights of the Halfway River Peoples. It is my opinion that additional cultural and ecological studies of the Tuszah study area are required before this issue can be adequately addressed.

. . .

However, as discussed above, there are numerous shortcomings with a study of this nature, from both a cultural and ecological perspective. In fact, I suggest that until more detailed information is obtained in both these areas, studies such as this will fail to adequately address the concerns and management needs of forest managers and First Nations.

. . . .

[68] Given the importance attached to Treaty and Aboriginal Rights, in the absence of significant information and in the face of assertions by Halfway as to their uses of CP212, it was patently unreasonable for Lawson to conclude that there was no infringement.

D. Notice

[44] The learned chambers judge held that the highest standard of fairness should apply in the circumstances of this case, and although the petitioners had some notice of Canfor's application for C.P.212, that notice was inadequate because the petitioners did not see Canfor's application in final form until after the Cutting Permit had been approved by the District Manager, and the petitioners had no specific notice that the District Manager would make his decision on 13 September, 1996 or on any other date. The history of the notice given to the petitioners is set out in para.73 of her reasons.

E. Infringement of Treaty 8 Right to Hunt

[45] The learned chambers judge held that there was a prima facie infringement of the petitioners Treaty 8 right to hunt, as recognized and affirmed by s.35(1) of the **Constitution Act, 1982** which provides:

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

[46] She held that infringement was to be determined in accordance with the test laid down in **R. v. Sparrow**, *supra*. She said in part at paras.91-93:

[91] Pursuant to Treaty 8 the Beaver First Nation (of which Halfway is a member) agreed to surrender "all their rights, titles and privileges whatsoever" to the Tuszuh 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

by the District Manager offended the rules of procedural fairness in four respects: he fettered his decision by applying government policy; he pre-judged the merits of issuance of the cutting permit before hearing from the petitioners; he failed to give the petitioners adequate notice of his intention to decide whether to issue C.P.212; and he failed to provide an opportunity to be heard. These are all matters of procedural fairness, and do not go to the substance or merits of the District Manager's decision. There is, therefore, no element of curial deference owed to that decision by either the chambers judge or by this Court.

[59] The chambers judge's decisions on fettering, apprehension of bias, inadequacy of notice and opportunity to be heard are all questions of mixed law and fact. To the extent that her decision involves questions of fact decided on affidavit and other documentary evidence, this Court would intervene only if the decision was clearly wrong, that is to say not reasonably supported by the evidence: see *Placer Development Limited v. Skyline Explorations Limited* (1985), 67 B.C.L.R. 367 (C.A.) at 389; *Colliers Macaulay Nichols Inc. v. Clark*, [1989] B.C.J. No. 2445 (C.A.) at para.13; *Orangeville Raceway Limited v. Wood Gundy Inc.* (1995), 6 B.C.L.R. (3d) 391 (C.A.) at 400; and *Rootman Estate v. British Columbia (Public Trustee)*, [1998] B.C.J. No. 2823 (C.A.) at para.26.

[60] To the extent that her decision involves questions of law this Court would, of course, intervene if it were shown that the judge misapprehended the law or applied the appropriate legal principles incorrectly.

IX

Whether the Chambers Judge Erred in Deciding Those Issues

A. Fettering

[61] The learned chambers judge held (para.35) that the District Manager fettered his discretion concerning issuance of the cutting permit by "treating the government policy of not halting development as a given and by simply following the direction of the Minister of Forests not to halt development."

[62] The general rule concerning fettering is set out in **Maple Lodge Farms Ltd. v. Canada**, [1982] 2 S.C.R. 2, which holds that decision makers cannot limit the exercise of the discretion imposed upon them by adopting a policy, and then refusing to consider other factors that are legally relevant. Other cases to the same effect are **Davidson v. Maple Ridge (District)** (1991), 60 B.C.L.R. (2d) 24 (C.A.) and **T(C) v. Langley School District No. 35** (1985), 65 B.C.L.R. 197 (C.A.). Government

agencies and administrative bodies must, of necessity, adopt policies to guide their operations. And valid guidelines and policies can be considered in the exercise of a discretion, provided that the decision maker puts his or her mind to the specific circumstances of the case rather than blindly following the policy: see *Maple Lodge Farm*, *supra* at pages 6-8 and *Clare v. Thompson* (1983), 83 B.C.L.R. (2d) 263 (C.A.). It appears to me, with respect, that the learned chambers judge applied correct legal principles in her consideration of whether the District Manager fettered his discretion.

[63] The question then is whether she applied those principles correctly in the circumstances of this case. In my respectful view she did not. Government policy, as expressed by the District Manager, was to not halt resource development pending resolution of the TLECs. In other words, such claims would not be treated as an automatic bar to the issuance of cutting permits. Even though such a claim was pending in respect of a potential logging area, the policy was to consider the application for a cutting permit in accordance with the requirements of the regulations, *Act* and *Code*.

[64] A TLEC does not, on its face, require the cessation of all logging in the subject area. Such a claim does not impose any obligation on the District Manager, or on the Ministry

generally. The claim is simply one factor for the District Manager to consider with respect to the land's significance as a traditional hunting area, and to potential land use.

[65] The government policy in respect of TLECs does not preclude a District Manager from considering aboriginal hunting rights, and the effect that logging might have upon them. It is apparent in this case that the District Manager gave a full consideration to the information before him concerning those hunting rights. Cognisance by him of the government policy on TLECs did not give rise to the automatic issuance of a cutting permit without further consideration of other matters relevant to that decision.

[66] I am therefore of the view that the learned chambers judge erred in applying the legal principles concerning fettering to the facts of this case. While the existence of TLEC was a factor for the District Manager to consider, the government policy of not halting resource development while such a claim was pending did not limit or impair the District Manager's discretion, or its exercise. Misapplication of the appropriate legal principle is an error of law that this Court can and should correct.

B. Reasonable Apprehension of Bias

[67] The basic legal test on this issue is whether reasonable right-minded persons informed of the relevant facts, and looking at the matter realistically and practically, would consider that the District Manager had prejudged the question of whether to issue C.P.212: see *Committee for Justice and Liberty v. Canada (National Energy Board)* (1978), 1 S.C.R. 369 at 394-95, and *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)* (1992), 1 S.C.R. 623.

[68] The matter is a little more complex in this case where the District Manager's role includes both an investigative and an adjudicative function. The expression of a tentative or preliminary opinion on what the evidence shows in the investigative stage does not necessarily amount to a reasonable apprehension of bias: see *Emcom Services Inc. v. British Columbia (Council of Human Rights)* (1991), 49 Admin.L.R. 220 (B.C.S.C.) and *United Metallurgists of America Local 4589 v. Bombardier-MLW Limited*, [1980] 1 S.C.R. 905.

[69] In a case such as this the District Manager has a continuing and progressive role to play in making the numerous enquiries required of him by the *Regulations, Act* and *Code*, and in communicating with the applicant and others who have a stake

in his decision. It is to be expected that his conclusions would develop over time as more information was obtained, and as interested parties made their positions known. His "decision letter" was written to Chief Metecheah on 3 October, 1996, but it is clear that the components of that decision were the result of previous investigations and deliberations.

[70] In these circumstances I think one should be very cautious about inferring prejudice or the appearance of bias to the District Manager.

[71] The learned chambers judge's conclusion that there was a reasonable apprehension of bias is based primarily on the statement the District Manager made in his letter of 29 August, 1996 to Chief Metecheah, that if the appellants' application complied with the Ministry's regulations and the **Code** he had "no compelling reasons" not to approve their application.

[72] Applying the legal test set out above, and having regard to the nature of the District Manager's investigative and adjudicative roles, it would, in my view, be unreasonable to infer from that letter that the District Manager had closed his mind to anything further the petitioners might wish to put forward. A fair reading of his statement is that he had formed a tentative view on the information then available that the

permit should issue, but that the final decision had not been made, and he was prepared to refuse issuance of the permit if there was a good reason to do so.

[73] Nor in my view does the statement from David Menzies' affidavit, quoted at para.49 of the chambers judge's reasons, support an inference of bias reasonably apprehended.

Administrative procedures followed by the District Manager in confirming approval of the appellants' application, before the formal application was received, are consistent with the continuing nature of the District Manager's contact and dialogue with the applicants.

[74] It may be that the District Manager held a mistaken view of the law concerning the Crown's duty to satisfy itself that there was no infringement of the aboriginal right to hunt, and that the onus did not lie upon the petitioners to assert and prove that right or infringement. But in my view a misapprehension of the law by an administrative officer does not necessarily demonstrate a failure by him to keep an open mind, or an unwillingness to decide the issues on the merits as he saw them. Even the most open minds may sometimes fall into legal error.

[75] In my respectful view, the learned chambers judge erred in

holding that the District Manager's conduct gave rise to a reasonable apprehension of bias.

C. Adequacy of Notice

[76] The learned chambers judge held that the petitioners did not have adequate notice that the District Manager would make his decision on 13 September, 1996 (para.78 of her reasons). With respect, I think the learned chambers judge more closely equated the decision making process in this case with a purely adjudicative process than is warranted by the legislative scheme.

[77] As indicated above, this is not a case where a formal hearing on a fixed date was held or required. The District Manager's job required him to develop information over time, and it was properly within his role as an administrator to make tentative decisions as he went along, up to the time when he was finally satisfied that a cutting permit should or should not issue in accordance with the requirements of the **Regulations, Act and Code**.

[78] In para.73 of her reasons the learned chambers judge set out in detail the means by which the petitioners were made aware of Canfor's logging plans for the area covered by

C.P.212. The first notice, on the chambers judge's findings of fact, occurred in 1991. On 8 November, 1995 the District Manager sent the petitioner a copy of Canfor's application for C.P.212, and on 5 March, 1996 the District Manager wrote to the petitioners' lawyer to advise that "a decision regarding C.P.212 would be made within the next couple of weeks". In fact, the decision was not made for another six months.

[79] On 13 May, 1996 the District Manager provided the petitioners with a map of Canfor's proposed harvesting activities, including blocks in C.P.212. The map was colour-coded and clearly identified the cut blocks under consideration by the District Manager. The learned chambers judge described the meeting at which this map was presented to the petitioners as "the only true advance notice" of Canfor's plans, but she held it to be defective as notice because it did not give the date on which his decision would be made.

[80] In my respectful view the learned chambers judge was plainly wrong to conclude that adequate notice had not been given in this case. Only if it could be said that notice of a fixed date for decision was required by law could her conclusion be justified. For the reasons expressed above, notice of such a fixed date was not required either by the statute, or by the requirements of procedural fairness.

Imposing a requirement for such a fixed date would be inconsistent with the administrative regime under which the District Manager operated, and would unnecessarily restrict the flexibility that such a regime contemplates. The petitioners were well aware of Canfor's plans to log in the area covered by C.P.212 and had time to submit evidence and to make representations. The notice was adequate in the context of the legislative scheme, and the nature of the District Manager's duties.

D. The Right to be Heard

[81] The learned chambers judge dealt with this issue at paras. 69-72. She held that the District Manager had not met the high standards of fairness in ensuring that the petitioners had an effective opportunity to be heard. She said the right to be heard was very similar to the consultation requirement encompassed by the Ministry's fiduciary duty to the petitioners.

[82] Under the legislative scheme described above, there is no requirement for the District Manager to hold a formal "hearing", and in fact none was. However, the legislation and the **Regulations** do require consideration of First Nations' economic and cultural needs, and imply a positive duty on the

District Manager to consult and ascertain the petitioners' position, as part of an administrative process that is procedurally fair. As the District Manager did not do this it is my view that the learned chambers judge was correct in holding there to have been a breach of the duty of procedural fairness.

E. Conclusion on Administrative Law Issues

[83] In my respectful view, there was a failure to provide the petitioners an adequate opportunity to be heard. Otherwise, there was no lack of procedural fairness on any of the other grounds asserted by the petitioners, and found by the learned chambers judge.

X

The Standard of Review Applicable to the District Manager's Decision

[84] The learned chambers judge treated the District Manager's decision as to treaty rights, and breach of same, as a question of fact (see para.37 above, quoting the chambers judge's reasons at paras. 63, 66 and 68). She appears to have concluded, or assumed, that it was within the statutory powers of the District Manager to decide such matters, and she

therefore asked whether his decisions on those matters were patently unreasonable. She concluded that the District Manager's decisions on those matters were patently unreasonable (see her conclusion No. 5 at para.158), and she therefore held that she was justified in substituting her view on those matters for those of the District Manager.

[85] With respect, interpreting the treaty, deciding on the scope and interplay of the rights granted by it to both the petitioners and the Crown, and determining whether the petitioners' rights under the treaty were infringed, are all questions of law, although the last question may be one of mixed fact and law. Even though he has a fiduciary duty, the District Manager had no special expertise in deciding any of these issues, and as I understand the legislation, he has no authority to decide questions of general law such as these. To the extent that his decisions involve legal components, in the absence of any preclusive clause, they are reviewable on the standard of correctness: see *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557 at para.63; *Zurich Insurance Company v. Ontario (Human Rights Commission)*, [1992] 2 S.C.R. 321; *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554; and *University of British Columbia v. Berg*, [1993] 2 S.C.R. 353.

[86] Moreover, as an agent of the Crown, bound by a fiduciary duty to the petitioners arising from the treaty in issue, the District Manager could not be seen as an impartial arbitrator in resolving issues arising under that treaty. To accord his decision on such questions the deference afforded by the "patently unreasonable" standard would, in effect, allow him to be the judge in his own cause.

[87] As I consider these issues, characterized in the chambers judge's reasons as aboriginal issues, to be questions of law, the test applied to the District Manager's decision is that of correctness. Similarly, of course, the standard of correctness applies to her conclusions. In other words, the question for us is whether she erred in law.

XI

Treaty 8

A. Principles of Treaty Interpretation

[88] The principles applicable in the interpretation of treaties between the Crown and First Nations have been discussed and expounded in a number of cases: see *Calder v. Attorney General of British Columbia*, [1973] S.C.R. 313 at p.404; *R. v. Sutherland*, [1980] 2 S.C.R. 451; *R. v. Taylor*

(1981), 34 O.R. (2d) 360 (Ont.C.A.); *R. v. Bartleman* (1984), 55 B.C.L.R. 78 (C.A.); *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29; *Simon v. R.*, [1985] 2 S.C.R. 387; *R. v. Horse*, *supra* *Saanichton Marina Ltd. et al v. Tsawout Indian Band* (1989), 36 B.C.L.R. (2d) 79 (C.A.); *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85; *R. v. Sioui*, [1990] 1 S.C.R. 1025; *R. v. Sparrow*, *supra*; and *R. v. Badger*, *supra*.

[89] In *Saanichton v. Tsawout*, *supra*, Mr. Justice Hinkson conveniently summarized the then principles of interpretation at pp. 84-85:

(b) Interpretation of Indian treaties - general principles

In approaching the interpretation of Indian treaties the courts in Canada have developed certain principles which have been enunciated as follows:

- (a) The treaty should be given a fair, large and liberal construction in favour of the Indians;
- (b) Treaties must be construed not according to the technical meaning of their words, but in the sense that they would naturally be understood by the Indians;
- (c) As the Honour of the Crown is always involved, no appearance of "sharp dealing" should be sanctioned;
- (d) Any ambiguity in wording should be interpreted as against the drafters and should not be interpreted to the prejudice of the Indians if another construction is reasonably possible;
- (e) Evidence by conduct or otherwise as to how the parties understood the treaty is of

assistance in giving it content.

[90] Paragraph (d) in that list should now be modified to include the statement of Mr. Justice Cory in *R. v. Badger*, *supra* at 794:

Third, any ambiguities or doubtful expressions in the wording of the treaty or document must be resolved in favour of the Indians. A corollary to this principle is that any limitations which restrict the rights of Indians under treaties must be narrowly construed.

[91] And to para.(e) one might add the following, from *R. v. Sioui*, *supra*, at 1035, per Lamer, J. (as he then was):

In particular, [Courts] must take into account the historical context and perception each party might have as to the nature of the undertaking contained in the document under consideration

[92] Those are the principles which I consider applicable in the circumstances of this case.

B. The Parties' Positions

1. The Appellants' Position

[93] The positions of the Ministry of Forests and of Canfor are very similar, if not identical, and I consider them together.

[94] Both the Minister and Canfor say that the Indian right to hunt preserved in paragraph 9 of Treaty 8 (quoted above at para.2 of these reasons) is expressly made subject to two independent rights of the Crown which are of equal status to the Indian's rights. Those two Crown rights are the government power to regulate hunting etc. and the government right to "require" or "take up" parts of the Treaty lands for, *inter alia*, "lumbering". The appellants say that the Crown's right to require or take up lands for one of the listed purposes limits or qualifies the petitioners' right to hunt. The appellants say the Crown's right to acquire or take up land is clearly expressed, and is not ambiguous.

[95] The appellants say that no extrinsic evidence is necessary or admissible to alter the terms of the treaty by adding to or subtracting from its express terms.

[96] The appellants say the granting of C.P.212 was an exercise by the Crown of its express right to require or take up land, and there is therefore no infringement of the petitioners' treaty right to hunt.

[97] The appellants say that the learned chambers judge erred when she held that any interference with the petitioners' right

to hunt was a breach of Treaty 8, and say further that she erred in basing her decision on the petitioners' "holistic perspective" and in holding that they had the right to exercise their "preferred means" of hunting in an "unspoiled wilderness". The Minister says such conclusions are embarrassing as they do not reflect the historical realities of what had occurred in the Tuzdzu (mining and oil and gas exploration) before the granting of C.P.212.

[98] The appellants say that s.35 of the **Constitution Act, 1982** gives the petitioners no better position than they held before 1982, because their right to hunt in the treaty lands was, and remains, a defeasible right subject to derogation by the Crown's exercise of its rights. The power to require and take up lands remains unimpaired by s.35.

[99] The appellants maintain that "taken up" includes designation of land by the Crown in a cutting permit, and that visible signs of occupation, or incompatible land use (see **R. v. Badger**, *supra*, at paragraphs 53, 54, and 66-68) are not necessary as indicia. The appellants say those considerations that are relevant where an Indian is charged with an offence as in **Badger**, are not relevant here where such an offence is not alleged, and the Crown is merely exercising its Treaty right.

[100] So the appellants say that as a result of the "geographical limitation" in Treaty 8 the Crown is entitled to take up Treaty lands for "settlement, mining, lumbering, or other purposes" without violating any promise made by the Crown to the Indians. As there has been no infringement of Indian treaty rights, no "justification" analysis is required.

2. The Petitioners' Position

[101] The petitioners say that the Crown's (and Canfor's) approach to Treaty 8 would give the Crown "the unlimited and unfettered right to take up any land or all lands as it sees fit and does not have to justify its decision in any way". It says this approach would allow the Crown to ignore the impact of such conduct on the rights of aboriginal signatories and would render meaningless the 1982 constitutionalization of Treaty rights. The Crown's approach, say the petitioners, is therefore unreasonable and manifestly wrong. To give the Treaty such an interpretation would not uphold the honour and integrity of the Crown.

[102] The petitioners say that the government power to require or take up land is not a separate right in itself. It is rather a limitation on the petitioners' right to hunt, etc. The petitioners say s.35 guaranteed the aboriginal rights to

hunt and fish. The Crown's right of defeasance is not mentioned in s.35, and is therefore not subject to a similar guarantee.

[103] Prior to 1982, before the right to hunt was guaranteed by s.35, the Crown could have exercised its right of defeasance, and so overridden or limited the right to hunt. But since the enactment of s.35 the Crown's right is not so unlimited. Now the Crown can only exercise its right after consultation with the Indians. The Treaty creates competing, or conflicting rights - the Indian right to hunt on the one hand, and the Crown's right to take up such hunting grounds for the listed purposes on the other. Such competing rights cannot be exercised in disregard of one another. If exercise of the Crown right will impair or infringe the aboriginal right, then such infringement must be justified on the analysis set out in *Sparrow*, *supra* (a non-Treaty case).

[104] The petitioners say the meaning of the Treaty proviso allowing the Crown to require or take up lands is ambiguous and can be read in more than one way. It should therefore be read in the context of the Crown's oral promises at the time of Treaty negotiations. Extrinsic evidence, including the representations made by the Crown's negotiators to the signatories in 1899, as well as in 1900, is admissible for the

purposes of construing the Treaty. The petitioners say the Treaty should be read in a broad, open fashion, and construed in a liberal way in favour of the Indians. All subsequent adhesions refer back to the Treaty made at Lesser Slave Lake with the Cree people in 1899, and the oral promises made there are essential to a true understanding of the Treaty made with the petitioners' forebears.

C. The Admissibility of Extrinsic Evidence

[105] In support of its argument against the admissibility of extrinsic evidence, The Ministry of Forests relies on **R. v. Horse**, *supra*, where Mr. Justice Estey, writing for the court, said at S.C.R. 201:

I have some reservations about the use of this material as an aid to interpreting the terms of Treaty No. 6. In my view the terms are not ambiguous. The normal rule with respect to interpretation of contractual documents is that extrinsic evidence is not to be used in the absence of ambiguity; nor can it be invoked where the result would be to alter the terms of a document by adding to or subtracting from the written agreement.

And further at p.203:

In my opinion there is no ambiguity which would bring in extraneous interpretative material. Nevertheless I am prepared to consider the Morris text, proffered by the appellants, as a useful guide to the interpretation of Treaty No. 6. At the very

least, the text as a whole enables one to view the treaty at issue here in its overall historical context.

[106] Those comments were made in a case involving Treaty 6, which has an identical "geographical limitation" to that contained in Treaty 8. Further, *Horse* was concerned with the interpretation of s.12 of the Saskatchewan Natural Resources Transfer Agreement, which required interpretation of the words "unoccupied Crown land" and "right of access", language not at issue in this case. Counsel for the Ministry also referred us to *R. v. Sioui*, *supra* and *R. v. Badger*, *supra*. In my respectful view, the conventional statement of the rule governing admissibility of extrinsic evidence enunciated in *R. v. Horse* has been somewhat relaxed by subsequent decisions. In *R. v. Sioui*, *supra*, after referring to *R. v. Horse* at p.1049, Mr. Justice Lamer (as he then was) said at p.1068:

The historical context, which has been used to demonstrate the existence of the treaty, may equally assist us in interpreting the extent of the rights contained in it. As MacKinnon J.A. said in *Taylor and Williams*, *supra*, at p.232:

Cases on Indian or aboriginal rights can never be determined in a vacuum. It is of importance to consider the history and oral traditions of the tribes concerned, and the surrounding circumstances at the time of the treaty, relied on by both parties, in determining the treaty's effect.

[107] And in *R. v. Badger*, *supra*, Mr. Justice Cory for the majority held at pp.798-9:

Third, the applicable interpretative principles must be borne in mind. Treaties and statutes relating to Indians should be liberally construed and any uncertainties, ambiguities or doubtful expressions should be resolved in favour of the Indians. In addition, when considering a treaty, a court must take into account the context in which the treaties were negotiated, concluded and committed to writing. The treaties, as written documents, recorded an agreement that had already been reached orally and they did not always record the full extent of the oral agreement: see Alexander Morris, The Treaties of Canada with the Indians of Manitoba and the North-West Territories (1880), at pp.338-42; *Sioui*, *supra*, at p.1068; Report of the Aboriginal Justice Inquiry of Manitoba (1991); Jean Fiesen, Grant me Wherewith to Make my Living (1985). The treaties were drafted in English by representatives of the Canadian government who, it should be assumed, were familiar with common law doctrines. Yet, the treaties were not translated in written form into the languages (here Cree and Dene) of the various Indian nations who were signatories. Even if they had been, it is unlikely that the Indians, who had a history of communicating only orally, would have understood them any differently. As a result, it is well settled that the words in the treaty must not be interpreted in their strict technical sense nor subjected to rigid modern rules of construction. Rather, they must be interpreted in the sense that they would naturally have been understood by the Indians at the time of the signing. This applies, as well, to those words in a treaty which impose a limitation on the right which has been granted. See *Nowegijick*, *supra*, at p.36; *Sioui*, *supra*, at pp. 1035-36 and 1044; *Sparrow*, *supra*, at p.1107; and *Mitchell*, *supra*, where La Forest J. noted the significant difference that exists between the interpretation of treaties and statutes which pertain to Indians.

[108] I observe in passing that *R. v. Badger*, like *R. v. Horse* also involved interpretation of s.12 of the Natural

Resources Transfer Agreement, 1930. But I understand the ruling concerning the admissibility of extrinsic evidence to be equally applicable in a case such as this one, where that agreement is not in issue.

[109] In this case, the learned chambers judge held that extrinsic evidence was admissible to explain the "context" in which the Treaty was signed (at paras. 96-98 of her reasons). In my respectful view in so doing she did not err in principle. The passage quoted above from the judgment of Mr. Justice Cory in *Badger* at pp.798-9 is particularly apt in this case. The Treaty, written in English, purports to reflect the mutual understanding of the Crown and all aboriginal signatories. The understanding of the aboriginal peoples cannot be deduced from the language of the Treaty alone, because its meaning to the aboriginal signatories could only have been expressed to them orally by interpretation into their languages, and by whatever oral explanations were necessary to ensure their understanding.

D. What Extrinsic Evidence is Admissible

[110] The Crown says, without admitting any ambiguity in the Treaty, that even if extrinsic evidence is admissible for the purpose of giving historical context, evidence of the Commissioner's Report on negotiations in 1899 is not admissible

in this case, because there is no evidence that what was said by the government negotiators at Lesser Slave Lake, and elsewhere in 1899, was also said at Fort St. John in 1900, when the Beaver people signed. In particular, the Crown says that the passage of the Commissioner's Report referred to by Mr. Justice Cory in *Badger*, and by the learned chambers judge in this case, is not evidence of what was said to the Beaver people at Fort St. John. In the Crown's submission, only the report of the Commissioners made in 1900 is admissible.

[111] What the Commissioners report of 1889 said, as quoted in part by the learned chambers judge at para.98 of her reasons, is this:

There was expressed at every point the fear that the making of the treaty would be followed by the curtailment of the hunting and fishing privileges, ... We pointed out ... that the same means of earning a livelihood would continue after the treaty as existed before it ...

Our chief difficulty was the apprehension that the hunting and fishing privileges were to be curtailed. The provision in the treaty under which ammunition and twine is to be furnished went far in the direction of quieting the fears of the Indians, for they admitted that it would be unreasonable to furnish the means of hunting and fishing if laws were to be enacted which would make hunting and fishing so restricted as to render it impossible to make a livelihood by such pursuits. But over and above the provision, we had to solemnly assure them that only such laws as to hunting and fishing as were in the interest of the Indians and were found necessary in order to protect the fish and fur-bearing animals would be made, and that they would be as free to hunt

and fish after the treaty as they would be if they never entered into it.

[112] In my respectful view, the position of the Crown on this issue is not tenable. The adhesion signed by the representatives of the Beaver people at Fort St. John in 1900 contains this:

The Beaver Indians of the Upper Peace River and the country thereabouts, having met at Fort St. John, on this thirtieth day of May, in this present year 1900, Her Majesty's Commissioner, James Ansdell Macrae, Esquire, and having had explained to them the terms of the treaty unto which the Chief and Headmen of the Indians of Lesser Slave Lake and adjacent country set their hands on the twenty-first day of June, in the year 1899, do join in the cession made by the said Treaty, and agree to adhere to the terms thereof in consideration of the undertakings made therein.

(my emphasis)

[113] The terms of the Treaty signed by the Indians at Lesser Slave Lake had been explained to them orally, as indicated in the Commissioner's report in 1899, and it is therefore, in my view, a reasonable inference from the terms of the Beavers' adhesion in 1900 that the terms of the Treaty were explained to them in similar, if not identical, terms.

[114] Moreover, it would not be consistent with the honour and integrity of the Crown to accept that the Treaty was interpreted and explained to the Indians at Lesser Slave Lake

in one way, but interpreted and explained to the Beaver at Fort St. John in another less favourable and more limited way. To accept the proposition put forward by the Ministry would be to acknowledge that the same Treaty language is to be given different meanings in respect of different signatories. Only the clearest evidence could persuade me to such a conclusion, and such evidence is not present in this case.

[115] The Ministry of Forests further objects to the admission of the affidavit evidence of Father Gabriel Breynat, an interpreter present at the signing of Treaty 8 in 1899 at Fort Chippewan, and Fond du Lac. This affidavit was sworn in 1937 at Ottawa, Ontario. The Ministry says the document is irrelevant, and in addition has not been properly proven as an ancient document.

[116] The objection as to relevance is similar to the Crown's objection to the Commissioner's Report of 1899, as relating to events at a different time and place, and with a different Indian people. I would not give effect to the objection based on relevance for the reasons expressed above.

[117] Turning to the question of proof, the general rule in Canada governing the admissibility of ancient documents (a document more than thirty years old) is that any document

"which is produced from proper custody, is presumed in the absence of circumstances of suspicion, to have been duly signed, sealed, attested, delivered, or published according to its purport": Sopinka, Lederman and Bryant, The Law of Evidence in Canada, (Toronto: Butterworths, 1992) at 955. If there are suspicious circumstances surrounding the origins of the document, the court will either require proof of the execution of it as being in a similar manner as the execution of a similar document of a more recent date. Further, documents are considered to have been in "proper custody" when they have been kept by someone in a place where the documents might reasonably and naturally be expected to be found:

Sopinka et al, *supra* at 956, citing *Doe d. Jacobs v. Phillips* (1845), 8 Q.B. 158, 115 E.R. 835, and *Thompson v. Bennett* (1872), 22 U.C.C.P. 393 (C.A.).

[118] The affidavit of Father Breynat appears on its face to have been executed in a manner consistent with the execution of modern affidavits. The copy produced is not entitled in any particular cause or matter, and one cannot tell from the document itself the purpose for which it was sworn. I would not say that this gives rise to suspicions concerning its origins, but rather that there is an unanswered question as to why it was sworn.

[119] The affidavit of Father Breynat was adduced in these proceedings as an exhibit to the affidavit of Michael Pflueger. He is Alberta counsel representing the Halfway River First Nation in its Treaty Land Entitlement Claim. His affidavit does not disclose in whose custody Father Breynat's affidavit has been kept. There is a notation at the top of page 1 of Father Breynat's affidavit, clearly not part of the original, which says "Anthropology UA", which I take to be a reference to the Anthropology Department at the University of Alberta. However, there is nothing to indicate whether the University was the custodian of the document. Mr. Pflueger deposes that the affidavit of Father Breynat is part of "the standard treaty package that is submitted with Treaty Land Entitlement Claims".

[120] On the evidence as it stands, I do not think there is any indication of suspicious circumstances surrounding the document's origins. However, I think the evidence falls short of proving that the document was produced from "proper custody". Wigmore, Evidence in Trials at Common Law vol. 7 (Boston: Middlebound & Company, 1978) explains why evidence as to custody of such a document is important:

A forger usually cannot secure the placing of a document in such custody; and hence the naturalness of its custody, being relevant circumstantially, is required in combination with the document's age.

I think therefore that Father Breynat's affidavit is inadmissible as not having been properly proven. The learned chambers judge did not refer to this affidavit, so she cannot be said to have made any error on that account.

E. R. v. Sparrow and its Application

[121] In *R. v. Sparrow*, *supra*, the Supreme Court of Canada considered the effect of s.35(1) of the *Constitution Act, 1982* on the status of aboriginal rights, and set out a framework for deciding whether aboriginal rights had been interfered with, and if so, whether such interference could be justified. In *Sparrow* a native fisher was charged with an offence under the *Fisheries Act*, R.S.C. 1970, CF-14. In his defence, he admitted the constituent elements of the charge, but argued that he was exercising an existing aboriginal right to fish, and that the statutory and regulatory restrictions imposed were inconsistent with s.35.

[122] The court held that the words in s.35 "existing aboriginal rights" must be interpreted flexibly, so as to permit their evolution over time, and that "an approach to the constitutional guarantee embodied in s.35(1) that would incorporate 'frozen rights' must be rejected." It held that the Crown had failed to discharge the onus of proving that the

aboriginal right to fish had been extinguished, and it held that the scope of the right to fish for food was not confined to mere subsistence, but included as well fishing for social and ceremonial purposes.

[123] The court also considered the meaning of the words "recognized and affirmed" in s.35. It held that a generous, liberal interpretation of those words was required. It held the relationship between government and aboriginal peoples was trustlike, rather than adversarial, and that the words "recognized and affirmed" incorporated a fiduciary relationship, and so imported some restraint on the exercise of sovereign power. Federal legislative powers continue to exist, but those powers "must be reconciled with the federal duty", and that reconciliation could best be achieved by requiring "justification" of any government regulation that infringed or denied aboriginal rights. Section 35 was therefore "a strong check on legislative power". The court emphasized the importance of "context" and the "case by case approach to s.35(1)".

[124] The court then set out the test for *prima facie* interference with an existing aboriginal right. First, does the impugned legislation have the effect of interfering with an existing aboriginal right, having regard for the character or

incidence of the right in issue? Infringement may be found where the statutory limitations on the right are unreasonable, impose undue hardship, or deny the aboriginal the preferred means of exercising the right. The question is whether either the purpose or effect of the statutory regulation unnecessarily infringes the aboriginal interest.

[125] The court then considered the question, if a *prima facie* infringement be found, of how the Crown could show that the infringement was justified. The justification analysis involved asking whether there is a valid legislative objective. In the context of *Sparrow*, conservation and resource management were considered to be valid legislative objectives. The Crown has a heavy burden on the justification issue because its honour is at stake. Justification also requires considering whether the aboriginal interest at stake has been infringed, "as little as possible", whether in cases of expropriation fair compensation is available, and whether the aboriginal group has been consulted with respect to conservation, or at least informed of the proposed regulatory scheme. This list of factors was said not to be exhaustive.

[126] There are several features in the present case that differ from *Sparrow*, and the extent to which those differences may qualify or limit *Sparrow*'s application to this case will

have to be considered. First, there is the fact that the right to hunt in this case is based on Treaty 8. There was no treaty in *Sparrow*. Second, *Sparrow* is another case involving the allegation of an offence against a native person, in answer to which charge he has relied upon his aboriginal right. In this case there is no offence alleged. It is the provincial Crown which asserts a positive right under Treaty 8 to require or to take up land as the basis for its legislative scheme in respect of forestry. Third, in *Sparrow* the attack was made on the constitutional validity of federal legislation, the *Fisheries Act*. In this case the petitioners do not allege that any legislation is unconstitutional. The amended petition alleges that the decision of the District Manager in issuing C.P.212 was in breach of constitutional or administrative law duties. The attack is therefore on executive or administrative conduct rather than on any legislative enactment. Fourth, and finally, it is provincial legislation that authorizes the impugned conduct. In *Sparrow*, the attack was on federal legislation.

[127] The fact that a treaty underlies the aboriginal right to hunt in this case does not, to my mind, render inapplicable the s.35(1) analysis engaged in by the court in *Sparrow*. Section 35(1) gives constitutional status to both aboriginal and treaty rights. As indicated above, treaties with aboriginal peoples have always engaged the honour and integrity

of the Crown. The fiduciary duties of the Crown are, if anything, more obvious where it has reduced its solemn promises to writing.

[128] As noted above in discussing some of the other cases, there is in this case no allegation of an offence by an aboriginal person. The Crown asserts its positive rights under the Treaty as the basis for its forestry program. In *Sparrow*, the federal Crown relied on its enumerated powers in s.91 of the *Constitution Act, 1867* (the *BNA Act*) as the basis for its legislative and regulatory scheme in respect of fisheries. Here, even if one accepts that the Crown's right to require or take up land under Treaty 8 has achieved constitutional status under s.35(1) (a position which the petitioners stoutly reject), its authority to act could be no higher than the constitutional powers the federal Crown sought to exercise in *Sparrow*.

[129] In my view the fact that the Crown asserts its rights under Treaty 8 can place it in no better position vis-a-vis a competing or conflicting aboriginal treaty right than the position the Crown enjoys in exercising the powers granted in either s.91 or 92 of the *Constitution Act, 1867*.

[130] There is also a distinction between the alleged

unconstitutionality of legislation in *Sparrow*, and the attack here on the conduct of a government official; and the fact that the conduct was authorized under provincial legislation, whereas in *Sparrow* a federal statute was impugned. Here the petitioners do not challenge the validity of the provincial legislation concerning forestry. They seek to prohibit any activity in connection with C.P. 212 until the Ministry has fulfilled its "fiduciary and constitutional" duty to consult with the petitioners.

F. Interpretation of Treaty 8 and Infringement of the Right to Hunt

[131] The appellants say the learned chambers judge erred in holding, at para.101, that: "...That any interference with the right to hunt, fish or trap constitutes a *prima facie* infringement of Treaty 8 rights" and further erred in holding (at para.114) that the issue was to be considered from the petitioners' "holistic perspective", and that the approval of C.P.212 denied the petitioners "their preferred means... to hunt... in an unspoiled wilderness in close proximity to their reserve lands." The appellants assert the Crown's independent right under the Treaty to require or take up lands as described above in these reasons.

[132] I begin by observing that earlier cases involving the

interpretation of the proviso in Treaty 8 (e.g. *R. v. Badger*, *supra*) or similar language in other treaties (e.g. *R. v. Horse*, *supra*) are of limited assistance for two reasons. First, they are cases involving a charge against an Indian for breach of a provincial statute, in answer to which the accused relied upon the treaty right to hunt. Second, they are cases involving the interpretation of s.12 of the Natural Resources Transfer Agreement, in addition to the language of the treaty granting the right to hunt. The only case we were cited involving the interpretation of Treaty 8, and in which the Natural Resources Transfer Agreement was not a factor, is *R. v. Noel*, [1995] 4 C.N.L.R. 78, a decision of the Northwest Territories Territorial Court. As with the other cases, *Noel* was a charge against a native for breach of legislation in answer to which he relied on his Treaty 8 right to hunt.

[133] A second observation I would make is that prior to the enactment of s.35 of the *Constitution Act, 1982*, parliamentary sovereignty was not limited or restricted by treaties with aboriginal peoples, and the federal government had the power to vary or repeal treaty rights by act of parliament: see *R. v. Sikyea*, [1964] S.C.R. 642, and *Daniels v. White*, [1968] S.C.R. 517 where the *Migratory Birds Convention Act* was held to supersede Indian treaty rights.

[134] The third observation I would make is that the Indians' right to hunt granted to the signatories of Treaty 8, and the Crown's right to regulate, and to require or take up lands, cannot be given meaning without reference to one another. They are competing, or conflicting rights as has been recently affirmed in *R. v. Sundown*, [1999] S.C.J. No. 13 at paras. 42 and 43. The Indians' right to hunt is subject to the "geographical limitation", and the Crown's right to take up land cannot be read as absolute or unrestricted, for to do so (as even the Crown concedes) would render the right to hunt meaningless. Such a position cannot be asserted in conformity with the Crown's honour and integrity. So even before the enactment of s.35 in 1982, a balancing of the competing rights of the parties to the Treaty was necessary.

[135] Fourth, the enactment of s.35 in 1982 has improved the position of the petitioners. Their right to hunt, and other treaty rights, now have constitutional status. They are therefore protected by the supreme law of Canada, and those rights cannot be infringed or restricted other than in conformity with constitutional norms.

[136] I am therefore of the view that it is unrealistic to regard the Crown's right to take up land as a separate or independent right, rather than as a limitation or restriction

on the Indians' right to hunt. In either case, however, the Crown's right qualifies the Indians' rights and cannot therefore be exercised without affecting those rights.

[137] The effect of the decision to issue C.P.212, and the reasonableness of the District Manager's decision, must be viewed in the context of the competing rights created by Treaty 8, namely the Indians' right to hunt, and the government's right to take up land for lumbering. The petitioners' interest in the logging activity proposed in the Tusdzuh was known from the outset, and it was recognized by both appellants. In his letter of 3 October, 1996, the District Manager recognized the petitioners' assertion of a Treaty Land Entitlement Claim (TLEC) in the area where C.P.212 was located, as well as the effect logging might have on wildlife habitat and hunting activities. His view was that Canfor's proposed logging plan would have "minimal impact" on those matters, and that the plan included elements that would "mitigate" the impact of logging.

[138] In my view the District Manager effectively acknowledged that C.P.212 would affect the petitioners' hunting rights in some way. Given the fiduciary nature of the relationship between government and Indians, and the constitutional protection afforded by s.35 over the treaty right to hunt, it seems to me that the interference

contemplated by C.P.212 amounts to an infringement of the petitioners' right to hunt. The granting of C.P.212 was the *de facto* assertion of the government's right to take up land, a right that by its very nature limited or interfered with the right to hunt.

[139] I do not think the learned chambers judge erred in holding that any interference with the right to hunt was a *prima facie* infringement of the petitioners' Treaty 8 right to hunt.

[140] In my respectful view, the learned chambers judge overstated the petitioners' position in holding that they were entitled to exercise their "preferred means of hunting" by doing so in an "unspoiled wilderness". The Tuszuh was not unspoiled wilderness in 1996 when the District Manager approved C.P.212, nor was it unspoiled wilderness in 1982 when treaty rights received constitutional protection. This was a wilderness criss-crossed with seismic lines, where oil and gas exploration and mining had taken place.

[141] Nor do I think "preferred means" should be taken to refer to an area, or the nature of the area, where hunting or fishing rights might be exercised. Those words more correctly refer to the methods or modes of hunting or fishing employed.

[142] But despite these disagreements with the reasons of the learned chambers judge, I do not think she erred in concluding that approval of C.P.212 constituted a *prima facie* infringement of the Treaty 8 right to hunt because the proposed activity would limit or impair in some degree the exercise of that right.

[143] The appellants contend that in reaching that conclusion the learned chambers judge substituted her finding of fact for that of the District Manager. But the interpretation of Treaty rights, and a decision as to whether they have been breached, are not within any jurisdiction conferred on the District Manager by the **Forest Act**, **Forest Practices Code** or relevant regulations. They are questions of law and even the District Manager acknowledges that the proposed harvesting would have some effect on hunting. He said (at p.3 of the letter of 3 October, 1996) that:

...the proposed harvest areas would have minimal impacts on wildlife habitat suitability and capability for ungulates and black bear...

[144] I respectfully agree with the learned chambers judge that any interference with the right to hunt is a *prima facie* infringement of the Indians' treaty right as protected by s.35

of the *Constitution Act, 1982*.

XII

Justification

[145] The analysis required in deciding whether infringement of a treaty right is justified is referred to above briefly in paragraph 83. Although *Sparrow* was not a treaty case, in my view the same approach is warranted here as in cases of aboriginal rights, as both treaty and aboriginal rights have constitutional protection under s.35(1) of the *Constitution Act, 1982*.

[146] Justification requires consideration of the following questions (said in *Sparrow* not to be an exhaustive or exclusive list):

1. Whether the legislative or administrative objective is of sufficient importance to warrant infringement;
2. Whether the legislative or administrative conduct infringes the treaty right as little as possible;
3. Whether the effects of infringement outweigh the benefits derived from the government action; and
4. Whether adequate meaningful consultation has taken place.

[147] Overriding all these issues is whether the honour and integrity of the Crown has been upheld in its treatment of the petitioners' rights.

[148] I will consider those issues in turn.

A. Importance of the Legislative Objective

[149] The learned chambers judge does not appear to have addressed this question, nor does the petitioner appear to have led any evidence to suggest that the objectives of the **Forest Act** and **Code** are not of sufficient importance to warrant infringement of the petitioners right to hunt.

[150] It would, in my view, be unduly limited, and therefore wrong, to consider the objective in issuing a cutting permit only from the perspective of Canfor's presumed goal to have a productive forest business with attendant economic benefits, or from the perspective of the Provincial Government to have a viable forest industry and a vibrant Provincial economy. The objectives of the forestry legislation go far beyond economics. The preamble to the **Code** (see para.28 above) refers to British Columbians' desire for sustainable use of the forests they hold in trust for future generations, and to the varied and sometimes competing objectives encompassed within

the words "sustainable use".

[151] In *Sparrow* the legislative objective was found to be conservation of the fishery, and the Court held that to be a sufficiently important objective to warrant infringement of the aboriginal right to fish for food. Viewing the legislative scheme in respect of forestry as a whole, and by a parity of reasoning with *Sparrow*, in my view the legislative objectives of the *Forest Act* and *Code* are sufficiently important to warrant infringement of the petitioners' treaty right to hunt in the affected area. Those objectives include conservation, and the economic and cultural needs of all peoples and communities in the Province.

B. Minimal Impairment

[152] As with the first issue, the learned chambers judge does not appear to have addressed directly the question of minimal infringement. When dealing with the issue of infringement of the right to hunt, she did say (at para.108) that "there is no persuasive evidence to suggest that other areas do not exist which Canfor could log in place of C.P.212 to avoid interfering with aboriginal rights".

[153] But the learned chambers judge stopped short of

saying that minimal interference means no interference, and correctly so, for the law does not impose such a stringent standard. In *R. v. Nikal*, [1996] 1 S.C.R. 1013 at 1065, the Court held that "[s]o long as the infringement was one which in the context of the circumstances presented could reasonably be considered to be as minimal as possible then it will meet the test".

[154] The onus for showing minimal impairment rests on the Crown. See *Semiahmoo Indian Band v. Canada* (1997), 148 D.L.R. (4th) 523, [1998] 1 C.N.L.R. 250 at 268 (F.C.A.).

[155] In this context, the findings of the District Manager are significant. He found (see para.32 above) that Canfor's proposed operations would have minimal impacts on wildlife habitat suitability and capability for moose, deer and bear, that there would be minimal to no impact on fish habitat or fishing activities, and that the proposed harvesting plan included sufficient measures to mitigate any concerns as to the trapping of fur bearing animals in the area.

[156] In my respectful view, these findings, which are within the scope of the District Manager's authority to make, are sufficient to meet the tests for minimal impairment or infringement of the right to hunt.

C. Whether the Effects of Infringement Outweigh the Benefits to be Derived from the Government Action

[157] Again, this issue was not addressed by the chambers judge. Given the minimal effects on hunting that the proposed logging would have, as found by the District Manager, and in the absence of any evidence to the contrary, it is in my view a fair inference that the benefits to be derived from implementation of the legislative scheme, and the issuance of cutting permits in accordance with its requirements, would outweigh any detriment to the petitioners caused by the infringement of the right to hunt.

D. Adequate Meaningful Consultation

[158] The learned chambers judge found that there had been inadequate consultation with the petitioners, and it is upon this ground that she found the Crown had failed in its attempts to justify the infringement of the petitioners' right to hunt.

[159] It is perhaps worth mentioning here the difference between adequate notice as a requirement of procedural fairness (considered above at paras.66-70) and adequate consultation, which is a substantive requirement under the test for justification. The fact that adequate notice of an intended

decision may have been given, does not mean that the requirement for adequate consultation has also been met.

[160] The Crown's duty to consult imposes on it a positive obligation to reasonably ensure that aboriginal peoples are provided with all necessary information in a timely way so that they have an opportunity to express their interests and concerns, and to ensure that their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action: see *R. v. Sampson* (1995), 16 B.C.L.R. (3d) 226 at 251 (C.A.); *R. v. Noel*, [1995] 4 C.N.L.R. 78 (Y.T.T.C.) at 94-95; *R. v. Jack* (1995), 16 B.C.L.R. (3d) 201 at 222-223 (C.A.); *Eastmain Band v. Robinson* (1992), 99 D.L.R. (4th) 16 at 27 (F.C.A.); and *R. v. Nikal*, *supra*.

[161] There is a reciprocal duty on aboriginal peoples to express their interests and concerns once they have had an opportunity to consider the information provided by the Crown, and to consult in good faith by whatever means are available to them. They cannot frustrate the consultation process by refusing to meet or participate, or by imposing unreasonable conditions: see *Ryan et al v. Fort St. James Forest District (District Manager)* (25 January, 1994) Smithers No. 7855, affirmed (1994), 40 B.C.A.C. 91.

[162] The chambers judge's findings as to what steps were taken by way of consultation are matters of fact that cannot be impugned unless there is no evidence to support them. In my view there is such evidence and we must accept the facts as found by her.

[163] It remains to consider the adequacy or inadequacy of the Crown's efforts in that behalf.

[164] The learned chambers judge found (at para.141) that:

The following reasonable opportunities to consult were denied to Halfway:

- (a) Halfway was not invited to attend the meeting between MOF and Canfor employees at which the cutting permit was approved.
- (b) The report "Potential Impacts to Fish & Wildlife Resources" was not provided to Halfway until August 26, 1996, despite that a draft copy was available January 4, 1996.
- (c) There was no real opportunity to participate in the CHOA.
- (d) Canfor's actual application for CP212 was not provided to Halfway until after the decision was made.

[165] These findings, particularly (b) and (c) support the conclusion that the Crown did not meet the first and second parts of the consultation test referred to, namely to provide

in a timely way information the aboriginal group would need in order to inform itself on the effects of the proposed action, and to ensure that the aboriginal group had an opportunity to express their interests and concerns.

[166] I respectfully agree with the learned chambers judge that given the positive duty to inform resting on the Crown, it is no answer for it to say that the petitioners did not take affirmative steps in their own interests to be informed, conduct that the learned chambers judge described as possibly "not ... entirely reasonable".

[167] As laid down in the cases on justification, the Crown must satisfy all aspects of the test if it is to succeed. Thus, even though there was a sufficiently important legislative objective, the petitioners rights were infringed as little as possible, and the effects of the infringement are outweighed by the benefits to be derived from the government's conduct, justification of the infringement has not been established because the Crown failed in its duty to consult. It would be inconsistent with the honour and integrity of the Crown to find justification where the Crown has not met that duty.

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.

[172] I agree with Mr. Justice Finch that the District Manager's decision must be reviewed "in the context of the competing rights created by Treaty 8". On the facts as the District Manager found them, however, this is not a case of "visible incompatible uses" such as would give rise to the "geographical limitation" on the right to hunt as Cory J. discussed it in *Badger, supra*.

[173] I do not think the District Manager for a moment thought he was "taking up" or "requiring" any part of the Halfway traditional hunting grounds so as to exclude Halfway's right to hunt or to extinguish the hunting right over a

particular area, whatever the Crown may now assert in support of his decision to issue a cutting permit. At most the Crown can be seen as allowing the temporary use of some land for a specific purpose, compatible with the continued long-term use of the land for Halfway's traditional hunting activities. The Crown was asserting a shared use, not a taking up of land for an incompatible use. There was evidence before the District Manager to support a finding that the treaty right to hunt and Canfor's tree harvesting were compatible uses. That finding must underpin his conclusion that CP212 would not infringe the treaty right to hunt.

[174] Nor do I agree with Canfor's argument that the test formulated by Cory J. in *Badger* is not applicable to a lumbering use. Justice Cory is clear that, "whether or not land has been taken up or occupied is a question of fact that must be resolved on a case-by-case basis" i.e. whether a proposed use is incompatible with the treaty right is a question of fact. The same can be said of "required or taken up ... for the purpose of ... lumbering", although I would compare lumbering more with the wilderness park use in *R. v. Sioui* [1990] 1 S.C.R. 1025 and *R. v. Sundown* [1999] S.C.J. No. 13, than with settlement, or the use for a game preserve in *Rex v. Smith* (1935), 2 W.W.R. 433 (Sask. C.A.) or a public road corridor in *R. v. Mousseau* [1980] 2 S.C.R. 89.

[175] The District Manager's task was to allocate the use of the land in the Timber Supply Area among competing, perhaps conflicting, but ultimately compatible uses among which the land could be shared; not unlike the sharing of herring spawn in *R. v. Gladstone* [1996] 2 S.C.R. 723.

[176] Nevertheless, a shared use decision may be scrutinized to ensure compliance with the various obligations on the District Manager, including his obligation to "act constitutionally", as I recall Crown counsel putting it in oral argument. Counsel agreed *Sparrow* provided the guidelines for that scrutinization on judicial review if a treaty right was engaged and I will expand further on that analysis below.

[177] Just as the impact of a statute or regulation may be scrutinized to ensure recognition and affirmation of treaty rights of aboriginal peoples, so may the impact of a decision made under such a statute or regulation by an employee of the Crown. The District Manager can no more follow a provision of a statute, regulation, or policy of the Ministry of Forestry in such a way as to offend the Constitution than he could to offend the *Criminal Code* or the *Offence Act*.

[178] I share Mr. Justice Finch's view that the District Manager was under a positive obligation to the Halfway River First Nation to recognize and affirm its treaty right to hunt in determining whether to grant Cutting Permit 212 to Canfor. This constitutional obligation required him to interpret the **Forest Act** and the **Forest Practices Code** so that he might apply government forest policy with respect for Halfway's rights. Moreover, the District Manager was also required to determine the nature and extent of the treaty right to hunt so as to honour the Crown's fiduciary obligation to the first nation: **Delgamuukw v. B.C.** [1997] 3 S.C.R. 1010 at 1112-1113 per Lamer C.J.C.; and see the discussion by Williams C.J.S.C. in **Cheslatta Carrier Nation v. B.C.** (1998), 53 B.C.L.R. 1 at 14-15.

[179] Mr. Justice Finch points out that the District Manager's failure to consult adequately precluded justification under the second stage of the **Sparrow** analysis of the infringement of the Halfway treaty right to hunt he considered was constituted by CP212. In my view this deficiency in the decision-making process is a breach of the Crown's fiduciary responsibilities that makes this Court's application of the **Sparrow** analysis premature.

[180] Because only the first nation will have information

about the scope of their use of the land, and of the importance of the use of the land to their culture and identity, if the **Sparrow** guidelines are to organize the review of an administrative decision it makes good sense to require the first nation to establish the scope of the right at the first opportunity, to the decision-maker himself during the consultation he is required to undertake, so that he might satisfy his obligation to act constitutionally. It is only upon ascertaining the full scope of the right that an administrative decision maker can weigh that right against the interests of the various proposed users and determine whether the proposed uses are compatible. This characterization is crucial to an assessment of whether a particular treaty or aboriginal right has been, or will be infringed. Thus, particularly in the context of a judicial review where the Court relies heavily upon the findings of the decision maker, a consideration of whether consultation has been adequate must precede any infringement/justification analysis using the **Sparrow** guidelines.

[181] It is implicit in Halfway's submission that the proposed lumbering use is incompatible with its rights or at least would be found to be so if the District Manager had full information and properly considered the scope of its treaty right to hunt and of its aboriginal right to use the particular

tract in question for religious and spiritual purposes.

[182] The requirement that a decision-maker under the **Forest Act** and the **Forest Practices Code** consult with a first nation that may be affected by his decision does not mean the first nation is absolved of any responsibility. Once the District Manager has set up an adequate opportunity to consult, the first nation is required to co-operate fully with that process and to offer the relevant information to aid in determining the exact nature of the right in question. The first nation must take advantage of this opportunity as it arises. It cannot unreasonably refuse to participate as the first nation was found to have done in **Ryan et al v. Fort St. James Forest District (District Manager)** (25 January, 1994) Smithers No. 7855, affirmed (1994), 40 B.C.A.C. 91. In my view, a first nation should not be permitted to provide evidence on judicial review it has had an appropriate opportunity to provide to the decision-maker, to support a petition asserting a failure to respect a treaty right.

[183] The District Manager's failure to consult adequately means that we cannot know what additional information might have been available to him regarding the nature and extent of the Treaty 8 right to hunt or of other aboriginal rights not surrendered by the treaty. Nor can we know how he might have

weighed that information with information he might have sought regarding other possible cutting areas to meet Canfor's needs while minimizing the effects on the Halfway River First Nation's treaty right to hunt. Counsel adverted in argument to Canfor having obtained permits to cut in other areas to replace CP212 after the chambers judge made her order. Finally, any weighing of benefits is limited by the evidence, in this case almost entirely put forward by Canfor. Only when adequate consultation has taken place and both parties have fulfilled their respective consultation duties will the District Manager be in a position to determine whether the uses are compatible or a geographical limitation is being asserted, and the consequences in either event to the application for a cutting permit.

[184] Halfway did not receive an appropriate opportunity to establish the scope of its right. Thus, the District Manager's decision must be set aside because it was made without the information about Halfway's rights he should have made reasonable efforts to obtain. The most that can be decided definitively on judicial review in such circumstances is whether the legislative objective was sufficiently important to warrant infringement. About that there has never been a question in this case.

[185] This conclusion does not signify agreement with Canfor's submission that the interference by CP212 with Halfway's treaty right to hunt could not be elevated to an infringement of a constitutional right. There was evidence of a diminution of the treaty right in this case for the valid purpose of lumbering, a purpose recognized by the treaty itself as a reason for government encroachment on the treaty right to hunt. There was evidence the proposed lumbering activity would preclude hunting in an area considerably larger than the particular cutting blocks during active logging for two years.

While mitigating steps were to be taken, there was also evidence of the detrimental effect of road construction on the long-term use of the area by native hunters. Common sense suggests these effects might be sufficiently meaningful, particularly when they are felt in an area near the first nation's reserve, to require justification by the government of its action, depending on the nature of the hunting right. Had the District Manager understood the extent of his obligation to consult, he might have concluded the activities of Canfor authorized by CP212 would result in a meaningful diminution of the Treaty 8 right to hunt, just as he might have seen to the mitigation of such effects or to compensation for them as part of his analysis of how the proposed use and the treaty right could be accommodated to each other.

[186] My difference with the reasoning of Mr. Justice Finch flows from my view that the chambers judge was wrong when she found that "any interference" with the right to hunt constituted an "infringement" of the treaty right requiring justification. I cannot read either *Sparrow* or *Badger* to support that view. As my colleague notes at para. 124, in *Sparrow* the court stated the question as "whether either the purpose or effect of the statutory regulation unnecessarily infringes the aboriginal interest." In *Badger*, at 818, in his discussion as to whether conservation regulations infringed the treaty right to hunt, Cory J. indicated the impugned provisions might not be permissible "if they erode an important aspect of the Indian hunting rights." In *Gladstone*, *supra*, Lamer C.J.C. indicated that a "meaningful diminution" of an aboriginal right would be required to constitute an infringement. Each of these expressions of the test for an "infringement" imports a judgment as to the degree and significance of the interference. To make that judgment requires information from which the scope of the existing treaty or aboriginal right can be determined, as well as information about the precise nature of the interference.

[187] Incidentally, as an aside, given the significance of particular land to aboriginal culture and identity, I would not preclude "preferred means" from being extended to include a

preferred tract of land. Proof may be available that use of a particular tract of land is fundamental to a first nation's collective identity, as it is to many indigenous cultures. While it may be that "preferred area" for hunting is not relevant, "preferred area" for religious and spiritual purposes is likely to be. Such rights do not appear to have been included in the treaty-making one way or the other.

[188] If, after the requisite consultation has occurred, the District Manager confirms the nature of his decision is one involving compatible shared uses, modification of the *Sparrow* guidelines for review of his allocation of the resources is likely to be necessary. I find support for such modification in the following statement from *Sparrow*, at 1111 (per Dickson C.J.C. and La Forest J.):

... We wish to emphasize the importance of context and a case-by-case approach to s. 35(1). Given the generality of the text of the constitutional provision and especially in light of the complexities of aboriginal history, society and rights, the contours of a justificatory standard must be defined in the specific factual context of each case.

[189] As is apparent from the discussion in *Gladstone*, *supra*, it will be impossible to determine how the contours of the justificatory standard should be modified without an understanding of the existing treaty and aboriginal rights and

the precise nature of the competing use or uses proposed. Lamer C.J.C. emphasized the distinction between a right with an internal limit such as the right to fish for social, ceremonial and food purposes in *Sparrow* and a right with an external, market-driven limit such as the right to sell herring spawn commercially at issue in *Gladstone*. As he noted, the scope of the aboriginal right can determine whether or not exclusive exercise of that right is warranted or how the doctrine of priority will be applied in a government decision on resource allocation. In the circumstances of the case at hand the scope of the Halfway nation's hunting right is yet to be fully determined. Thus it is impossible to reach a conclusion as to what justificatory standard would be applied to the issuance of the cutting permit.

[190] Where the decision maker has determined the proposed uses are compatible with the aboriginal right, the question becomes one of accommodation as opposed to one of exclusive exercise of either the aboriginal right in question or the Crown's proposed use. In *Sioui, supra*, the Court held it was up to the Crown "to prove that its occupancy of the territory cannot be accommodated to reasonable exercise of the Hurons' rights," if the Crown wanted to assert its occupancy of the land in question was incompatible with the Hurons' religious customs or rites. It may be that guidance can be found in this

concept for the review of an administrative decision on the allocation of resources among compatible uses.

[191] In summary, so as to fulfill the Crown's fiduciary and constitutional duties to Halfway, the District Manager is required to initiate a process of adequate and meaningful consultation with Halfway to ascertain the nature and scope of the treaty right at issue. Having done so, and having determined the effect of the proposed non-aboriginal use, he then makes a determination as to whether the proposed use is compatible with the treaty right. If it is he must seek to accommodate the uses to each other. It will be that accommodation the court reviews within the contours of a justificatory standard yet to be determined.

[192] If the District Manager determines the proposed use is incompatible with the treaty right, he will be asserting a geographical limitation on the treaty right. In that event, I agree with Mr. Justice Finch that his decision may be reviewed under the *Sparrow* analysis.

[193] It follows from these reasons that I too would affirm the order of Dorgan J. setting aside the decision of the District Forest Manager to grant CP212.

"The Honourable Madam Justice Huddart"

Reasons for Judgment of the Honourable Madam Justice Southin:

[194] This is an appeal by the respondents below from this judgment pronounced 24 June 1997:

THIS COURT ORDERS that

- the decision of the District Manager made September 13, 1996, approving the application for Cutting Permit 212 be quashed; and
- costs be awarded to the Petitioner.

[195] What led to this judgment was a petition for judicial review brought in late 1996 for an order:

- [1. Reviewing and setting aside the decision of the Ministry of Forests to allow forestry] activities within Cutting Permit 212;
2. Declaring that the Ministry of Forests has a fiduciary and constitutional duty to adequately consult with the Halfway River First Nation and declaring that the level of consultation to date is insufficient;
3. Compelling the Ministry of Forests to consult with the Halfway River First Nation with respect to the full scope, nature and extent of the impact of proposed forestry activities on the exercise of the Treaty and Aboriginal rights of the Halfway River First Nation in accordance with the reasons and directions of this Honourable Court, and compelling the Ministry of Forests to provide funding to the Halfway River First Nation to support this consultation process;

[There is no "4." in the amended petition.]

5. Remitting the matter to the Respondent Ministry of Forests to complete the consultation process and then reconsider and determine whether to consent to the proposed cutting activities, and to determine appropriate conditions and

requirements to be imposed upon any such cutting activities;

6. Prohibiting the Ministry of Forests from making any decision with respect to forestry activity within Cutting Permit 212 until completing the consultation process ordered by this Honourable Court.
7. Retaining jurisdiction over matters dealt within this application such that any party may return to the Court, by motion, for determination of any issue relating to the consultation or the implementation of this Order.
8. Such other relief as this Honourable Court may deem meet; and
9. Costs on a solicitor client basis.

[196] The central point was an assertion by the respondents in this Court that rights preserved to them under s. 35 of the **Constitution Act, 1982** were infringed by that act of the District Manager.

[197] The learned judge below had before her not only this petition for judicial review but also an application by the respondent below, here the appellant, Canadian Forest Products Ltd., more familiarly known in this Province as Canfor, for an interlocutory injunction restraining the Chief and Halfway River First Nation from interfering with the implementation of the cutting permit.

[198] The petition recites that in support of it will be read the affidavits of Chief Bernie Metecheah, Chief George Desjarlais, Stewart Cameron, Peter Havlik, Judy Maas, and Michael Pflueger. These affidavits and their exhibits comprise nearly 1,000 pages in the appeal book.

[199] As both proceedings came on together, the learned judge below had affidavits from both sides in both proceedings.

In its action, Canfor filed the affidavits of James Stephenson, Jill Marks and J. David Menzies, totalling 330 pages of the appeal book. The Crown in this proceeding filed, among others, two affidavits of Mr. Lawson, the District Manager, bearing date the 20th December, 1996, and amounting to 432 pages. There were some further shorter affidavits from both sides. Thus, the appeal book, excluding the reasons for judgment, judgment and notice of appeal, is 2,376 pages.

[200] These proceedings engaged the chambers judge in eight days of hearing.

[201] As I shall explain, I would allow the appeal on the simple footing that the central issue in this case concerning the existence or non-existence of rights in the Halfway River First Nation under s. 35 of the *Constitution Act, 1982*, ought to have been dealt with by action. For a precedent of an

action on a treaty, see *Saanichton Marina Ltd. v. Claxton* (1988), 18 B.C.L.R. (2d) 217, aff'd. (1989), 36 B.C.L.R. (2d) 79, in which the learned trial judge, Mr. Justice Meredith, most usefully included in his reasons for judgment the Tsawout Indian Band statement of claim.

[202] In revising these reasons, I have had the benefit of the draft reasons of my colleagues.

[203] If this were not the first case on the implications for British Columbia of Treaty 8 and if these implications did not go far beyond whether Canfor can or cannot log these cut blocks, I would agree with Mr. Justice Finch that, as the parties did not object to the mode of proceeding, it must be taken to be satisfactory. But, in my opinion, the courts do have an obligation to ensure that a case the implications of which extend beyond the parties – and the implications of this case may extend not only to all the inhabitants of the Peace River but also, because the Peace River country is not poor in resources, to all the inhabitants of British Columbia – is fully explored on proper evidence. Furthermore, to my mind, the so-called administrative law issues in this case are nothing but distractions from the issues arising on the Treaty.

[204] By s. 35(1), of the *Constitution Act, 1982*:

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

[205] Because Treaty No. 8 is central to this case and to all other cases which may arise in the Peace River between First Nations, on the one hand, and the Crown and the non-aboriginal inhabitants on the other, I set it out in full:

TREATY No. 8

ARTICLES OF A TREATY made and concluded at the several dates mentioned therein, in the year of Our Lord one thousand eight hundred and ninety-nine, between Her most Gracious Majesty the Queen of Great Britain and Ireland, by Her Commissioners the Honourable David Laird, of Winnipeg, Manitoba, Indian Commissioner for the said Province and the Northwest Territories; James Andrew Joseph McKenna, of Ottawa, Ontario, Esquire, and the Honourable James Hamilton Ross, of Regina, in the Northwest Territories, of the one part; and the Cree, Beaver, Chipewyan and other Indians, inhabitants of the territory within the limits hereinafter defined and described, by their Chiefs and Headmen, hereunto subscribed, of the other part:-

WHEREAS, the Indians inhabiting the territory hereinafter defined have, pursuant to notice given by the Honourable Superintendent General of Indian Affairs in the year 1898, been convened to meet a Commission representing Her Majesty's Government of the Dominion of Canada at certain places in the said territory in this present year 1899, to deliberate upon certain matters of interest to Her Most Gracious Majesty, of the one part, and the said Indians of the other.

AND WHEREAS, the said Indians have been notified and informed by Her Majesty's said Commission that it is Her desire to open for settlement, immigration, trade, travel, mining, lumbering, and such other purposes as to Her Majesty may seem meet, a tract of

country bounded and described as hereinafter mentioned, and to obtain the consent thereto of Her Indian subjects inhabiting the said tract, and to make a treaty, and arrange with them, so that there may be peace and good will between them and Her Majesty's other subjects, and that Her Indian people may know and be assured of what allowances they are to count upon and receive from Her Majesty's bounty and benevolence.

AND WHEREAS, the Indians of the said tract, duly convened in council at the respective points named hereunder, and being requested by Her Majesty's Commissioners to name certain Chiefs and Headmen who should be authorized on their behalf to conduct such negotiations and sign any treaty to be founded thereon, and to become responsible to Her Majesty for the faithful performance by their respective bands of such obligations as shall be assumed by them, the said Indians have therefore acknowledged for that purpose the several Chiefs and Headmen who have subscribed hereto.

AND WHEREAS, the said Commissioners have proceeded to negotiate a treaty with the Cree, Beaver, Chipewyan and other Indians, inhabiting the district hereinafter defined and described, and the same has been agreed upon and concluded by the respective bands at the dates mentioned hereunder, the said Indians DO HEREBY CEDE, RELEASE, SURRENDER AND YIELD UP to the Government of the Dominion of Canada, for Her Majesty the Queen and Her successors for ever, all their rights, titles and privileges whatsoever, to the lands included within the following limits, that is to say:-

Commencing at the source of the main branch of the Red Deer River in Alberta, thence due west to the central range of the Rocky Mountains, thence northwesterly along the said range to the point where it intersects the 60th parallel of north latitude, thence east along said parallel to the point where it intersects Hay River, thence northeasterly down said river to the south shore of Great Slave Lake, thence along the said shore northeasterly (and including such rights to the islands in said lakes as the Indians mentioned in the treaty may possess), and thence easterly and northeasterly along the south shores of Christie's Bay and McLeod's Bay to old Fort Reliance near the mouth of Lockhart's River, thence

southeasterly in a straight line to and including Black Lake, thence southwesterly up the stream from Cree Lake, thence including said lake southwesterly along the height of land between the Athabasca and Churchill Rivers to where it intersects the northern boundary of Treaty Six, and along the said boundary easterly, northerly and southwesterly, to the place of commencement.

AND ALSO the said Indian rights, titles and privileges whatsoever to all other lands wherever situated in the Northwest Territories, British Columbia, or in any other portion of the Dominion of Canada.

TO HAVE AND TO HOLD the same to Her Majesty the Queen and Her successors for ever.

And Her Majesty the Queen HEREBY AGREES with the said Indians that they shall have the right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.

And Her Majesty the Queen hereby agrees and undertakes to lay aside reserves for such bands as desire reserves, the same not to exceed in all one square mile for each family of five for such number of families as may elect to reside on reserves, or in that proportion for larger or smaller families; and for such families or individual Indians as may prefer to live apart from band reserves, Her Majesty undertakes to provide land in severalty to the extent of 160 acres to each Indian, the land to be conveyed with a proviso as to non-alienation without the consent of the Governor General in Council of Canada, the selection of such reserves, and lands in severalty, to be made in the manner following, namely, the Superintendent General of Indian Affairs shall depute and send a suitable person to determine and set apart such reserves and lands, after consulting with the Indians concerned as to the locality which may be found suitable and open for selection.

Provided, however, that Her Majesty reserves the right to deal with any settlers within the bounds of any lands reserved for any band as She may see fit; and also that the aforesaid reserves of land, or any interest therein, may be sold or otherwise disposed of by Her Majesty's Government for the use and benefit of the said Indians entitled thereto, with their consent first had and obtained.

It is further agreed between Her Majesty and Her said Indian subjects that such portions of the reserves and lands above indicated as may at any time be required for public works, buildings, railways, or roads of whatsoever nature may be appropriated for that purpose by Her Majesty's Government of the Dominion of Canada, due compensation being made to the Indians for the value of any improvements thereon, and an equivalent in land, money or other consideration for the area of the reserve so appropriated.

And with a view to show the satisfaction of Her Majesty with the behaviour and good conduct of Her Indians, and in extinguishment of all their past claims, She hereby, through Her Commissioners, agrees to make each Chief a present of thirty-two dollars in cash, to each Headman twenty-two dollars, and to every other Indian of whatever age, of the families represented at the time and place of payment, twelve dollars.

Her Majesty also agrees that next year, and annually afterwards for ever, She will cause to be paid to the said Indians in cash, at suitable places and dates, of which the said Indians shall be duly notified, to each Chief twenty-five dollars, each Headman, not to exceed four to a large Band and two to a small Band, fifteen dollars, and to every other Indian, of whatever age, five dollars, the same, unless there be some exceptional reason, to be paid only to heads of families for those belonging thereto.

FURTHER, Her Majesty agrees that each Chief, after signing the treaty, shall receive a silver medal and a suitable flag, and next year, and every third year thereafter, each Chief and Headman shall receive a suitable suit of clothing.

FURTHER, Her Majesty agrees to pay the salaries of such teachers to instruct the children of said Indians as to Her Majesty's Government of Canada may seem advisable.

FURTHER, Her Majesty agrees to supply each Chief of a Band that selects a reserve, for the use of that Band, ten axes, five hand-saws, five augers, one grindstone, and the necessary files and whetstones.

FURTHER, Her Majesty agrees that each Band that elects to take a reserve and cultivate the soil, shall, as soon as convenient after such reserve is set aside and settled upon, and the Band has signified its choice and is prepared to break up the soil, receive two hoes, one spade, one scythe and two hay forks for every family so settled, and for every three families one plough and one harrow, and to the Chief, for the use of his Band, two horses or a yoke of oxen, and for each Band potatoes, barley, oats and wheat (if such seed be suited to the locality of the reserve), to plant the land actually broken up, and provisions for one month in the spring for several years while planting such seeds; and to every family one cow, and every Chief one bull, and one mowing-machine and one reaper for the use of his Band when it is ready for them; for such families as prefer to raise stock instead of cultivating the soil, every family of five persons, two cows, and every Chief two bulls and two mowing-machines when ready for their use, and a like proportion for smaller or larger families. The aforesaid articles, machines and cattle to be given one for all for the encouragement of agriculture and stock raising; and for such Bands as prefer to continue hunting and fishing, as much ammunition and twine for making nets annually as will amount in value to one dollar per head of the families so engaged in hunting and fishing.

And the undersigned Cree, Beaver, Chipewyan and other Indian Chiefs and Headmen, on their own behalf and on behalf of all the Indians whom they represent, DO HEREBY SOLEMNLY PROMISE and engage to strictly observe this Treaty, and also to conduct and behave themselves as good and loyal subjects of Her Majesty the Queen.

THEY PROMISE AND ENGAGE that they will, in all respects, obey and abide by the law; that they will maintain peace between each other, and between

themselves and other tribes of Indians, and between themselves and others of Her Majesty's subjects, whether Indians, half-breeds or whites, this year inhabiting and hereafter to inhabit any part of the said ceded territory; and that they will not molest the person or property of any inhabitant of such ceded tract, or of any other district or country, or interfere with or trouble any person passing or travelling through the said tract or any part thereof, and that they will assist the officers of Her Majesty in bringing to justice and punishment any Indian offending against the stipulations of this Treaty or infringing the law in force in the country so ceded.

[Emphasis mine.]

[206] The Beaver Indians, from whom the present respondents are descended, adhered to the Treaty in 1900:

The Beaver Indians of the Upper Peace River and the country thereabouts, having met at Fort St. John, on this thirtieth day of May, in this present year 1900, Her Majesty's Commissioner, James Ansdell Macrae, Esquire, and having had explained to them the terms of the treaty unto which the Chief and Headmen of the Indians of Lesser Slave Lake and adjacent country set their hands on the twenty-first day of June, in the year 1899, do join in the cession made by the said treaty, and agree to adhere to the terms thereof, in consideration of the undertakings made therein.

In witness whereof, Her Majesty's said Commissioner, and the following of the said Beaver Indians, have hereunto set their hands, at Fort St. John, on this the thirtieth day of May, in the year herein first above written.

[Here followed the signatures.]

[207] Canfor holds under the Crown a forest licence A18154 dated 28th June, 1993, which covers a very substantial area of

northeastern British Columbia between the Rocky Mountains and 120° west longitude, being there the boundary between this Province and Alberta. Under such a licence the District Manager from time to time issues cutting permits. The issuance of such permits is governed not only by the terms of the licence but also by the terms of the **Forest Act**.

[208] For the purposes of these reasons for judgment I accept:

1. The Halfway River First Nation, which has its reserve on the Halfway River, claims under Treaty 8 the right to hunt, fish and trap, particularly to hunt moose, in the area covered by the cutting permit, the logging of which may impede their hunting for moose.
2. The holder of a forest licence does not, under its licence, acquire any exclusive right of occupation of the lands encompassed in a cutting permit.
3. Neither the **Wildlife Act**, R.S.B.C. 1996, c. 488, nor any other statute of this Province forbids hunting on lands upon which logging is being carried on but it does prohibit the dangerous discharge of firearms. It would be dangerous to discharge firearms where logging is being carried on and I do not think for one moment that any

member of the Halfway River First Nation would do such a thing even if there were no statutory prohibition.

[209] The respondents assert a breach of the Treaty in two ways:

1. When the reserve for the Halfway people was set up, which was said not to have happened until 1914, that is, some fourteen years after the Beaver had adhered to the Treaty, they received less than their entitlement under the Treaty. In its claim to the Federal Government, submitted in 1995 under the Federal Land Claims Process, the Halfway River First Nation calculated the shortfall thus:

15.1 The following is a summary of the key population figures indicating a shortfall at date of first survey. Detailed information concerning individual members of the Halfway River Band, absentees/arrears and late adherents is contained in the Genealogical Appendices.

Halfway River Band on Hudson Hope Band Paylist - Date of First Survey - 1914	77
Deduct Double Counts	0
Base Paylist	77
Absentees/Arrears	13
Late Adherents	4
Adjusted Date of First Survey Population	94

Calculation of Shortfall
 94 x 128 acres - 9823 acres = Treaty Land
 Entitlement Shortfall of 2,139 acres

I do not pretend to have grasped the full import of this claim, nor the relationship to it, if any, of Section 13 of the British Columbia Terms of Union and the various events arising from that section, as to which see my judgment in *British Columbia (Attorney General) v. Mount Currie Indian Band* (1991), 54 B.C.L.R. (2d) 156 at 176 (C.A.), where the whole sorry history of reserves in other parts of the Province is recounted and in which, in my opinion, the right clearly belonged to the Mount Currie Indian Band. If the Halfway River First Nation is right and the claim is not settled but must be pursued in an action, an interesting question of law will fall to be determined: Is British Columbia bound to provide further lands and, if so, who is to choose those lands, or is Canada bound to pay compensation and, in either event, to what ancillary remedies, if any, is the Halfway River First Nation entitled? At this stage, no authority with the power to resolve the claim as made in 1995 has made any findings of fact or law relating thereto.

2. Development in the area has deleteriously affected the hunting. Chief Metecheah deposes:

3. The Halfway River First Nation community is very poor. More than 75% of our members rely on social assistance and hunting to feed their families. Because we are so poor, the members of our community rely very much on hunting to feed their children.

4. All of the land within Cutting Permit 212 ("C.P. 212") is very good for hunting and is the land that is used the most by our people to feed their children. The C.P. 212 area is next to our reserve. Our members don't need to spend much money to get there to get food for their families.

5. All through C.P. 212, there is proof of this use. Our members' permanent camp sites, corrals and meat drying racks are everywhere in the area.

6. We have many religious, cultural and historical sites in C.P. 212.

7. I am told by one of our members that some of the cut blocks are right where important spiritual ceremonies are held.

8. We have told the Ministry of Forests ("Ministry") that we are willing to gather this information but we need money and help to do this.

9. I have hunted throughout the Treaty 8 territory all my life and I have seen the effects of forestry activities on wildlife and hunting. The land is not as good for hunting once the trees have been cut. Non-Native hunters use the roads left by the forestry people to hunt in our traditional territory and there is less game left to feed our families.

10. If the hunting in C.P. 212 is affected, children in our community will go hungry.

11. C.P. 212 is right next to our Reserve. Because of all of the things that the government has done to our traditional territory by allowing logging companies and oil and gas companies to cut trees and pollute the land without consulting us or respecting our rights, our people must go farther and farther from our Reserve to get to land where we can hunt and gather berries and medicine. We use the land in C.P. 212 for teaching our children about our spiritual beliefs and our way of life. If the trees in C.P. 212 are cut down and the animals are driven away we will not be able to teach our children how to hunt and how our ancestors lived.

[210] The appellants do not accept that the development of the area has adversely affected the animal population or, more particularly, that cutting pursuant to this cutting permit will do so. There is some evidence that logging, because it results in fresh growth, ultimately produces good browse for ungulates, including moose.

[211] The assertions by the Chief in paragraphs 9-11 are sweeping and I am sure he is profoundly convinced of their truth. But, in my opinion, assertions, even if contained in an affidavit, which are sweeping in scope but which the deponent does not support, to use Lord Blackburn's words in another context, by condescending to particulars, should be given little weight in a proceeding seeking a final, in contradistinction to an interlocutory, order.

[212] As I understand Mr. Justice Finch's reasons, his central premise is set forth in this paragraph:

[144] I respectfully agree with the learned chambers judge that any interference with the right to hunt is a *prima facie* infringement of the Indians' treaty right as protected by s.35 of the **Constitution Act, 1982**.

[213] That premise leads inexorably to the application of the doctrine of **R. v. Sparrow**, [1990] 1 S.C.R. 1075, [1990] 3 C.N.L.R. 160, [1990] 4 W.W.R. 410, 46 B.C.L.R. (2d) 1.

[214] It is upon that premise that my colleague and I part company.

[215] I accept that the doctrine of the honour of the Crown applies to the interpretation of treaties which are within s. 35(1) of the **Constitution Act**. But I do not accept that the central words of the Treaty bear the construction put upon them by my colleague. To my mind, the words which, in the court below, ought to have been but were not addressed, except perhaps by a side wind, are "as may be required or taken up". Do the words empower the Crown, to whom all the lands covered by the Treaty were surrendered, to convey those lands away to others in fee simple? Such a conveyance would, of course, give exclusive possession to the grantee.

[216] In the case at bar, the issuance of a cutting permit did not give exclusive possession to the appellant Canfor. It did not exclude the respondents from hunting. But if the Crown did grant all the lands away, it might be argued with some force that it had made the reservation nugatory. One might apply the common law doctrine of derogation from a grant, by analogy, to such a state of affairs.

[217] In order that the significance of the principal issue to this Province may be understood, I must set out some history.

[218] By the British Columbia **Boundaries Act**, 26 & 27 Vict., c. 83 (1863), Parliament at Westminster established the boundaries of then Colony of British Columbia thus:

3. *British Columbia* shall for the Purposes of the said Act, and for all other Purposes, be held to comprise all such Territories within the Dominions of Her Majesty as are bounded to the South by the Territories of the United States of *America*, to the West by the *Pacific Ocean* and the Frontier of the *Russian Territories in North America*, to the North by the Sixtieth Parallel of North Latitude, and to the East, from the Boundary of the United States Northwards, by the *Rocky Mountains* and the One hundred and twentieth Meridian of West Longitude, and shall include *Queen Charlotte's Island* and all other Islands adjacent to the said Territories, except *Vancouver's Island* and the Islands adjacent thereto.

[219] When the Colony of British Columbia, which by then encompassed Vancouver Island as well, became part of Canada in 1871, it did so pursuant to the Terms of Union and the order in council of 16 May 1871. By the Terms of Union a substantial part of British Columbia known as the Railway Block was conveyed to the Dominion government. By subsequent statutes, other lands known as the Peace River Block were granted by the Province to Canada. These statutes are recited in the **Railway Belt Retransfer Agreement Act**, S.B.C. 1930, c. 60.

[220] From the time that the Beaver adhered to this treaty in 1900 until after the Second World War, there was very little settlement in what British Columbians call the Peace River which, more sensibly, ought to have been part of Alberta, lying as it does east of the Rocky Mountains.

[221] The introduction by Gordon E. Bowes to *Peace River Chronicles* (Prescott Publishing Co., 1963) gives a sufficient overview [p. 13 *et seq*]:

The Hudson's Bay Company remained in undisturbed possession of its huge fur preserve until the gold rush to the Peace and the Finlay in 1862. Many of the gold-seekers turned to the fur trade themselves, and so ended the Company's monopoly. There was another gold rush in the years 1870-73, this time to the Omineca country. Klondikers passed through in 1898-99, and a few returned later as traders. In 1908-09, there was a smaller gold rush to McConnell Creek on the Ingenika River.

Ignoring difficulties and hardships, the miners and the independent traders and trappers opened up the country and made it known to the outside world. They were soon followed by missionaries, travellers, and railway and geological survey parties. Their favourable reports drew attention to the agricultural advantages of the eastern part of the region.

Land surveyors and settlers entered the Peace River region of British Columbia only a few years prior to the First World War. Until that time, the area from the Rockies east to the Alberta boundary had been kept under a provincial government reserve which prohibited homesteading. The purpose of this reserve was to permit the federal government to select 3,500,000 acres of unalienated arable land (the Peace River Block) in return for aid given earlier by Ottawa for railway construction elsewhere in the province. The long-delayed choice of the

block was announced in 1907, and Ottawa threw open some of the lands for homesteading in 1912.

Lack of transportation has been the great obstacle to development of the region. Some settlers came in on the mere rumour of a railway. In 1913 there were 40 settlers near Hudson Hope, 30 along the Peace down to Fort St. John, and about 400 in the Pouce Coupe prairie. Even Finlay Forks had two general stores in 1913, and hopes were high. The First World War pricked the bubble, leaving deserted cabins everywhere.

The building of what is now the Northern Alberta Railways line in 1916 from Edmonton to Grande Prairie on the Alberta side facilitated some further settlement of the eastern half of the region. Following the war, the Soldier Settlement Board helped to establish veterans on the land. Another influx of land-hungry settlers occurred in 1928 and 1929, with the result that there were almost 7,000 persons in the eastern part of the region by 1931.

The completion of the Northern Alberta Railways line to Dawson Creek in January 1931 marked the beginning of a new era. At long last the railway had arrived, if only just within the area's eastern boundary! During the depression years discouraged wheat farmers from the parched districts of southern Alberta and Saskatchewan swelled the migratory waves. The trek into the Promised Land with livestock and farm equipment sometimes took as long as three or four months.

The arrival of bush pilots and the establishment of air lines in the thirties heralded the coming of further improvements in transportation. The Second World War, with its building of airports and the Alaska Highway and its forced economic expansion, played a sudden and spectacular part in the region's growth. Dawson Creek was given a highway to the Yukon and Alaska a full decade before it obtained one to the rest of the province! In the immediate post-war years, settlement continued in substantial volume. A major land boom occurred in 1948-49. Dawson Creek established itself in the front rank in all of Western Canada for grain shipments. The eastern part of the region is still the fastest-growing section of British Columbia.

The initial exploitation of the oil and gas fields, the completion of the John Hart Highway from Prince George in 1952, the building in 1957 of Canada's first major natural gas pipeline, Westcoast Transmission Company's line from Taylor south to the American border, the long-delayed and eagerly-awaited extension of the Pacific Great Eastern Railway to Fort St. John and Dawson Creek in 1958, the completion of the Western Pacific Products and Crude Oil pipeline to Kamloops in 1961, and the construction, now under way, of the great hydro-electric power project near Hudson Hope, all represent other significant steps in the region's development in recent years.

The present prosperity and the growing commercial importance of Dawson Creek, Fort St. John, Hudson Hope, Taylor, and Chetwynd contrast sharply with conditions two decades ago. Isolated no longer, and provided with air lines, highways, railways, and gas and oil pipelines, the region has overcome its transportation problems. Nature's lavish endowment of this corner of British Columbia is becoming evident to all. Not only one of the world's greatest power sites but also the untold wealth of natural gas, oil, coal, base metals, gold, timber, and millions of fertile acres for agriculture are beginning to make the pioneers' wildest dreams come true.

[222] Thus, I think it fair to infer that from the time they adhered to the Treaty in 1900 until after the Second World War, the Beaver people, including the present respondents, were left with their hunting ranges largely free of the "taking up" for any purpose by the Crown of lands ceded to it and from intrusion by non-natives upon those lands for such purposes as hunting, fishing, exploring for minerals, and so forth. Thus, until then, no issue could have arisen of breach by the Crown.

[223] Since the early 1960's, there has been in the Peace River further extensive taking up of land by the Crown, although to what extent that taking up has excluded the Beaver people from their traditional hunting ranges by the granting of exclusive possession to others, does not appear with any clarity in the evidence in this case.

[224] In my opinion the issue is not whether there is an infringement and justification within the *Sparrow* test, but whether the Crown has so conducted itself since 1900 as to be in breach of the Treaty. The proper parties to a proceeding to determine that issue are in my opinion the Halfway River First Nation and the Attorney General for British Columbia, or, if monetary compensation is sought, Her Majesty the Queen in right of British Columbia, and the proper means of proceeding is an action.

[225] The question in such an action would be whether what the Crown has done throughout the Halfway River First Nation's traditional lands by taking up land for oil and gas production, forestry, and other activities has so affected the population of game animals as to make the right of hunting illusory. "To make the right of hunting illusory" may be the wrong test. Perhaps the right test is "to impair substantially the right of hunting" or some other formulation of words.

[226] Whatever is the correct formulation, it cannot be applied without addressing all that has been done by the Crown since the lands were ceded to it. The Beaver Indians have the right to hunt but that right is burdened or cut down by the right of the Crown to take up lands. There are many issues of fact to be addressed on proper evidence to answer the question in whatever terms one puts it.

[227] My colleague, Madam Justice Huddart, approaches this case differently from Mr. Justice Finch. The culmination of her reasons is in this paragraph:

[191] In summary, so as to fulfill the Crown's fiduciary and constitutional duties to Halfway, the District Manager is required to initiate a process of adequate and meaningful consultation with Halfway to ascertain the nature and scope of the treaty right at issue. Having done so, and having determined the effect of the proposed non-aboriginal use, he then makes a determination as to whether the proposed use is compatible with the treaty right. If it is he must seek to accommodate the uses to each other. It will be that accommodation the court reviews within the contours of a justificatory standard yet to be determined.

[228] Essentially, therefore, she accedes to the respondent's prayer for relief contained in the petition for judicial review.

[229] With respect, to create a system in which those appointed to administrative positions under the **Forest Act** or any other statute of British Columbia regulating Crown land in the Peace River are expected to consult "to ascertain the nature and scope of the treaty right at issue" and to determine "whether the proposed use is compatible with the treaty right" is to place on our civil servants a burden they should not have to bear - a patchwork quilt of decision making by persons appointed not for their skill in legal questions but for their skill in forestry, mining, oil and gas, and agriculture.

[230] A District Manager under the **Forest Act** is no more qualified to decide a legal issue arising under this treaty than my colleagues and I are qualified to decide how much timber Canfor should be permitted or required to cut in any one year in order to conform to the terms of its tenure.

[231] Not only is this burden on the civil servants unfair to them, but also it ladens the people of British Columbia with burdens heavy to be borne, burdens which no other province's people have to bear, even though the other provinces, except Newfoundland, also have First Nations.

[232] If my colleagues are right, British Columbia, which was once described as the spoilt child of Confederation, is about to become the downtrodden stepchild of Confederation.

[233] This case has serious economic implications. To decide the issues arising on the evidence here adduced, which, as the parties chose to proceed, was not focused on that question only, is a course fraught with danger, especially to third parties. Those third parties include, as well as those who have rights acquired under the **Forest Act**, R.S.B.C. 1996, c. 157, and predecessor statutes, those who have rights acquired under the **Petroleum and Natural Gas Act**, R.S.B.C. 1996, c. 361, and predecessor statutes, the **Mineral Tenure Act**, R.S.B.C. 1996, c. 292, and predecessor statutes, and the **Land Act**, R.S.B.C. 1996, c. 245, and predecessor statutes.

[234] If the Crown has so conducted itself that it has committed a breach of its obligations under the Treaty to the respondents, and, perhaps, other First Nations who are also Beaver Indians, then it is right that the Crown should answer for that wrong and pay up. The paying up will be done by all the taxpayers of British Columbia. But it is not right that Canfor and all others, who in accordance with the Statutes of British Columbia have obtained from the Crown rights to lands in the Peace River and conducted their affairs in the not

unreasonable belief that they were exercising legal rights, should find themselves under attack in a proceeding such as this.

[235] Canfor, a substantial corporation, presumably can afford this litigation. But others whose rights may be imperilled may not have Canfor's bank account.

[236] I would allow the appeal and set aside the judgment below.

"The Honourable Madam Justice Southin"

Black's Law Dictionary®

Eighth Edition

Bryan A. Garner
Editor in Chief



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2. The confinement of a person in custody. 3. A writ authorizing a prison official to continue holding a prisoner in custody. [Cases: Extradition and Detainers ⇨52.] 4. A person who detains someone or something.

de tallagio non concedendo (dee tə-lay-jee-oh non kon-sə-den-doh), *n.* [Law Latin "of not granting tallage"] *Hist.* The title of a statute declaring that no taxes will be imposed by the king or his heirs without the consent of the archbishops, bishops, earls, barons, knights, and other freemen of the realm. • The statute has been used to support the constitutional doctrine disallowing taxation except by Parliament. 34 Edw., st. 4.

detection. The act of discovering or revealing something that was hidden, esp. to solve a crime.

"There is a clear distinction between inducing a person to do an unlawful act and setting a trap to catch him in the execution of a criminal plan of his own conception. There is also a distinction between the terms 'detection' and 'entrapment,' as applied to the activities of law enforcement officers. Legitimate detection of crime occurs when officers test a suspected person by offering him an opportunity to transgress the law in such manner as is usual in the activity alleged to be unlawful. On the other hand, entrapment occurs when officers induce a person to violate the law when he would not otherwise do so." 21 Am. Jur. 2d *Criminal Law* § 202 (1981).

de tempore cujus contrarium memoria hominum non existit (dee tem-pə-ree k[y]oo-jəs kən-trair-ee-əm mə-mor-ee-ə hom-ə-nəm non eg-zis-tit). [Latin] From time whereof the memory of man does not exist to the contrary. See LEGAL MEMORY.

de tempore in tempus et ad omnia tempora (dee tem-pə-ree in tem-pəs et ad om-nee-ə tem-pə-rə). [Latin] From time to time, and at all times.

de temps dont memorie ne court (də təhn dawn mem-ə-ree nə koor). [Law French] From time whereof memory does not run; time out of human memory. • This Law French phrasing was a forerunner of Blackstone's classic formulation: "time whereof the memory of man does not run to the contrary." 1 William Blackstone, *Commentaries on the Laws of England* 460-61 (1765). See LEGAL MEMORY.

détente (day-tahnt). [French] 1. The relaxation of tensions between two or more parties, esp. nations. 2. A policy promoting such a relaxation of tensions. 3. A period during which such tensions are relaxed. Cf. ENTENTE; ALLIANCE.

detentio (di-ten-shee-oh), *n.* [Latin] 1. *Roman law.* See *possessio naturalis* under POSSESSIO. 2. *Hist.* Detention; detainment, as opposed to *captio* ("taking").

detention, n. 1. The act or fact of holding a person in custody; confinement or compulsory delay. — **detain, vb.**

investigative detention. The holding of a suspect without formal arrest during the investigation of the suspect's participation in a crime. • Detention of this kind is constitutional only if probable cause exists.

pretrial detention. 1. The holding of a defendant before trial on criminal charges either because the established bail could not be posted or because release was denied. 2. In a juvenile-delinquency case, the court's authority to hold in custody, from

the initial hearing until the probable-cause hearing, any juvenile charged with an act that, if committed by an adult, would be a crime. • If the court finds that releasing the juvenile would create a serious risk that before the return date the juvenile might commit a criminal act, it may order the juvenile detained pending a probable-cause hearing. Juveniles do not have a constitutional right to bail. The Supreme Court upheld the constitutionality of such statutes in *Schall v. Martin*, 467 U.S. 253, 104 S.Ct. 2403 (1984). — Also termed *temporary detention*.

preventive detention. Confinement imposed usu. on a criminal defendant who has threatened to escape, poses a risk of harm, or has otherwise violated the law while awaiting trial, or on a mentally ill person who may cause harm.

2. Custody of property; esp., an employee's custody of the employer's property without being considered as having legal possession of it.

detention hearing. See HEARING.

detention in a reformatory. A juvenile offender's sentence of being sent to a reformatory school for some period. [Cases: Infants ⇨223.1.]

determinable, adj. 1. Liable to end upon the happening of a contingency; terminable <fee simple determinable>. 2. Able to be determined or ascertained <the delivery date is determinable because she kept the written invoice>.

determinable easement. See EASEMENT.

determinable estate. See ESTATE (1).

determinable fee. 1. See *fee simple determinable* under FEE SIMPLE. 2. See *base fee* under FEE (2).

determinable freehold. See *determinable estate* under ESTATE (1).

determinate hospitalization. A fixed period of hospitalization, usu. by civil commitment.

determinate obligation. See OBLIGATION.

determinate sentence. See SENTENCE.

determination, n. 1. A final decision by a court or administrative agency <the court's determination of the issue>. [Cases: Administrative Law and Procedure ⇨489; Federal Civil Procedure ⇨928. C.J.S. *Public Administrative Law and Procedure* §§ 147-148.]

initial determination. The first determination made by the Social Security Administration of a person's eligibility for benefits. [Cases: Social Security and Public Welfare ⇨8.5, 142.15, 175.25. C.J.S. *Social Security and Public Welfare* §§ 13, 75.]

2. The ending or expiration of an estate or interest in property, or of a right, power, or authority <the easement's determination after four years>. — **determine, vb.**

determination letter. A letter issued by the Internal Revenue Service in response to a taxpayer's request giving an opinion about the tax significance of a transaction, such as whether a nonprofit corporation is entitled to tax-exempt status. — Also termed *ruling letter*. [Cases: Internal Revenue ⇨3049.]

quarta Trebellianica (kwor-tə trə-bel-ee-an-ə-kə). [Latin "the quarter due under Trebellianus's *senatus consultum*"] *Hist.* The fourth portion that an heir could retain from a succession after transferring the succession as directed by the testator under a *fideicommissum*. — Also termed *quarta Trebelliana* (trə-bel-ee-ay-nə or -an-ə). Cf. FALCIDIAN PORTION.

quarter, n. 1. In the law of war, the act of showing mercy to a defeated enemy by sparing lives and accepting a surrender <to give no quarter>. 2. See *quarter section* under SECTION.

quarter day. See DAY.

quartering, n. Hist. 1. The dividing of a criminal's body into quarters after execution, esp. as part of the punishment for a crime such as high treason. See HANGED, DRAWN, AND QUARTERED. 2. The furnishing of living quarters to members of the military. • The Third Amendment generally protects people from being forced to use their homes to quarter soldiers. U.S. Const. amend. III. 3. The dividing of a shield into four parts to show four different coats of arms. — **quarter, vb.**

quarterly report. A financial report issued by a corporation (and by most mutual funds and investment managers) every three months.

quartermaster. See TREASURER.

quarter seal. See SEAL.

quarter section. See SECTION.

quarter session. See SESSION (1).

Quarter Sessions Court. See COURT OF GENERAL QUARTER SESSIONS OF THE PEACE.

quarters of coverage. The number of quarterly payments made by a person into the social-security fund as a basis for determining the person's entitlement to benefits. [Cases: Social Security and Public Welfare ⇨135, 140.5. C.J.S. *Social Security and Public Welfare* §§ 36-38, 42, 48-49, 58-59, 61.]

quarto die post (kwor-toh di-ee pohst), *n.* [Law Latin "on the fourth day after"] The defendant's appearance day, being four days (inclusive) from the return of the writ.

quash (kwahsh), *vb.* 1. To annul or make void; to terminate <quash an indictment> <quash proceedings>. 2. To suppress or subdue; to crush <quash a rebellion>.

quashal (kwahsh-əl), *n.* The act of quashing something <quashal of the subpoena>. [Cases: Witnesses ⇨16. C.J.S. *Witnesses* §§ 21, 32-52.]

quasi (kway-si or kway-zi also kwah-zee). [Latin "as if"] Seemingly but not actually; in some sense; resembling; nearly.

"QUASI. A Latin word frequently used in the civil law, and often prefixed to English words. It is not a very definite word. It marks the resemblance, and supposes a little difference, between two objects, and in legal phraseology the term is used to indicate that one subject resembles another, with which it is compared, in certain characteristics, but that there are also intrinsic and material differences between them. It negatives the idea of identity, but implies a strong superficial analogy, and points out that the conceptions are sufficiently similar for one to be classed as the equal of the other." 74 C.J.S. *Quasi*, at 2 (1951).

quasi-admission. See ADMISSION (1).

quasi-affinity. See AFFINITY.

quasi-autonomous nongovernmental organization. A semipublic administrative body (esp. in the United Kingdom) having some members appointed and financed by, but not answerable to, the government, such as a tourist authority, a university-grants commission, a price-and-wage commission, a prison or parole board, or a medical-health advisory panel. • This term is more commonly written as an acronym, *quango* (kwang-goh), without capital letters.

quasi committee of the whole. See COMMITTEE.

quasi-community property. See COMMUNITY PROPERTY.

quasi-contract. See *implied-in-law contract* under CONTRACT.

quasi-corporation. See CORPORATION.

quasi-crime. See CRIME.

quasi-criminal proceeding. See PROCEEDING.

quasi-delict. See DELICT.

quasi-deposit. See DEPOSIT (5).

quasi-derelict. See DERELICT.

quasi-deviation. See DEVIATION.

quasi-domicile. See *commercial domicile* under DOMICILE.

quasi-dwelling house. See DWELLING HOUSE.

quasi-easement. See EASEMENT.

quasi-enclave. See ENCLAVE.

quasi-entail. See ENTAIL.

quasi-estoppel. See ESTOPPEL.

quasi ex contractu (kway-si [or -zi] eks kən-trak-t[y]oo). [Latin] *Hist.* Arising as if from contract.

quasi ex delicto (kway-si [or -zi] eks di-lik-toh). [Latin] *Hist.* Arising as if from delict. See DELICT.

quasi-fee. See FEE (2).

quasi feudum (kway-si [or -zi] fyoo-dəm). [Law Latin "as if a (heritable) fee"] *Hist.* A heritable right, usu. in money.

quasi-governmental agency. See AGENCY (3).

quasi-guarantee treaty. See *guarantee treaty* under TREATY (1).

quasi-guardian. See GUARDIAN.

quasi-individual. See *private corporation* under CORPORATION.

quasi in rem. See IN REM.

quasi-in-rem jurisdiction. See JURISDICTION.

quasi-insurer. See INSURER.

quasi-judicial, adj. Of, relating to, or involving an executive or administrative official's adjudicative acts. • Quasi-judicial acts, which are valid if there is no abuse of discretion, often determine the fundamental rights of citizens. They are subject to review by courts. [Cases: Administrative Law and Procedure ⇨108. C.J.S. *Public Administrative Law and Procedure* §§ 10-11.]

"Quasi-judicial is a term that is . . . not easily definable. In the United States, the phrase often covers judicial decisions taken by an administrative agency — the test is the nature of the tribunal rather than what it is doing. In England quasi-judicial belongs to the administrative category and is used to cover situations where the administrator is bound by the law to observe certain forms and possibly hold a public hearing but where he is a free agent in reaching the final decision. If the rules are broken, the determination may be set aside, but it is not sufficient to show that the administration is biased in favour of a certain policy, or that the evidence points to a different conclusion." George Whitecross Paton, *A Textbook of Jurisprudence* 336 (G.W. Paton & David P. Derham eds., 4th ed. 1972).

quasi-judicial act. 1. A judicial act performed by an official who is not a judge. [Cases: Officers and Public Employees ⇨110. C.J.S. *Officers and Public Employees* §§ 234–245.] 2. An act performed by a judge who is not acting entirely in a judicial capacity. See *judicial act* under **ACT**.

quasi-judicial duty. See **DUTY** (1).

quasi-judicial power. See **POWER** (3).

quasi-legislative, adj. (Of an act, function, etc.) not purely legislative in nature <the administrative agency's rulemaking, being partly adjudicative, is not entirely legislative — that is, it is quasi-legislative>. [Cases: Administrative Law and Procedure ⇨106, 381. C.J.S. *Public Administrative Law and Procedure* §§ 10, 87, 91.]

quasi-legislative power. See **POWER** (3).

quasi-main motion. See *incidental main motion* under **MOTION** (2).

quasi-municipal corporation. See *quasi-corporation* under **CORPORATION**.

quasi-national domicile. See **DOMICILE**.

quasi-offense. See **OFFENSE** (2).

quasi-partner. See **PARTNER**.

quasi-personalty. See **PERSONALTY**.

quasi-possession. See *incorporeal possession* under **POSSESSION**.

quasi-posthumous child. See **CHILD**.

quasi-public corporation. See **CORPORATION**.

quasi-pupillary substitution. See **SUBSTITUTION** (5).

quasi-realty. See **REALTY**.

quasi-rent. (*often pl.*) *Law and economics.* Value over and above one's opportunity cost or next best alternative; the excess of an asset's value over its salvage value. • In the economic theory of marriage, a quasi-rent is a spouse's excess value of the marriage over the value of the next best option of not being in that specific marriage. The next best option may be separation, divorce, or divorce and remarriage, depending on the spouse's preferences and opportunities.

quasi-seisin. See **SEISIN**.

quasi-suspect classification. See **SUSPECT CLASSIFICATION**.

quasi-tenant. See **TENANT**.

quasi-tort. See **TORT**.

quasi traditio (kway-si [or -zi] trə-dish-ee-oh). [Latin "as if transfer"] *Roman law.* A party's acquisition of a servitude by using it with the informal permission or acquiescence of the owner.

"According to the civil law again a servitude — that is, a limited right of user in respect of a thing not one's own, e.g. a usufruct or a right of way — could only be created by means of certain definite legal forms. The praetorian law, on the other hand, allowed a servitude to be created by a so-called quasi traditio servitutis; that is, it was satisfied if one party gave the other, without any form, permission to exercise the right of user in question." Rudolph Sohm, *The Institutes: A Textbook of the History and System of Roman Private Law* 82 (James Crawford Ledlie trans., 3d ed. 1907).

quasi-trustee. See **TRUSTEE** (1).

quasi-usufruct. See **USUFRUCT**.

quator tempora jejunii. See **EMBER DAYS**.

quattuor pedibus currit (kwah-too-or ped-ə-bəs kər-it). [Law Latin] It runs upon four feet; it runs upon all fours. • The term commonly described a precedent that was extremely close to a point being decided. See **ON ALL FOURS**.

quayage (kee-əj). A toll or fee charged for lading or unloading goods on a quay or wharf. — Also written *keyage*.

Quayle action. Patents. An office action telling the patent applicant that the claims are allowable on the merits but that the form of the application still needs to be amended. *Ex parte Quayle*, 25 USPQ 74, 1935 C.D. 11, 453 O.G. 213 (Comm'r Pat. 1935). • The applicant generally has two months to respond. A *Quayle* action ends the prosecution on the merits, and amendments that affect the merits will be treated in a manner similar to amendments after final rejection. — Also termed *Ex parte Quayle action*. [Cases: Patents ⇨109. C.J.S. *Patents* §§ 152–155.]

qu. cl. fr. abbr. QUARE CLAUSUM FREGIT.

queen. 1. A woman who possesses, in her own right, the sovereignty and royal power in a monarchy. • Among the more famous English queens are Queen Mary I, Queen Elizabeth I, Queen Victoria, and Queen Elizabeth II. — Also termed *queen regnant*. 2. The wife of a reigning king. • She has some royal prerogatives (such as having her own officers), but is in many ways legally no different from the rest of the king's subjects. — Also termed *queen consort*. 3. A woman who rules in place of the actual sovereign (e.g., if the sovereign is a child). — Also termed *queen regent*. 4. **DOWAGER-QUEEN**.

Queen Anne's Bounty. See **FIRST FRUITS** (2).

queen dowager. See **DOWAGER-QUEEN**.

queen mother. A queen who has children, esp. a dowager-queen whose child is the reigning monarch. See **DOWAGER-QUEEN**.

Queen's Bench. Historically, the highest common-law court in England, presided over by the reigning monarch. • The jurisdiction of this court now lies with the Queen's Bench Division of the High Court of Justice; when a king begins to reign, the name automatically changes to *King's Bench*. — Abbr. **Q.B.** — Also termed *Court of Queen's Bench*. Cf. **KING'S BENCH**.



LETTER NO. L-18-04

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VIA FACSIMILE / E-MAIL

«Email_Fax»

March 31, 2004

«Gender» «FirstName» «LastName»
«Title»
«Company»
«Company2»
«Address1»
«Address2»
«City», «Province» «PostalCode»

Dear «Name2»:

Re: British Columbia Utilities Commission
Certificate of Public Convenience and Necessity ("CPCN") Application Guidelines

Please find enclosed the British Columbia Utilities Commission's CPCN Application Guidelines, and Order No. G-28-04 which cancels Commission Order No. G-133-99 and the CPCN Application Requirements that previously were in effect.

Draft CPCN Application Guidelines were distributed to public utilities and other interested parties for comment by Letter No. L-4-04 dated January 28, 2004. The Commission appreciates the helpful comments that were provided by a number of parties, and has revised the CPCN Application Guidelines in response to these comments.

The purpose of the CPCN Application Guidelines is to assist public utilities and other parties wishing to construct utility facilities in their preparation of CPCN applications so that the review of the applications can proceed as efficiently as possible. Future CPCN applications should be prepared in accordance with the Guidelines.

Yours truly,

Original signed by:

Robert J. Pellatt

JBW/cms
Enclosure

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British Columbia Utilities Commission

*Certificates of Public Convenience and Necessity
CPCN Application Guidelines*

Issued: March 2004

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PURPOSE AND SCOPE OF CPCN APPLICATION GUIDELINES

Section 45 (1) of the Utilities Commission Act (“UCA”) states:

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.

Section 46 (1) of the UCA states:

An applicant for a certificate of public convenience and necessity must file with the commission information, material, evidence and documents that the commission prescribes.

The purpose of the CPCN Application Guidelines is to assist public utilities and other parties wishing to construct or operate utility facilities in their preparation of CPCN applications for such facilities so that the review of the applications can proceed as efficiently as possible. The Commission expects that CPCN applications will be prepared in accordance with the CPCN Application Guidelines.

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.

The CPCN Applications Guidelines do not alter the fundamental regulatory relationship between utilities and the Commission. They provide general guidance regarding Commission expectations of the information that should be included in CPCN applications, while providing the flexibility for an application to reflect the specific circumstances of the utility and the size and nature of the project. The Commission may make further directions regarding information to be included in specific CPCN

applications, and will generally require utilities to provide further information to supplement the material in filed applications.

DEEMED CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY

Sections 45 (2), 45 (5) and 45 (6) of the UCA state:

(2) For the purposes of subsection (1), a public utility that is operating a public utility plant or system on September 11, 1980 is deemed to have received a certificate of public convenience and necessity, authorizing it

- (a) to operate the plant or system, and
- (b) subject to subsection (5), to construct and operate extensions to the plant or system.

(5) If it appears to the commission that a public utility should, before constructing or operating an extension to a utility plant or system, apply for a separate certificate of public convenience and necessity, the commission may, not later than 30 days after construction of the extension is begun, order that subsection (2) does not apply in respect of the construction or operation of the extension.

(6) A public utility must file with the commission at least once each year a statement in a form prescribed by the commission of the extensions to its facilities that it plans to construct.

In order that it can evaluate whether a public utility should apply for a CPCN for a specific extension to utility plant or systems, the Commission needs to be aware of planned extensions that are significant. This information is provided in the statement of planned extensions that a utility is required to file at least once a year.

The statement should be filed in a timely fashion and should identify each discrete extension to utility plant or systems that may have a material impact on customer rates or that may raise some other significant issue. The statement should include all significant expansions or modifications to facilities or other assets that the utility is likely to initiate over the period until the filing of the next statement on extensions. A utility should inform the Commission in the event that it plans to initiate a significant new project that was not identified in its most recent statement on extensions.

The Commission may provide specific directions to a utility regarding its statement on extensions. In some cases, with the approval of the Commission, a resource plan and related capital expenditures action plan filed pursuant to Subsection 45(6.1)(a) of the UCA may meet the requirements of Section 45(6) providing it is filed prior to the start of construction of the extensions or modifications. Also, the Commission may establish criteria for projects that a utility needs to identify in its statement of extensions, including factors such as the amount of capital expenditure and the potential impact on the public. The Commission may also establish project thresholds that may relate to size, production capacity or type that will determine CPCN application requirements for each utility. Projects that fall outside the scope of the specified criteria would generally not require a CPCN application, although the expenditure may require Commission approval pursuant to Subsection 45(6.2)(b) or in a revenue requirements decision or settlement.

CPCN APPLICATION PROCEDURES

An application for a CPCN, pursuant to Sections 45 and 46 of the Utilities Commission Act, will be made to the Secretary, British Columbia Utilities Commission.

Applications are to be filed in accordance with the Commission's Document Filing Protocols. An electronic copy and 20 hard copies of the completed signed application should be submitted.

Applications are normally considered public documents and will be made public, except where special circumstances require confidentiality.

The filed application is initially reviewed by the Commission for possible deficiencies, and this will normally generate an Information Request for response by the Applicant. Once the additional information is received, the application is reviewed by the Commission in the context of project justification, issues and concerns raised, as well as general project suitability. When necessary, the Commission may establish a Regulatory Agenda if further review of the application is required. The Commission will make a determination on disposition that will generally be one of the following options.

- (a) Grant a CPCN without further input from the Applicant or other interested parties.

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- (b) Require further information from the Applicant.
- (c) Set down an oral or written public hearing.
- (d) Deny the application.

Approval of a CPCN application will result in a Commission Order to the Applicant embodying the Certificate of Public Convenience and Necessity. This Order may contain terms and conditions which the Commission believes are necessary to protect the public interest.

For further information, contact:

The Commission Secretary
British Columbia Utilities Commission
Sixth Floor, 900 Howe Street
Vancouver, B.C.
V6Z 2N3

Telephone: (604) 660-4700
Toll Free: 1-800-663-1385
Facsimile: (604) 660-1102
Commission.Secretary@bcuc.com
web site: <http://www.bcuc.com>

CPCN APPLICATION GUIDELINES

A CPCN application under Sections 45 and 46 of the UCA should contain the following information:

1. Applicant

- (i) the name, address and nature of business of the Applicant and all other persons having a direct interest in the ownership or management of the project;
- (ii) evidence of the financial and technical capacity of the Applicant and other persons involved, if any, to undertake and operate the project;
- (iii) the name, title and address of the person with whom communication should be made respecting the Application; and
- (iv) the name and address of legal counsel for the Applicant, if any.

2. Project Description

- (i) a description of the project, its purpose and cost, including engineering design, capacity, location options and preference, as well as all ancillary or related facilities that are proposed to be constructed, owned or operated by the Applicant;
- (ii) an outline of the anticipated timetable for construction and operation, together with dates by which critical events, including approvals required from other agencies, must take place to ensure continued economic viability;
- (iii) a description of any new or expanded public works, undertakings or infrastructure that will be entailed by the project, together with an estimate of the costs and necessary completion dates;

- (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; and
- (v) identification of the customers to be served by the project; and, where the project would expand the area served by the Applicant, a geographical description of the expanded service area.

3. Project Justification

- (i) studies or summary statements identifying the need for the project and confirming the technical, economic and financial feasibility of the project, identifying assumptions, sources of data, and alternatives considered (if applicable);
- (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; and
- (iv) a statement of the revenue requirement impact of the project and the resulting effect on the rates of customers; and
- (v) information relating the project to the Applicant's approved resource plan and action plan filed pursuant to Section 45(6.1) of the UCA, which may address some or all of the Project Justification requirements.

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.

5. Additional Requirements for New Service Areas

- (i) the telephone number or other means by which customers will be able to contact the utility, particularly regarding an emergency;
- (ii) the facilities and trained personnel that will provide emergency response;
- (iii) the tariff including terms and conditions of service, rate schedules and initial rates that the Applicant proposes for customers in the new service area; and
- (iv) information confirming that the proposed rates will be competitive with other service options that are available to customers in the new service area.

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 in the Application.